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New Jersey Court of Errors and Appeals

Notice of Appeal

(*Filed, January 3, 1917*)

IN CHANCERY OF NEW JERSEY

Between, FLORENCE I. MERKEL, individually and as executrix, etc., Complainant, and WILLIAM MERKEL, Defendant.	On Bill etc. Notice of Appeal.

The complainant hereby appeals from the order discharging the order to show cause and the restraining order made in this Court, in the above stated cause, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, December 29th, 1916.

HERBERT CLARK GILSON,
Solicitor of Complainant.

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

WM. C. GEBHARDT,
Of Counsel with Complainant.

Due and legal service of the within notice is acknowledged this 30th day of December, 1916.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,
Solr's. of Deft.

Petition on Appeal

(*Filed, January 16, 1917*)

NEW JERSEY COURT OF ERRORS AND APPEALS

Between, FLORENCE I. MERKEL, individually and as executrix of John G. Merkel, deceased, Complainant-Appellant, and WILLIAM MERKEL, Defendant-Respondent.	On Bill etc. Petition of Appeal.

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

The petition of Florence I. Merkel, individually and as executrix of the last will and testament of John G. Merkel, deceased, the appellant

in the above entitled cause, respectfully shows that your petitioner finds herself aggrieved by the order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 26th day of December, A. D., 1916, where in your petitioner was complainant, and the said William Merkel was defendant, in this respect, to wit; that the said order adjudges that the said order to show cause with the restraining order enjoining the said defendant, his agents and servants, from negotiating, selling, assigning, transferring and hypothecating any and all of the promissory notes mentioned in the bill of complaint filed in said cause, be discharged. And your petitioner appeals from that part of the said order of the Chancellor which orders that said restraint be discharged as aforesaid upon the ground that the same is erroneous, for that the said defendant should be restrained and enjoined as aforesaid pending the final decree in said cause.

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

HERBERT CLARK GILSON,
Solicitor of Appellant.
WM. C. GEBHARDT,
Of counsel with Appellant.

Due and legal service of the written petition is acknowledged this 10th day of January, 1917.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,
Solr's. of Deft.

Answer to Petition of Appeal

(Filed, January 18, 1916)

NEW JERSEY COURT OF ERRORS AND APPEALS

Between, FLORENCE I. MERKEL, individually and as executrix of John G. Merkel, deceased, Complainant-Appellant, and WILLIAM MERKEL, Defendant-Respondent.	On Bill, etc. Answer to Petition of Appeal.

The answer of the above named defendant-respondent to the petition of appeal of the above named complainant-appellant.

This defendant-respondent not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless says and admits:

1. That an order was on the 26th day of December, 1916, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof this defendant-respondent prays to refer thereto when the same shall be produced. And this defendant respondent is advised and believes that the said order is agreeable to equity and prays that the same may be affirmed with costs to be adjudged this defendant-respondent.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,
Solicitors for and of counsel with
Defendant-Respondent.

Order to Show Cause

(*Filed, July 31, 1916*)

IN CHANCERY OF NEW JERSEY

Between, FLORENCE I. MERKEL, individually and as executrix, etc., Complainant, and WILLIAM MERKEL, Defendant.	On Bill, etc. Order to Show Cause.

Upon reading the bill of complaint in this cause, and the affidavit thereto annexed, and on motion of Herbert Clark Gilson, of counsel with complainant:

It is on this 31st day of July, 1916, ORDERED that the defendant, WILLIAM MERKEL, show cause before the Chancellor, at Chancery Chambers in Jersey City, on Monday the 7th day of August, next, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue restraining him, his servants and agents, from negotiating, selling, assigning, transferring and hypothecating any and all of the promissory notes given to him by the complainant and dated January 1st, 1915.

AND IT IS FURTHER ORDERED, that the defendant, his servants and agents, in the meantime, and until the further order of this Court in the premises, desist and refrain from negotiating, selling assigning, transferring and hypothecating any and all of the said promissory notes.

And it is Further Ordered, that a copy of the said bill and affidavit, and of this order, which may be certified by the solicitor of complainant, be served on the defendant within two days from the date of this order.

E. R. WALKER,
C.

Respectfully advised
Vivian M. Lewis,
V. C.

Bill of Complaint

(*Filed, July 31, 1916*)

IN CHANCERY OF NEW JERSEY

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

The complainant, Florence I. Merkel, individually and as executrix of the last will and testament of John G. Merkel, deceased, of Newark, New Jersey, respectfully shows that:

1. On July 3, 1910, John G. Merkel departed this life leaving a last will and testament and by which he devised and bequeathed all of his property, real, personal and mixed unto complainant, individually, and he appointed her sole executrix of his estate, and letters testamentary were duly granted to complainant by the Surrogate of Essex County: a copy of which said last will and testament is hereto annexed and made part of this bill, marked Schedule A.

2. On December 24th, 1903, and prior thereto, the said John G. Merkel was the sole owner and possessor of 248 shares of the capital stock of "John G. Merkel Company," incroporated under the laws of the State of New Jersey, that being all of the stock issued by said company except 2 shares held by complainant individually, and Julia Voigt.

3. On and prior to December 24th, 1903, William Merkel the brother of deponent's husband was in the employ of said company as a salesman, and deponent's husband entered into a written agreement with the said William Merkel on that day, in and by which he agreed to convey 30 shares of the capital stock of said company to the said William Merkel, as bonus, upon condition that the latter should remain in the employ of said company for the full term of 5 years, from January 1st, 1904, and that during said term, the said William Merkel should devote his full and undivided time and energy for and in behalf of said company, and should work for the success of said company; and also upon condition that the capital stcok of said company should reach a book value of $400 each share; and that after the said term of five years, to wit, after January 1st, 1909, in case the book value of each share of said stock should not have reached the said sum of $400, and the said William Merkel should sever his connection with said company, and leave its employ, then and in that event the said William Merkel should receive the difference between the book value of each share of said stock at the time of taking stock of said company on May 1st, 1904, and the book value of each share of said stock

on January 1st, 1909, and said 30 shares of said stock should remain and be the absolute property of the said John G. Merkel; a copy of which said agreement is hereto annexed and made part of this bill marked Schedule B.

4. Prior to December 24th, 1903 and until about the year 1911, the said William Merkel received a salary of $19 per week as salesman as aforesaid, which was subsequently increased to $25 per week, and the said William Merkel was fully compensated for his services to said company and its business; and he, the said William Merkel, did not devote his full and undivided time and energy for and in behalf of said company during the term of 5 years mentioned in the said agreement, but on the contrary he was discharged from said employment for good cause, and he was engaged in another business and devoted part of his time and energy to the other business; and the capital stock of John G. Merkel Company did not reach a book value of $400 each share; and there was no difference between the book value of each share of said stock at the time of taking stock of said company on May 1st, 1904, and the book value of each share of said stock on January 1st, 1909, all of which facts were known to complainant at the times hereinafter stated.

5. On or about November 4th, 1914, the said William Merkel left the employ of said John G. Merkel Company because complainant would not comply with his demand to convey 30 shares of stock to him as hereinafter mentioned.

6. On or about November 4th, 1914, the said William Merkel demanded of complainant that she

convey to him the 30 shares of stock of the John G. Merkel Company mentioned in the agreement of December 24th, 1903, or that complainant pay him, the said William Merkel, the equivalent thereof in cash and the said William Merkel then falsely and fraudulently represented and told complainant that he had devoted his full and undivided time and energy for and in behalf of said company and had worked for the success of said company during the term of 5 years mentioned in the said agreement, and that the capital stock had reached a book value of $400 each share; and that the difference between the book value of each share of said stock at the time of taking stock of said company on May 1st, 1904, and the book value of each share of said stock on January 1st, 1909, was $400 each share; which said representations and statements, were false and untrue by the said William Merkel when he made them.

7. Complainant refused to comply with the said demand of William Merkel as aforesaid, and he thereupon instituted suit in the Essex County Circuit Court against complainant to recover damages for the alleged breach of the agreement of December 24th, 1903.

8. Complainant thereupon consulted counsel learned in the law and was mistakenly and illegally advised by him that the said William Merkel had a legal cause of action against complainant for the said 30 shares of stock, or for damages for the breach of the said agreement, and said counsel advised complainant to compromise and settle said claim and cause of action, as hereinafter stated.

9. Acting and relying upon the said false and fraudulent representations and statements of the said William Merkel, and upon the mistaken and illegal advice aforesaid, and without any consideration whatsoever, complainant did on December 21st, 1914, enter into a compromise and settlement of the said alleged claim and cause of action with William Merkel, in and by which complainant agreed to pay him $6,000 in settlement and compromise of his said alleged claim, to be paid as follows: $1,000 in cash at the time of said compromise, and promissory notes each for $100 payable every month until the balance of $5,000 shall have been paid: and a written agreement and promissory notes, dated January 1st, 1915, were thereupon executed and delivered by complainant individually in accordance with said compromise; the said William Merkel executed a general release of his alleged claim, and the said action was discontinued, copies of which said agreement and release are hereto annexed and made part of this bill marked Schedule C and D, respectively.

10. Complainant has paid the said William Merkel the sum of $2700 under said compromise, that being the first installment of $1000, and 17 promissory notes; and complainant has just discovered and been advised of the false representations and statements, and the mistake in the law, and advice as aforesaid.

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

1. That William Merkel, who is defendant to this suit, may answer this bill of complaint without oath and each statement therein made.

2. That the said compromise and the said agreement, notes and release may be set aside and cancelled.

3. That the defendant be ordered and decreed to repay to complainant the said sum paid to him by complainant under said compromise.

4. That a writ of injunction may issue, restraining and enjoining the defendant and his servants and agents from negotiating, selling, assigning, transferring and hypothecating the said remaining promissory notes given to him by complainant under said compromise.

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

HERBERT CLARK GILSON,
Solicitor of Complainant.
WM. C. GEBHARDT,
Of Counsel.

Schedule A

Annexed to bill of complaint

I, John G. Merkel, of the City of Newark, in the County of Essex and State of New Jersey Being of Sound Mind, Memory and Understanding, do make and publish this my last WILL and TESTAMENT in manner following, that is to say:

It is my will and I do hereby order that all my

just debts and funeral expenses be paid and satisfied as soon as can be after my decease.

I give, devise and bequeath all my property, real, personal and mixed whatsoever and wheresoever the same may be to my wife Florence I. Merkel, to her her heirs absolutely and forever.

