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### WITNESSES FOR DEFENDANT.

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Bill of Complaint.

In Chancery of New Jersey.

Filed Aug. 17, 1927.

TO HIS HONOR, EDWIN ROBERT WALKER, CHAN- 10  
CELLOR OF THE STATE OF NEW JERSEY:

Complainant, The Citron-Byer Co., a corporation organized and existing under and by virtue of the laws of the State of New Jersey, respectfully shows,

1. On or about June 28, 1927, H. E. Salzburg Co., Inc., did on behalf of itself and one M. K. Frank and complainant, purchase certain trolley line and equipment from the Newport Electric Corporation which said trolley line and equipment are located in the State of Rhode Island; and it was on or about said twenty-eighth day of June, 1927, agreed by and between the said H. E. Salzburg Co., Inc., the said M. K. Frank and complainant, that the said property so purchased should be purchased and held by the said parties in three equal parts as a joint venture, and although the purchase was made in the name of the said H. E. Salzburg Co., Inc., complainant charges that the said purchase was nevertheless for the equal benefit of the said H. E. Salzburg Co., Inc., complainant and the said M. K. Frank, and it was likewise then and there agreed that the said property so purchased as aforesaid should be held and disposed of by complainant, the said M. K. Frank and the said H. E. Salzburg Co., Inc., and that the profits or losses arising therefrom should be borne in equal one-third parts by each of said parties. 40

*Bill of Complaint.*

2. Thereafter, said H. E. Salzb<sup>u</sup>rg Co., Inc., repudiated the agreement entered into as aforesaid and informed this complainant that it did not recognize complainant as a partner or joint adventurer or as having any interest in the property so purchased as aforesaid and it refused to accept from  
 10 the complainant any part of the moneys necessary to be paid to the said Newport Electric Corporation; and the said H. E. Salzb<sup>u</sup>rg Co., Inc., did appropriate and convert to its own use all of the property constituting said trolley line, equipment, etc., so purchased as aforesaid from the said Newport Electric Corporation for the equal benefit of complainant, the said M. K. Frank and the said H. E. Salzb<sup>u</sup>rg Co., Inc., and the said H. E. Salzb<sup>u</sup>rg Co., Inc., has excluded complainant from any  
 20 participation in or control over the property so purchased as aforesaid.

3. Complainant shows that the purchase price paid by the said H. E. Salzb<sup>u</sup>rg Co., for the said plant and equipment and trolley line, is the sum of \$38,500 and that the same is reasonably worth the sum of \$50,000.

4. Complainant shows that by virtue of the agreement hereinbefore referred to, complainant is  
 30 entitled to a one-third interest in and to the said goods and chattels and the profits arising from the sale of the same and that because the defendant H. E. Salzb<sup>u</sup>rg has converted the same to its own use, there is due to the complainant from the defendant one-third of the difference between the cost price of \$38,500 and the market price of \$50,000, to wit, the sum of \$3833.33.

5. The said H. E. Salzb<sup>u</sup>rg Co., Inc., is a corporation of the State of New York and is not a  
 40

*Bill of Complaint.*

resident of the State of New Jersey, but is a resident of the State of New York and has not obtained a license from the Secretary of State of the State of New Jersey to transact business as a foreign corporation in the State of New Jersey, and that the said H. E. Salzb<sup>u</sup>rg Co., Inc., has lands, tenements and hereditaments and personal property, moneys, effects, rights and credits in the County of Hudson within this State.  
 10

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

1. That H. E. Salzb<sup>u</sup>rg Co., Inc., who is the defendant to this suit may answer this bill of complaint and each statement therein made.

2. That the said defendant H. E. Salzb<sup>u</sup>rg Co., Inc., may be ordered and decreed to make a full and true discovery and disclosure of all moneys received and paid in connection with the said trolley line and plant purchased from the said Newport Electric Corporation as aforesaid.  
 20

3. That the said defendant H. E. Salzb<sup>u</sup>rg Co., Inc., may be required to account for all moneys received and disbursed by it in connection with the said trolley plant and equipment and may be decreed to pay to complainant such sums of money as may rightfully be found owing by the defendant on such accounting.  
 30

4. That an account may be taken of the sums due to complainant by virtue of the matters in this bill of complaint set forth from the defendant, and that the said defendant may be decreed to pay to complainant the moneys so to be found due to it from the said H. E. Salzb<sup>u</sup>rg Co., Inc.  
 40

*Bill of Complaint.*

5. That a writ of sequestration may issue against the real and personal property, moneys, effects, rights and credits of the defendant H. E. Salzburg Co., Inc., within this State directed to a Master of this Court or to one of the Sheriffs of any of the Counties of the State of New Jersey, commanding the said Master or said Sheriff to take sufficient of said property to answer the demand of this complainant in the sum of \$4000 into his possession and to hold the same to the order and decree of this Court.

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

BERNARD FREEDMAN,  
Solicitor for and of Counsel with  
Complainant.

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30

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**Answer.**

Filed Sept. 21, 1927.

IN CHANCERY OF NEW JERSEY.

Between THE CITRON-BYER Co., Complainant, and H. E. SALZBERG Co., INC., Defendant.	}	On Bill, &c. Answer.	10
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Defendant, a corporation of the State of New York, answering the complaint of the complainant, says that,

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1. It admits that on or about June 28th, 1927, it purchased certain trolley line and equipment from the Newport Electric Corporation, which equipment is located in the State of Rhode Island, but denies that the purchase was made in behalf of itself, one M. K. Frank and the complainant, and further denies that an agreement was entered into on the date alleged, or any other date that the property so purchased should be purchased for the benefit of itself, M. K. Frank and the complainant, in three equal parts as a joint venture, and further denies that such property should be sold or disposed of for the benefit of itself, M. K. Frank and the complainant and the profits or losses should be equally divided between them, but, on the contrary, says that the said M. K. Frank, the complainant and this defendant were competitors and as such submitted competitive bids and the contract for the purchase of the said trolley line and equipment

30

40

*Answer.*

was awarded to this defendant as the highest bidder therefor, and upon such award that purchase was made by this defendant for the benefit of itself, and under no agreement whereby the said Frank or the complainant were to participate in any manner or form whatever in the ownership thereof, or in the profits realized therefrom, or losses sustained as a result of the sale or disposition thereof.

2. Defendant denies that there was any repudiation of an agreement that the complainant should be considered as a partner or joint adventurer, or that refusal was made to accept a part of the purchase price, but, on the contrary, says that no agreement existed between the complainant and this defendant which could be repudiated and that there was no appropriation or conversion of the property by this defendant, but, on the contrary, says that delivery of said property was accepted by this defendant because it was the purchaser thereof, free of the rights of the complainant or any other person therein, and admits that the complainant has not been permitted to participate in the control over such property for the reason that said complainant and said M. K. Frank have no interest of any nature or kind whatsoever in said property, and that they were, therefore, not entitled to exercise any dominion over the same, nor to participate in the disposal thereof, nor to have any interest in the profits that might be realized therefrom or any share in the losses that might result from the disposal thereof.

3. Paragraph "3" of the bill of complaint is denied.

40

*Answer.*

4. Paragraph "4" of the bill of complaint is denied, and this defendant hereby makes the allegations contained in paragraphs "1" and "2" of this answer a part of this paragraph with the same force and to the same effect as if repeated and alleged.

10

5. Paragraph "5" of the bill of complaint is admitted.

BRENNER & KRESCH,  
Solicitors for and of Counsel with defendant.

**Replication.**

Filed Sept. 22, 1927.

IN CHANCERY OF NEW JERSEY.

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Between  
THE CITRON-BYER Co.,  
Complainant,  
and  
H. E. SALZBURG Co., INC.,  
Defendant.

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On Bill, &c.  
Replication.

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Complainant joins issue on the answer of the defendant.

BERNARD FREEDMAN,  
Solicitor of Complainant.

40

Order of Reference.

Filed Sept. 28, 1927.

IN CHANCERY OF NEW JERSEY.

10 Between  
 THE CITRON-BYER Co.,  
 Complainant,  
 and  
 H. E. SALZBURG Co., INC.,  
 Defendant.

On Bill, &c.  
 Order of  
 Reference.

20 This matter being opened to the court by Bernard Freedman, Solicitor of the Complainant, and it appearing that Messrs. Brenner & Kresch, Solicitors for the Defendant, consent thereto,

It is, on this 28th day of September, 1927, Ordered that the above entitled cause be and the same hereby is referred to Hon. Alonzo Church, one of the Vice Chancellors of this Court to hear the same for the Chancellor and to report to him and advise what order or decree should be made herein.

30 E. R. WALKER,  
 C.

We hereby consent to the making and entry of the foregoing order.

BRENNER & KRESCH,  
 Solicitors of Defendant.

A true copy.  
 Thomas Barber  
 Clerk.

IN CHANCERY OF NEW JERSEY.

November 1, 1927.

Between  
 CITRON-BYER COMPANY,  
 Complainant,  
 and  
 H. E. SALZBERG COMPANY.  
 Defendant.

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Transcript of shorthand notes of testimony taken in the above entitled cause, before his Honor, ALONZO CHURCH, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of BERNARD FREEDMAN, for Complainant; BRENNER and KRESCH (by Mr. BRENNER) for Defendant.

20

ISRAEL CITRON, sworn for the complainant.

*Direct-examination by Mr. Freedman:*

Q. Mr. Citron, what is your business and with what firm are you connected? A. I am the treasurer of the Citron-Byer Company; we deal in scrap iron, metals and other scrap material.

30

Q. And in the course of your business do you buy plants for dismantling? A. Yes, sir.

Q. Salvage? Now, in June, 1927, June 28th, or about that time, did you have a conversation with Mr. Salzberg, of the H. E. Salzberg Company? A. Is that the date—

Q. Well, about that date. A. Yes; I did.

Q. And where did this conversation take place, 40

*Israel Citron—Direct—for Complainant.*

and who was present? A. It took place in one of the offices of the Utility Corporation, I think, on Broadway, of which the Vice President of the Newport Electric Company had an office there, and it took place in the presence of Mr. Frank, M. K. Frank, and a man by the name of Mr. Goldsmith of the firm of Joseph Hyman, Woolworth Building, and Mr. Gross was there, Mr. Salzberg and myself.

The Court: Let me just ask this: You are endeavoring to establish a joint venture?

Mr. Freedman: Yes, sir.

The Court: Well, are you establishing it by parol evidence?

Mr. Freedman: Yes, sir.

The Court: Well, you can't do that, under the statute of fraud.

Mr. Freedman: In the first place, the statute of fraud is not pleaded here; in the second place, I don't know of any provision of the statute of fraud that requires a joint venture—the agreement for a joint venture to be in writing.

The Court: Vice Chancellor Backes has very recently decided a case along those lines.

Mr. Freedman: Your Honor please, that is an affirmative defense. It has not been pleaded.

Mr. Brenner: We didn't have to plead it.

The Court: Yes, you do. The statute of fraud has to be specially pleaded.

Mr. Brenner: Not as here. We deny entirely the contract as made; we deny the existence of the contract, and I think your Honor will find under the Zigner case, where

*Israel Citron—Direct—for Complainant.*

the contract itself is denied, that that permits the defense of the statute of fraud.

The Court: Well, I will hear the testimony, but it seems to me it is almost a waste of time.

Mr. Brenner: If there is any question about it, will your Honor permit me at this time to amend the answer to set that up?

Mr. Freedman: I don't think that would be fair.

The Court: Of course, you can amend the answer and set up the statute of fraud. If so, I won't hear it now, because you have got to have some chance to combat that.

Mr. Brenner: I have not before—(interrupted)

The Court: I cannot remember the name of that case—my usual inability to remember names—but my recollection is that it was in a recent case Vice Chancellor Backes decided that where there was an interest in land that had to be in writing in the statute of fraud.

Mr. Freedman: Yes, but this is not in reference to an interest in land. This is a joint venture as to personal property.

The Court: Oh, that is a different matter. All right. Go on.

Q. Now, will you tell us what took place on that day between Salzberg and you? A. We had been called in, Mr. Frank and Mr. Salzberg and myself had been called in there by an official of the Newport Electric Company as the three highest bidders on a certain line up in Newport, Rhode Island.

Q. Yes? A. And this official told us that our bids were very close together, so far as submitted,

*Israel Citron—Direct—for Complainant.*

and, as each one of us had asked for another chance to put in—(interrupted)

10 Q. What was that? A. Had asked for an opportunity to see—before the line was disposed of, that he discussed the matter with us before he disposed of the line. He called us in for the purpose of telling us if we wanted to raise our bids that we could do it and we looked—we somehow or other got out of the office, all five of use were present there, and met in another office and we decided that each one of us had submitted a high enough bid and that we would not raise it.

20 Q. What do you mean that each one of you had submitted a high enough bid? A. That is, that I said I had bid as much as I would want to give and I wouldn't want to raise mine, and Mr. Salzberg said he had given a bid as much as he wanted to give and he wouldn't want to raise and Mr. Frank said the same thing, but instead—

Q. Was there anything else said? A. Yes. Instead of the line being awarded to one individual, that we would probably—that we would buy it together, as together we would be able to get more out of the property than one individual.

30 Q. Was there any reason spoken of as to why you would be able to get more out of it together than any one individual would probably get out of it? A. The three of us, primarily the main object is different lines; we are in the scrap business; Mr. Frank is in the railing business and Mr. Salzberg is in the electric business, in the second hand electric machinery business, and there was large quantities of each one of these three items involved in this property, and it was assumed that I could get more for the scrap end of the line than either one  
40 of the other two; Mr. Frank could get more from

*Israel Citron—Direct—for Complainant.*

the rail end of the line than either one of the two; and Mr. Salzberg, of the Salzberg firm, could get more for the electric end, the machinery end.

10 Q. Was there any agreement made between you three? A. There was an agreement made that whoever bid—that our bids are high enough as it is and we will not increase our bids and whoever is awarded the line buys it for the three of us.

Q. And what were the three of you to do with this line? A. We were to pay for it, all three of us, and we were to work it out to the best interests, and all three of us were to be equal partners in it.

Mr. Freedman: Now, at this time I call for the production of the contract.

20 Mr. Brenner: I think we have it, but it is not here.

Q. And did you go from that office anywhere? A. Yes, sir.

Q. Did you go away from that office? A. Yes.

Q. And where did you go to? A. Well, immediately after—this was in a different office—we went into the—(interrupted)

Q. Now, where did you go from there? A. From that office we went to the office of M. K. Frank.

30 Q. Yes. And who was present in the office of M. K. Frank? A. In M. K. Frank's office Mr. Salzberg, Mr. Frank, Mr. Goldsmith and myself. Mr. Gross had left Mr. Salzberg.

Q. And did you have any conversation then with reference to this property that you were buying? A. Yes.

40 Q. What was that conversation? A. Well, we agreed that the award—that it was announced before we left that Mr. Salzberg had put in the highest bid and the line would be awarded to him.

*Israel Citron—Direct—for Complainant.*

Q. Yes. A. And we agreed in Mr. Frank's office that Mr. Salzberg had bought the line for the three of us, that we were to decide as to how we were to handle the proposition.

Q. Well, was any arrangement then made about payment of the purchase price to the property?

10 Mr. Brenner: Don't lead, please. Please do not lead him.

Mr. Freedman: I am not leading him.

The Court: Ask him what arrangement.

Mr. Freedman: I asked were there any and—

The Court: All right; that will do. Was there any arrangement made about paying for it?

20 The Witness: There was not any definite arrangement made at that time.

Q. Was there anything spoken of about paying for this property at that time in Mr. Frank's office?

A. Well, we were—Mr. Frank and myself were willing to put up our third interest, each one of us.

Mr. Brenner: Now, I object to that, if the Court please.

30 The Court: I will sustain the objection.

Mr. Brenner: And ask it be stricken out.

Q. Did Mr. Salzberg say anything to you, did you say anything to Mr. Salzberg or did Mr. Frank say anything in your and Mr. Salzberg's presence about what arrangements were to be made as to the payment of this property that was to be purchased?

A. As far as I recollect, we were to meet the following day.

40 Q. Yes. A. And decide definitely. We had made

*Israel Citron—Direct—for Complainant.*

a definite appointment for the following day at two o'clock. Mr. Salzberg said Mr. Gross had left him, had some business to attend to, and he wants to talk it over with his partner and he is making a definite appointment for two o'clock the following day to meet in Mr. Frank's office again and definitely decide that we should pay for the property and, in fact, to draw up the partnership arrangement in a legal way, that is, on paper; that was the understanding. 10

The Court: Well, did you meet at two o'clock the next day?

The Witness: Well, Mr. Salzberg—

The Court: Did you, did you, did you?

The Witness: No, sir—that is, we met, but Mr. Salzberg was not there.

The Court: Well. 20

Q. Now, at this conversation in Frank's office, after you left the Newport Electric Company was it definitely arranged or was it not whether this was to be—whether this property which had been awarded to Salzberg by the Newport Electric Company was to be the property of the three and on what terms? A. It was definitely agreed that this was the property of the three parties and that we were all equal partners. 30

Q. And that you could share— A. Equally in profits or losses.

Q. And what did he say—Salzberg say, he wanted to talk to Mr. Gross about? A. Wanted to talk to Mr. Gross as to how we—I don't know what was in his mind—as to how we should handle the property. There was probably some talk about one party buying the other two out.

Q. Well, did Mr. Salzberg say whether or not he 40

*Israel Citron—Direct—for Complainant.*

wanted to buy any particular part of that for himself alone? A. Yes, sir; he did.

Q. Well, what was that? A. He did make some mention about—he said, “Well, I probably wouldn’t care—be interested in handling the line myself; I might sell it out to either one of you two, but I  
10 would like to handle the elec—the motors or the electric machinery”, some electric machinery connected with the line; there were four or five or six, I don’t just recollect how many.

Q. You mean, he wanted to keep some of this electric machinery for himself? A. Himself.

Q. Buy it from the partnership? A. Buy it from the partnership on the basis of the purchase price.

Q. And the next day you met with—at Mr. Frank’s office, in accordance with your arrange-  
20 ment? A. I was there, yes.

Q. And who else was there? Well, was Mr. Frank there? A. Mr. Frank was there, and I think Mr. Goldsmith was there.

Q. Did Mr. Salzberg show up? A. He did not.

Q. Did you communicate with him? A. Yes, we communicated with him.

Q. Who did? A. Mr. Frank, I think, called Mr. Salzberg’s office and spoke to Mr. Gross.

30 Mr. Brenner: Well, now, I object to that.  
The Court: I will sustain the objection.

Q. Have you ever talked to Mr. Salzberg about it after that? A. I did, yes.

Q. And what did he say to you? A. He called me to the phone the day following the meeting that we had in Mr. Frank’s office when he was present, he called me on the long distance phone at my home and told me that he didn’t want to go through  
40 with the proposition, didn’t want to have anything

*Israel Citron—Cross—for Complainant.*

to do with it, he bought the line and he is going to keep it. That is just about the words he used.