I hereby nominate and appoint my wife Florence I. Merkel sole executrix of this my last will and Testament also guardian of my children during their minority.

In witness whereof I have hereunto set my hand and seal this Sixteenth day of April in the year of our ord Nineteen hundred and four.

JOHN G. MERKEL (L. S.)

Signed, Sealed, Published and Declared by the said John G. Merkel the testator to be his last Will and Testament in our presence, who in his presence and at his request and in the presence of each other, have hereunto subscribed our names as witnesses.

Frederick Scharringhausen, 27 Milford Avenue, Newark, N. J.

Miss E. Wincklhofer, 248 Norfolk Street, Newark, N. J.

Schedule B

Annexed to bill of complaint

This Agreement made this twenty fourth day of December, in the year of Our Lord, Nineteen Hundred and Three,

Bill of Complaint—Schedule B

BETWEEN John G. Merkel, of the City of Newark, in the county of Essex and state of New Jersey, party of the first part, and William Merkel, of the city of Newark, in the county of Essex and State of New Jersey, of the second part,

WITNESSETH: Whereas the said John G. Merkel is the sole owner and possessor of two hundred and fifty shares of stock of the "John G. Merkel Company," incorporated under the laws of the State of New Jersey,

AND WHEREAS the said William Merkel is employed by the said "John G. Merkel Company"

NOW THEREFORE it is agreed by and between the parties to these presents,

FIRST: The said John G. Merkel, party of the first part, agrees for himself, his executors, administrators and assigns, to convey to the said William Merkel, thirty (30) shares of the capital stock, full paid, of the "John G. Merkel Company," upon the following conditions however,

FIRST: That said William Merkel shall be and remain in the employ of the said John G. Merkel Company, for the full term of five years from January 1st, 1904, and that during said term, the said William Merkel shall devote his full and undivided time and energy for and in behalf of said Company, and shall work for the success of said Company.

SECOND: That said thirty shares of stock shall remain in the control and custody of said John G. Merkel until said stock shall reach a book value of four hundred dollars each share, and for and during the term of five years hereinbefore mentioned and at such time and when each share

attains said book value of Four Hundred Dollars, and after the expiration of said five years, that then said thirty shares of stock shall become the sole property of, and the title thereto shall vest in, the said William Merkel, second party hereto.

And it is hereby further agreed by said John G. Merkel with the said William Merkel that after January first, 1909, being the full term of five years, as aforesaid, in case the book value of each share of stock of said John G. Merkel Company shall not have reached the sum of Four Hundred Dollars, and the said William Merkel shall sever his connection with said company, and leave its employ, then and in that event the said William Merkel shall receive the difference between the book value of each share of stock at the time of taking stock of said company at May first, 1904, and the book value of each share of stock at January first 1909, and said thirty shares of stock of said Company shall then become, remain and be the absolute property of, and the title thereto shall remain vested in, the said John G. Merkel, unless however, that the value of each share of stock shall be Four Hundred Dollars at January 1, 1909, when said thirty shares shall be and become the sole and absolute property of said William Merkel, in any event.

And the said William Merkel, party of the second part, for himself, his executors, administrators and assigns, does hereby agree, in consideration of the foregoing agreements and stipulations,

First: That he will enter into and remain in the employ of the John G. Merkel Company, and de-

vote his whole and undivided time, attention and energy to said Company, and work in its behalf and to its success; and does agree to and does accept in every particular, the terms of the agreements and stipulations hereinbefore entered into and expressed by said John G. Merkel.

And to the end of the full terms and sense of the foregoing agreement and the performance thereof, each party with each other does agree.

In Witness whereof the parties hereto have hereunto interchangeably set their hands and seals the day and year first above written.

WM. MERKEL (L. S.)
JOHN G. MERKEL (L. S.)

Signed, sealed and delivered
in the presence of
Jos. Wincklhofer.

Schedule C

Annexed to bill of complaint

AGREEMENT made this twenty-first day of December, 1914 between FLORENCE I. MERKEL, party of the first part, and WILLIAM MERKEL, party of the second part, both of the City of Newark, Essex County, New Jersey;

WITNESSETH, the parties having settled between them the matters in dispute in issue in a certain cause now pending in the Essex County Circuit Court wherein William Merkel is the plaintiff and Florence I. Merkel individually and as executrix of the will of John G. Merkel, deceased, is defend-

ant, for the sum of six thousand dollars ($6000), they hereby agree that the party of the first part may make said settlement by the payment of one thousand dollars ($1000) in cash, and the balance by giving promissory notes for one hundred dollars each, the first to be payable on February 1, 1915, and the balance thereof to be payable one each successive month thereafter. Said notes to be made by the party of the first part and to bear interest at the rate of six per cent, per annum.

It is understood and agreed between the parties that if default be made in the payment of any one of said notes, that all the remaining notes then unpaid shall immediately become due and payable.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

FLORENCE I. MERKEL (L. S.)
WM. MERKEL (L. S.)

Signed, sealed and delivered
in the presence of
Jacob L. Newman.

Schedule D

Annexed to bill of complaint

To all to whom these presents shall come or may concern, Greeting:

Know Ye That I, William Merkel, of the City of Newark, in the County of Essex and State of New Jersey for and in consideration of the sum of One Dollar and other good and valuable considerations, lawful Money of the United States of America, to me in hand paid by Florence I. Mer-

kel, individually and as executrix of the last will of John G. Merkel, deceased, have remised, released and forever discharged, and by these Presents do, for myself, my heirs, executors and administrators, remise, release and forever discharge the said Florence I. Merkel, individually and as executrix of the last will of John G. Merkel, deceased, her 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, reckonings, 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 the said Florence I. Merkel, individually and as executrix of the last will of John G. Merkel, deceased, ever had, now have or which I, the said William Merkel my 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.

In Witness Whereof, I have hereunto set my hand and seal the twenty-first day of December, in the year of Our Lord One Thousand Nine Hundred and fourteen.

WM. MERKEL, (L. S.)

Signed, Sealed and Delivered
in the presence of
Andrew Van Blarcom.

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

Be it Remembered, That on this twenty-first day of December, in the year of Our Lord One

Thousand Nine Hundred and fourteen, before me the subscriber, a Master in Chancery of New Jersey personally appeared William Merkel, who, I am satisfied, is the grantor in the within Release named; and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

ANDREW VAN BLARCOM,
Master in Chancery
of New Jersey.

Affidavit

IN CHANCERY OF NEW JERSEY

Between, FLORENCE I. MERKEL, individually and as executrix, etc., Complainant, and WILLIAM MERKEL, Defendant.	On Bill etc. Affidavit.

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

Florence I. Merkel, being duly sworn on her oath deposes and says, that she is the complainant in the above stated cause, and that the matters and things set forth in the annexed bill of complaint are true to the best of her knowledge and belief.

Affidavit

Deponent further says, that she is the widow of John G. Merkel who departed this life on July 3d, 1910, leaving a last will and testament, a true copy of which is attached to the foregoing bill, in any by which he devised and bequeathed all of his property to deponent and appointed her sole executrix of his estate, and that letters testamentary were granted to deponent by the Surrogate of Essex County.

On December 24th, 1903, and prior thereto, deponent's husband was the owner of 248 shares of the John G. Merkel Company, a corporation organized under the laws of the State of New Jersey, that being all of the stock issued by said corporation, excepting two shares held by deponent and Julia Voigt. That prior to and on December 24th, 1903, William Merkel, the brother of deponent's husband, was in the employ of said company, as a Salesman, and on or about the last mentioned date deponent's husband entered into a written agreement with the said William Merkel, a true copy of which said agreement is annexed to the foregoing bill, in and by which deponent's husband agreed to convey 30 shares of the capital stock of said company to William Merkel, as a bonus, upon condition that the letter should remain in the employ of said company for the full term of 5 years, from January 1st, 1904, and that during said term he, the said William Merkel should devote his full and undivided time and energy for and in behalf of said company, and should work for the success of the company; and also upon condition that the capital stock of said company should reach a book value of $400 each share; and that after the said term of 5 years in

case the book value of each share of said stock should not have reached the sum of $400 and the said William Merkel should sever his connection with said company, and leave its employ, then and in that event the said William Merkel should receive the difference between the book value of each share of said stock at the time of taking stock of said company on May 1st, 1904, and the book value of each share of said stock on January 1st, 1909, and said 30 shares of said stock should remain and be the absolute property of the said John G. Merkel.

After the death of deponent's said husband the business of said company was continued by deponent; and William Merkel remained in the employ of said company at a salary of $19 to $25 per week, until November 4th, 1912, when he left the employ of said company because deponent would not convey 30 shares of said stock of said company to him as hereinafter mentioned.

That during the time William Merkel was in the employ of said company he was fully compensated with his salary aforesaid, for all the services rendered by him to said company and its business. And during the 5 years mentioned in the said agreement he, the said William Merkel did not devote his full and undivided time and energy for and in behalf of said company, but on the contrary he was discharged from said company for good cause and he was engaged in the automobile tire business in Jersey City, N. J., and spent part of his time in that business. And the capital stock of said company did not reach a book value of $400 each share during the term mentioned in said agreement, or at any other time,

and there was no difference between the book value of each share of said stock at the time of taking stock of said company on May 1st, 1904, and the book value of each share of said stock on January 1st, 1909; all of which was learned by deponent after the settlement hereinafter mentioned.

On or about November 4th, 1912, William Merkel demanded 30 shares of stock of said company or the value thereof in cash, from deponent; and the said William Merkel then stated and told deponent that he had devoted his full and undivided time and energy for and in behalf of said company, and had worked for the success of said company during the 5 years mentioned in the said agreement, and that the capital stock of said company had reached a book value of $400 each share; and that the difference between the book value of each share of said stock at the time of taking stock of said company on May 1st, 1914, and the book value of each share of said stock on January 1st, 1909, was 400 each share; all of which statements were false as hereinbefore mentioned, and were known to be false by William Merkel when he made them.

Deponent refused to comply with the said demands of William Merkel, and he thereupon instituted suit against deponent, individually and as executrix of the estate of John G. Merkel deceased, in the Essex County Circuit Court, to recover damages for an alleged breach of the agreement to convey 30 shares of stock of said company aforesaid. Deponent then consulted a certain counsellor at law of the State of New Jersey, who advised and told deponent that William

Merkel had a legal cause of action against deponent for the breach of said agreement, and that deponent should therefore settle and compromise the said claim.

Deponent thereupon, on or about December 21st, 1914, entered into a settlement and compromise of the said claim of William Merkel, relying upon the truth of his said statements, and upon the advise aforesaid, in and by which deponent agreed to and did pay William Merkel $6000, as follows: $1000 in cash and promissory notes each for $100 payable every month until the balance of $5000 was paid; and a written agreement and promissory notes dated January 1st, 1915 were thereupon signed and delivered by deponent individually, and a release and discontinuance of the said action were signed by William Merkel; true copies of which said agreement and release are annexed to the foregoing bill. And deponent has paid $2700 in all to William Merkel in accordance with said compromise.

Deponent further says, that she has just been advised and has recently learned that the said advice of Jacob L. Newman was erroneous and improper, and that the said statements of William Merkel were false in the particulars hereinbefore mentioned.

FLORENCE I. MERKEL.

Subscribed and sworn to before me this
26th day of July, 1916.
Emil Germanus,
Justice of the Peace
of N. J.
(Seal)

Answer of Defendant

(Filed, September 5, 1916)

IN CHANCERY OF NEW JERSEY

Between FLORENCE I. MERKEL, individually and as executrix of the last will of John G. Merkel, deceased, Complainant, And WILLIAM MERKEL, Defendant.	On Bill. Answer.

The answer of William Merkel, of Irvington, Essex County, New Jersey, respectfully shows:

1. He admits the truth of the first paragraph of the bill of complaint.

2. He admits the truth of the second paragraph of the bill of complaint, except that he always understood that the said John G. Merkel was the owner of all the shares of stock of the John G. Merkel Company, and he so described himself in the agreement of December 24th, 1903.

3. It is true that on and prior to December 24th, 1903, he was employed by said company and entered into a written agreement, a true copy of which is annexed to the bill of complaint. This defendant denies that the thirty shares of stock which he was to get were considered as a bonus, but on the contrary the contract was entered into for the purpose of inducing defendant to continue in the employ of said company, and have an inter-

est therein. If the recitals in paragraph three of the bill of complaint are true recitals of the conditions and terms of said agreement, this defendant admits the same.

4. In answer to the allegations of the fourth paragraph of the bill of complaint, this defendant never received more than nineteen dollars ($19) per week, during the time he was employed by said company. At the time the agreement of December 24th, 1903, was entered into, he was given to understand that he was made Vice-President of the company, and manager of the hardware department, in which capacity he continued until the time he was discharged by the complainant, acting as president of the company. This defendant says that after the making of said agreement of December, 1903, he continued in the employ of said company at a smaller salary than he could have earned elsewhere, simply for the reason that according to the terms of said agreement he had what he considered a financial interest in the company. This defendant says that during his entire connection with said company he devoted his full and undivided time and energy for and in behalf of the company. He admits that he was discharged from employ by the company, but without cause. He denies that he was engaged in another business and devoted part of his time and energy to another business. He denies that the capital stock of said company did not reach a book value of four hundred dollars ($400) per share, but on the contrary alleges that said stock did reach a book value of four hundred dollars ($400) per share, and was worth that amount in October, 1912, when he was discharged from the employ of

said company. He denies that there was no difference between the book value of each share of stock on May 1st, 1904 and January 1st, 1909, but on the contrary says that said stock increased steadily in value and every inventory which was made showed such to be the fact. That the inventory books were in the possession of the company at the time this defendant was discharged, and would show the exact conditions of the company, and it would there appear that there was a substantial increase between the years 1904 and 1909. The complainant, in her answer to the action at law referred to in the bill of complaint alleged that the defendant left the employ of said company at his own volition, but she now alleges in her bill of complaint, that the defendant was discharged for good cause. This defendant denies that the facts referred to in paragraph four of the bill of complaint were unknown to complainant. After the death of John G. Merkel, her husband, she was president of the company and was in the active management thereof. She was present at the place of business of the company nearly every day, and took an active interest in all its affairs, and was actively engaged in the management and supervision of all its affairs. The books containing the inventory of the business were in the possession of the company at the time defendant was discharged, and during the time the suit was pending the complainant had ample opportunity to inform himself of the contents thereof.

5. This defendant denies the allegations of the fifth paragraph of the bill of complaint, except that he was discharged on or about October 28th, 1912.

6. This defendant demanded the thirty shares of stock of said company at the time he was discharged in October, 1912, and made a written demand for the same in the month of February, 1913. This defendant denies that at the time he was discharged, or at any other time, he represented to the complainant that he had devoted his full and undivided time and energy for and in behalf of the company, and had worked for the success of the company for the term of five years mentioned in said agreement. There was no such conversation between him and the said company, as the complainant never found any fault with him for his services to the company, and the question of whether or not he had devoted his full and undivided time and energy in behalf of the company was not discussed. This defendant denies that at the time he was discharged, or at any other time, he represented to complainant that the capital stock had reached the book value of four hundred dollars ($400) per share, except that he alleged in his complaint in the action at law, that said shares of stock were worth four hundred dollars ($400) per share when he demanded the same in February, 1913, and although he never made the representation to complainant as aforesaid, it was his contention in the action at law, that said shares of stock were of the book value of four hundred dollars ($400) each at the time of his discharge. This defendant denies that he represented to complainant at the time he was discharged or at any other time, that the difference between the book value of each share of stock on May 1st, 1904, and January 1st, 1909, was four hundred dollars ($400) per share.

7. Defendant admits that the complainant refused to deliver the thirty shares of stock to him, and that he instituted suit in the Essex County Court, against complainant, individually and as executrix, as aforesaid, to recover damages for the alleged breach of the agreement of December 24th, 1903.

8. This defendant admits that complainant consulted counsel and through Jacob L. Newman, her attorney, filed an answer to said action at law, but denies that complainant was mistakenly and illegally advised, as alleged in the eighth paragraph of the bill of complaint.

9. This defendant denies that complainant acted and relied upon any fraud or fraudulent representation of the defendant, and denies that she acted upon mistaken or illegal advice, and denies that the settlement of said action at law was made without consideration. This defendant admits that the action at law was settled for six thousand dollars ($6000) and that he received one thousand dollars ($1000) in cash and the balance in promissory notes as alleged in the ninth paragraph of the bill of complaint. Defendant admits that he executed and delivered a general release to complainant individually and as executrix, and admits that the agreement mentioned in paragraph nine was executed and delivered, and that the Schedules "C" and "D" annexed to the bill of complaint contained true copies of the agreement and release.

10. Defendant admits that he received the sum of twenty-seven hundred dollars ($2700) under said settlement, but has no knowledge of what the complainant has discovered or been advised.

11. Defendant further answering says that annexed to this answer is a true copy of complaint filed by him in the action at law, and also a true copy of the answer filed by Florence I. Merkel, the above complainant, thereto. That said action at law was commenced on the 28th day of February, 1913. That said agreement referred to in the bill of complaint dated December 24th, 1913, provided that the thirty shares of stock should remain in the custody and control of said John G. Merkel, until said stock should reach a par value of four hundred dollars ($400) per share, and for and during the term of five years from the first day of January, 1904, and at such time and when each share should attain said book value of four hundred dollars per share, and after the expiration of said five years, that said thirty shares of stock should then become the property of this defendant. Defendant in said action at law claimed damages thousand dollars ($15,000), and contended that at was discharged he was entitled to said shares of stock under the terms of the said agreement, and that the book value of said shares was then four hundred dollars ($400) per share. This defendant had in his possession at the time he was discharged, a copy of the inventories for the years 1910, 1911 and 1912. That the inventory for the year 1910 showed the net assets of over $57,000; that the inventory of 1911 showed assets of nearly $72,000, and the inventory for the year 1912 which was made on August 1st, showed net assets of $84,482.15. That in the inventory of August 1st, 1912, the assets of the said John G. Merkel Company in many respects were valued at a very low

figure. That if said assets had been valued at their true market value at the time of taking of said inventory, the net assets of the said John G. Merkel Company would have been largely increased. That between the first day of August, 1912, and the time defendant was discharged in October, 1912, the assets of said John G. Merkel Company had largely increased from their value on August 1st, 1912. That at the time this defendant was discharged in October, 1912, the shares of stock of said John G. Merkel Company were worth the sum of four hundred dollars ($400.00) per share. The capital stock of the said John G. Merkel Company is $25,000, divided into two hundred fifty shares, of the par value of $100 per share.

12. After the institution of said action at law, the complainant herein filed an answer, a true copy of which is annexed to this answer and made part thereof. In said answer she alleged that this defendant left the employ of said company of his own volition, on the 28th day of October, 1912, and that he had been engaged in his own business for a year prior thereto. The complainant herein further alleged in her said answer at law, by the sixth paragraph thereof, that the shares of stock were not of the value of four hundred dollars ($400) per share, or anywheres near that value, on the 5th day of February, 1913, when demand was made in writing for the same, and that this defendant was not entitled to said thirty shares of stock according to the terms of said agreement. That said action at law was on the calendar of the said Essex County Circuit for nearly two years before it was reached for trial. Early in December Term, 1914 of said Court, the trial became im-

minent, and the complainant was subpoenaed on behalf of this defendant, as a witness, and to produce in Court all the books of said John G. Merkel Company containing all inventories from the 1st day of January, 1904, to the 12th day of December, 1914, and all papers relating in any way to said inventory, and all books showing the financial condition of said company, which might tend to show the book value of the capital stock of the said company.

That negotiations for a settlement had been made but unsuccessfully, until after the complainant herein was subpoenaed, as aforesaid, and within a day or two after that, the action at law was settled for six thousand dollars ($6000), as hereinbefore mentioned. That this defendant accepted the settlement with reluctance, as he believed that he was entitled to a larger sum.

13. That this defendant settled said action at law in good faith, and believed and still believes that he had just and legal action against the said complainant, individually and as executrix. That he had devoted a number of years of his life at a small salary, relying upon further compensation in accordance with the terms of said agreement.

WHEREFORE, the defendant asks that he be dismissed with his costs of suit in this behalf sustained.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,
Solicitors of Defendant.

Answering Affidavit of William Merkel

(Filed, September 5, 1916)

IN CHANCERY OF NEW JERSEY

Between FLORENCE I. MERKEL, individually and as executrix of the last will and testament of John G. Merkel, deceased, Complainant, And WILLIAM MERKEL, Defendant.	On Bill, etc. Affidavit

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

William Merkel, being duly sworn upon his oath deposes and says:

1. I reside in the Town of Irvington, County of Essex and State of New Jersey, and am the defendant named in the above stated cause. It is true that John G. Merkel, who was my brother, departed this life on the 3d day of July, 1910, leaving a last will and testament by which he devised and bequeathed all his property, real and personal to the above complainant, who was appointed executrix of the will, duly qualified and letters of administration were issued to her by the Surrogate of Essex County.