Mr. Freedman: Cross-examine.

*Cross-examination by Mr. Brenner:*

Q. Now, Mr. Citron, the first notice that you had  
10 of the fact that this line was to be sold was when you got a letter to that effect, was it not? A. Yes, we got a letter.

Q. And in that letter it was suggested that you should give a sealed bid as to what you wanted to bid for the real estate and the—what made up this railway company? A. Personal property and real estate.

Q. Yes. And you did make a bid for the personal property and the real estate, did you not? A.  
20 Yes, sir.

Q. What was the amount of your bid?

Mr. Freedman: I object to that. It is improper, incompetent and immaterial.

The Court: Well—

Mr. Freedman: I don’t see the materiality of that at all.

The Court: Well, I don’t see that it is  
30 very material myself.

Mr. Brenner: It is material, the Court please, to show this, that there was quite a difference between the amount of these three bids. The testimony of this gentleman is that they were the three highest bidders. Well, we contend they were so closely together—

The Court: All right. I will allow it.  
40 What was the amount of your bid?

*Israel Citron—Cross—for Complainant.*

The Witness: I think it was around thirty seven thousand, I don't just remember now.

Q. Thirty seven thousand, and that bid had been divided partly for personal property and partly for real estate? A. Yes.

10 Q. The personal property was how much? A. I think it was about thirty four or thirty five.

Q. I see. So that there was two or three thousand for the real property? A. I think, about two thousand.

Q. Wasn't your bid for the personal property thirty two thousand three hundred and fifty dollars? A. Maybe. I haven't got the facts before me. It may have been that.

20 Q. The balance for the real estate, which made your total bid thirty seven thousand dollars? A. It may be so. I can't just recollect.

Q. All right. At that time that you submitted your bid, did you know that Frank was a bidder? A. I did not.

Q. Did you know that Salzberg was a bidder? A. Not at the time that I submitted mine, no.

30 Q. And, at the time that your bids were brought in, you met neither Frank nor did you meet Salzberg.

Mr. Freedman: Just a minute. I object to that question as immaterial.

The Court: I will allow it. Just what was the question?

Q. (Question read as follows: "And, at the time that your bids were brought in, you met neither Frank nor did you meet Salzberg.") A. I did not.

40 Q. The man that you did meet was a man named Tuttle, a lawyer in New York? A. Yes, sir.

*Israel Citron—Cross—for Complainant.*

Q. And did you say to Mr. Tuttle, at the time you submitted your bid, that if you were not the highest bidder that you would like to put in another bid?

Mr. Freedman: I object to that as immaterial, your Honor please.

The Court: I will allow it. 10

A. I do not—

Q. Yes or no, please. A. Well, I intimated that, yes, that I wanted another bid.

Q. Did you intimate it or did you say so? A. Yes, I said that I wanted another bid.

Q. So that, at that time, you wanted some advantage over the others at the time that their bids were—(interrupted)

The Court: No. That is a conclusion. 20

Mr. Freedman: I object to that.

The Court: I will sustain the objection. What he said and did. That is all we want.

Q. Was your purpose in making that suggestion so that you might put in a bid higher than the others who had already bid under the sealed proposal arrangement?

Mr. Freedman: I object. 30

The Court: I will sustain the objection.

Q. Did you suggest to Mr. Tuttle that, after the bids were opened, he should let you know whether you were the highest bidder so that, if you were not, you could submit a further bid?

Mr. Freedman: I object to that.

The Court: I think that is all right.

Mr. Freedman: I don't see any of these 40

*Israel Citron—Cross—for Complainant.*

questions have any bearing on the matter here in court.

The Court: I will allow it.

The Witness: What was the question?

10 Q. (Question read as follows: "Did you suggest to Mr. Tuttle that, after the bids were opened, he should let you know whether you were the highest bidder so that, if you were not, you could submit a further bid?") A. I told Mr. Tuttle that I would like—(interrupted)

Q. Did you or did you not? Yes or no, please. A. I told Mr. Tuttle I wanted another opportunity—I don't know what the suggestion was—I wanted another opportunity to put in another bid and if he could give me that opportunity.

20 Q. And that was your desire, wasn't it? A. Yes, sir.

Q. You then, subsequently, received a letter from Mr. Tuttle, asking you to be at his office? A. Why, I believe—

Q. Did you or didn't you? A. I got a telephone call.

Q. You got a telephone call? A. I think the office got a telephone call and got in touch with me. I was out of town at the time.

30 Q. All right. You did go to Mr. Tuttle's office, didn't you? A. Yes, sir.

Q. At the time you were going to Mr. Tuttle's office, did you at that time know that you were going to meet Mr. Frank or Mr. Salzberg and Mr. Gross? A. I did not.

Q. So that, up to that time, there was no arrangement between you, was there? A. Oh, no.

40 Q. When you got to Mr. Tuttle's office, Mr. Tuttle called the attention of Salzberg to a situation that their bid did not divide real estate and per-

*Israel Citron—Cross—for Complainant.*

sonal property, did he not? A. That is right.

Q. In other words, their bid was a bulk bid on personal property and real estate? A. That is right.

Q. He also called Mr. Frank's attention to the fact that he had bid nothing on real estate, did he not? And said that they had decided that they were going to eliminate the real estate. A. They said that they could get more out of it than what we figured it was worth. 10

Q. And decided then and there to eliminate all bidding on real estate. A. No, it was not decided that way.

Q. How long after was that decided? A. No. We could have an opportunity to put in a bid on real estate, if we wanted to.

Q. But, for this particular bid it was understood that you three were brought there to advise you of the fact that the real estate would not be considered on that bid. A. No, no; that is—(interrupted) 20

Q. Didn't Mr. Tuttle say so? A. No. He told us that they could get more for the real estate than either of us who did bid on it; evidently we had figured the real estate of very little value and they claimed that they could get more out of the line if we wanted to bid on the real estate or be glad to take it if we wanted to pay more. 30

Q. So it was still open at that time for you to bid both on real estate and personal property? A. Yes; if we wanted to.

Q. Were you then asked if you wanted to change your bid, as far as the personal property was concerned?

Mr. Freedman: I object to that, if your Honor please. This whole line of question- 40

*Israel Citron—Cross—for Complainant.*

ing has absolutely no materiality. This defendant has filed an answer in which they deny that they ever made the agreement. Now, the only thing at issue here is the making of this agreement, a joint venture, and I do not think that the defendant has a right to go into anything else. They have seen fit to file an answer. If they wanted to raise any other issues, they should have done that.

10

The Court: Well, it is probably not cross-examination. You didn't go into it, as I understand it.

Mr. Freedman: No; I did not.

20

Mr. Brenner: The purpose of it is to show, the Court please, that it was impossible under the circumstances that then existed for these men to have agreed on any such thing as a joint venture.

The Court: Well, the question is, did they? All things are possible, I suppose. I think it would be better to confine your cross examination to the direct examination; when they met and were going to meet the next day and did not; that is the crux of the situation.

30

Mr. Brenner: This is exactly what took place in the office at the time this man says they made this agreement.

The Court: Very well. Then they withdrew and had a talk together, according to him; and then they were to go back and get together again on this day and they didn't do it.

40

Mr. Brenner: We do not agree as to that at all.

The Court: Well, cross-examine him on it, then.

*Israel Citron—Cross—for Complainant.*

Mr. Brenner: That is what I am going to do.

Q. Was the suggestion—were you asked the question at that time as to whether you wanted to change your bid?

Mr. Freedman: I object to that.

10

The Court: I will sustain the objection.

Q. Was Frank asked that question?

Mr. Freedman: I object to that.

The Court: I will sustain the objection.

Q. Did you not, at that time, say you would not change your previous bid for the personal property, to Mr. Tuttle, in the presence of both Mr. Salzberg and in the presence of Mr. Frank?

20

Mr. Freedman: I didn't get that.

The Court: That is all right; he testified to it.

Q. (Question read as follows: "Did you not, at that time, say you would not change your previous bid for the personal property, to Mr. Tuttle, in the presence of both Mr. Salzberg and in the presence of Mr. Frank?") A. After—that was after we had an agreement between us.

30

Q. Before the talk—before the agreement which you said was made, did you not, at that time, say that you would not change your bid, but were going to stick to your original bid for the personal property? A. Well, we had all agreed—(interrupted)

Q. Well, did you or didn't you, before you had this so-called conference? A. It was practically at the same time that we agreed not to raise our bid, also to buy the property in for the three of us.

40

Q. Now, Mr. Citron, I am talking about the time

*Israel Citron—Cross—for Complainant.*

before you left the room, when Salzberg, Gross, yourself and Frank were in the room with Mr. Tuttle. Did you not, at that time, before any of you had left the room and before any of you had conferred together, say to Mr. Tuttle that your bid would stand and that you would not change it, as far as the personal property was concerned? A. No; we did not discuss that at all.

Q. You are positive of that? A. (Continuing) In the presence of Mr. Tuttle.

Q. You are positive of that? A. Positive.

Q. Didn't Mr. Frank say that he would not change the amount of his bid for this personal property, before you left the room? A. We had no discussion of that in the presence of Mr. Tuttle.

Q. Now, Mr. Frank did or he did not.

The Court: He said he—

The Witness: I don't know what he did.

Q. While you were there? A. While I was there we had no discussion on that.

Q. All right. Didn't Mr. Salzberg then say that he wanted to confer with Mr. Gross in another room as to whether they would change their bid? A. I don't know for what, but they went out together.

Q. Didn't he say so? A. He said he wanted to confer with Gross. They went out together.

Q. And didn't he say that the purpose of that conference was to see whether they wanted to change their bids on the personal property? A. No; there was nothing said about that.

Q. Was not. All right. Wasn't it then that Mr. Tuttle suggested that they should go into an adjoining room, after they said they wanted to confer about changing their bid? A. Well, I don't know at whose suggestion, they both went out, I suppose to talk the matter over.

*Israel Citron—Cross—for Complainant.*

Q. Wasn't it at either Mr. Salzberg's or Mr. Gross' suggestion? A. It was not.

Q. That they did go out into the other room?

A. Well, I believe they went out at their own suggestion. I don't know. They both left the room they were—they both left the room.

Q. Did they say anything? A. They wanted to talk it over.

Q. Did they say what they wanted to talk over?

A. Not that I know of. I don't know.

Q. You were there all the time? A. I was there.

Q. And within ear shot, weren't you? A. They wanted to talk it over.

Q. And you were within hearing distance when they were talking, were they not, to Mr. Tuttle?

A. You mean—

Q. Gross and Salzberg. A. Privately in the room, I couldn't hear.

Q. No. I am talking about the conversation before they left the room. Were you within hearing distance at that time? A. The conversation with Mr. Tuttle?

Q. Yes. A. Yes.

Q. And you overheard the entire conversation, did you not? A. Yes, sir.

Q. But you say that you do not recall their reasons—or the reason that they gave for leaving the room? A. I don't recall the reason, no.

Q. Did Mr. Tuttle direct them to the room in which they could go for the purpose of conferring?

Mr. Freedman: I object to that. I do not see that it has any point whatever.

The Court: I don't either, upon my word, I don't. They went out of the room and talked together. Now, it seems to me that is enough. You haven't got down to your

*Israel Citron—Cross—for Complainant.*

cross-examination, the most important part of it.

Mr. Brenner: I want to show what led up to it.

The Court: I am not interested. I want to find out what they did when they all three met together.

10

Mr. Brenner: All right.

Q. Salzberg and Gross left the room first, didn't they? A. As near as I can recollection, yes.

Q. Who was the second one to leave? A. Frank.

Q. Did you go—and then you left? A. As near as I can recollect, then Goldsmith and myself left the room.

Q. All right. A. That is the room where Tuttle was in and this vice president of the Newport Electric Company.

20

Q. That is what I am talking about. A. Yes.

Q. Did you or Frank go directly into the room where Gross and Salzberg were conferring or did you confer first in another room? A. Well, I didn't go with Frank. Frank left by himself. Mr. Goldsmith and myself left the room last, as near as I can recollect.

30

Q. And where did you go when you left the room, directly in to where Gross and Salzberg were or some other place?

Mr. Freedman: Your Honor please, I don't like to be objecting to every question, but—(interrupted)

The Court: Well, it is easier to let him go ahead and maybe some day we will get to the point.

40

The Witness: I think we went to the reception room and then coming down the hall

*Israel Citron—Cross—for Complainant.*

we went to the room where Mr. Frank and Mr. Gross and Mr. Salzberg were and we were all five of us there together in that room. It was a private office and nobody else there.

Q. Now, in that room was there any suggestion by one to the other as to the price that had been bid by either one of them? 10

Mr. Freedman: I object as immaterial.

The Court: Well, I will allow it.

The Witness: What is the question?

Q. (Question read as follows: "Now, in that room was there any suggestion by one to the other as to the price that had been bid by either one of them?") A. No, sir. 20

Q. Did you know, while you were in that room, the price that Frank had bid? A. No.

Q. Did you get in that room the price that Gross or Salzberg had bid? A. No, sir.

Q. And you say it was then and there arranged that neither of you would change your price, but you and Frank and Salzberg would go into this thing at the highest price bid?

Mr. Freedman: Just a minute. I object to that question. You say it was then and there arranged. He didn't say that at all. He said that he announced they would not change their bid. 30

The Court: Ask him what was said.

Q. Was the arrangement then made—

The Court: No. Ask him what he said. What was said at this conference. 40

*Israel Citron—Cross—for Complainant.*

Q. Was there anything said at this conference about neither changing their bids?

The Court: What was said at this conference, that is what I want.

Mr. Brenner: I would like to ask—

The Court: Well, I want to ask him what was said at that conference. 10

The Witness: Your Honor, we all five of us were there and we said we believed each one of us had submitted a high enough bid for the property, that if we—we would bid very much higher there would not be very much profit in the property for whoever would buy it and that it would be better if we all three of us bought it; whoever was awarded the line it would be bought for three of us and in that way we would get more out of the personal property on account of each one of us being particularly in an individual line. 20

The Court: All right.

Q. Now, do you mean to say, Mr. Citron, that, without knowing what Salzberg had bid, if he had been the highest bidder, regardless of the price that he had offered to pay for this, that you would have taken a one third interest in it? A. Well, Mr. Tuttle— 30

Q. Please answer my question.

The Court: No. Answer the question.

The Witness: What was the question?

Q. (Question read as follows: "Now, do you mean to say, Mr. Citron, that, without knowing what Salzberg had bid, if he had been the highest bidder, regardless of the price that he had offered 40

*Israel Citron—Cross—for Complainant.*

to pay for this, that you would have taken a one-third interest in it?") A. Well, I knew beforehand that our bids were very close together. Mr. Tuttle gave us that information.

Q. You have not yet answered my question.

Mr. Freedman: I think the answer is full and complete. 10

The Court: Yes; I think that is sufficient.

Q. Didn't it make any difference to you what price Salzberg was bidding?

Mr. Freedman: I object to that.

The Court: I will allow it.

Mr. Freedman: The testimony already is that this man knew the bids were all three almost alike.

The Court: I will allow it. 20

Mr. Freedman: It is simply a rehash over and over again.

Mr. Brenner: Read the question.

Q. (Question read as follows: "Didn't it make any difference to you what price Salzberg was bidding?")

The Witness: Do I understand that question, your Honor?

The Court: Yes. 30

The Witness: Well, I would naturally expect that Salzberg would buy—would bid a price so he could realize a profit on the line. We are always in business and we take one another's experience of the value of property and many a time we enter into a partnership just upon the experience of another man.

Q. So as to make sure of the price, why didn't 40

*Israel Citron—Cross—for Complainant.*

you ask Salzberg at that time, so you would know what to pay for your one third part.

Mr. Freedman: I object to the question.

The Court: I will allow it.

The Witness: Sir?

The Court: Go on, answer.

10 The Witness: We didn't have to ask him at that time, because we were informed by Mr. Tuttle that our bids were very close together.

Q. Now, if this was to be a three party arrangement, there was not to be any secret as to price any longer, was there?

20 The Court: This doesn't mean anything. It is all argumentative. He has told you over and over again the reason he thought he would go in as a third partner was because their prices were almost the same. That is the reason he made this alleged agreement, if there was one.

Mr. Brenner: Our insistment, if the Court please, is that the prices were not almost the same.

30 The Court: Well, you can prove it. He said he didn't know, so you cannot prove it by this witness what Salzberg's bid was.

Mr. Brenner: I am trying to find out from this witness whether he was to go into a three party arrangement of this kind without knowing the other man's price.

The Court: He said he would, because Mr. Tuttle said the three bids were almost identical. Now, that is enough for that.

40 Mr. Brenner: May I ask for an answer to the last question?

*Israel Citron—Cross—for Complainant.*

The Witness: What was the question?

Q. (Question read as follows: "Now, if this was to be a three party arrangement, there was not to be any secret as to price any longer, was there?")

The Court: Well, I will rule that out.

10 Q. The fact is, however, that you did not ask Mr. Salzberg what his price was? A. No; I did not.

Q. All right. After you came back in the room, did you then ask what the price was that Salzberg had bid? A. You mean in Mr. Tuttle's room?

Q. When you came back to Mr. Tuttle's room. A. No; I did not.

Q. Are you positive of it? A. I did not.

20 Q. Did you ask Mr. Tuttle what the price was? A. I did not.

Q. When did you first learn the price?

Mr. Freedman: I object to that as immaterial.

The Court: Well, I think that is all right. That is all right. When did you first learn the price?

The Witness: I have not learned it.

30 Q. You don't know, as a matter of fact, at this present moment what the price is? A. No, sir.

Q. You are sure of that? A. I am sure of that.

Q. Do you know who gave Mr. Freedman the information as to what the price was? A. I don't know.

Q. You did not— A. (Continuing) As to—I—as to about what it was.

Q. You didn't give him the exact amount? A. I couldn't tell. I don't know.

40 Q. What did you tell him the amount was?

*Israel Citron—Cross—for Complainant.*

Mr. Freedman: I object to that. Anything that Mr. Citron told Mr. Freedman has absolutely nothing to do with this case.

The Court: He says he doesn't know.

10 Q. Don't know at the present time and have not given the information to Mr. Freedman?

Mr. Freedman: I object.

The Court: I will sustain the objection. Purely argumentative.

Q. Did Salzberg and Gross leave Tuttle's office with you and with Frank or did you and Frank leave first? A. We left all together.

Q. They did not remain there? A. Salzberg and Gross?

20 Q. Yes. A. No.

Q. And you say that this meeting at Frank's office was arranged during the time of the conference?

Mr. Freedman: No. I object to that. That is not what the witness said.

30 Q. What was it? A. Why, we—as soon as Mr. Tuttle said that Salzberg was the highest bidder and the line would be awarded to him, after the papers were ready and so forth, why, we got together and we said, "Well, now, let's go over and discuss this matter. We bought this line together and let us meet in Mr. Frank's office" and Salzberg was agreeable to it.

Mr. Freedman: Was Mr. Tuttle there, when you said that you had bought the line together?

The Witness: No.

Mr. Freedman: I object as immaterial.

40

The Court: I will allow it.

*Israel Citron—Cross—for Complainant.*

Q. You said, as soon as Mr. Tuttle announced the price—announced the fact that Salzberg was the highest bidder that you then said that you would go to Frank's office because of this agreement that you were buying together? A. Yes.

Q. Now, where was that said? A. Oh, outside of the offices; probably in the hall, waiting for the elevator, or down in the street. 10

Q. Then it was after leaving Tuttle's office. A. Yes; a few minutes; I suppose, ten or fifteen minutes.

Q. And what was to be then arranged in Mr. Frank's office? A. We were to talk—discuss the matter over. We had bought the property for somewheres around forty thousand, we were to talk over the financial end of it, how, how, how the payment—each one of us was to make one third payment and was sufficient, the disposition of the property. 20

Q. When you got over to Mr. Frank's office did you have any talk whatsoever regarding the financing of this enterprise? A. Well—

The Court: He says he was not there.

Mr. Brenner: Yes; he said he was there at Mr. Frank's office, but he did not return the following day. 30

The Court: All right.

The Witness: How is that?

The Court: On this first meeting, when you and Gross and Salzberg were there, did you discuss how you were going to finance it?

The Witness: I was to put up a third of it and I was willing to put up a third of it. 40

*Israel Citron—Cross—for Complainant.*

The Court: Well, there was no further conversation, eh?

The Witness: No further, no, sir.

The Court: All right.

10 Q. You simply agreed in that office that you were to give your one third, Frank was to give his one third and Salzberg his one third? A. And that we were to handle the line jointly; we bought the line jointly.

Q. Who was to superintend the dismantling of this line? A. Well, that was the purpose of the meeting.

20 Q. Well, did you arrange at that meeting who was to superintend it? A. We didn't get a chance because Salzberg said he couldn't discuss the matter, he had to talk it over with Mr. Gross, and we made an appointment for the following day, which he did not keep.

Q. All right. When were you to put up your one third share? A. As soon as the traction company demanded it.

Q. Did you ever offer, subsequent to that, your one third share to Salzberg?

30 Mr. Freedman: I object to that. It is immaterial and—

The Court: I will allow it.

Mr. Freedman: —absolutely irrelevant.

The Witness: The question is, did I ever offer?

The Court: Yes. Did you ever offer to pay your one third?

The Witness: You mean after the deal was consummated?

40 The Court: After he did not show up at this conference.

*Israel Citron—Cross—for Complainant.*

The Witness: I didn't in writing, because Mr. Salzberg called me on the phone and said—(interrupted)

Mr. Freedman: Just a minute. The question was not whether it was in writing.

The Court: Did you offer?

10 The Witness: I offered it right there in Mr. Frank's office. I told them I am willing to put up my third. In fact, there was some talk that I would probably buy out the entire line from the two of them.

The Court: All right. Did you, after that, offer your money to Salzberg?

The Witness: Yes, sir.

The Court: When?

20 Q. When? A. It was in Mr. Frank's office, right after—

Q. I am talking about since leaving Frank's office? A. We didn't have any meeting.

The Court: Then you didn't make any offer.

The Witness: Not after that; we didn't get together with him.

The Court: All right.

30 Q. When did you first learn that Salzberg was not going through with this agreement that you say he had made? A. It was the day following the sale that we had in Mr. Tuttle's office, the day following, the evening following.

Q. That would be around July first, wouldn't it? A. No; it was the evening following.

40 Q. All right. You had this talk in Tuttle's office on June twenty eighth. A. On June twenty eighth.

*Israel Citron—Cross—for Complainant.*

Q. That would be about June twenty ninth when you knew that Salzberg was not going ahead? A. That is the idea.

Q. (Continuing) With this arrangement. A. The twenty ninth in the evening.

10 Q. Did you do anything to notify the Newport Electric Company that you had an interest in this contract?

Mr. Freedman: I object to that as immaterial.

The Court: I will allow it.

A. I did.

Q. What was the episode? A. I think that same day—the following day or a day or two later. I can't just recollect.

20 Q. Did you do anything to prevent the Newport Electric Company from entering into the contract with Salzberg and closing that contract? A. I don't know. I turned it over to my attorney.

Q. When? A. I think one or two days. A day or two after Salzberg salled me on the phone and says he doesn't want—he bought the line, he is going to keep it for himself, he didn't want to have anything to do with it or with me.

30 The Court: Is that all?

Mr. Brenner: I think that is all.

The Court: How many more witnesses have you got?

Mr. Brenner: I have got two more.

The Court: Well?

Mr. Freedman: I have two or three more.

The Court: It is one o'clock. Well, I guess we cannot finish it up before lunch. We will adjourn until two o'clock.

40

Noon Recess.

*Harry E. Salzberg—Direct—for Complainant.*

Mr. Freedman: I will call Mr. Salzberg.

HARRY EDWARD SALZBERG, sworn for the complainant.

*Direct-examination by Mr. Freedman:*

10 Q. How much did the H. E. Salzberg Company pay the Newport Electric Company for the personal property that you bought there? A. Thirty eight thousand five hundred.

Mr. Freedman: That is all.

Mr. Brenner: That is all.

The Court: That is all, sir.

Mr. Freedman: Mr. Frank.

10

20

MARK K. FRANK, sworn for the complainant.  
*Direct-examination by Mr. Freedman:*

Mr. Freedman: I want to offer in evidence a copy of the letter written to H. E. Salzberg Company dated June 30, 1927, written by me.

(Letter marked Exhibit C-1.)

30 Q. Mr. Frank, you were one of the people present at the office of the Newport Electric Company in June, on June twenty eighth this year? A. Yes, sir; I was.

Q. And who else was there besides yourself, or in conference with Mr. Tuttle? A. Why, Mr. Citron and Mr. Goldsmith, Mr. Salzberg and this other gentleman sitting there, I forget his name.

Mr. Brenner: Gross.

Q. Gross? A. Gross, yes.

40

*Mark K. Frank—Direct—for Complainant.*

Q. And what was said at that time by Mr. Tuttle or by any of the parties present? A. Why, Mr. Tuttle asked each one of us at that time, he said, "Now," he said, "your bids are all just very close together, all four—all three bids," and he said, "I have brought you in here for the purpose of asking you if you want to raise your bid."

10 Q. I see. And was anything said—or, well, did anybody offer to raise their bid there in Mr. Tuttle's office? A. No; nobody said anything at all about raising the bid.

Q. And then you all went out? A. We all went out.

Q. Where did you go to? A. Why, we went—I think, Mr. Salzberg and Mr. Gross went out first, and then I went afterwards. They went to the of-  
20 fice next door to where Mr. Tuttle was.

Q. You mean, the room next door? A. The room next door, yes.

Q. Yes? A. And then I went out next and Mr. Goldsmith and Mr. Citron followed me.

Q. And did you all come together? A. Yes.

Q. Or did you separate? A. Why, we all—I think we walked up and down the hall for a minute or two and then we all came in the same office where Mr. Salzberg was in.

30 Q. Yes. And what was said there, anything? A. What?

Q. Was anything said in that office room? A. Why, certainly.

Q. Well, what was it? A. Why, when we got in that office there we all decided that our bid was high enough, that we wasn't going to make any other bid.

40 Q. Well, did you say anything about whether or not you would raise your bid? A. I didn't say any-

*Mark K. Frank—Direct—for Complainant.*

thing about raising my bid, but Mr. Salzberg and Mr. Citron, we all said there our bid was high enough.

Q. Did you say that, did you say that your bid was high enough? A. Yes; I said my bid was high enough.

Q. And did Mr. Citron say whether or not his bid was high enough? A. We all said that our bid was high enough, that we should not bid any higher, that we all were in there together and in this proposition that we would all go in together; it would be a partnership.

Q. Did each one say each one's bid was high enough and then start talking about going into partnership? A. No. The remarks made in there were that we thought our bid was high enough, and then we said, if we buy it we are all in different lines of business, I could handle the rails and Mr. Salzberg could handle the electric machinery and Mr. Citron could handle the scrap.

Q. What do you mean "handle"—you mean— A. Sell it.

Q. Sell it to better advantage? A. To better advantage than we could.

Q. I see. And was there any agreement made then? A. It was a verbal agreement made there that we were all buying this together. Whoever got it, whoever was the highest bidder, the other two were partners.

Q. I see. Was there anything said as to the division of profit and losses? A. No.

Q. There was not anything said about that at that time in there? A. We were to meet afterwards and find out how we were to handle it.

Q. I see. Well, was there anything said as to the percentage of the interest of each one? A. We

*Mark K. Frank—Direct—for Complainant.*

each were to be one third interest in it.

Q. And that was during this conversation— A. That was the conversation—

Q. in the Newport Electric Company's office? A. Positively.

Q. And you had— After that you left the office of the Newport Electric Company; is that right? 10  
A. Then we came back in to where Mr. Tuttle was.

Q. Yes? A. And Mr. Tuttle asked us if we all wanted to raise our bid.

Q. Yes? A. And we said, no, that we did not want to raise our bid, and the material was then awarded to Mr. Salzberg.

Q. And did you all go out together from Mr. Tuttle's office? A. As near as I can remember, we all went out together, or very close together any- 20 way.

Q. How far did you go together? A. Why, we went over to my office.

Q. Did everybody go along? A. Everybody excepting Mr. Gross. He didn't go along. That is, he walked down the street with us and then he decided he had some other business and he left us and went to his office. I don't know whether he went to his office or somewhere else.

Q. Your office in New York, you mean? A. Yes. 30

Q. And what conversation, if any, took place there in your office? A. Why, we didn't—Oh, in my office. Why, we discussed the proposition and Mr. Salzberg said that he wanted certain parts of the machinery himself. He wanted, I think, a generator or something of that kind. He wanted to keep that for himself, and he wanted to get that at the scrap value.

Q. Yes. Now, during that conversation in your 40 office was there anything said as to whether or not

*Mark K. Frank—Direct—for Complainant.*

this property was property of all three jointly? A. Yes, absolutely. Mr. Salzberg made the remark that the property belonged to the three of us.

Q. And did you all agree to that? A. We all agreed to it.

Q. And was there anything said about the contribution or the payment for this? A. We were to each pay one third when the contract was given, just as soon as the electric company gave him his contract. 10

Q. I see. You mean, as soon as the electric company would require the money? A. We would each pay our share.

Q. And you were to handle this? A. All jointly together.

Q. And Salzberg, you say, talked about wanting to buy some of it from the three of you? A. He wanted it; he was very insistent about getting some of the generators or something, I think, for, I think he said, a customer he had for it, or something; he wanted to be sure he got that without paying a very high price, the three of us. 20

Q. I see. Did you make any arrangement to meet again? A. Yes, we did, the next day at two o'clock in my office.

The Court: What was the purpose of that meeting? 30

The Witness: Why, that was to—I—well—draw up an agreement in writing; he was in a very big hurry at that time, and he wanted to get away.

Q. Everything was arranged, was it? A. Everything was all arranged, absolutely.

Mr. Brenner: I object to that; it is leading and suggestive. 40

*Mark K. Frank—Direct—for Complainant.*

The Court: Yes. I will sustain the objection.

Q. Well, were there any arrangements left undone? A. No, sir; there were not.

10 Q. Did you offer to pay your third of the purchase price to Salzberg? A. Absolutely.

Q. When did you offer? A. When we went in the office, right after the sale.

Q. And did he say anything at that time about taking—about taking it, whether he would take it or not? A. No, he did not; he didn't say anything about taking it, at that time, taking the money, because it was just given to him; he didn't have no chance or any time to say anything at that time. You see, he wanted to get away from there and get  
20 over to his office and think the matter over, talk it over with his partner about what machines he wanted and this and that and other details.

Q. Well, was that the purpose of the meeting the next day? A. That was the purpose of the meeting, together with the papers that were all to be drawn up.

Q. Since that time, did you talk to Mr. Salzberg? A. Yes, several times since that time.

30 Q. Did he ever tell you how much he paid for the electric plant?

The Court: Well, we know.

A. Yes.

Mr. Freedman: I want to show how it got to me.

A. He told me he paid forty five thousand dollars for it.

40 Q. Now, after you made this arrangement, on the twenty eighth, to meet the next day, did you communicate with Salzberg at all? A. We did.

*Mark K. Frank—Direct—for Complainant.*

Q. When? A. Why, I think Mr. Gross called up in the morning and he said that Mr. Salzberg was out in Long Island somewhere at a plant of his and that he could not get in that afternoon.

Q. I see. And Mr. Gross is a— Is Mr. Gross in any way connected with Mr. Salzberg?

Mr. Brenner: Mr. Gross is a partner. 10

The Court: Mr. Gross is a partner, yes.

A. I don't know. I think he has got some interest in the business.

Mr. Brenner: Partner in the business.

Q. Now, did you talk to Gross or Salzberg again?

A. Oh, several times.

Q. What was said? A. Why—

Q. Did he tell you whether or not— 20

The Court: Now, wait a minute. What was said?

The Witness: Why, he said he was not going to go through with the deal with Mr. Citron, because he had a controversy with him once before on other transactions, but he wanted to go through with me and wanted to treat me fair in the matter and was going to go through with me, but he wouldn't go through with Citron. 30

Q. All right. And what else was said during any of these conversations? A. Why, he also said that—I said, "Well, now, I don't think that is a fair proposition." "Well," he said—and I said, "As far as settling it is concerned," I said, "I will pay you a thousand dollars for your contract, or," I said, "I will take a thousand dollars," that is for my share of it, and he said, "All right, I will give 40

*Mark K. Frank—Cross—for Complainant.*

you a thousand dollars for your share of the agreement.”

10 Q. I see. A. And I said I didn't think that was a fair proposition without seeing some settlement made with Citron, although he said, "I have a counter claim against Citron in a deal that he backed out on," or had some controversy about some rails that Citron wouldn't give him at that time and he said, "That is the reason why I won't go in with Mr. Citron." I said, "Well, didn't you already agree to go in?" "Well," he says, "Yes, but I can't do it now. I won't go in with him."

Mr. Freedman: Cross-examine.

*Cross-examination by Mr. Brenner:*

20 Q. When you came to Mr. Tuttle's office, Mr. Frank, did you expect to meet either Mr. Salzberg, nor to meet Mr. Citron, did you? A. No.

Q. You came there in response to a telegram or telephone or letter? A. I think—I don't remember, but I think it was either a telephone call or a letter, I am not certain which.

30 Q. Now, Mr. Tuttle said, in the presence of everybody there, that one of the parties had asked to change his bid, did he not? A. I think—

Mr. Freedman: I object to that as immaterial.

The Court: I will allow it. Did he?

The Witness: Yes, sir. I do remember him saying something about some real estate. That is what I do remember.

40 Q. I am talking about the change of bid. He said that one of the parties had asked to put in a higher bid, didn't he? A. Well, that part I don't

*Mark K. Frank—Cross—for Complainant.*

remember, but I do remember this, I remember something about some real estate.

Mr. Freedman: No.

Q. Listen to the question. We will get done just that much quicker. Did he say that Citron was the one who had asked leave to put in a higher bid? A. I don't remember that. 10

Q. You had bid only on the personal property, hadn't you? A. I bid on the rails and the copper wire and the machinery.

Q. It was just the personal property? A. I didn't bid on real estate.

Q. You had no interest in the land? A. I don't think my bid covered real estate.

Q. Right. And Salzberg had put in a bulk bid without separating real estate and personal property? A. Well, I don't know. I think there was something of the kind, but I can't remember clearly about that part of it. 20

Q. And Citron-Byer had put in a bid which separated the item of personal property from the item of real estate? A. I don't know what Citron-Byer's bid was. I wasn't told what it was.

Q. Now, when Mr. Tuttle suggested or asked whether anybody wanted to change their bid, did not Mr. Citron say that he wanted to leave his bid stand? 30

Mr. Freedman: I object as not proper cross-examination, and immaterial.

The Court: I will allow it.

A. I— When that part came up—(interrupted)

Q. Just say yes or no. He did or he did not say that. A. I, I, I, I don't think he did say that.

Q. Didn't you at that time say that you did not want to change your bid? A. No, I did not. 40

*Mark K. Frank—Cross—for Complainant.*

Q. And wasn't it only Gross and Salzberg who did want to change their bids, because they had not separated the items of real estate and personal property? A. I told you I don't remember about that part of it, about the real estate part of it. I told you before.

10 Q. Wasn't the purpose of Gross and Salzberg leaving the room so that they might confer concerning the change of their bid from a bulk bid covering real estate and personal property to the one dividing the bid?

Mr. Freedman: I object.

The Court: I will sustain the objection.

A. No; I don't think so.

20 Mr. Freedman: Don't answer it.

The Witness: Oh, pardon me.

Q. Did you meet Citron in the hall or did you go right in the room with Salzberg and Gross? A. I think I met Citron in the hall, if I remember correctly.

Q. And did you and he have a conference in the hall before going in with Salzberg and Gross? A. I don't think we did. I don't remember whether we did now, but I don't think we did.

30 Q. Now, when you got in the room, who started the conversation? A. We all seemed to get together.

Q. Well, you didn't all talk together. Who started the talk concerning what you were to do? A. I don't remember which one of us particularly, but I do remember all spoke to the other—one spoke to the other, the same as here.

40 Q. Don't you remember who opened the conversation? A. I don't remember who opened the conversation, I don't remember that. I couldn't swear

*Mark K. Frank—Cross—for Complainant.*

to that truthfully who opened the conversation first. I do remember that we just spoke about it. I can't say which one said it first, whether I said it first or whether Mr. Salzberg or Mr. Citron said it first about going in together.

Q. Now, was the agreement in that room that the price bid was not to be changed? A. Yes. 10

Q. That you are positive of, are you? A. Absolutely.

Q. Well, do you know that the price was changed when you came out of the room? A. No; I don't think the price was changed.

Q. Don't you know that Salzberg and Gross representing the Salzberg Company, did increase their price? A. No. No; I don't think they did increase their price.

Q. Don't you know that their price was a bulk bid for real estate and personal property? A. No. I don't know. 20

The Court: He told you he didn't know they did.

Mr. Brenner: I will follow that up.

Q. You say— You don't know that when they came out of the room that they said that they would leave the price that had been fixed for the personal property and real estate stand as their bid for the personal property alone? A. No; I don't remember that. 30

Q. Will you say that that was not said? A. No; I wouldn't say that I remember that, excepting that I say we all agreed to—that whoever was awarded the award, we were all equal partners in same.

Q. And you have no recollection whatsoever— A. No.

Q. —of any conversation after leaving the room 40

*Mark K. Frank—Cross—for Complainant.*

— A. Nothing about the real estate.