2. I worked for my brother individually and for the John G. Merkel Company for about twenty

years in different capacities. On the 24th day of December, 1903, I entered into an agreement, a copy of which is annexed to the bill of complaint, and continued in the employ of said John G. Merkel Company until on or about the 28th day of October, 1912, and during that time I devoted all my time and energy to the business of said John G. Merkel Company, receiving a salary during the term of said agreement from ten dollars to nineteen dollars a week. On or about October 28th, 1912, I was discharged by Florence I. Merkel, who was at that time the president of said company, and I then demanded thirty shares of stock of said company in accordance with the terms of my said agreement with John G. Merkel.

3. After the death of said John G. Merkel the business of John G. Merkel Company was continued by the said Florence I. Merkel as president, and I remained in the employ of the company at a salary of nineteen dollars per week, having complete charge of the hardware department of said business.

4. During the five years mentioned in said agreement and thereafter until I was discharged, I devoted my full and undivided time and energy in behalf of the business of said company.

5. At the time I was discharged, it was my contention that the book value of said shares was four hundred dollars. I deny that the book value of said stock did not increase from May 1st, 1904 to January 1st, 1909, but on the contrary the inventories made showed a substantial increase in the book value of the stock. At the time I was discharged from the said John G. Merkel Company

there were books which showed the inventories and the book value of the stock.

6. Neither at the time I was discharged from said company, nor at any other time, did I make any statement to the said Florence I. Merkel that I had devoted my full and undivided time and energy to the company, and had worked for its success for five years, as the question of my not devoting my entire time to the business of the company was never raised by her, and at no time did she ever find any fault with me for not attending to the affairs of said company. Neither at the time I was discharged, nor at any other time, did I tell the said Florence I. Merkel that the book value of said stock had reached a value of four hundred dollars per share; neither did I tell her at any time that the difference between the book value of each share of stock on May 1st, 1904, and the book value of each share of stock on January 1st, 1909, was four hundred dollars per share.

7. It is true that upon the refusal of the said Florence I. Merkel to deliver to me thirty shares of the capital stock of the said John G. Merkel Company, I instituted suit against her individually and as executrix as aforesaid, in the Essex County Circuit Court to recover damages for the breach of the contract entered into between me and the said John G. Merkel.

8. I have no knowledge of what the said Florence I. Merkel was advised by her attorney, but I believed and now believe that I had a just and legal cause of action against her for the breach of said agreement.

9. In the month of December, 1914, after said cause had been pending in the Essex County Circuit Court for nearly two years, a settlement was effected whereby I received one thousand dollars in cash and five thousand dollars in promissory notes, said notes being payable one each month with interest. It was with reluctance that I accepted said settlement because I believed that I was entitled to a considerably larger sum, but upon receipt of said cash and promissory notes, I executed a release to the said Florence I. Merkel, a copy of which was annexed to the bill of complaint, and directed my counsel to discontinue the case pending in said Essex County Circuit Court.

10. The capital stock of said John G. Merkel Company was twenty-five thousand dollars divided into two hundred and fifty shares of the par value of one hundred dollars a share. The inventory made in August, 1910, shows net assets of over fifty-seven thousand dollars; the inventory made in August, 1911, shows net assets of nearly seventy-two thousand dollars, and the inventory made in August, 1912, shows net assets of eighty-four thousand, four hundred eighty-two dollars and fifteen cents ($84,482.15). I have in my possession a written copy of the inventory book referring to the inventories for the years 1910, 1911 and 1912. In addition to these assets the said John G. Merkel Company had a contract to purchase certain lands and premises on Prince Street, in the City of Newark, which was very valuable, but not inventoried as an asset. This contract was worth sufficient to bring the total value of the net assets over one hundred thousand dollars. I have not in my possession a statement of the inven-

tories made prior to the year 1910, but I believe that each inventory showed, as hereinbefore satted, a substantial increase in the net assets of the business.

WM. MERKEL.

Sworn and subscribed to before me this
5th day of August 1916,
Bernard V. McGovern,
Attorney at law of N. J.

Answering Affidavit of Andrew Van Blarcom

(Filed, September 5, 1916)

IN CHANCERY OF NEW JERSEY

Between
FLORENCE I. MERKEL, individually and as executrix of the last will and testament of John G. Merkel, dec'd,
Complainant,
And
WILLIAM MERKEL,
Defendant.

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

Andrew Van Blarcom, being duly sworn on his oath according to law, deposes and says:

1. I am a member of the firm of Raymond, Mountain, Van Blarcom & Marsh, and represented William Merkel, the above defendant, in a certain cause instituted in the Essex County Circuit

Court against the above complainant, said cause being the one referred to in the affidavit of the complainant, annexed to the bill of complaint filed in this cause.

2. Summons was issued in said action at law, from the Essex County Circuit Court, on the 28th day of February, 1913. The complaint filed and served in the action, demanded $15,000, the value of thirty shares of stock of the John G. Merkel Company. Said action was based on the agreement between said William Merkel and John G. Merkel Company, a copy of which agreement is annexed to the bill of complaint. A true copy of the complaint filed in the action at law is hereto annexed, marked Exhibit "A."

3. After the issuing and service of summons and complaint, the said Florence I. Merkel filed an answer, a true copy of which is annexed hereto and marked Exhibit "B." . In and by the answer of said Florence I. Merkel, she alleged that the said William Merkel was not discharged from his employ with said John G. Merkel Company, but that he left of his own volition, and that he had been engaged in his own business for a year prior to the time he left in October, 1912. The said Florence I. Merkel denied in her answer that said William Merkel had performed all the terms and conditions of said agreement, on his part, and denied that the shares of stock in question were of the value of $400 per share or anywheres near that value, and denied that according to the terms of said agreement the said William Merkel was entitled to said shares of stock, all of which appears by the answer filed by the said Florence I. Merkel, a true copy of which is annexed hereto.

Answering Affidavit of Andrew Van Blarcom

4. Said action at law was duly noticed for trial at the various terms of the Essex County Circuit Court, and finally was noticed for the December Term, 1914. Between the time of the institution of suit, and when the trial became imminent at the December Term, 1914, I had been negotiating a settlement, and several offers of settlement had been discussed between Mr. Newman and myself. No conclusion was reached until Florence I. Merkel, the above complainant, was subpoenaed as a witness for the above defendant, to appear before the Essex County Circuit Court, on the 14th day of December, 1914, and bring with her the books of the John G. Merkel Company, containing all inventories, and generally the books of said company showing its assets and liabilities and any books which would tend to show the book value of its capital stock. This subpoena was served on the 12th day of December, 1914, and a few days after terms of settlement were agreed upon whereby said Florence I. Merkel agreed to pay to said William Merkel the sum of six thousand dollars.

5. I delivered the general release described in the bill of complaint and received the agreement therein contained, between the above complainant and defendant. The matters in issuance between the parties were settled, and the case pending in the Essex County Circuit Court was discontinued.

ANDREW VAN BLARCOM.

Sworn and subscribed to before me, this
5th day of August, 1916.
at Newark, in the County of Essex and
State of New Jersey.
Bernard V. McGovern,
Attorney at Law of New Jersey.

Exhibit A

Annexed to answering affidavit of Andrew Van Blarcom

(Filed, September 5, 1916)

ESSEX COUNTY CIRCUIT COURT

WILLIAM MERKEL, Plaintiff, vs. FLORENCE I. MERKEL, individually and as executrix of the will of John G. Merkel, deceased, Defendant.	Action at Law. Complaint.

William Merkel, plaintiff, of the Town of Irvington, in the County of Essex and State of New Jersey, says, that:

1. On the twenty-fourth day of December, nineteen hundred and three, plaintiff and John G. Merkel, in his lifetime, entered into a certain agreement in writing, a true copy of which is hereto annexed and made a part of this complaint.

2. In pursuance of said agreement, plaintiff entered into the employ of John G. Merkel Company, a corporation, organized under the laws of the State of New Jersey, and continued in the employ of said company until on or about the twenty-eighth day of October, nineteen hundred and twelve, when plaintiff, without cause, was dis-

charged by defendant, who was then president of said John G. Merkel Company.

3. That on or about the third day of July, nineteen hundred and ten, the said John G. Merkel departed this life, leaving a last will and testament, which was duly admitted to probate by the Surrogate of the County of Essex, on the fourth day of July, nineteen hundred and ten, and is now recorded in said Surrogate's office. That in and by said last will and testament the said John G. Merkel appointed his wife, the above defendant, sole executrix thereof, and she was therein named as the sole legatee. That the said Florence I. Merkel duly qualified as executrix of said will and letters testamentary were issued to her by the Surrogate aforesaid. That a true copy of said will is hereto annexed and made part of this complaint.

4. The plaintiff has performed all the terms and conditions of the said contract on his part.

5. On the fifth day of February, nineteen hundred and thirteen, plaintiff caused to be served upon defendant personally, a notice demanding the delivery to him of thirty shares of the capital stock of the John G. Merkel Company, a true copy of which notice is hereto annexed and made a part of this complaint.

6. That on said fifth day of February, nineteen hundred and thirteen, the day that the plaintiff demanded said shares of stock, the same were of the value of four hundred dollars per share, and that according to the terms of said agreement above

mentioned, the said plaintiff was then and there entitled to said thirty shares of stock from the said defendant.

7. Defendant has neglected and refused to deliver said shares of stock to the said plaintiff.

Plaintiff demands fifteen thousand dollars damages, with lawful interest and costs of suit.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,
Attorneys of Plaintiff.

Exhibit B

Annexed to answering affidavit of Andrew Van Blarcom

(Filed, September 5, 1916)

ESSEX COUNTY CIRCUIT COURT

WILLIAM MERKEL, Plaintiff, vs. FLORENCE I. MERKEL, individually and as executrix of the will of John G. Merkel, dec'd., Defendant.	Action at Law. Answer.

1. Defendant admits that on the twenty-fourth day of December, nineteen hundred and three, the plaintiff and John G. Merkel, in his lifetime, en-

tered into a certain agreement in writing, a true copy of which is annexed to and made a part of the complaint.