Q. Wait a minute—whereby Salzberg did change his bid to a higher price? A. Not that I can remember.

Q. You wouldn't say that that was not done.

10 The Court: Now, he has said over and over again he don't remember. Why continue?

Mr. Brenner: Because, your Honor please, I contend that this—(interrupted)

The Court: Well, I thoroughly understand the question and answer; you have asked him four times and he says he don't know.

Q. That is the best answer you can give?

20 Mr. Freedman: I object to that question. Not a proper question.

The Court: I will sustain the objection.

Q. Was there anything—in the room where you three were together or you four were together, was there anything said regarding the price that was to be paid? A. No, there was not.

30 Q. Was there any request made by anybody, when coming out into Mr. Tuttle's room, to find out from him the price that was bid by the highest bidder? A. I don't think there was. It didn't make any material difference. We were all partners together.

Q. I am not asking whether you were all partners together. I am asking whether anybody asked the question. A. I don't think anybody asked the question. There may have been somebody asked the question, but I don't remember whether it was asked or not.

40 Q. Mr. Tuttle suggested that he would let you

*Mark K. Frank—Cross—for Complainant.*

know who the highest bidder was, did he not? A. Well, I think he did say that. I think he said that to somebody. He didn't say it to me, I don't believe. I didn't ask that, either.

Q. Did he say it to anybody in the room? A. He says he would let me know who the highest bidder was.

10 Q. At that time or by letter? A. He would let us know—I think he says he would let us know who was going to be awarded the material. He didn't say that was—that is what Mr. Tuttle said.

Q. Did he say he was going to send you a letter informing you as to who would be awarded the bid? A. That I can't truthfully say. I don't remember that part of it.

Q. All right. Wasn't it then that Mr. Citron insisted on knowing who the highest bidder was? 20

Mr. Freedman: I object to the question, your Honor please. He is wasting a lot of time on immaterial matters.

Mr. Brenner: I think this is important, the Court please.

The Court: There is nothing in this testimony to show that Mr. Citron insisted—(interrupted)

Mr. Brenner: I am asking this witness. 30

The Court: He said "Wasn't it at that point that Mr. Citron insisted or not".

Q. Well, did Mr. Citron at that point insist on knowing who was the highest bidder? A. Well, I don't remember whether he asked Mr. Tuttle or not.

Q. All right. A. (Continuing) Who was the highest bidder, but I remember Mr. Tuttle saying he would let us know who was the highest bidder. 40

*Mark K. Frank—Cross—for Complainant.*

Q. Did Citron and Gross remain behind with Mr. Tuttle or did they leave at the same time that you and Mr. Citron left to go to your office? A. I think we all left practically at the same time, or very close to it.

10 Q. And when you did go to your office, there was an understanding there that you would meet the following day? A. At two o'clock.

Q. And the understanding of the purpose of meeting the following day so that the entire subject matter might be incorporated in a written agreement? A. Not exactly, no.

Q. Well, were you to draw a written agreement the following day? A. We were to have a written agreement, certainly we were, but the details had all been arranged.

20 Q. I don't care whether the details were arranged or whether they weren't. The fact is you were to meet the following day, when all of these details were to be put in writing. A. Yes.

Q. And signed by everybody interested. When did you have the next talk with Mr. Salzberg? A. In the morning, the morning after I talked with Mr. Gross, and he said that Mr. Salzberg couldn't get in, and then Mr. Salzberg told me the next day—told me on the telephone—(interrupted)

30 Q. Just a minute. Wasn't it at that time that there was the suggestion that they wouldn't go through with the agreement? A. No.

Mr. Freedman: No.

Q. When did that suggestion come? A. That came the following day, when I spoke to Mr. Salzberg, he said he wouldn't go in with Mr. Citron because he had an agreement with him once before  
40 and he backed out and he was not going to go in,

*Mark K. Frank—Cross—for Complainant.*

but he was willing to go in with me.

Q. Yes. Still on the basis of one third to you or one half to you? A. Well, that was not mentioned at all.

Q. Well, was anything else mentioned at that time? A. No, no.

Q. He said he was willing to go through— A. 10 He was willing to treat me fair and give me mine and go through with my share of the proposition.

Q. And the reason he was not willing was because he and Mr. Citron had some trouble some years before? A. Yes. Mr. Citron backed out of an agreement that he had about some rails, or something, that he sold. Mr. Citron—

Q. I don't care what the details were. A. And that he backed out of the agreement.

Q. I just want the facts. A. That is it. 20

Q. Was there anything said on that day about changing the arrangement with you so as to buy you out or you to buy him out? A. That day, no.

Q. When was that conversation? A. That was about a week later, when we got together on it in Mr. Citron's office and I—I mean Mr. Salzberg's office.

Q. Well, did Salzberg, at that time, still want to go through with the original arrangement so far as you were concerned? A. Well, he didn't seem so very anxious at that time. 30

Q. Did he say that he would not or that he would? A. He was cort of that way, and I said, "Well, I will give you a thousand dollars for your interest in it or take the thousand." He says, "Well, I will buy you out and give you a thousand."

Q. Who made the suggestion first, you or he, as to the thousand? A. I did. I offered to buy him out after—for his share of it. 40

*Mark K. Frank—Cross—for Complainant.*

Q. Well, now, did you agree to the thousand dollar arrangement? A. Well, we practically agreed to it, yes.

Q. Well, did you agree to it? A. We practically agreed to it, yes.

Q. So that you had no further one third interest in the proposition? 10

Mr. Freedman: I object to that.

The Court: I will sustain the objection.

Q. Then the party agreement, as far as you and Salzberg were concerned, was that you were to get one thousand—

Mr. Freedman: I object as immaterial.

The Court: I will sustain the objection.

A. It was practically agreed. 20

Mr. Freedman: Just a minute. You answered the question.

The Court: He has already stated that was the agreement.

Mr. Brenner: Your Honor says he has stated that was the agreement.

The Court: Yes. He said it was practically agreed.

Q. Where do you live, Mr.—(interrupted) 30

Mr. Freedman: I object to that as immaterial.

The Court: What is that?

Mr. Freedman: My friend is laying a foundation—

The Court: I don't think that is important—still— Where do you live?

The Witness: I have a home in Pittsburgh and I also have a home in Rye, New York. 40

*Harry Goldsmith—Direct—for Complainant.*

My plant is located in Pittsburgh and I spend about half my time in both places.

HARRY GOLDSMITH, sworn for the complainant. 10

*Direct-examination by Mr. Freedman:*

Q. Mr. Goldsmith, with whom are you connected? A. With Mr. Joseph Hyman.

Q. What business are you in? A. We are in the steel rail and scrap iron, steel business.

Q. Wholesale or retail? A. Well, we are jobbers and dealers.

Q. Were you present during this conversation on June the twenty eighth this year between Citron and Salzberg and Gross and Frank? A. I was. 20

Q. Were you in the office at the Newport Electric Company? A. I was.

Q. Were you in Mr. Tuttle's office there? A. I was.

Q. And did you hear that conversation? A. I did.

Q. Tell us what it was. A. Why, Mr. Tuttle told the three parties, Mr. Frank, Mr. Salzberg and Mr. Citron that he called them in for the purpose of— give them an opportunity of—increasing their bids, if they so desired. 30

Q. Did he say anything about whether or not their bids were far apart? A. He says, "Well, gentlemen, your bids are very close together and," he says, "Give you an opportunity, or if you want to bid—increase your bids, to do so now."

Q. Well, was there anything said there that you recollect? A. Nothing else that I remember, by Mr. Tuttle. 40

*Harry Goldsmith—Direct—for Complainant.*

Q. Was anything said that you remember by any of the other people there? If you don't remember, say so. A. I don't remember.

10 Q. Did the parties separate? A. They did. Mr. Salzberg and Mr. Gross went out and Mr. Frank, I believe, followed very shortly thereafter, and I went out a little later with Mr. Citron in the hall and—(interrupted)

Q. Now, what were you doing there, Mr. Goldsmith? A. Well, frankly, I was a disinterested party. I was called by—when Mr. Citron called me up on the phone and said he was called to go down to the office of the Newport Electric Company and asked me if I would accompany him, and I said I would, and I did.

20 Q. You had no interest at the time? A. Absolutely none.

Q. When did you see these people together again, after you left Mr. Tuttle's room, and where? A. After I left Mr. Tuttle's room, I saw all the gentlemen together in the room somewheres outside.

Q. The Newport— A. In the same building, in the same office, but in another room.

Q. I see. And were you in that room with them? A. I certainly was.

30 Q. What conversation, if any, took place there? A. Why, they all agreed that their bids was—

Mr. Brenner: I object. That is certainly a conclusion.

The Court: No.

Q. What did each one say? A. Each one said they thought their bids were high enough.

40 Q. You mean, each for himself? A. Each for himself. And, as far as I remember, I don't know—I believe it was Mr. Salzberg who sort of started

*Harry Goldsmith—Direct—for Complainant.*

the conversation, and it was agreed—an agreement was made—(interrupted).

The Court: No.

10 Q. No. What was said? A. He said that he would—that they ought to leave the bids as they are, and whoever was the highest bid would get the property and buy it for the three. In other words, the three were jointly interested. 10

Q. Well, did they say that that was satisfactory—did Citron say—

Mr. Brenner: I am going to object.

The Court: "What did Citron say?"

Mr. Freedman: All right.

20 Q. What did Citron say to that? A. Citron said that was satisfactory and Mr. Frank said that was satisfactory. 20

Q. All right. Was anything said about the share or proportion that each was to hold in this property? A. Why, it was agreed—(interrupted)

The Court: No. Do not say that it was agreed.

Q. What was said? A. That the three were jointly interested. 30

Q. In what share or proportion? A. One third share.

Q. Was anything said about the division of profits or losses? A. Why, not that I remember at that time.

Q. Was—did anyone express dissatisfaction with this arrangement? A. No one that I remember.

Q. Well, did they all concur in it? A. They did.

40 Q. What was done then? A. Why, they all left the—they all left the little room and came back to 40

*Harry Goldsmith—Direct—for Complainant.*

Mr. Tuttle's office and I believe Mr. Citron spoke first and he says he wouldn't increase his bid and Mr. Frank said likewise and Mr. Salzberg the same thing.

Q. And did Mr. Tuttle say anything? A. No; he did not; he didn't say anything on that subject.

10 Q. Did he say anything on any other subject? A. Why, he said, "All right. Very well, gentlemen," and he announced the high—he announced the one who got the property.

Q. Who did he say got the property? A. H. E. Salzberg.

20 Q. And what was done after that by Salzberg, Citron and Frank? A. As far as I can remember, we all left at exactly the same time. We went down the street and it was agreed, while we were waiting for the elevator after leaving there, that we would go to Mr. Frank's office in New York, Park Row.

Q. Did you go to Mr. Frank's office? A. I did go.

Q. Who else? A. Mr. Salzberg, Mr. Frank and Mr. Citron, and Mr. Gross left us. He walked down a short distance, but left Mr. Salzberg before we got to the office.

30 Q. I see. And did you go into Mr. Frank's office? A. I did.

Q. Was there any conversation there? A. Well, as far as I remember, they were all—Mr. Citron and Mr. Frank were ready to act, to put up their—  
(interrupted)

40 Q. What was the conversation? A. Why, Mr. Salzberg stated that he was interested in a special sort of equipment of that property, I think it was generators or transformers, and he wanted to be sure that he got that material, because he had some-

*Harry Goldsmith—Direct—for Complainant.*

body interested in it and he wanted to get it at the price—at the purchase price of the scrap value price.

10 Q. Was there anything said as to whether or not this property was purchased exclusively for Mr. Salzberg? A. Absolutely not. He admitted right there and then, if I remember the conversation, that it was the joint account property of the three.

Q. Was there anything said about the contribution of capital for the payment of this property? A. Why, if I remember correctly, they were—Mr. Frank and Mr. Citron stated that they were ready to put up their share on—whenever the full amount was required, when the contract was given to Mr. Salzberg.

20 Q. I see. Was there anything else said there at that time that you can recollect? A. Yes. Mr. Salzberg stated that he was in a hurry and he wanted to consult Mr. Gross, and, rather than make the necessary settlement right there, based on the arrangement, he would want to consult Mr. Gross, and he said he would make an appointment for the same time, two o'clock, the next day, in Mr. Frank's office.

Q. What did he want to consult Mr. Gross about, did he say? A. He did not.

30 Q. Well, did he say whether he wanted to consult Mr. Gross about the—(interrupted)

The Court: Well, now, wait a minute. He says he didn't say what—

Q. Didn't he say? A. As far as I remember—

Mr. Brenner: I object to the witness' answering the question.

40 The Court: Yes; the witness said he didn't say what he wanted to talk to him about.

*Harry Goldsmith—Direct—for Complainant.*

Q. Was this agreement that you say was made in Frank's office contingent on Gross' approval or not?

Mr. Brenner: I object, if the Court please.

The Court: I will sustain the objection.

10 Q. When Gross was present at the first conversation in the Newport Electric Company's office, had he agreed as to whether or not this property was to be bought by all three?

Mr. Brenner: Objected to.

A. He had—

Mr. Brenner: Just a minute.

The Witness: Pardon me.

The Court: I think that is all right. I will allow it.

20

A. He had—

Mr. Brenner: My reason is it calls for a conclusion. I have no objection to what was said in that office.

Mr. Freedman: Suppose I reframe it.

Q. Did Gross say whether or not he was satisfied to have this matter handled by all three? A. Inasmuch as—(interrupted)

30 Q. Did he or not? A. He did; he was satisfied.

Q. When you say that Salzberg—you don't remember whether or not Salzberg said what he wanted to consult Gross about?

Mr. Brenner: I object to that, if the Court please. It has been previously answered.

The Court: Yes.

40 Mr. Freedman: Well, I am going to, if your Honor please, refresh, if I can, the recollection of this witness.

*Harry Goldsmith—Cross—for Complainant.*

The Court: Well—

Mr. Freedman: He said he didn't recollect. He didn't say there was no reason assigned.

The Court: Do you remember why he wanted to consult with Mr. Gross, if he said why he wanted to consult with him?

10

The Witness: I don't remember.

The Court: He said that once before.

Mr. Freedman: Suppose I ask this question and then your Honor can—

The Court: All right.

Q. Did he say whether or not he wanted to consult with Mr. Gross as to his concurrence in this agreement?

20

Mr. Brenner: I object to that.

The Court: I will sustain the objection.

Mr. Freedman: Cross-examine.

*Cross-examination by Mr. Brenner:*

Q. Are you friendly with Citron? A. No more friendly with Mr. Citron than any of the others.

Q. Are you friendly with Mr. Citron? A. I am.

Q. Yes or no answers that. A. I am.

30

Q. You are not working for him, are you? A. I am not.

Q. Are you working for a competitor?

Mr. Freedman: I object to that question.

The Court: I don't see that it makes any difference if he is a friend. It doesn't make any difference. He is sworn to tell the truth.

A. I worked—

40

*Harry Goldsmith—Direct—for Complainant.*

Mr. Freedman: Just a minute.

Mr. Brenner: On this basis, if the Court please: The witness has said that he is absolutely disinterested in the outcome of this suit. Now, I think I have a right to go into that and find out whether he has any interest.

10

The Witness: I work for a competitor.

Mr. Brenner: Please wait.

The Court: Wait a minute.

The Witness: Pardon me.

Mr. Brenner: And what he may have done or what his relationship to Mr. Citron is, may or may not show whether he has an interest in the others. That is my purpose.

The Court: All right. I will allow it.

20

The Witness: I worked for a competitor of Mr. Citron.

The Court: All right.

Q. Did you call to the mind of Mr. Citron the fact that this Newport Electric Company equipment was to be sold?

Mr. Freedman: I object to that; immaterial.

The Court: I will allow it.

30

A. I did call his attention to it.

Q. And what was your purpose in doing that, if you work for a competitor? A. Because our—this particular concern—this—our company—the gentleman I work for is not interested in this particular material and I called it to Mr. Citron's attention, because I know he is interested in properties of that kind.

40

Q. So that you were somewhat interested in him getting this property, weren't you? A. I was not.

*Harry Goldsmith—Cross—for Complainant.*

Q. Had you ever done that on any other occasion, had you brought his attention to some sale that was going on, or was this the first occasion? A. No. I had done it before.

Q. You had. Then when you had to go—when he had to go over to Mr. Tuttle's office, he didn't tell you his reason for asking you to come along, did he? A. He told me he received a phone call to come over to Mr. Tuttle's office and asked me if I would accompany him and I did.

10

Q. He gave you no other reason except he wanted your company? A. That is all.

Q. You are a pretty busy man, aren't you, Mr. Goldsmith? A. Sir?

Q. You are a pretty busy man, aren't you? A. Yes; sometimes I am and sometimes I have leisure hours.

20

Q. Did you have leisure hours at that time or were you busy? A. I was not very busy, and I went with him.

Q. I see. Now, when you were in the room outside of Mr. Tuttle's office, your recollection is that it was Mr. Salzberg who started in the talking that anybody should change their bids? A. If I remember correctly, he was the gentleman that approached that topic.

30

Q. And the other two immediately agreed with him that there should be no change?

Mr. Freedman: I object to that question, assuming something that is not in the evidence. There is nothing yet that they agreed to that. The testimony is that each said that he would not change his bid.

The Court: Yes. There is nothing said.

40

*Harry Goldsmith—Cross—for Complainant.*

Q. Who talked after Salzberg, do you recall? A. I don't recall.

Q. Whoever it was, that party said that he would not change his bid? A. They—that is right.

Q. Each in turn, as a matter of fact, agreed not to change their bids? A. That is right. They said they had bid enough.

Q. Do you know that Mr. Salzberg's bid was changed when they came back in Mr. Tuttle's room? A. I don't know that.

Q. Do you know that his bid was greatly increased? A. I don't know that.

Mr. Brenner: That is all.

The Court: That is all. Is that your case?

Mr. Freedman: That is our case.

The Court: Go on with the defense.

Mr. Brenner: Mr. Tuttle.

BRUCE R. TUTTLE, sworn for the defendant.

*Direct-examination by Mr. Brenner:*

Q. Mr. Tuttle, you are a member of the New York Bar? A. Yes, sir.

Q. And have been for how many years?

Mr. Freedman: I don't think that that is of any importance, your Honor.

The Court: No. It is not important at all. Mr. Tuttle is a member of the bar. That is sufficient identification.

Mr. Brenner: A lot of credit to be attached to his testimony may be affected by the

*Bruce R. Tuttle—Direct—for Defendant.*

length of time he has been a member of the bar.

Mr. Freedman: No. I do not think a lawyer is necessarily entitled to any more than anybody else.

Q. Did you send out the proposal for the bids on the property of the Newport Electric Company? A. No, sir.

Q. Who did? A. Mr. E. P. Gozling, of Newport, Rhode Island.

Q. And what is his connection? A. He is vice president and general manager.

Q. And what is your position? A. I am of counsel for the company.

Q. When did you first come into the matter, as far as these bids were concerned? A. On the tenth of June Mr. H. T. Prichard, who is vice president of the company, and also vice president of the holding company, submitted to me two bids which had been received and asked me to look them over.

Q. And whose bids were they? A. Do you object if I refresh my recollection?

Q. I don't presume there will be any objection. A. M. K. Frank and Julius Myer and Perry, Buxton, Doane Company.

Q. After those bids were referred to you, did you do anything?

Mr. Freedman: If your Honor please, I don't know that this line of questioning has anything at all to do with the issue in this case.

The Court: The whole point is what happened at these conferences, interviews. That is the whole point.

*Bruce R. Tuttle—Direct—for Defendant.*

Mr. Brenner: That is exactly what—(interrupted)

The Court: This has nothing to do with it.

Mr. Brenner: I intend to show, if the Court please, how these men came to the office.

10 The Court: That doesn't make any difference how they came there. What I want to know is what they did when they got there.

Mr. Brenner: All right. I can give you that.

Q. Who came to your office, and when, with anybody connected in this situation, either Citron-Byer's, Frank— A. Yes.

20 Q. —Goldsmith, Salzberg or Gross? A. After the tenth of June, the matter of the bidding on the property was handled largely from the New York office by me, and both Mr. Goldsmith and Mr. Citron and Mr. Salzberg and Mr. Gross were in to see me. I never saw Mr. Frank until the twenty eighth of June, the actual date that has been under discussion here.

Mr. Freedman: Now—

30 Q. Who was the first man that came in to see you?

Mr. Freedman: I object.

The Court: Let us get down to the twenty eighth of June. Tell us what happened on the twenty eighth of June, please.

Mr. Brenner: I want to find out, first, if anybody came there before.

The Court: I am not interested in that.

Mr. Freedman: I object—

40 The Court: I want to know—

*Bruce R. Tuttle—Direct—for Defendant.*

Mr. Freedman: I object to anything beyond that.

Mr. Brenner: Your Honor rules that I cannot put it in?

The Court: Yes.

10 Q. If anybody did come to your office, prior to June twenty eighth, was it in connection with this bidding?

Mr. Freedman: I object to that, your Honor please.

The Court: I will sustain the objection.

Q. Now, on the twenty eighth day of June, who came to your office? A. Mr. Citron, Mr. Goldsmith, Mr. Frank, Mr. Salzberg and Mr. Gross met Mr. Prichard and myself at our request.

20 Q. And who opened the conversation? A. I think I opened the conversation.

Q. Now, tell us what you said, please. A. I explained to the gentlemen the purpose of calling them together. I knew that they were all somewhat surprised, in all probability, at seeing everyone else there, and I explained to them that the purpose of calling the meeting was to permit H. E. Salzberg & Company to modify its bid and to permit the Citron-Byer people to raise their bid.

30 Q. Now— A. The bid of Salzberg was a lump sum for real estate and personal property. At the time the original proposals were sent out it was contemplated that—(interrupted)

Mr. Freedman: I object to anything that was contemplated.

The Court: Yes; I will sustain the objection. Now, go on—

40 Q. On the original proposals?

*Bruce R. Tuttle—Direct—for Defendant.*

The witness: If your Honor please, I cannot tell a connected story—

Mr. Freedman: I object to it.

The Court: You can tell what was said on the twenty eighth of June. That is all I want.

10

The Witness: It was necessary to give the Salzberg outfit a chance to change their bid, because we had decided the real estate should not be sold at the time the personal property was sold and the bid of Salzberg was in a lump sum, whereas the bids of the others, except Frank, was a certain amount for the real estate—I mean, a certain amount for personal property and a certain amount for combined real estate and personal property. Frank's bid was alone on the personal property.

20

Q. He did not include the real estate at all? A. Did not include the real estate at all.

Mr. Freedman: Well, this is—

The Court: No. This is all right, because this is what happened on the twenty eighth.

30

The Witness: I had to explain to these gentlemen that—(interrupted)

Q. Now, wait a minute. You say Frank's bid did not take in real estate? A. It did not.

Q. Now, take the next one, the Citron-Byer bid, did that include the real estate? A. It included a sum for the personal property and another sum that would include both real estate and personal property.

40

Q. Give me the amount that was for personal

*Bruce R. Tuttle—Direct—for Defendant.*

property and the amount that was for real estate, as far as their bid was concerned.

Mr. Freedman: I object to that. If he has the bid, it is the best evidence.

The Court: I will allow it.

Mr. Freedman: Let him offer it in evidence. 10

The Witness: I have a memorandum of it. The bids were in Providence—

Q. Just answer the question.

Mr. Freedman: May I, if your Honor please, at this time object to this testimony? The bid was in writing, the witness says it was. It was under his control. We certainly haven't got it. I don't think he has a right to use any other evidence but the written evidence. 20

The Court: I suppose that is technically true, but—(interrupted)

The Witness: The bids are not under my control, your Honor please.

The Court: Then I guess you cannot testify.

Q. Did you know the bid of Citron-Byer? A. Yes, sir. 30

Q. And did you discuss the amount with Mr. Citron? A. I had seen all the bids.

Q. Did you discuss that with Mr. Citron? A. I did. Mr. Citron submitted his bid personally on the fifteenth of June to me.

Q. Did he tell you what the bid was? A. Yes, he did. I read the bid.

Q. What did he tell you the bid was, at that time? A. The bid was thirty five thousand five 40

*Bruce R. Tuttle—Direct—for Defendant.*

hundred for the personal property alone. It was thirty seven thousand sixty seven dollars for all the property, both real and personal.

Q. Did you discuss Mr. Frank's bid with him?

A. Mr. Frank never submitted his bid to me, no, sir. His bid was sent to me; I saw his bid; but he didn't come in with it.

10 Q. Now, the bid of the Salzberg Company, you say that that was a bulk bid? A. It was.

Q. Do you know how much that was for? A. Yes, I do.

Q. How much? A. Thirty eight thousand five hundred for real estate and personal property.

Q. All right. Now, let us get back to the conference on that date. What was said by you about changing the bids? A. I said that it was necessary 20 to give Mr. Salzberg a chance to put in a bid on that personal property alone, as we decided not to sell the real estate. I explained to Mr. Frank at the time, probably, that the procedure was unusual. Mr. Citron knew about it, because he had requested an opportunity, in the last analysis, to change his bid, if the bidding was close together. I communicated with the four high bidders on the list; the Perry-Buxton-Doane were one of them; they never showed up. So I asked if there was any desire on 30 the part of any of them to change their bids.

Q. What was the answer? A. Mr. Frank and the Citron-Byer people said no.

Q. Was that before or after they went into the adjoining room? A. This was when we were all together in the beginning, before they went out.

Q. And both Frank and Citron said they did not want to change their bid? A. That they did not want to change their bid. I asked Mr. Salzberg 40 if his company wanted to submit a bid on the per-

*Bruce R. Tuttle—Direct—for Defendant.*

sonal property alone, and I think I asked Mr. Gross, because Mr. Gross was the man with whom I had been dealing. Gross said he wanted to talk to Salzberg about it, and I told him they could step out in the adjoining room and they did. Mr. Gross and Mr. Salzberg left the room.

Q. For what purpose? A. To discuss— 10

Mr. Freedman: I object to that, the purpose.

The Court: I think I will sustain the objection. They went out.

Mr. Brenner: All right.

The Court: When they came back, what happened?

Q. What happened, after they went out? A. We 20 stopped there for a few minutes, and Mr. Citron said he wanted to speak to Mr. Goldsmith, and asked where he could go. I told him he would find a room further up the hall, so he and Mr. Goldsmith went out.

Q. Then what happened? A. Mr. Frank was there by himself and Mr. Prichard and I were there and we were talking together. Finally, Mr. Frank got up and walked out.

Q. Now, when they returned, did they all return 30 together or did they return separately as they had left? A. It is my recollection that they returned together.

Q. All right. Now, after the return, what was the first thing that was said? A. I think I asked Mr. Salzberg if they had decided whether or not they wanted to bid on the personal property.

Q. And what was the response to that? A. They 40 said they had, and I asked them what the bid would

*Bruce R. Tuttle—Direct—for Defendant.*

be and they said they would let the amount that they had bid on the combined real estate and personal property stand for the bid on personal property alone.

Q. The bid as it was originally was for the real estate and personal property? A. Real estate and  
10 personal property.

The Court: Yes, yes. We know that.

Q. And the bids as modified by them were for the same bid for personal as it was for bulk on the real estate and personal?

Mr. Freedman: Very leading question, your Honor please.

The Court: Yes, and it is just summing up the testimony that we have already had.  
Strike it out.  
20

The Witness: It is the same amount of money.

The Court: Strike it out.

Q. Was anything then said by any of the others, either Frank or Citron? A. I think I asked them if they wanted to raise their bids.

Q. What did they say? A. Both of them declined—if I asked—I am not positive I asked, but I  
30 think I did. Anyway they did not raise any bids.

Q. All right. What next happened? A. I told them we would let them know by letter who was the successful bidder.

Q. What followed that? A. Mr. Citron wanted to know why they couldn't know right away and so I turned to Mr. Prichard and asked if there was any objection to giving it out, or if he wished to discuss the matter further with me in private, and he said, "No. Go ahead and tell them," so I told them  
40 H. E. Salzberg was the successful bidder.

*Bruce R. Tuttle—Direct—for Defendant.*

Q. What next happened? A. I think Mr. Citron wanted to know the amount of it, either Mr. Citron or Mr. Frank wanted to know the amount of the successful bid, and I felt that couldn't be given out without the consent of Salzberg and Mr. Prichard, who represented the Newport Electric Company, and Mr. Salzberg objected to the information, so I didn't tell them.  
10

Q. What happened after that? A. I think Mr. Salzberg and Mr. Gross, or one of them, remained, and the others left. They remained to draft up with us a letter that should pass between the parties, pending the signing of a formal contract.

Q. How long did they, or one of them, remain there? A. I can't tell you, because I think I left the room about ten minutes after Mr. Citron left, and I left them with Mr. Prichard. I had something—I have forgotten now what it was I had to do—and they worked with Mr. Prichard on the draft of a letter.  
20

Q. Did you return to the office while they were there, or had they left before you returned? A. I think I saw them again that day.

Q. When was the next time that you heard from anybody in this transaction? A. Well, I had dealings with Salzberg right along thereafter in fixing up the final contract.  
30

Q. And when did the contract pass between the electric company— A. On the eleventh of July.

Q. —and Salzberg? A. On the eleventh of July.

Q. And Salzberg paid the entire purchase price? A. No, sir.

Q. Paid part of it? A. Yes, sir.

Q. And part of it was secured? A. Part of it is—they have given us a note for part of it, but that has not been paid yet.  
40

*Bruce R. Tuttle—Direct—for Defendant.*

Q. I see. Did you ever hear from Citron-Byers or from Frank after that time? A. Yes; I did.

Q. When was the first time that you heard from either one of them? A. Mr. Pritchard referred to me a letter that he had received on, I think it was July sixteenth.

10 Q. After the contract was made? A. After the contract was made.

Q. And that was the first that you heard from either Citron or from Frank? A. Yes. There was no mention of Frank in the letter. It was Citron's attorney's letter, from Citron's attorney.

Q. Did you ever hear from Frank regarding that? A. No.

Mr. Friedman: I don't know, your Honor please, what all this has to do with the case.

20 The Court: This is all right. I will allow it. Did you ever hear from Mr. Frank?

Q. It has been testified, Mr. Tuttle, that during this conversation you had said to everybody there that each one had asked for permission to raise their bids. Did you so state in that conference?

30 A. No. I stated that it was essential for one man to change his bid, if he was going to be considered, and that the Citron-Byer men had asked for an opportunity to raise their bid. Mr. Frank had no dealing with me whatsoever.

Mr. Brenner: Take the witness.

The Court: Cross-examine.

*Cross-examination by Mr. Freedman:*

Q. Mr. Tuttle—

40 Mr. Brenner: May I ask this one question?

*Bruce R. Tuttle—Cross—for Defendant.*

Mr. Freedman: Surely.

Q. (By Mr. Brenner.) Was any proposal sent originally to the Citron-Byer Company? A. I think not, no.

Mr. Brenner: That is all.

Q. You are a pretty busy man, aren't you, Mr. Tuttle? A. Yes, sir; to a certain extent. 10

Q. You have a great many conferences right along, don't you? A. To a certain extent, yes.

Q. Well, do you or don't you? A. Some days I do and some I don't. It is rather a broad question.

Q. You remember very clearly what took place at this conference on the twenty-eighth? A. Yes, I do. I have a very particular reason for remembering it. 20

Q. I see. And on that day you say that you are sure that everybody had not—not everybody—that not everybody had asked for a chance to raise their bids? A. Nobody asked for it on that day. It was asked for previously.

Q. Oh. And you never had any conversations with Frank— A. Not until that day.

Q. —until that day? And these people came to your office and you told them that their bids were very much—or, very close, didn't you, that there was very little difference between all three bids? A. That is right. 30

Q. Is that right? A. Approximately, yes. One was— (interrupted).

Q. And you told them if they wanted a chance to change their bid, they could have it? A. I did.

Q. That is right. Then they went out of your room, one by one? A. Yes, they went out later.

Q. And they came back and nobody raised their bids? A. Yes. Salzberg did. 40

*Bruce R. Tuttle—Cross—for Defendant.*

Q. They raised their bid? A. Yes, sir.

Q. Well, now, you say that their bid was thirty eight thousand and five hundred and you sold it to them for thirty eight thousand five hundred? A. Their bid was thirty eight thousand five hundred, including fifty five hundred real estate. The final bid was thirty eight thousand five hundred without the fifty five hundred of real estate. 10

Q. Was their bid in two parts? A. Their bid was one part; it was a lump sum for real estate and personal property originally put in.

Q. So you don't know, do you, how much they figured the real estate or how much they figured the personal property in that lump sum bid? A. They told me—

Mr. Brenner: I object. 20

The Court: I understand thoroughly what happened. These people made a lump sum for personal property and real estate.

Mr. Freedman: Yes.

The Court: And then Mr. Tuttle told them that that wouldn't do.

Mr. Freedman: They dropped the real estate.

The Court: Because he had withdrawn the real estate and he wanted to know if they wanted to raise their bid on personal property, and they came back and said the bids that they had made for the whole thing should apply to the personal property. 30

Mr. Freedman: That is right.

The Court: Therefore, of course it was raising the bid just that much because they were paying thirty eight thousand five hundred for only personal. 40

*Bruce R. Tuttle—Cross—for Defendant.*

Mr. Freedman: Yes, but what I was getting at, I understand that, that would be modifying, but this witness said he figured fifty five hundred for the real estate.

The Court: Yes.

Mr. Freedman: There is nothing in that bid. 10

The Court: I understand the situation.

Mr. Freedman: Whatever the real estate was worth, it was taken out, it was dropped.

The Court: Yes.

Q. And you say the bid of Citron-Byer was thirty eight thousand five hundred for personal property?

A. That is my recollection.

Q. And thirty seven thousand and sixty seven for the whole thing? A. Yes, sir. 20

Mr. Freedman: That is all.

Mr. Brenner: Mr. Gross.

MEYER GROSS, sworn for the defendant:

*Direct-examination by Mr. Brenner:*

Q. Mr. Gross, you are a member of the Salzberg Company? A. Yes, sir. 30

Q. And you recall being in Mr. Tuttle's office? A. Yes, sir.

Q. And who opened the conversation there? A. Why, we were called in the office. Mr. Tuttle stated that he called in the three representatives of the three highest bidders, and he said that the bids were not on a parity because some of the bids were for the personal property and some were sep- 40

*Meyer Gross—Direct—for Defendant.*

arate and some bids were for personal and real estate.

The Court: Well, don't waste any time on that. We all know that thoroughly.

10 Q. What was next said? A. He asked us if we wanted to take out the real estate, or asked us if we wanted to put the bid on personal property alone.

Q. And what did you then do? A. I wanted to confer with Mr. Gross on the matter and I asked him if I would be given the permission to have a conference in the adjoining room.

Q. And you went into the adjoining room? A. Yes, sir.

20 Q. What happened then in the adjoining room, from the time that you entered until you left? A. Mr. Salzberg and myself were conferring in there.

The Court: All by yourselves.

Mr. Brenner: No.

The Court: By yourselves?

The Witness: Yes, sir.

Q. And how long were you in there conferring alone before somebody came in? A. Probably five minutes.

30 Q. Then who came in? A. Mr. Frank, Mr. Citron and Mr. Goldsmith.

40 Q. Now, tell us what happened in that room? A. Mr. Frank said, "Why should we give the Newport Company the benefit of the additional price? We should have worked together on it and handled the proposition that way." Mr. Citron said, "Let me buy it. I will tell you my bid." And as he said that we said, "We don't want to know your bid. We are not going to tell you our bid. We

*Meyer Gross—Direct—for Defendant.*

are not going to ask you your bid." We said, "If you want to buy it, go in there and buy it." That is practically all that happened in there, and we went out.

10 Q. Did you, at that time, agree that you were to go in this thing jointly with Frank and with Citron-Byer Company, in which each concern was to have a one third interest? A. No, sir.

Q. You came back then, into Mr. Tuttle's room? A. Yes, sir.

Q. And what happened in that room? A. Mr. Tuttle asked us if we wanted to put a bid in on the personal property and we said that we would remove the rails and let our bid stand the way it was.

20 Q. You would let the bid stand for the personal property? A. Personal property as it was, yes.

Q. And was anything said by Citron or was anything said by Mr. Frank or Mr. Goldsmith? A. They each said, in turn, they didn't want to change their bids.

30 Q. What happened then? A. Mr. Tuttle said, "There is no more to do here," and Mr. Citron wanted to know—Mr. Tuttle said he would let us know by letter who got the business and Mr. Citron said, since it must have been one of the three of us, we would like to know who it was, and Mr. Tuttle conferred with Mr. Prichard and they agreed to give it out, and they said it was H. E. Salzberg that got the business.

40 Q. Was anything further said at that time? A. Then Mr. Citron wanted to know what the bid was and asked Mr. Tuttle. Mr. Tuttle didn't want to give it unless it was approved by Mr. Prichard, and Mr. Salzberg— and he asked Mr. Salzberg and he said he didn't want it given out, the bid.

*Meyer Gross—Direct—for Defendant.*

Q. Did you leave at the time Mr. Frank, Mr. Goldsmith and Mr. Citron left, or did you leave subsequently? A. We did not; we remained there.

Q. How long? A. I would say fifteen or twenty minutes.

10 Q. Had you any arrangement or had you made any arrangement in this room in which this conference was had, under which you were to meet in Mr. Frank's office after leaving Mr. Tuttle's office? A. No, sir.

Q. When you did leave Mr. Tuttle's office where did you meet Mr. Frank and Mr. Citron and Mr. Goldsmith? A. It was either at the elevator or in the corridor down below, of the building.