2. Defendant also admits that in pursuance of said agreement, the plaintiff entered into the employ of the John G. Merkel Company, a corporation organized and existing under the laws of the State of New Jersey, and continued in the employ of said company until about the twenty-eighth day of October, nineteen hundred and twelve; but denies that the plaintiff, without cause, was discharged by the defendant who was then and there the president of said John G. Merkel Company, and asserts that the plaintiff, of his own volition, left the said company and had been engaged in his own business for a year prior thereto.

3. Defendant admits that on or about the third day of July, nineteen hundred and ten, the said John G. Merkel departed this life, leaving a last will and testament, which was duly admitted to probate by the Surrogate of the County of Essex on the fourteenth day of July, nineteen hundred and ten, and is now recorded in said Surrogate's office, and admits that in and by said last will and testament the said John G. Merkel appointed his wife, the above defendant, sole executrix thereof, and she was therein named as the sole legatee, and admits that she, the said Florence I. Merkel, duly qualified as executrix of the said will, and letters testamentary were issued to her by the Surrogate aforesaid, and admits that a true copy of said will is annexed to and made part of the complaint.

Answering affidavit of Andrew Van Blarcom—Exhibit B

4. Defendant denies that the plaintiff has performed all the terms and conditions of said contract on his part, but avers the truth to be that the plaintiff has failed to perform the contract on his part, and has neglected and refused so to do.

5. Defendant admits that on the fifth day of February, nineteen hundred and thirteen, the plaintiff caused to be served upon the defendant a notice demanding the delivery to him of thirty shares of the capital stock of the John G. Merkel Company, a true copy of which notice is annexed to and made part of the complaint.

6. Defendant denies that on the fifth day of February, nineteen hundred and thirteen, the day that the plaintiff demanded said shares of stock, the same were of the value of Four Hundred Dollars per share, or that they were worth anything near Four Hundred Dollars per share, and denies that, according to the terms of said agreement, the plaintiff was then and there entitled to the said thirty shares of stock from said defendant.

7. The defendant says that she has refused to deliver said shares of stock to the said plaintiff because she alleges that the said plaintiff is not entitled to same, having broken his contract in many and divers respects.

JACOB L. NEWMAN.
Attorney of Defendant.

Supplemental Affidavit of Defendant

(Filed, September 5, 1916)

IN CHANCERY OF NEW JERSEY

Between FLORENCE I. MERKEL, individually and as executrix of the last will and testament of John G. Merkel, deceased, Complainant, And WILLIAM MERKEL, Defendant.	On Bill, etc. Supplemental Affidavit of Defendant.

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

William Merkel, being duly sworn upon his oath according to law, deposes and says:

1. Since I made the affidavit in the above stated cause bearing date August 5th, 1916, at the request of my counsel I have examined the agreement mentioned in the tenth paragraph of said affidavit relating to the purchase of certain lands and premises on Prince Street, in the City of Newark, New Jersey, which agreement was not in my possession on August 5th, 1916.

2. I find upon examination of said agreement that the John G. Merkel Company was not a party to the same. This affidavit is made for the purpose of correcting the allegation in the tenth paragraph of my former affidavit.

3. When the inventory was made in the month of August, 1912, the assets in many particulars

were valued at a very low figure. Between the time of taking said inventory in August, 1912, and the time of my discharge in October, 1912, the said net assets had increased. I believe that the net assets of the said John G. Merkel Company if valued at their true market value at the time I was discharged from my employment in said company, would amount to one hundred thousand dollars ($100,000.00).

Sworn and subscribed to before me,
at Newark, New Jersey, this
day of August, nineteen hundred
and sixteen.

Affidavit of Complainant in Reply

(Filed, September 5, 1916)

IN CHANCERY OF NEW JERSEY

Between FLORENCE I. MERKEL, individually and as executrix, etc., Complainant, And WILLIAM MERKEL, Defendant.	On Bill, etc. Affidavit in Reply.

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

Florence I. Merkel, being duly sworn, on her oath deposes and says, that she has read the an-

swer and affidavit and the supplemental affidavit of William Merkel in the above stated cause.

Deponent further says, that at the time William Merkel demanded the thirty shares of stock as set forth in the bill of complaint, deponent was not familiar with the details of the said business, and especially with the condition of the business prior to her husband's death, during which time the term of five years mentioned in the contract with defendant expired. The John G. Merkel Company was incorporated by deponent's husband in the year 1896, and the business was conducted solely by him until his death in the year 1910. The business is that of wagon and carriage hardware, coal, etc. William Merkel was never vice-president of the company, or manager of the hardware department and he never held any office or position with said company, except that of salesman. He was discharged from said employment several times by deponent's husband during the five years mentioned in the contract, to wit: between December 24th 1903 and January 1st, 1909, because he had not devoted all of his time to said business; and it was only after urgent requests of his mother that deponent's husband took defendant back in said employment. Deponent and her daughter, Julia B. Merkel, were present on several occasions in her home when William Merkel and his mother called upon deponent's husband, and deponent heard William Merkel and his mother ask her husband to take William Merkel back in the business; at those times William Merkel stated and admitted that he had not devoted his entire time to said business but would do so in the future.

After the death of deponent's husband, defend-

ant continued to remain away from business during business hours, and deponent often told him that he was not acting fairly with her in failing to devote his time to the business.

The circumstances of William Merkel leaving the employ of the company on or about November 4th, 1912, were as follows: About that time deponent, who was then taking an active part in said business, received a promissory note in the mail, signed "John G. Merkel Company" to the order of a rubber concern in Trenton for $1000; deponent had never heard of said concern or the note, and she suspected that William Merkel had signed and given the note, and asked him what right he had to sign the note; William Merkel said it was an "outside matter" and had nothing to do with the John G. Merkel Company. Deponent thereupon told defendant that he had no right to sign the name of the company to a note. About that time deponent was informed, and she verily believes, that the "outside matter" referred to by defendant was an automobile business in which he had been interested in Jersey City for several years prior to and on November 4th, 1912.

The contract or option for the purchase of certain lands on Prince Street, referred to in defendant's affidavit was between deponent's husband, individually and the owner of the property; the John G. Merkel Company was not a party to said contract and had no interest therein.

The assets of said company are shown by the following statements taken from the books of the company; the loose leaves of the ledger showing the inventories for the years 1910, 1911 and 1912, are missing, and deponent is informed and be-

lieves that the defendant took them when he left the employ of said company, and that he still has them; if they show that the assets were $57,000 in the year 1910, and $72,000 in the year 1911, and $84,482.15 in the year 1912, they are correct, but no allowance was ever made for accounts which were not collected, as the company never kept a "profit and loss" account, and never charged off the uncollected accounts; the loose leaves of the ledger for the year 1904, 1906 and 1907, are also missing. The net assets after deducting expenses for the other years were as follows:

January 1, 1905. Assets	$48,178.07
August 1, 1908. Assets	55,051.94
January 1, 1909. Assets	58,895.10

These assets are the accounts receivable, cash on hand, cash in bank, bills receivable, rolling stock, office fixtures, merchandise as per inventory. The accounts payable, bills, and accounts due banks are deducted. But some of the accounts receivable included in the assets were never collected, partly because defendant sold to a large number of persons who were not financially responsible, and he made no effort to ascertain their financial condition, to wit:

December 31, 1908	Uncollectible Accounts (Hardware)	$4473.17
" " 1910	Uncollectible Accounts (Hardware)	4119.09
" " 1911	Uncollectible Accounts (Hardware)	1765.45
" " 1912	Uncollectible Accounts (Hardware)	4387.18

Besides those uncollected accounts one of the salesmen in the coal department disappeared with over $2600 of the company's money.

Deponent also denies that the assets were valued on August 1st, 1912, or at any other time, at a low figure. They were valued at their true market value; and she denies that between August 1st, 1912, and the time when defendant left the employ of the company, the assets had greatly increased.

About the middle of September, 1912, deponent advertised the said business for sale in the "Carriage Monthly," a trade paper, and received offers from the defendant, a man from Philadelphia. After an examination of the books and the business, the latter offered deponent $40,000 for the business and the real estate mentioned in the option aforesaid, the price of which was $14,000, making his offer for the business the sum of $26,000. The defendant offered $57,000 for the said business together with the said real estate, making his offer for the business the sum of $43,000. Deponent accepted the offer of defendant in December, 1912, and he gave her his check for $500 on account of the purchase price, but he stopped payment on the check before defendant presented it at the bank the following morning.

FLORENCE I. MERKEL.

Subscribed and sworn to before me this
5th day of September, 1916.

Clarence Linn,
Master in Chancery,
of New Jersey.

Affidavit of Julia B. Merkel in Reply

(Filed, September 5, 1916)

IN CHANCERY OF NEW JERSEY

Between FLORENCE I. MERKEL, individually and as executrix, etc., Complainant, And WILLIAM MERKEL, Defendant.	On Bill, etc. Affidavit in Reply.

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

Julia B. Merkel, being duly sworn, on her oath deposes and says, that she is 21 years of age and the daughter of the above named complainant.

On two or three occasions William Merkel and his mother called upon deponent's father in his house, and deponent heard them ask her father to take William Merkel back in his employ. Deponent's father told William Merkel on those occasions that he had taken him back in his employ several times to make peace in the family and he was out of patience with him.

JULIA B. MERKEL.

Subscribed and sworn to before me this
21st day of August, 1916.
Clarence Linn,
Master in Chancery
of New Jersey.

Order Discharging Order to Show Cause

(Filed, December 26, 1916)

IN CHANCERY OF NEW JERSEY

Between FLORENCE I. MERKEL, individually and as executrix of John G. Merkel, deceased, Complainant, And WILLIAM MERKEL, Defendant.	On Bill, etc. Order Discharging Order to Show Cause.

The Court having read the bill of complaint and the affidavits annexed thereto, the answer of the defendant and the affidavits annexed thereto, and the affidavits of the complainant in reply, and having heard the arguments of counsel for the complainant and the defendant, and having duly considered the matter, and being of opinion that the order to show cause granted in the above stated cause on the 7th day of August, 1917, should be discharged;

IT IS THEREUPON, on this 26th day of December, 1916, on motion of Andrew Van Blarcom, of counsel with the defendant,

ORDERED, that the order to show cause be discharged with costs, and that the restraint therein imposed be removed.

E. R. WALKER.

C.

Respectfully advised,
John Griffin,
V. C.
A true copy.
Robert H. McAdams,
Clerk.