Q. They had been waiting for you? A. Yes, sir.

20 Q. Did you go to the office of Mr. Frank? A. No, sir.

Q. When was the next time that you talked to Citron-Byer or to Frank or anybody else? A. We didn't—I didn't talk to Mr. Citron on the matter. The talk with Mr. Frank was in the office.

Q. Did you, at any time, either during that conference or at any subsequent time, ever agree that you three were to go into this proposal together? A. No, sir.

30 Mr. Brenner: Take the witness.

*Cross-examination by Mr. Freedman:*

Q. Now, as a matter of fact, Mr. Gross, Mr. Tuttle wanted to run an auction sale there, didn't he? A. You will have to ask Mr. Tuttle that.

Q. Well, you were there. I am asking you. A. I don't know what Mr. Tuttle wanted to do.

40 Q. Well, you were there. Did you hear him say

*Meyer Gross—Direct—for Defendant.*

whether he wanted to run an auction sale or not? A. I don't recall.

Q. You won't say that he didn't? A. Neither would I say that he did.

Q. Answer my question, too.

The Court: He didn't run one, anyway, did he? 10

Mr. Freedman: No.

The Witness: No.

The Court: No auction sale run, was there?

Mr. Freedman: No.

The Court: Well——

Q. You say you didn't talk to anybody after you left? You didn't talk to anybody connected with this matter after you left the office of the Newport Electric Company? A. We walked up several blocks from the building; they were waiting for us down below; we walked up several blocks from the building; they were conferring there and I left, because I had some important matters in the office. 20

Q. What were they conferring about? A. I don't know. It is hard to remember, as a matter of fact, when five men walk on the street, everybody saying something. 30

Q. Do you know what they were talking about? A. No.

Q. They were not talking about this electric plant, were they? A. What electric plant?

Q. Up at Newport. A. It is machinery; it is not an electric plant.

Q. Well, whatever it is. They were not talking about that, were they? A. I think they were talking—if anything, they were talking more about the manner in which the thing was handled. 40

*Meyer Gross—Cross—for Defendant.*

Q. Did they talk about whether this was the joint property of all three? A. It was never considered as a joint property of all three.

Q. Never, at any time? A. No, sir.

Q. I see. And you left Mr. Salzberg with Citron and with Frank; is that right? A. Yes, sir.

10 Q. Do you know where Salzberg went, or did he say where he was going? A. Mr. Frank's office.

Q. Oh, he said that he was going to Mr. Frank's office? And you went back to your own office? A. Yes, sir.

Q. Is that right? A. Yes.

Q. And you are positive that you had not made an agreement or an arrangement in the office of the Newport Electric Company that this property you were purchasing you were purchasing for the benefit of all three firms? A. I am positive.

20 Q. Now, after you left Frank and Citron and Salzberg there on the street, did you talk with anybody connected with this about the matter? A. I went back to my office.

Q. Well, did you talk to anybody any other day? A. As I said, Mr. Frank came in our office.

Q. Oh, he came into your office? A. Yes.

Q. When? A. Probably a couple of days, two or three days after that.

30 Q. Between that time and the time that you left him, you had not communicated with him at all about this matter? A. I think he was in our office before I ever communicated with him, yes.

Q. He didn't call you up on the telephone the next day, did he, on the twenty ninth of June? A. I think that the day he called, if he did call up, I think that day Mr. Salzberg and myself were in Long Island.

40

*Meyer Gross—Cross—for Defendant.*

Q. Well, did he speak to you on the twenty ninth?

A. No, sir.

Q. On the telephone? A. Not to my recollection.

The Court: He says himself that somebody in the office said that Mr. Salzberg went to Long Island.

10

Mr. Freedman: Yes, sir. He said that this gentleman told him that Salzberg went to Long Island.

Q. Immediately after that do you remember receiving a letter—or—yes—do you remember receiving a letter from me, copy of which is in evidence (showing witness paper). A. Yes; I do.

Q. And when you talked to Mr. Frank, when he came into your office, what did he say to you about this? A. Mr. Frank wanted a thousand dollars.

20

Q. What for? A. He said that Citron-Byer was going to make trouble for us, he wanted a thousand dollars, and if he got the thousand dollars he probably would not help Citron-Byer out in the case.

Q. He said Citron-Byer was going to make trouble for you and he wanted a thousand dollars for that? A. Yes.

Q. In order to buy him off? A. Yes, sir.

30

Q. Did he say what Citron-Byer wanted? A. (Witness pauses.)

Q. Did he say what Citron-Byer wanted? You heard the question, didn't you, Mr. Gross?

Mr. Brenner: If your Honor please—

The Witness: I wish you would give me a minute to recollect.

Mr. Freedman: I think it is a very simple question. It can be answered.

40

*Meyer Gross—Cross—for Defendant.*

The Court: Let him go. Let him think.

The Witness: He said Citron and Byer would take a thousand dollars and he would take a thousand dollars.

10 Q. For what? A. They wanted to get—they wanted this thing themselves.

Q. What did they want the thousand dollars for, Mr. Gross? A. Well, for the thing, whatever they are telling you in here, whatever they thought they agreed to.

Q. Oh, he told you they thought they agreed to go partners with him? A. No. There was never any mention of partners in the whole—(interrupted).

20 Q. He thought they agreed, you said, they, all three of them, and they wanted a thousand dollars to state that? A. There was no mention of all three.

Q. What did they want the thousand dollars for? A. Mr. Frank might be able to tell you that.

Q. Didn't Frank tell you what he wanted the thousand dollars for and what Citron-Byer wanted it for? A. (Witness pauses.)

30 Q. Did he or not? A. They wanted a thousand dollars.

Q. For what? A. I am not passing decision what they wanted it for. I am telling you what I think they wanted it for.

Q. What did they tell you they wanted that thousand dollars for?

The Court: Don't you remember whether they did or not.

The Witness: I don't remember what their reason was for wanting it.

40

*Meyer Gross—Cross—for Defendant.*

Q. You don't know why they wanted the thousand dollars? A. No.

Q. They simply wanted a thousand dollars; is that right? A. Yes.

Q. I see. And did you agree to give a thousand dollars to Mr. Frank? A. He didn't agree to anything.

10 Q. Did you promise to give him a thousand dollars? A. No, sir.

Q. You did not? A. No, sir.

Q. Did your partner in your presence promise to give him a thousand dollars? A. I don't remember that he did.

Q. You don't know. At any rate, they wanted a thousand dollars for some reason that you don't know? A. Yes, sir.

20 Q. Is that the way you want to let that rest? A. Yes, sir.

Mr. Freedman: That is all.

The Court: That is all.

H. E. SALZBERG, recalled:

*Examined by Mr. Brenner:*

30 Q. Mr. Salzberg, you recall that you and Mr. Gross left the office of Mr. Tuttle to confer in an adjoining room? A. Yes, sir.

Q. And you recall that Mr. Frank and Mr. Goldsmith and Mr. Citron came into that room? A. Yes, sir.

40 Q. Was there any agreement made in that room whereby the highest bidder was to buy the property for all three concerned? A. No agreement made whatsoever. The only thing Mr. Frank came in the room and the statement he says—

*H. E. Salzburg—Recalled, Direct—for Defendant.*

The Court: Well, now, don't say any more. You have answered counsel's question. No agreement was made.

10 Q. Who started the conversation, after Mr. Frank, Mr. Goldsmith and Mr. Citron came in the room? A. Mr. Frank.

Q. And what did he say? A. He said, "What is the use to give the money to the Newport Electric Company? We can have it for ourselves.

Q. Did he say anything further? A. Yes, sir.

Q. Give us the rest of his talk in that room. A. He said to me, "Now, let us buy together." I said, "Who do you mean?" He said, "Citron and Byer and you and myself." I said, "Citron and Byer is out of this," I said, "They have done me once and  
20 I don't want to have no business with them. Forget about them." So he says— Can I finish it?

Q. Go ahead. A. So he says, "Now," he says, "what is the use to be sore at it?" He says, "Let's buy it up." I says, "What is it you want?" He says, "Now, listen—"

Q. That is all in this little room? A. Yes.

Q. Go ahead. A. He says, "Let's put up together." I said, "I can't tell you now, I don't want to say  
30 anything now. I am not going to commit myself now." So Mr. Citron sprung up and he says, "I can give you my bid, if you will give me yours." I said, "Stop right here. I don't want to know your bid and I am not going to give you mine." I said, "I can't tell you anything at this moment. I will see what is going to develop later. If you want to buy it, you can buy it. I don't want to know your bid," and we all went out.

40 Q. What happened when you went out? A. Mr. Tuttle asked us would we arrive at a decision on

*H. E. Salzburg—Recalled, Direct—for Defendant.*

it? I said, "Yes." He says, "What is your bid?" I said, "Our bid will stand thirty eight thousand five hundred for the personal property alone and leave the others—leave the real estate out." That is all.

Q. And did anybody else give his bid? A. No, sir; nobody. 10

Q. What happened then? A. And Mr. Citron wanted to know who got the business and Mr. Tuttle stated that he would write us a letter. Mr. Citron insisted on knowing right away, so when he insisted on it, he says, "H. E. Salzberg Company got the business."

Q. All right. Then what happened? A. And then they went out and we remained. So I said to Mr.—(interrupted) 20

Q. Was there anything said at that time as to the price? A. No, sir; no price was mentioned.

Q. Did anybody want to know the prices or your price? A. Mr. Citron wanted to know the price. He asked Mr. Tuttle and Mr. Tuttle turned to me and said, "Can I give him your price?" And I said, "No; you can't." I said, "This is confidential."

Q. All right. Then you say the others went out and who remained? A. Mr. Gross and myself re- 30  
mained.

Q. For how long? A. For about fifteen or twenty minutes.

Q. Doing what? A. Well, we wanted to get a letter, suggested to Mr. Gross to get a letter.

Mr. Freedman: Oh, well—

Q. Don't tell us what you suggested. It was for the purpose of getting some letters? A. Yes.

Q. All right. Now, when you came out did you 40

*H. E. Salzburg—Recalled, Direct—for Defendant.*

see Citron, Frank or both of them? A. Yes, sir. We went downstairs right on the street, on the corridor as you go out towards Broadway, and I met them all standing there.

Q. Did you meet them by appointment? A. No, sir; I just met them right there when we went outside.

10 Q. All right. Where did you go? A. We all started to go and finally Mr. Frank said—suggested it—he says, “Come down in my office.”

Q. Did he tell you why? A. No, he didn't. So finally I said, “What will I do in your office?” He says, “You know, I can use old rails, I can use your rails.” I said, “Well, all right; we will sell it to you.” And Mr. Citron said, “You know you have got a lot of stock there.” I said, “All right. We will sell you that, too.” And Gross says he had to go to the office, he had an appointment. I said, “Well, I will go up to your office,” so after we went up there—shall I go on?

The Court: Go on.

The Witness: After I went up there in Frank's office we started to discuss prices and I said, “I will tell you——”

30 Q. Prices of what? A. He wanted to buy the rails.

Q. Yes. A. And I said, “Now, I will tell you; I can't say anything about price at this time. I will have to consult with Mr. Gross.” And Mr. Citron also wanted to get what I will take for the scrap, the scrap copper, and so forth, and I says, “I don't know,” I says, “I can't say anything right now. I will have to consult Mr. Gross and see what we will sell it for,” and he says, “Supposing you meet us tomorrow afternoon?” I said, “If I

40

*H. E. Salzburg—Recalled, Direct—for Defendant.*

have a chance, I will do so, meet you tomorrow afternoon.” Well, as it happened I couldn't get him in the afternoon, and, after that, I talked it over with Mr. Gross and we decided—(interrupted).

Q. Don't tell what you and Gross decided. A. Pardon me. All right.

Q. After you talked to Gross what did you do? 10 A. Then I called him up.

Q. Called who? A. Called Mr. Citron up in the evening, on the telephone, on the long distance telephone to his house, and I told him we decided we don't want to do any business with him, we didn't want to sell him anything.

Q. What did you do, as far as Frank was concerned? A. Didn't do nothing.

Q. Did you talk to Frank after that? A. I spoke to him several times, that is about a week or two weeks after—about a week after that. 20

Q. About what? A. When we were discussing the rails and different things. And then— Can I modify my statement of what happened in the room there? A. Go ahead. A. While talking there in the room Mr. Citron—Mr. Goldsmith jumped up and he says to me, “They ought to buy the stuff cheaper than anybody else.” I said “Why?” He says, “You know, we went to quite an expense of appraising it and looking it over,” and I says, “What has that got to do with me?” 30

Q. Did you talk to Frank again about the purchase of these rails? A. Yes. I spoke to him several times after that.

Q. Did you ever, at any time, make any agreement with these gentlemen, whereby they were to get, each of them, a one third interest in this purchase? A. No, sir; never. It was never mentioned. 40

*H. E. Salzburg—Recalled, Cross—for Defendant.*

Q. This stuff that you bought has to be dismantled, doesn't it? A. Yes, sir.

Q. And how long will it take to dismantle it?

Mr. Freedman: I object to that.

The Court: I will sustain the objection.

Is that all?

10

Q. Is the job finished yet? A. No; not half.

Mr. Brenner: Take the witness.

*Cross-examination by Mr. Freedman:*

Q. You expect to make a profit on that job? A. I don't know.

Mr. Brenner: I object.

20

The Court: Wait a minute. I will sustain the objection. That hasn't anything more to do with it than the other.

Q. So, on the twenty ninth, in the evening, June, when you talked to Citron over the long distance telephone, you were through with him, you weren't going to do any business at all? A. No, sir.

Q. That is right? A. Yes, sir.

30 Q. You didn't care to make any sales? A. No, sir.

Q. Is that right? A. Yes, sir.

Q. Do you remember having a conversation with me, Mr. Salzberg? A. Yes; I do.

Q. In your office? A. Yes, I do, very well.

40 Q. And do you remember telling me that you wanted to sell this plant to Citron? A. I said, "We will sell," yes, I said, "We will sell," but not to Citron. I will correct you, the exact conversation that took place between you and me.

*H. E. Salzburg—Recalled, Cross—for Defendant.*

Q. You did not? A. No, sir. I will prove it exactly what we had together.

Q. All right. You will get a chance. A. All right.

Q. I came over to see you in behalf of Citron-Byer? A. Yes, sir.

Q. I had written you a letter? A. Yes, sir; you 10 called me up, first.

Q. Wait a minute. A. All right.

Q. I wrote you a letter, didn't I, on the thirtieth of June? A. I don't remember the dates.

Q. Well, this letter that is in evidence. A. Well, all right; that is all right.

Q. What did you do with that letter? A. Eh?

Q. What did you do with that letter? A. I don't 20 know.

Q. Did you refer it to an attorney? A. I think I did, yes; sure. 20

Q. And did that attorney report to you any conversations or conferences with me? Did he? A. My attorney has, yes. I referred—I took that letter up to my attorney and he told me to —(interrupted)

Q. He told you that he had spoken to me, didn't he? A. I think he did; I don't remember.

Q. Yes. A. I think he did probably; yes. 30

Q. And you were out of town during the month of July, the first part of the month? A. I think so. I was in and out all the time.

Q. You were on a trip? A. Yes, sir.

Q. You called me or I called you on the telephone? A. Yes.

Q. Around the middle of July? A. Yes, yes, yes.

Q. And you asked me if I wouldn't come over to see you? A. You called me on the telephone. 40

Q. Yes. A. Yes.

*H. E. Salzburg—Recalled, Cross—for Defendant.*

Q. I told you, didn't I, that your attorney had suggested that I call you on the telephone direct?

A. You called me.

Q. Yes. A. Yes, sir.

Q. And you asked me if I wouldn't come over and see you? A. You told me you wanted to come over and see me, yes. I said, "You can come over if you like to." 10

Q. Didn't you tell me you would like to have me come over to your office and talk to you? A. I don't know. I will tell you—

Q. You have answered the question. When I came over there you knew I was the attorney of Citron-Byer Company, didn't you? A. Yes, sir.

Q. And didn't you tell me that, as far as the partnership was concerned, there was nothing to it, but, if we wanted to, you would sell us that material and equipment that you bought for fifty thousand dollars? A. I did not. 20

Q. You did not? A. No, sir; I will tell you. I will say positively—

Q. Now, wait a minute. A. Just a minute.

The Court: Let him tell what he did say.

Q. Go ahead. A. Mr. Freedman came to my office and he said, "What are you going to do?" I said, "We are going to do nothing," I said. "You represent Citron-Byer." He said, "Yes." I said, "As far as Citron is concerned," I said, "he is out of it." but I asked, "Are you a son-in-law to Mr. \_\_\_\_\_" Can you refresh my memory? 30

Q. Mr. Gordon? A. Gordon. He says, "Yes," he says, "I am. Mr. Gordon is my father-in-law." I said, "Mr. Gordon," I said, "probably might do business, but not Citron and Byer. They are out of the question. I don't want to do business with 40

*H. E. Salzburg—Recalled, Cross—for Defendant.*

them. They cheated me once and I don't want him to do it again."

Q. Mr. Gordon is connected, and you knew he was, with the Citron-Byer Company? A. Yes, I did.

Q. And you said, if we wanted to buy this material or equipment, you would sell it to us for fifty thousand dollars? A. I didn't set no price whatsoever. 10

Mr. Brenner: I object.

The Court: I don't see that this has anything to do with it.

Mr. Freedman: I think it impeaches the credibility of this witness. He said he wouldn't have any dealings with him on the twenty ninth. 20

The Witness: I don't think I said that I wouldn't have any dealings with him on the twenty ninth.

Mr. Freedman: It shows he is telling something that is not true.

The Court: In response to your question, he is telling you what happened and what he said.

Mr. Freedman: Yes.

Q. So that afternoon of the twenty eighth, when you went up to the office of M. K. Frank, you went up there only for the purpose of selling some part of the material; is that right? A. I didn't went up on any purpose at all. There was a general conversation, while walking along that street, and I said, "Now, you got rails—" He says, "You got rails and scrap." He says, "Suppose you come up to my office and we will discuss this matter. We might do business." I said, "I don't like 30 40

*H. E. Salzburg—Recalled, Cross—for Defendant.*

to wait now; I am a little busy," and he started to coax me, and I said, "All right. I will go up for a few minutes. I haven't got much time." That is all that was said.

Q. Wait a minute. You did go up there, didn't you? A. I did.

10 Q. And, at that time, when you got there, you made an appointment for two o'clock the next day, didn't you? A. I did.

Q. And you didn't keep that appointment, did you? A. No, sir.

Q. And then you called up that night and called Citron on the telephone? A. The reason I didn't keep it now, I will explain you the reason.

Q. Please answer my question.

20 The Court: No. You didn't keep it. That is all he asked you.

The Witness: I don't keep it; no, sir.

Q. And then that night you called Citron up on the long distance phone at his home? A. Yes.

Q. And you told him that you did not want to do any business with him? A. Exactly.

Q. And—— A. I told him I didn't want to sell it.

30 Q. That is all. You have answered the question. A. All right.

Q. Now, you said before, on your direct-examination, that they, Citron and Frank, suggested that you handle this together in the room there? A. Mr. Frank suggested it first.

Q. Yes. And then Citron agreed to it? A. Citron agreed to it.

Q. And you said—— A. Wait a minute. Just a minute. What I said was this——

40 Q. Mr. Salzberg, just one moment, please. We

*H. E. Salzburg—Recalled, Cross—for Defendant.*

will get along a whole lot better if you will let me do the asking of questions.

Mr. Brenner: The witness was answering.

Mr. Freedman: He is making speeches.

Mr. Brenner: I object to that statement.

The Court: Ask your question, now, and then let him answer. 10

Mr. Freedman: Yes.

The Court: All right.

Q. You said, on your direct-examination, that in this room in the Newport Electric Company's office, when you went out, Frank or Citron, or both of them suggested that this deal be handled by all three. A. Yes.

Q. And what did you say in response to that, Mr. Salzberg? A. I said nothing. I said, "I don't know. I can't give you no answer on that at all." 20

Q. I see. And was Mr. Gross there when you said that? A. Yes, sir.

Q. Did Mr. Gross say anything? A. No, sir.

Q. And did Mr. Citron or Mr. Frank say anything in response to that reply? A. I have told you that before; yes; Mr. Frank—Citron started. He said, "Now, what is the use," he says, "to be sore at each other? I will tell you my bid," he says, "if you will tell me yours." I said, "Stop right here. I don't want your bid and I am not going to tell you mine." 30

Q. Then, what did he say in response to that, if anything? A. He didn't say anything.

Q. He didn't say anything? A. I said, "Do you want to buy——"

Q. Wait. You have not answered the question. He didn't reply anything at all? A. No, sir. 40

*H. E. Salzburg—Recalled, Cross—for Defendant.*

Q. And then you separated? A. We all went back to the—

Q. I see. A. —office.

Q. Have you—Now, before you went out of Mr. Tuttle's room— A. Yes, sir.

10 Q. —Mr. Citron had asked for permission to raise his bid; is that right? A. Mr. Citron had asked—I think so. I don't know. I don't remember. I know—No; not in my presence; no. That is right. He didn't, he didn't ask, not that I know of.

Q. Did Mr. Tuttle say whether he could raise his bid, if he wanted? A. Let me see, let me think. Yes, I think he said he could raise his bid, if he wanted to. I think he did.

20 Q. In Frank's office, when you got there, nothing was said about how this deal was to be handled, the partnership? A. Under no—No; there was no partnership absolutely was mentioned.

Q. Nothing was said about a contribution of a third each to the capital? A. Never. Money was not offered; it was not talked about.

Q. But some time later you had a conference with Frank where Frank demanded a thousand dollars from you? A. Yes.

30 Q. What did Frank say he wanted that thousand for? A. He said he is entitled to some profit out of this. I said, "Why are you entitled to some profit?" He said, because he went to a lot of expense. He says, "Why," he says, "you give me a thousand." I said, "I don't want to buy it. I have bought it once. I don't give any money at all." So he says he thought he was entitled to profit because he had a lot of expense traveling and—(interrupted)

40 Q. And did you agree to pay him a thousand dollars? A. No, sir; I did not.

*H. E. Salzburg—Recalled, Cross—for Defendant.*

Q. Did you offer to pay him a thousand dollars? A. I did not.

Q. You did not? A. No, sir.

Q. Did you offer to give him anything for his share? A. I don't remember whether I offered him anything, no, sir. I don't remember offering him anything. 10

Q. You never did? A. I don't think so, no, sir; I don't think I did. I am pretty sure I did not. I always consulted my attorney.

Q. You consulted your attorney when he asked for this thousand dollars? A. I did.

Q. And your attorney told you not to give it to him? A. String him along, probably, that is all.

Q. Your attorney told you to string him along? A. Yes, sir. Not to say anything.

Q. I see. And did you string him along? A. 20 Yes, probably did.

Q. For a couple of weeks? A. Probably did; yes, sir.

Q. And then he called you on the telephone? A. Who did?

Q. Mr. Freedman. A. Mr. Freedman?

Q. Yes, whom you had been stringing along for a couple of weeks.

Mr. Brenner: I object to that. 30

A. Mr. Freedman—

The Court: You have got mixed up.

Mr. Freedman: No.

The Court: He says he consulted his attorney and his attorney told him to string Mr. Frank along and so he strung Mr. Frank along.

Q. And did your attorney tell you to string Mr. Freedman along, too? A. I don't remember. 40

*H. E. Salzburg—Recalled, Cross—for Defendant.*

Q. Did he tell you he was stringing Mr. Freedman along for a couple of weeks?

The Court: I don't see that this has anything to do with it. Do not let these personalities enter into it.

10 Mr. Freedman: I am trying to keep it out as much as I can, but he has brought that in.

The Court: But in response to your question. This is a very narrow issue, very narrow, it seems to me.

Q. At this conference in Mr. Frank's office, on the afternoon of the twenty ninth, didn't you say something about wanting to keep the generators for yourself personally, that is, for your company?

20 A. I believe I did. I was talking, the general conversation, I said: He wanted to know the way I felt about it; he wanted to know how much money —(interrupted)

Q. Never mind.

Mr. Freedman: I ask all that be stricken out. He has answered the question.

The Witness: But we talked something about the generators.

30 Q. Yes. A. And he said, "If you want to buy the scrap and you buy the rails." I said, "Well, we are going to use it all; we can use the generators and the rails ourselves."

Q. You didn't say that you wanted to buy the generators off of the three of them? A. I did not.

Q. For your own company. A. I did not.

Q. At cost? A. Absolutely I did not, not to my remembrance; I am sure I did not.

40 Q. You are almost sure? A. Yes. I don't see how I can—I am positive I did not.

*H. E. Salzburg—Recalled, Cross—for Defendant.*

Q. You are almost sure you didn't make any agreement with these people to be an equal partner? A. I am positive of that.

Q. Oh, that you are positive of. A. Yes, sir.

Mr. Freedman: That is all.

The Court: This is a bill to establish a joint venture? 10

Mr. Freedman: Yes, sir.

The Court: I am going to deliver my opinion now.

In certain personal property the complainant asserts that there was an agreement between him and the defendant, establishing a joint venture. Of this defendant and his witnesses make a categorical denial. Then, when we come to the consideration of the testimony of the witnesses for the complainant, we find this: The first witness, which is the complainant himself, gives the details of a meeting in Mr. Tuttle's office, and of a subsequent meeting in Mr. Frank's office and he says that it was agreed to meet the next day at two o'clock to prepare details and to make the contract legal, that is, to put it on paper; and the second witness says, "We were to meet afterwards to see how we were to handle it and to draw up an agreement, and he"—I suppose Salzburg—"was to talk it over, in the meantime, with his partner." The third witness says he went away because he was in a hurry, he wanted first to consult Mr. Gross before arranging the details. 20 30

Now, there we have a clear exposition of a contract that was not complete in all its details, which was not absolute, complete, fixed and certain, which a contract must be. 40

Just shortly thereafter it is agreed by everybody

*H. E. Salzburg—Recalled, Cross—for Defendant.*

that Mr. Salzburg called up and said it was all off, or there was nothing doing, or whatever his remark was, and so it seems quite clear to me that these people met and had conversations as to whether or not they should buy and sell this material, and perhaps—although the defendants deny it—  
 10 whether or not they should go into an agreement, but the best we can spell out of the complainant's witnesses is that a tentative agreement was entered into, which was to be made final and absolute on the following day. And on the following day nothing happened. Now, the complainant admits that he never knew the actual bid that the Salzburg people made for this property, and, it seems to me, it is highly improbable that there could have been a definite, fixed contract, when he did not ever  
 20 know the cash consideration for it and how much it would be necessary for him to pay.

To be sure, he knew, within a few thousand dollars, but, when they all went into Mr. Tuttle's presence again and Mr. Salzburg handed him a new bid, he had no means of knowing whether it was more—a great deal more or not.

I do not think that complainant has made out his case, and I will dismiss the bill.

30 I have not made any comment on Mr. Frank's visit to Mr. Salzburg, and it may be that two weeks after June thirtieth—that would be about the fourteenth of July—he, who according to the complainant's theory, was to be the third party in the transaction, withdrew as far as he was concerned, because he said he was satisfied with a thousand dollars, and that, surely, would not be one third of a thirty eight thousand five hundred dollar contract, or, I should not think it would.

40 However, I am not expressing any opinion on

*Exhibit C-1.*

that, but, I say, on the complainant's own showing, he has not made out a contract sufficiently definite and distinct as required under our decisions.

**Exhibit C-1.**

June 30th, 1927

10

H. E. Salzburg Co.,  
 50 Church St.,  
 New York City.

Gentlemen:

I have been retained by the Citron-Byer Co., in connection with some difficulties which they are having with you arising out of the purchase from the Newport Electric Company, 100 Broadway, of a trolley line, etc.

20

By agreement made between you and K. Franks and my clients, in the presence of Mr. Goldsmith, this trolley line was purchased by you for the account of all three. Now it seems that you are trying to keep the purchase for yourself. From the information which I have, it is very apparent that this is a three-party deal and unless you comply with the arrangement made previously, I have been instructed to take action to compel you to live up to your agreement. We do not intend to permit you to repudiate the bargain which you made.

30

I will wait until Wednesday of next week to give you an opportunity to arrange this matter in an amicable way and failing that, I shall immediately, after Wednesday next, take such action as I may be advised necessary to protect my client's rights in the premises.

Very truly yours,

Dict. B. Freedman

40

C. J.

**Final Decree.**

Filed Nov. 18th, 1927.

IN CHANCERY OF NEW JERSEY.

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Between  
 THE CITRON-BYER Co.,  
 Complainant,  
 and  
 H. E. SALZBERG Co., INC.,  
 Defendant.

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} On Bill, &c.  
 } Final Decree.

20 This cause coming on to be heard in the pres-  
 ence of Bernard Freedman, of counsel with the  
 Complainant, and Alfred Brenner, of Brenner &  
 Kresch, of counsel with the Defendant, and the  
 pleadings and proofs having been read, testimony  
 heard and arguments of respective counsel heard  
 and considered, and the court having duly consid-  
 ered the said pleadings, proofs and arguments, and  
 it appearing to the court that the relief prayed for  
 by the complainant should be denied,

30 It is, on this 18th day of November, 1927, by Ed-  
 win Robert Walker, Chancellor of the State of New  
 Jersey,

ORDERED, ADJUDGED AND DECREED  
 that the complainant's bill be and the same is here-  
 by dismissed; and it is

FURTHER ORDERED, ADJUDGED AND  
 DECREED that the complainant pay to the de-  
 fendant the costs of this suit to be taxed, together  
 with a counsel fee of \$400., which includes the sum

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*Final Decree.*

of \$80. expended for a bond, and that the said  
 counsel fee be taxed as a part of the costs; and it is

FURTHER ORDERED, ADJUDGED AND  
 DECREED that the said complainant shall, with-  
 in fifteen days after service upon it of a copy of  
 this decree and of the taxed costs in this cause,  
 pay to the complainant(?) the amount thereof and  
 that in default an execution may issue for the re-  
 recovery thereof.

10

E. R. WALKER,  
 C.

Respectfully advised.  
 ALONZO CHURCH  
 V. C.

The above decree is hereby approved as to form.  
 Dated, November 18th, 1927.

20

BERNARD FREEDMAN,  
 Solicitor of Complainant.

30

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*Petition of Appeal.*

expended by the respondent for premium on a bond,

10 And your Petitioner appeals from the said Final Decree of the Chancellor which adjudges and decrees as aforesaid upon the ground that it is erroneous in that it appears that on June 28, 1927, the respondent and the appellant as well as one Frank, entered into an agreement by the terms of which agreement it was agreed that certain property purchased in the name of the respondent was purchased and should be owned and held by the said Frank, this appellant, and the said respondent in equal one-third parts as a joint venture and that said property should be disposed of for the equal one-third benefit of the said parties, and that all losses or profits arising therefrom should be borne in equal one-third parts by the said appellant, respondent, and the said Frank, and it further appears that thereafter the said respondent repudiated the said agreement and refused to accept from the appellant any part of the moneys necessary to be paid for the purchase price of said property and the said respondent did appropriate and convert to its own use, all of of the said property so purchased as aforesaid and the said respondent did exclude appellant from participation in or control over the property so purchased as aforesaid; and the said Final Decree of the said Chancellor is erroneous for the reason that the said Final Decree should have ordered and decreed that the respondent make a full and true discovery and disclosure of all moneys received and paid in connection with the said property so purchased as aforesaid, and the said respondent should have been decreed to account for the value of the property or the money

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30

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*Petition of Appeal.*

received from its sale, to the appellant and the said Final Decree should have adjudged and decreed that the said respondent account for said property so converted by it and belonging to the said joint venture and that upon the ascertainment of the amount due from the respondent to the appellant upon such accounting the said Final Decree should have adjudged and ordered that the respondent do pay such sums so to be found due upon such accounting, to the appellant; and the said Final Decree is further erroneous in that it allows counsel fee and costs to the respondent since costs and counsel fee should have been awarded to the appellant.

10

Petitioner therefore prays that the said Final Decree of the said Chancellor may be in all things reversed, set aside and for nothing holden, and that Your Petitioner may have such other relief in the premises as to this Court shall seem proper.

20

BERNARD FREEDMAN,  
Solicitor for and of counsel with  
Appellant.

Service of the within Petition of Appeal is hereby acknowledged this 14th day of December, 1927.

BRENNER & KRESCH,  
Solicitors of Defendant-Respondent.

30

**Answer to Petition of Appeal.**

Filed December, 1927.

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

10

THE CITRON-BYER Co.,  
Complainant-Appellant,

vs.

H. E. SALZBURG Co., INC.,  
Defendant-Respondent.

On Appeal  
from the  
Court of  
Chancery.  
Answer to  
Petition  
of Appeal.

20 The answer of the above named respondent to the petition of appeal of the above named appellant.

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

30 1. That a decree was on the 18th day of November last past 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 respondent prays to refer thereto when the same shall be produced.

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

BRENNER & KRESCH,  
Solicitors and of Counsel with Defendant-Respondent.

40

**New Jersey Court of Errors and Appeals**

Between

THE CITRON-BYER Co.,  
Complainant,

and

H. E. SALZBURG Co., INC.,  
Defendant.

On Appeal  
from Court  
of Chancery.

**BRIEF OF COMPLAINANT-APPELLANT.**

This is an appeal from a Final Decree advised by Vice Chancellor Church dismissing the bill of complaint. The bill alleged that on June 28, 1927, the complainant, one M. K. Frank, and the defendant, entered into an agreement whereby it was agreed that certain personal property being a trolley line and its equipment, which was purchased from the Newport Electric Corporation, in the name of the defendant company, was, in fact, purchased by the defendant company for the benefit of the three parties as a joint venture and was to be held and disposed of in three equal parts; that the losses and gains were to be equally divided; the bill also alleged that after the making of the agreement and the purchase of said equipment, the defendant company repudiated the agreement and refused to recognize the complainant as a joint adventurer or to accept any part of the purchase moneys necessary to be paid from the complainant, and that the defendant converted the assets of the joint venture to its own use and excluded the complainant from any participation in or control of the property of the joint venture; the pray-

er of the bill was among other things for discovery and accounting and for decree that the sum found due on an accounting might be decreed to be paid by the defendant to the complainant.

We respectfully submit that the testimony in this case amply supported the allegations of the bill and that at the close of the testimony the relief prayed for should have been granted. We think from the opinion of the Vice Chancellor which appears on pages 97, 98 and 99 of the State of Case, it is a fair inference to say that the Vice Chancellor believed the testimony of the complainant's witnesses and he seems to have decided the case on the theory that the agreement alleged by the complainant was not shown by the testimony to have been sufficiently complete as the Vice Chancellor says, on page 97, "Now, we have a clear exposition of a contract that was not complete in all its details, which was not absolute, complete, fixed and certain, which a contract must be."

The admitted testimony in the case is that the Newport Electric Corporation desired to dispose of certain machinery, rails and equipment which had constituted its trolley line and plant, and that it invited bids to that end, and that numerous sealed bids were submitted; that the complainant, defendant and Mr. Frank were brought together by the representative of the Newport Electric Corporation in its office in New York, and were there informed in the presence of each other by the Electric Company's representative that their three bids were the three highest bids submitted and that they were very close together, and they were told that they could raise their bids should they desire to do so. The parties thereupon went into another room in the office of the Newport Company and there a discussion took place. These facts are agreed to by all parties concerned.

As to what took place in that room, there seems to be some conflict, and we submit that a fair reading of the testimony will disclose that the story told by Messrs. Citron, Frank and Goldsmith is the truth and this is also borne out by some of the evidence of the defendant's witnesses themselves.

Mr. Citron testifies on pages 12 and 13, that when the parties met in this room at the office of the Electric Company, one of them, he didn't know which one, said his bid was high enough and he wouldn't raise it. That each of the parties then said the same thing; that thereupon somebody suggested that since Mr. Frank specialized in rails, and Mr. Salzburg's firm specialized in electrical machinery, and Mr. Citron's firm specialized in scrap iron and metals, of all of which goods there would be large quantities, it would be advisable that whoever purchased this property should purchase it for all three firms, and that the three firms should contribute one-third of the capital each and handle it on an equal one-third profit and loss basis. That this was agreed to by everybody and was perfectly satisfactory to all parties interested.

We respectfully submit that if these facts are true, the complainant is entitled to the relief prayed for. It seems that after that the parties returned to the room where the representative of the Electric Company was in, and told him that none of them desired to raise the amount of their bids although it seems that the defendant company had bid a small sum for the real estate involved and they agreed to change their bid and let their bid stand for personal property alone instead of for both. It is also agreed in the testimony that after that and on the same day, the parties went to the office of Mr. Frank in New York, but that Mr. Gross, one of the partners of the defendant company, did

not go along to Frank's office. That there was some discussion there. Messrs. Citron, Frank and Goldsmith who were there say that this discussion was about how the business affairs of this new born joint venture were to be conducted, and that Mr. Salzburg wanted to buy from the firm certain of the machinery. Mr. Salzburg on the other hand says that he was coaxed to go to Mr. Frank's office by Mr. Citron, and Mr. Frank. They told him that they wanted to buy some rails and scrap from him and he didn't want to go, but finally consented. (State of Case, page 91-92.) Now it seems quite hard to imagine that a man who had just made a purchase of considerable material for the purpose of dismantling and disposing of it (as he says) having to be coaxed to go into a conference to discuss the sale of part of it at a profit. I don't think that his version of the reason why he went is such that this Court or the Court of Chancery should have accepted. I don't think the Vice Chancellor believed him. At any rate, whatever the discussion was, at Mr. Frank's office, it was arranged that there was to be a meeting the next day, the 29th, at two o'clock. Mr. Salzburg did not show up at this meeting but that on the evening of the 29th, he called Mr. Citron on the telephone and told him he didn't want, he says, to do any business with him, and Mr. Citron says he was told by Mr. Salzburg that he would not go through with the partnership agreement. So that we have here in some of the things a conflict of testimony, yet it is not such a hopeless conflict because there were many straws in this testimony which show where the truth lies. For example, Mr. Salzburg testified on page 91, and also on page 86 that he told Mr. Citron he would sell him some of the material, and yet he says on page 84 that while in the room in the Electric Company's office, Mr.