Opinion

(Filed, February 8th, 1917)

IN CHANCERY OF NEW JERSEY

Between
FLORENCE I. MERKEL, individually and as executrix, etc.,
Complainant,
and
WILLIAM MERKEL,
Defendant.

For the complainant, Herbert C. Gilson, Esq.
For the defendant, Messrs. Raymond, Mountain, Van Blarcom & Marsh.

Submitted, September 12, 1916; decided, November 21, 1916.

GRIFFIN, V. C.:

The bill in this cause is filed (1) to set aside a compromise agreement which resulted in the settlement of a suit at law; (2) to compel the return

of moneys paid thereunder, and (3) to restrain the disposal of the notes given under the agreement.

It seems that John G. Merkel in his lifetime was the holder of 248 shares of the capital stock of the John G. Merkel Company, with a capital issue of 250 shares; he practically owned the corporation, the other 2 shares being held by the present complainant and one Julia Voight to qualify them as directors. Prior to December 24th, 1903, the defendant, who was a brother of John G. Merkel was in the employ of the company as salesman. On the last mentioned day an agreement was entered into between John and William under which John agreed to transfer 30 shares of the capital stock of the company to William if he continued in the employ of the company for five years from January 1st, 1904, and during that time devoted his full time and energy in behalf of the company, and also upon condition that the capital stock of the company should, on January 1, 1909, reach the book value of $400 per share, and if it did not reach such book value, then the said stock should remain the sole property of John, in which latter case William should receive (in cash) the difference between the book value of the shares on May 1, 1904 and January 1, 1909—that is, if the book value had increased. On July 3, 1910, John G. Merkel died leaving a will in which he appointed the complainant, who was his wife, executrix. The defendant continued in the employ of the company from the time of the signing of the agreement until about November, 1912 (erroneously alleged in the bill to be November 4, 1914), when he was either discharged or voluntarily left the em-

ploy of the company. The complainant in her bill alleges both that he was discharged, and also that he left voluntarily. The defendant says that he was discharged.

The defendant, on February 5th, 1913, demanded that the complainant transfer to him the 30 shares of stock under the agreement, or the equivalent thereof in cash. This she declined to do, whereupon defendant, on February 28th, 1913, began suit in the Essex Circuit Court against the complainant, alleging performance of the agreement on his part, and the non-performance on the part of the complainant here, demanding damages in the sum of fifteen thousand dollars. The complainant here answered, denying generally that defendant performed, and also set up as a defense that on February 5th, 1913, the day that the plaintiff demanded said shares of stock the same were not of the value of $400 per share, nor that they were worth anything near $400 per share, and denied that the plaintiff (this defendant) was entitled to said 30 shares of stock. She also says that she refused to deliver the shares of stock because the plaintiff, having broken his contract in many and divers respects, was not entitled to them.

When the case was about to be reached for trial, in December, 1914, they compromised their differences for the sum of $6000. The compromise provided that $1000 should be paid in cash, and 50 promissory notes in the sum of $100 each, payable monthly should be given for the balance. The cash was paid, the notes delivered, the suit was discontinued and a release was given by the defendant here to the complainant. There appears to have

been numerous efforts to compromise before this time, which failed; and apparently the compromise was only effected when the complainant here was subpoenaed by the defendant (the plaintiff in the law suit) to produce her books in the law Court to the end that he might prove the book value of this stock. Two days after this subpoena was issued the case was settled. She continued to pay the notes, in accordance with the agreement, down to about July, 1915, during which time she paid seventeen, thus making the total amount paid under the agreement $2700.

The bill, after referring to the suit at law and the issues raised therein, bases the right to relief here upon two grounds: (1) newly discovered evidence, which if known at the time the suit at law was pending, would have enabled her to successfully defend the action; and (2) that she consulted counsel learned in the law and was mistakenly and illegally advised by him that William had a lawful cause of action against her for the 30 shares of stock, or for damages for breach of the agreement, and advised her to compromise.

First: Is the evidence newly discovered?

She says that on November 4, 1914 (should be February 1913) when William demanded the 30 shares or the equivalent thereof in cash, he falsely and fraudulently represented to the complainant here that he had devoted his full and undivided time and energy, etc. to the company during the term of the five years mentioned in the agreement; that the capital stock had reached a book value of $400 for each share; that the book value of said stock had increased since May 1, 1904, to $400 on January 1, 1909, and was then of that value, which

statements were false and untrue; and that, relying upon such statements and mistaken and illegal advice, she entered into the compromise settlement.

That she did not rely upon the statements made by the defendant is quite evident from her affidavit made in this cause on the 5th day of September, 1916, in which she says that during the five years, he had not devoted all his time to the business because he had been discharged during that time several times by John; that at the urgent solicitation of the mother of John and William, in the presence of the complainant and her daughter, Julia, William was taken back; and William admitted that he had not devoted his entire time to the said business, and would do so in the future. A similar affidavit is made by Julia. She therefore could not have been deceived by any such statement alleged to have been made by William, because, if her story be true, she knew the contrary to be the truth, William, however, denies her story.

This leaves, as the remaining ground, the alleged deception practiced by William in securing the compromises, namely, the representation that the stock had increased in value to $400 per share on January 1, 1909. In dealing with this matter, it must be borne in mind that this suit was in progress in a Court of law for almost two years before the compromise was reached. It was necessary for the defendant in the law suit (the complainant here), in preparing for trial, to ascertain this book value from the books of the company. It was the principal issue involved in that suit, according to the pleadings. The books were in her

possession. She and her counsel were in a position where the book value could be easily ascertained. Thus it was unnecessary for the complainant to rely upon any statement which the plaintiff in the law-suit might make as to this book value. Therefore, it would seem to have been gross negligence on the part of the complainant not to have known the book value and be acquainted with the facts touching it. After the settlement she continued to live up to the terms of the compromise agreement for a further period of about eighteen months, when, as she says, she "has just discovered and been advised of the false representations and statements and the mistake in law and advice, as aforesaid." During the period from the settlement until the bill was filed here, she had the books in her custody, and could at any time have ascertained the truth of the alleged representations. Now, at the end of three and a half years after the suit at law was begun, and eighteen months after the compromise was effected, she comes into this Court seeking to set aside the compromise agreement on the ground that she but recently learned that the statements of the defendant as to book value were false.

To entertain such a complaint upon such facts would be most intolerable. There should be a limit to litigation; it is not the policy of equity to aid in its prolongation.

The case as presented is somewhat analogous to an application for a new trial on the ground of newly discovered evidence. If the complainant went to trial in her case at law, having in her possession the books which would tend to prove the book value, but did not produce them, and judg-

ment went against her, she could not obtain a new trial, because such evidence would not be considered as newly discovered, nor such that, by the use of ordinary care and diligence, she might not have produced at the trial. *Servis vs. Cooper,* 33 N. J. Law, 68, *Stein vs. Cuff,* 76 N. J. Eq., 277; *Hannan vs. Maxwell,* 31 N. J. Eq., 318; *Powers vs. Butler,* 4 N. J. Eq., 465; 4 Pom. Eq. Juris., (3d Ed.), Sec. 1364.

Here, however, instead of going to trial, the parties substituted their compromise agreement for the judgment of the Court and jury. If complainant is in such laches that a Court of law would not grant a new trial on the grounds above stated, if the suit at law had proceeded to judgment against the complainant, why should a Court of equity, under similar circumstances, set aside the solemn agreement of the parties settling their suit at law, when it is apparent that her lack of knowledge of the facts was due to her gross laches in not examining the books in her custody, which would then have given her all the information on the subject she now possesses?

SECOND: Is the case of the complainant aided by the allegation that she was mistakenly and illegally advised by counsel?

This advice, I will assume, was given by counsel without knowledge of what the books in possession of his client might prove. It does not appear by the bill that counsel had seen the books; the bill does not allege that he had not seen them; it is quite plain, however, that he was charged with notice of their existence when the complainant here was subpoenaed to produce the books at the trial.

Under such circumstances, the case is quite like that of *Stein vs. Cuff, supra,* where an attorney, knowing of the importance of a certain witness and the value of certain papers, proceeded to trial without them, with the result that judgment passed against his client. A new trial was denied at law, and relief was refused to equity. To the same effect is 4 POM. EQ. JURIS., Sec. 1364.

The order to show cause will be discharged.

New Jersey Court of Errors and Appeals

Between FLORENCE I. MERKEL, individually and as executrix etc., Appellant, and WILLIAM MERKEL, Respondent.	On Appeal from Chancery.

BRIEF OF APPELLANT

Facts

The bill of complaint in this case was filed to set aside a compromise, which is alleged to have been the result of misrepresentations and mistake. In pursuance of the compromise complainant paid $1,000 in cash and gave 50 promissory notes, each for $100, dated January 1st, 1915, payable monthly. At the time the bill was filed $2,700 dollars of the notes had been paid (p. 22, l. 24), and the bill prays that the defendant be restrained from negotiating the remaining notes, and to set aside the release given under the compromise, and to compel the return of the moneys paid there-

under (p. 11, ll. 1-15). A temporary restraining order was allowed (p. 5), which was discharged on argument of the order to show cause (p. 50). This appeal was taken from the order discharging the restraining order.

Appellant is the widow of John G. Merkel who departed this life in the year 1910. He owned virtually all the stock of the John G. Merkel Company, a corporation (p 19, ll. 14-19), and bequeathed it all to his widow (Schedule A annexed to Bill, p. 11). The business was that of hardware, coal &c. The defendant, William Merkel, brother of John G. Merkel, had been in the employ of the company for a number of years. On December 24th, 1903, an agreement was entered into between John and William, whereby the latter was to receive 30 shares of stock of the corporation, as a bonus, upon condition that he devoted his entire time and attention to the business for five years from January 1st, 1904, and also upon condition that the book value of the stock reached $400 each share on January 1st, 1909, and if it did not reach that value then the stock was to remain the sole property of John, but William was to receive (in cash) the difference between the book value of the shares on May 1st, 1904 and January 1st, 1909 (Schedule B, annexed to Bill, p. 12).

William did not devote his entire time to the business; he was discharged several times by John, but their mother persuaded John to take William back (p. 45, l. 30; p. 49). After John's death, William managed the hardware department of the business for the complainant, but he was never vice-president or any other officer as he swore he was (p. 45, l. 19); he never held a share of stock. He failed to devote all his time to the business after the death of John, and the com-

plainant discovered he was engaged in other business (p. 20, l. 36). In February 1913, a note purporting to be signed by the company was presented to complainant who thereupon asked William about it. William took the note and, after some argument, demanded 30 shares of stock under the agreement with John, and stated that he had performed his part of the agreement. Upon complainant's refusal to transfer the stock, defendant left the employ of the company (p. 46, ll. 10-28). When he left, the defendant took with him the loose leaves of the ledger showing the profits (and value of the stock), during the years 1910, 1911 and 1912; and the leaves of the ledger for the years 1904, 1906 and 1907 are also missing (p. 46, l. 38; p. 47, l. 14). And without making any allowance for uncollected accounts, the increase from January 1st, 1905 to January 1st, 1909, was a little over $10,000 (p. 47, lines 17-19); but if a "profit and loss" account had been kept the increase as shown by the books would have been even less (p. 47, ll. 30-40).

The defendant then started an action at law against complainant for a breach of the agreement made with John, and complainant consulted her lawyer who filed an answer denying liability, but later advised complainant to settle the case, and stated that William had a good cause of action. The settlement for $6,000 as above stated resulted; but it is evident that if her counsel had known there had been no increase, or very little increase, in the value of the stock, and that William had taken the leaves of the ledger and had been engaged in another business while he was supposed to be devoting all his time to the Merkel Company, he would have advised that there was no liability on the part of complainant.

Fraud

The defendant should be restrained from negotiating the remaining notes until final hearing. If they are transferred to an innocent purchaser it may result in an injustice. The issues are largely subject to figures which will necessarily have to remain unsettled until final hearing, especially in view for the fact that defendant has taken the loose leaves of the ledger. Under these circumstances the refusal to grant a restraint is practically deciding the merits on the preliminary motion. And in view of the allegations and sworn statements of complainant with respect to the misrepresentations of the defendant, and that the shares never reached the value of $400 each, she is at least entitled to have the transfer of the notes restrained until final hearing.

There is no allegation on the part of defendant tending to show he was entitled to the 30 shares of stock; he only says that

> "*at the time* I was discharged it was my *contention* that the book value of said shares was four hundred dollars" (p. 32, l. 32).

But he knew that was not a fact because in September, 1912, he had agreed to buy the business for $43,000, and gave complainant a check for $500 to bind the bargain; but payment was stopped on the check and the sale was not consummated (p. 48, ll. 26-30). It is therefore evident that both parties valued the shares at less than $200 each, because the capital stock was $25,000 (p. 34, l. 20), and the value placed upon it, was $43,000. But even if the contention of defendant that the shares were

worth $400 each, when he left the employ of the company, were a fact, it would not entitle defendant to the 30 shares, because the contract provides that the shares must have reached that value on or before January 1st, 1909, not at the time he severed his connection with the company in February, 1913. According to his own statement, therefore, he was only entitled to the increase, if any, in the value of the shares between May 1st, 1904 and January 1st, 1909, because the stock did not reach the value of $400 per share on January 1st, 1909. Later on the defendant denies that he ever told complainant the shares had reached the book value of $400 each share (p. 33, l. 19), but he virtually contradicts himself because, by making the demand for the 30 shares, he impliedly represented that the stock had increased to $400 each share by January 1st, 1909, and that he had lived up to the agreement, both of which were untrue.

It is true the complainant knew that the defendant had not devoted all of his time to the business before the death of complainant's husband; but the statement of defendant that he had devoted all his time to the business also referred to the time after the death, and the complainant discovered later that the defendant was engaged in another business during the latter period (p. 10, ll. 31; p. 20, l. 35). Furthermore, the question whether the breach of the contract by the defendant before the death of complainant's husband, was condoned or not, is a question to be determined on final hearing because, any condonation is based upon the future conduct of the party. It is also true that complainant, in her original affidavit, stated that there was no difference in the book value of the stock on May 1st, 1904 and January 1st, 1909; but in view of the fact that defend-

ant had taken the loose leaves of the ledger, it required an expert bookkeeper to get the exact figures for her second affidavit. Any knowledge the complainant might ordinarily be charged with by reason of having possession of the books, is overcome by the undenied fact that the loose leaves of the ledger were taken by defendant. It is not strange that an inexperienced woman could not understand the figures and bookkeeping. Nor does the fact that an offer was made of $26,000 for the business, necessarily affect complainant's statement that she believed that defendant when he said the stock had reached a book value of $400 per share. The offer did not fix the value of the business for it was not accepted. The defendant was managing one branch of the business and complainant relied upon him when he represented that the shares were worth $400 each.

All of the elements of fraud are present. The misrepresentations were made for the purpose of inducing complainant to transfer the 30 shares of stock; the defendant knew they were false, and the complainant relied upon them. It is clear that the defendant was not entitled to the 30 shares, because they never reached the value of $400 each share; and it is also clear he has received more than he was entitled to even if there had been any increase between May 1st, 1904 and January 1st, 1909, and if he had performed his part of the contract. The fact that the compromise was a settlement of a law suit, does not bar the complainant. Relief would be granted against even a judgment founded on fraud; and any contract or release would be vitiated by fraud. (*Lincoln v. Judd*, 49 N. J. Eq., 387; *Hubbard v. International Mercantile Agency*, 68 *id.*, 434; 8 *Cyc.*, 527, 528; 1 *id.*, 338).

This case is entirely different from a case of newly discovered evidence. It is based upon fraud and mistake, and the fact that the fraud and mistake were discovered recently does not make it analogous to a suit for relief against a judgment where there was no fraud in procuring the judgment.

Under these circumstances a case is shown which is strong enough to render it probable that complainant will succeed on final hearing, and therefore the preliminary restaint should have been continued.

Mistake of Law

If complainant's counsel, at the time of the compromise, had known that the shares had not increased in value, and that defendant had been engaged in another business, and had taken the loose leaves of the ledger, it is fair to assume he would not have advised complainant to settle. The complainant, therefore, entered into the compromise under a mistake of law because she was erroneously advised.

> "The rule that money paid under a mistake of law cannot be recovered should be confined to cases falling strictly within it. Cases where money has been obtained by oppression, extortion or taking undue advantage of the party's situation, are not within the rule, and a fraudulent representation takes the case out of the rule."
>
> 30 Cyc., 1314.
>
> "Equity will relieve from a contract, entered into by a person under a mistake of his legal rights, where the other party to

> the contract, perceiving the mistake, not only fails to apprise the former of it, but is guilty of unfair and deceptive conduct, which tends to confirm the mistake and conceal the truth, and influence the entry into the contract under the mistake."
>
> Clark v. Clark, 55 N. J. Eq., 814.

And see:

Hawralty v. Warren, 18 *id.*, 124.

Laches

The question of laches is also a matter for final hearing. Length of time in itself is not a decisive feature; there may be any number of legal reasons for delay in taking action. In the present case complainant expressly alleges that she relied upon the statements made by the defendant (p. 10, l. 1; p. 22, l. 12); that she was unaware of their falsity (p. 22, l. 30); and that she has only recently learned they were untrue, and that she entered into the settlement under a mistake of law (p. 22, l. 27). And in view of the fact that defendant had taken the leaves of the ledger, the complainant did not have the information with respect to the increase, if any, in the value of the stock. It was only after extraordinary efforts that she obtained sufficient information to know that she had been deceived when advised that she was not liable unless the shares had reached a value of $400 on January 1st, 1909, and defendant had performed his part of the contract. This suit was instituted as soon as she discovered the mistake and the falsity of the defendant's representations; and the case is clearly distinguishable from a suit on the ground of newly discovered evidence (see First Point).

There can be no harm by restraining the negotiation of the notes until final hearing, and as complainant has made out a *prima facie* case, the restraining order should have been continued.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

Between

FLORENCE I. MERKEL, individually and as executrix, etc.,
Complainant-Appellant,

and

WILLIAM MERKEL,
Defendant-Respondent.

On Appeal from Chancery.

Brief of Respondent.

Facts.

The appellant filed her bill of complaint to set aside the compromise of an action at law, to recover the sum of $2,700, paid under the compromise, and to cancel thirty-three promissory notes of one hundred dollars each.

An order to show cause, with restraint, was granted on the 31st day of July, 1916. An answer and answering affidavits were filed and after a hearing before Vice-Chancellor Griffin, an order was entered, on the 26th day of December, 1916, discharging the rule to show cause and the restraint therein imposed.

The order discharging the order to show cause is now before the Court for review.

Pending the appeal to this Court, the restraint imposed in the order to show cause was continued. The order continuing the restraint is not returned as part of the record on appeal.

In the year 1903, an agreement was entered into between the respondent and John G. Merkel,

the husband of the appellant (Schedule B, p. 12). In this agreement, among other things, the respondent agreed to devote his full and undivided time and energy for and in behalf of the John G. Merkel Company, a corporation of this State, and to work for the success of that company, and under certain terms and conditions the respondent was to receive from John G. Merkel thirty shares of the stock of said company, or a cash payment, in accordance with the terms of the agreement.

The respondent continued in the employ of said company until October, 1912, when, he claims, he was discharged. Suit was instituted in the Essex County Circuit Court in February, 1913, for the recovery of $15,000 for the breach of the contract (see affidavit of Andrew Van Blarcom, p. 36). The action at law was on the calendar of the Essex County Circuit Court until December term, 1914. At the opening of the December term, the appellant was subpoenaed to appear at the trial and produce such books of the John G. Merkel Company as would show the financial condition of the company, and the net assets of the company during the years mentioned in the agreement. A few days after the service of the subpoena, a settlement was made for $6,000. Appellant and respondent were both represented by counsel (see affidavit of Andrew Van Blarcom, p. 37).

After the lapse of nearly one year and eight months, the appellant filed her bill to set aside the compromise and recover the money paid thereunder.

The ground upon which relief is sought, is fraud.

The facts related to have been misrepresented were two, first as to the time spent by

the respondent in his employment with said company, and second, as to the value of the stock.

These misrepresentations will be considered in their order.

First, as to the misrepresentations as to the time spent by respondent in the performance of his duties.

The appellant alleges in the sixth paragraph of the bill (p. 8) that on or about November 4, 1914, the said William Merkel demanded of her the thirty shares of stock, or the equivalent in cash, and that the said William Merkel then falsely and fraudulently represented and told appellant that he had devoted his full and undivided time and energy for and in behalf of the said company and had worked for the success of the said company during the term of five years mentioned in the said agreement, and that the capital stock had reached a book value of $400 each share, and that the difference between the book value of each share of the said stock at the time of taking stock of the said company on May 1, 1904, and the book value of the said shares of stock on January 1, 1909, was $400 each share, which said representations and statements were false and untrue by the said William Merkel when he made them.

In the ninth paragraph of the bill of complaint, the appellant alleges that she relied upon the fraudulent statements and misrepresentations.

Upon examining the affidavit of appellant in reply, it will be found that she had full knowledge, if what she says is true, that the respondent was not devoting all his time to the

business. The following is quoted from her affidavit in reply, at pp. 45-46:

> "Complainant and her daughter, Julia B. Merkel, were present on several occasions in her home when William Merkel and his mother called upon deponent's husband, and deponent heard William Merkel and his mother ask her husband to take William Merkel back in the business, and at those times William Merkel stated and admitted that he had not devoted his entire time to said business, but would do so in the future.
>
> After the death of deponent's husband, defendant continued to remain away from business during business hours, and deponent often told him that he was not acting fairly with her in failing to devote his time to the business."

In view of this affidavit, how can it be argued that she relied in any way upon his representations in this respect?

Referring to the alleged misrepresentations concerning the value of the stock, the appellant in her original affidavit annexed to the bill of complaint, at p. 20, l. 35; p. 21, l. 1, in the middle of the first paragraph says:

> "And the capital stock of said company did not reach a book value of $400 each share during the term mentioned in said agreement, or at any other time, and there was no difference between the book value of each share of said stock at the time of taking stock of said company on May 1, 1904, and the book value of each share of said stock on January 1, 1909; all of which was learned by deponent after the settlement hereinbefore mentioned."

On the top of this statement, the appellant made an affidavit in reply. The following is quoted from her affidavit in reply (p. 47) in reference to the net assets of the company during the years referred to in her original affidavit:

> "The net assets after deducting expenses for the other years, were as follows:
> January 1, 1905, assets.....$48,178.07
> August 1, 1908, assets..... 55.051.94
> January 1, 1909, assets..... 58,895.10

Upon this affidavit of the appellant, it appears that the net assets increased over twenty per cent. during a little more than four years of the contract, and it will be noticed that from the net assets referred to in complainant's affidavit in reply, expenses for other years have been deducted. What these expenses are, and what the different years are is not disclosed.

The last paragraph of appellant's affidavit in reply discloses the facts that before the respondent left the company's employ and before the alleged misrepresentations were supposed to have been made, a prospective purchaser of the capital stock of the company examined the books and business and then offered the complainant only $40,000 for the business and certain real estate not owned by the company, but valued at $14,000, making the net offer for the business $28,000.

In view of the fact that the appellant had knowledge of the examination of the books and business by the prospective purchaser, and an offer of $26,000, can it be possible that she still would have believed William Merkel when he told her that the shares were worth $400 each?

Counsel for the appellant has taken particular pains, in several instances, in his brief,

to state that the respondent took with him, when he left the employ of John G. Merkel Company, the loose leaves of the ledger showing the profits and the value of the stock, and states that the leaves of the ledger for the years 1904-1906 and 1907 are missing. This statement is made in his brief at pages 3, 5, 6 and 8. In view of the number of times that the defendant is accused of fraud, in this respect, it is interesting to find out what basis there is in the case for counsel's statement.

The only reference that is made to the fact that the respondent took the loose leaves of the ledger is found in the affidavit of appellant in reply (case, p. 47, beg. l. 35):

> "The assets of said company are shown by the following statements taken from the books of the company; the loose leaves of the ledger showing the inventories of the years 1910, 1911, 1912, are missing, and deponent is informed and believes that the defendant took them when he left the employ of said company, and that he still has them. * * * The loose leaves of the ledger for the years 1904, 1906, 1907 are also missing."

The practice of incorporating in an affidavit, hearsay testimony has been frequently condemned by the Courts of this State. If the respondent took anything from the appellant when he left, and she was told about it, the affidavit of the person telling her could have been produced without any difficulty, instead of making a statement of that kind on information and belief.

The respondent, however, in his affidavit (p. 34, l. 30) says:

> "I have, in my possession, a written copy of the inventory book referring to the inventories for the years 1910, 1911, 1912."

Respondent therefore did not take the original inventories, but only a copy thereof.

Argument of Law.

Point I.

The respondent is fortified by the opinion of Vice-Chancellor Griffin (p. 51). In his opinion, the Vice-Chancellor went into the facts at length, and reached the conclusion that the appellant was not entitled to preliminary restraint.

The respondent, in his answer and answering affidavits, unqualifiedly denied the making of any false representations, but assuming, for the sake of argument, that the false representations were made, the question arises whether the appellant relied upon them.

The following is quoted from Pomeroy's Equity Jurisprudence, third edition, vol. 2, section 876:

> "A misrepresentation, in order to constitute fraud, must contain the following essential elements: 1. Its form as a statement of fact; 2. Its purpose of inducing the other party to act; 3. Its untruth; 4, The knowledge or belief of the party making it; 5. The belief, trust and reliance of the one to whom it is made; 6. Its materiality. These elements will be examined separately."

The following is quoted from Pomeroy's Equity Jurisprudence, vol. 2, section 890:

> "Another element of a fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is, that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations. Unless an untrue statement is believed and acted upon, it can occasion no legal injury."

The following is quoted from Pomeroy's Equity Jurisprudence, vol. 2, section 892:

> "As a generalization from the authorities, the various conditions of fact and circumstance with respect to the question how far a party is justified in relying upon the representation made to him may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is justified in replying upon the statements which are offered as inducements for him to enter upon certain conduct. 1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties. 4. But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other

party has no such advantage, and the circumstances are not those described in the first or the second case, then it will be presumed that he relied on the statement; he is justified in doing so."

The following is quoted from *Swayze* v. *Swayze,* 37 Eq. 194:

"When parties whose rights are questionable have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims amongst themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time."

It is inconceivable that the appellant, having been sued at law for a breach of contract, and having alleged as one of her defenses at law that the book value of the stock was not as claimed by the respondent (p. 42, l. 18) should have made no investigation of the books of the company. She was president of the company, practically the only stockholder, and had, of course, full and complete access to its books. Therefore, she had an opportunity of making an examination of the books. She did not do so, and she is charged with the knowledge she would have obtained if she had prosecuted her examination with diligence.

It is respectfully submitted that the appellant is barred under the rule of equity as stated in the second section of the 892nd paragraph of Pomeroy's Equity Jurisprudence, above quoted.

The following is quoted from section 897 of Pomeroy's Equity Jurisprudence:

"All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the de-

ceived party upon his discovery of the fraud. The party who has been misled is required, as soon as he learns the truth, with all reasonable diligence, to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position," etc.

For a period of over one and a half years the appellant has done nothing.

If there was no fraud or imposition, the compromise will not be set aside, however disadvantageous it might be to the complainant.

Ackerman v. *Ackerman,* 44 N. J. L. 173.

The Court is also referred to the following sections of Pomeroy's Equity Jurisprudence, Vol. 2, 845, 850, 851, 855 and 856:

"A compromise and settlement of a claim asserted on reasonable grounds and in good faith, between parties having equal knowledge of the facts, is valid, though the matter is not in fact doubtful in legal contemplation." *Roane* v. *Union Pacific Life Ins. Co.,* 135 Pac. 892.

In a foot note to 8 Cyc. 526, an English case is cited as follows:

"Widow and other kin of an intestate agreed, by advice of their law agent, to compromise their respective claims by taking equal shares. The widow, after receiving her share, brought an action to rescind the agreement on the ground of ignorance of her legal rights and the erroneous advice of her law agent. It was held that, although the fair inference was that she was ignorant of her legal rights, yet as there was no proof of fraud on the part of the agent, she was bound by his

acts and affected by the knowledge which he was presumed to have of her legal rights." *Stewart* v. *Stewart,* 7 Eng. Reprint, 940.

After all, the case resolves itself into whether the respondent made the fraudulent representations, and then, if he did make them, whether the appellant relied upon them.

As to the first proposition, the Court has the absolute denial by the respondent of the making of any false representations; and as to the second proposition, the Court has the affidavit of the appellant herself, wherein she admits she had knowledge at the time of the compromise concerning the absence of the respondent from certain duties of his employment; and as to the value of the stock, the Court nas the appellant's affidavit in reference to the offer which was made for the business of the company after its books were examined. And more important than all, the fact that the appellant was in possession of the books, and during the year and a half, while the action at law was pending, had the opportunity of inspecting the books and ascertaining the truth of the situation.

Point II.

The case of the appellant is not aided by the allegation that she was mistakenly and illegally advised by counsel.

This situation is dealt with by Vice-Chancellor Griffin in his opinion at p. 57, and he reached the conclusion that appellant's counsel was charged with notice of the existence of the books when the appellant was subpoenaed to produce them at the trial, and under such circumstances the case is like that of *Stein* v. *Cuff,* 76 N. J.

Eq. 277, where an attorney, knowing of the importance of a certain witness, and the value of certain papers, proceeded to trial without them, with the result that judgment passed against his client. A new trial was denied at law, and relief was refused in equity. To the same effect is 4 Pomeroy's Equity Jurisprudence, section 1364.

In this connection it must be borne in mind that the respondent, in his action at law, alleged in his complaint that the shares of stock were of the value of $400 per share (p. 39) and that the appellant, in her answer filed in the action at law, denied that the shares were of that value, or anywhere near the same (p. 42).

Point III.

Appellant must show irreparable injury.

Aside from the fact that the allegations of the bill of complaint and the affidavits supporting the same are met by the absolute denial of the respondent by his answer and answering affidavit nowhere in the bill of complaint is there an allegation or insinuation that the respondent is in any respect irresponsible, or that he will be in any way unable to respond to the final decree of the Court of Chancery.

Chief Justice Gummere, speaking for the Court of Errors and Appeals, in *McMillan* v. *Kuehnle*, 78 N. J. Eq., p. 253, said:

> "We think the bill and affidavits of the complainants do not make out a case which entitles them to a preliminary injunction. Such a writ ought never to be ordered unless from the pressure of an urgent necessity. The damages which it is legitimate to prevent, during the pendency of a suit,

must be, in an equitable point of view, of an irreparable character."

And further, at the bottom of page 253:

"We there said (referring to Hagerty *v.* Lee): 'It is impossible to emphasize too strongly the rule so often enforced by this Court, that a preliminary injunction will not be allowed when the injury which may result from the invasion of the complainant's right is not irreparable.' "

It is respectfully submitted that the order discharging the order to show cause should be affirmed.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,
Of Counsel with Respondent.

March Term, 1917.