Frank broached the subject of making a joint venture between them and he, Salzburg replied, "I said 'Citron-Byer is out of this' I said they have done me once and I don't want to have no business with them, forget about them." If that were so early in the day of the 28th of June, why did he tell Citron as he said he did on page 86, "all right, we will sell you that too." (line 20, 21) "And Gross says he had to go to the office, he had an appointment." I said "Well, I will go up to your office" so he went up there which contradicts his testimony on page 91 that he was coaxed to go up to Mr. Frank's office.

Mr. Citron in his testimony is corroborated in every detail by the testimony of Mr. Frank who is disinterested in the outcome of this suit, and by Mr. Goldsmith's testimony who is disinterested in the outcome of this suit, and who was a total stranger to the transaction and employed by a competitor of the three gentlemen who were interested in the matter.

There is one thing in this case which seems to us to be highly important and that is the testimony of Mr. Frank that he made an arrangement and practically agreed with Mr. Salzburg that he would sell out his interest in this property to Mr. Salzburg for \$1,000.00 and Mr. Salzburg and his partner didn't deny he asked \$1,000.00, but— they say they did not agree to give it to him. The testimony in this respect I think is difficult to believe and a reading of Mr. Gross's testimony, pages 81-2-3, in which he testified says that he didn't know what the \$1,000.00 had been asked for, but simply that Frank demanded of him \$1000.00 for some reason which reason he could not give. He hemmed and hawed as the record will show, but refused to admit that he knew why the \$1,000.00 was asked for. We submit that from a reading of the testimony in this

case, the only conclusion that can be reasonably drawn is as stated by the witnesses for the complainant: That these three parties met in this room in the office of the Electric Company and that they there and then agreed that whoever bought this property was to buy it for the benefit of all and as a joint venture for the three firms. That the losses and profits were to be divided in three equal parts and that the capital was to be contributed into three equal parts; that they then went away from the office of the Electric Company and went to the office of Mr. Frank and that naturally there was some discussion as to how the business affairs of this new venture were to be handled. These people had just embarked in a business for which they were paying close to \$50,000.00. It was bought for the purpose of dismantling and a fair inference therefore is that it involved the expenditure of an additional sum of money for labor, transportation, etc., and it is only natural that these people got together to talk over this new business. That at that talk Mr. Salzburg raised the question that he wanted to buy some of the equipment for his own firm. That then an arrangement was made to meet again, and to draw up some sort of a writing to attest the agreement which had been previously arrived at. If this were not true, how is it possible that immediately after receiving a telephone call on the night of the 29th of June, from Mr. Salzburg, Mr. Citron would have had his counsel write the letter which appears as Exhibit C-1? That letter was written on the spur of the moment. The telephone call announcing the termination of relationship by Salzburg was received by Mr. Citron on June 29th, in the evening and on June 30th, counsel for the complainant addressed Exhibit C-1 to Salzburg in which he stated practically the same

thing as appears in the bill of complaint. This letter it seems to me should be treated as part of the *res gestae*.

Nor do we think that the court below questioned the truth, in the main, of the story told by the complainant and their witnesses but the court seems to have come to the conclusion that this contract which was made was not definite enough because the parties contemplated or spoke about making some sort of a written agreement. The testimony is quite clear on the part of the complainant. That all the details had been arranged. (State of Case, page 50). The failure to sign a written agreement cannot affect the validity of such an agreement, and, although he does not mention the decisions which he had in mind, the only ones that he could have had in mind it seems are those of which the case of Commissioners of Jersey City vs. Brown, 32 N. J. L. page 504 is typical. Nor are we unmindful of that case and of many other cases among which are some very recent decisions by this Court, and in those cases the rule is that where the parties contemplate a written agreement to be thereafter entered into, *which written agreement is essential and is a condition precedent to the contract*, the matter remains in fieri until the written agreement is signed. The distinction between the line of cases typified by Commissioners of Jersey City vs. Brown, *supra*, is very well set forth by Justice Depue speaking for this court in Wharton vs. Stoutenburgh, 35 Eq. 273. In that case this court said,

“The principal ground of contention against this decree was, that no contract, definite and complete in all its terms, was concluded between the parties.

“The fact that parties negotiating a con-

tract, contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, *whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement.*"

Wharton vs. Stoutenburgh is followed by a later case, Trenton & Mercer County Traction Corporation vs. Trenton, etc., reported in 90 N. J. L. page 378, and in that case Justice Swayze wrote the opinion for the Supreme Court and his opinion was affirmed by the Court of Errors in a per curiam reported in 91 N. J. L., page 719, for the reasons expressed by Mr. Justice Swayze. In that case Justice Swayze also distinguished between an agreement which the parties have entered into and understand that they are bound by, but nevertheless for greater certainty and as a memorial of their agreement they contemplate putting it into writing, and on the other hand, an agreement conditional on the meeting of the minds of the parties on another agreement somewhat similar perhaps in effect but with matters left open for future negotiation and thereafter to be reduced in writing and signed, but with the understanding at all times that until the written contract embodying the complete agreement is signed, neither party is bound.

It seems to us to be very apparent that there is a very broad distinction between that class of

cases where the writing is essential and until the contract is reduced to writing and signed neither party is bound and either party may retract or change his mind, and on the other hand, those contracts which people frequently make by word of mouth and expect to be bound by their verbal contract and then later feel that for greater certainty in the event that one of the parties might die or for whatever reason may occur to them, they prefer to have the contract in writing.

Now in this case there can be nothing more certain and definite than the testimony in the case, that on the twenty-eighth day of June, 1927, in the office of the Newport Electric Company the three parties met and there agreed that this purchase was a purchase for the three; that the profits and losses were to be equally divided and that the capital was to be equally contributed. What else there is necessary for an agreement of this kind, I fail to see. There might be some things which perhaps would be advisable to obviate future difficulties in the relationship between the parties but those agreements or covenants would not be necessary. There was as definite, fixed and certain a contract of joint venture as it is possible to imagine. Then the testimony shows that after that the parties met again and discussed this transaction on the same day. The learned Vice Chancellor says in his opinion,

"The first witness, which is the complainant himself, gives the details of a meeting in Mr. Tuttle's office, and of a subsequent meeting in Mr. Frank's office and he says that it was agreed to meet the next day at two o'clock to prepare details and to make the contract legal, that is, to put it on paper; and the second witness says, 'We were to meet afterwards to see how we were to handle it

and to draw up an agreement, and he—I suppose Salzburg—‘was to talk it over, in the meantime, with his partner.’ The third witness says he went away because he was in a hurry, he wanted first to consult Mr. Gross before arranging the details.”

An examination of the testimony on page 41, 42 and 50 will show that at the second conference everything was completely arranged that Mr. Salzburg was anxious to discuss with Mr. Gross what machinery he would want to buy back from the joint venture and while he said, on page 42, “You see, he wanted to get away from there and get over to his office and talk the matter over with his partner about what machines he wanted and this and that and other details,” and all through the testimony not only of the complainant’s witnesses but of the defendant’s, there is absolute corroboration that on the twenty-eighth in the office of the Electric Company there was an agreement made; that later in the day the parties met in the office of Mr. Frank, not an unusual occurrence when we consider that these people had just gone into a joint venture involving considerable money and unquestionably somebody suggested that it would be a good idea to reduce this agreement to writing. Then Mr. Salzburg perhaps started to have a change of heart and began thinking of doing what he eventually did do, “back out” and he said that there were some machines that he wanted to keep for his firm but before making up his mind he would like to talk to his partner. Further corroborative evidence is the letter Exhibit C-1. It is so closely connected in point of time with the transaction. It was not in any way contradicted nor was there any controversy as to the truth of its contents at the time it was sent. The matter

was left open. Mr. Tuttle’s testimony shows that on the 16th of June, (page 72) they received a letter from the complainant’s attorneys claiming an interest. The contract between the Electric Company and the defendant was entered into on the 14th or 15th of July. Mr. Salzburg (on page 95) testifies that he was “stringing them along” for a couple of weeks until he could get the contract signed. The Court can readily see what happened. Upon the receipt of Exhibit C-1, Mr. Salzburg started to “string along” the complainant, to use his expression, and on the 14th when he got his contract signed, he stopped “stringing them along” and told them that he repudiated his agreement and immediately the complainants tried to obtain what redress they could through the selling company but they were then too late. All of the testimony of Mr. Salzburg bears, it seems to us, on its face, all the earmarks of improbability and untruth. He says that he didn’t want to deal with Mr. Citron; he repeats it a number of times, and yet he offered, he says, to sell this material to Citron, but throughout all his testimony it will be seen that in every particular detail it corroborates the testimony of the complainant’s witnesses, except that they say it was a joint venture that they were talking over and agreeing to and Mr. Salzburg says they didn’t agree to a joint venture but they spoke about buying some of this material from him. He who had been so terribly cheated and wronged by Mr. Citron that he didn’t want to do any business with him, called him up on the long distance telephone to tell him that he wouldn’t do business with him, nevertheless went into conference to try and do business with him.

Now, the Vice Chancellor in his opinion seems to think that the fact that the parties didn’t know how much Salzburg was paying for the property

made a great deal of difference. The testimony shows quite clearly (pages 84 and 85) Mr. Salzburg says that after this conference between the three parties in the Electric Company's office, they all went out and when they came back to Mr. Tuttle's office, he asked them if they had arrived at a decision, and he, Salzburg, said "Yes" and then further said, "Our bid will stand \$38,500 for the personal property alone and leave the others—leave the real estate out." That was on Mr. Salzburg's direct-examination. And so the parties did know on Mr. Salzburg's own testimony what his bid contemplated, and on page 30, the Vice Chancellor himself answered the very question that he raises in his opinion, it seems to us, in these words, (line 20) "He has told you over and over again the reason he would go in as a third partner was because their prices were almost the same, that is the reason he made this alleged agreement if there was one" and then further on Line 37, the Court said "He said he would because Mr. Tuttle said the three bids were almost identical. Now, that is enough for that."

Another thing discussed by the Vice Chancellor in his opinion is the fact that Mr. Frank was willing to take \$1000 for his share of the contract. Now, here was a contract which was causing quite some trouble. Mr. Frank saw that in order to get his share he would probably have to litigate. The eventual outcome of litigation is always uncertain and the cost of it is sometimes prohibitive; at other times merely very heavy. His interest was one-third. In order to get his one-third, had Mr. Salzburg not repudiated the agreement he would have had to put up one-third of the purchase price, put up one-third of the cost of dismantling and also run the risk of every business venture that there

might be a loss rather than a profit because the change of market conditions or any other of the hazards to which commerce is subject, while by this arrangement he could settle a law suit and without any investment of his capital get a profit of \$1000. No accounting has been taken and the court is unable to say nor have we a right to argue as to how much profit there might have been realized on this transaction, so that it seems to me it is very unreasonable to say that because a man was willing to compromise and take less than what the court thought might be a fair profit on a contract of this kind, is any indication that his testimony was not true.

But the Court did not rest its decision on any such grounds but simply rested its decision on the ground that the complainant's testimony showed that the contract was not complete because it was not yet in writing apparently.

We submit that the testimony of the complainant shows clearly that the writing was not a condition precedent to the effectiveness of the contract. The contract was effective when made in the office of the Electric Company. The talk about a writing was an afterthought that did not in any way affect the contract; that the contract made orally and was sufficiently definite and that the defendant undoubtedly repudiated it and should have been made to account for the property which it converted.

We respectfully submit that the decree of the Court of Chancery should be reversed and that a decree should be entered according to the prayer of complainant's bill.

Respectfully submitted,

BERNARD FREEDMAN,

Solicitor for and of counsel

with Complainant. *Appellant.*

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**New Jersey Court of Errors and Appeals**

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THE CITRON-BYER CO.,  
*Complaint-Appellant,*

*v.*

H. E. SALZBURG CO., INC.,  
*Defendant-Appellee.*

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} On Appeal.

**BRIEF OF APPELLEE.**

**Statement of Facts.**

The Newport Electric Corporation located in Rhode Island, were the owners of a trolley line and equipment, which it intended to dismantle. Requests were made of persons who might be interested in the purchase of the equipment and real estate to submit bids therefor. The three highest bids were submitted by the Citron-Byer Co., Mark K. Frank and the H. E. Salzburg Co. The Salzburg bid was in a lump sum for real estate and personal property (Case, p. 65, lines 30-35). The bid of Frank was only for the personal property, no real estate being included (Case, p. 66, lines 20-32). The bid of the Citron-Byer Co. was for both real estate and personal property divided in such manner as to indicate the amount which would be paid for each.

On June 28th, 1927, these bidders were called by the counsel for the Electric Company to its office and the explanation there made that the company decided to withdraw the sale of the real estate and

confine the bidding to the personal property. Further explanation was made that Citron, representing his company had requested an opportunity to change his bid if the bidding was close, and that the Salzburg Company would be obliged to change its bid, because the items of real estate and personal property had not been so separated as to afford the opportunity of determining the amount it agreed to offer for the personalty (Case, p. 68, lines 17-30).

Tuttle testified that neither Frank nor the Citron-Byer Company desired to change their previous proposal (Case, p. 68, lines 31-32).

Salzburg representing his company asked for permission, however, to consult with his associate Gross and they were directed to an adjoining room, where they could confer (Case, p. 68, lines 35-40; p. 69, lines 1-10).

It was further testified by Tuttle and admitted by all parties, that a few moments thereafter, Citron accompanied by a Mr. Goldsmith left the room in which they had all previously gathered, and Frank followed shortly thereafter (Case, p. 69, lines 20-35).

It is agreed that all finally met in the room to which Salzburg and Gross had been previously directed, Citron, Goldsmith and Frank claiming that an agreement was there made that the bids should not be changed and no higher amount offered, but to the contrary that whoever should be successful in securing the equipment should purchase it for the joint benefit of the Citron-Byer Co., Frank and the Salzburg Co. This contention is denied by Gross and Salzburg, both of whom say that the suggestion was made by both Frank and Citron, but that they refused to enter into the proposed scheme.

After the conference in the adjoining room, all parties returned to the room where Tuttle was

waiting (Case, p. 69, lines 25-35). Tuttle says that on their return, he again asked if there was a desire to change the bid and Salzburg's response was that his company was willing to bid for the personal property, the amount which had been previously offered for both personal and real property (Case, p. 69, lines 39-40; p. 70, lines 1-10); that Frank and Citron refused the privilege of raising their bid and the request was then made that the successful bidder be announced and the announcement thereupon was made that the highest amount offered came from the Salzburg Company and the award would, therefore, be made to them (Case, p. 70, lines 35-40).

All witnesses agree that with the exception of Gross all thereafter went to the office of Frank, where there was a further conference which was to be continued over to the following day.

Complainant contended that on the basis of what it claimed transpired during the conference at the Electric Company's office together with what occurred at the subsequent conference at Frank's office constituted an agreement for the purchase by the H. E. Salzburg Co. for the benefit not only of itself, but jointly for itself, Frank and the Citron-Byer Co., and by reason thereof any profit that might be gained as the result of the contract made between the Electric Company and the Salzburg Company should enure to the benefit of the three competitors.

The decision of the Vice-Chancellor was to the effect that the complainant had failed in its proof that no joint venture had been established and denied the prayer of the bill. From this decision an appeal has been taken into this Court.

**ARGUMENT.****POINT I.**

**Assuming the truth of the testimony of complainant's witnesses, no complete agreement of joint venture was established.**

Disregarding the denial on the part of the defendant that any agreement had been made and considering only the testimony of all the witnesses who testified for the complainant it is insisted that no complete binding agreement had been made.

Referring to the conference in the office of Frank, Citron testified:

"Q. Now, where did you go from there? A. From that office we went to the office of M. K. Frank.

"Q. Yes, and who was present in the office of M. K. Frank? A. In M. K. Frank's office Mr. Salzburg, Mr. Frank, Mr. Goldsmith and myself. Mr. Gross had left Mr. Salzburg.

"Q. And did you have any conversation then with reference to this property that you were buying? A. Yes.

"Q. What was that conversation? A. Well, we agreed that the award—that it was announced before we left that Mr. Salzburg had put in the highest bid and the line would be awarded to him (Case, p. 13, lines 20-40).

"Q. Yes. A. And we agreed in Mr. Frank's office that Mr. Salzburg had bought the line for the three of us, that we were to decide as to how we were to handle the proposition.

"Q. Well, was any arrangement then made about payment of the purchase price to the property? A. THERE WAS NOT ANY DEFINITE ARRANGEMENT MADE AT THAT TIME (Case, p. 14, lines 1-20). \* \* \*

"Q. Did Mr. Salzburg say anything to you, did you say anything to Mr. Salzburg or did

Mr. Frank say anything in your and Mr. Salzburg's presence about what arrangements were to be made as to the payment of this property that was to be purchased? A. As far as I recollect, we were to meet the following day.

"Q. Yes. A. And decide definitely. We had made a definite appointment for the following day at two o'clock. Mr. Salzburg said Mr. Gross had left him, had some business to attend to, and he wants to talk it over with his partner and he is making a definite appointment for two o'clock the following day to meet in Mr. Frank's office again and definitely decide that we should pay for the property and, in fact, to draw up the partnership arrangement in a legal way, that is, on paper; that was the understanding" (Case, p. 14, lines 30-40; p. 15, lines 1-20).

Citron, as well as other witnesses agreed that the conference the following day was not held, due to the fact that Salzburg refused to attend.

Citron further testified that there was some further negotiation relative to particular portions of the equipment which each of the parties desired for their own use and that an arrangement should be made whereby those items should be purchased from the partnership at a price to be agreed upon (Case, p. 16, lines 1-40).

During his cross examination, when Citron was asked concerning the dismantling of the equipment to be purchased and who should superintend it, he said:

"Q. Well, did you arrange at that meeting who was to superintend it? A. We didn't get a chance because Salzburg said he couldn't discuss the matter, he had to talk it over with Mr. Gross, and we made an appointment for the following day, which he did not keep" (Case, p. 34, lines 15-25).

Frank referring to the same conference held in his office, testified:

"Q. And did he (referring to Salzburg) say anything at that time about taking—about taking it, whether he would take it or not? A. No, he did not; he didn't say anything about taking it, at that time, taking the money, because it was just given to him; he didn't have no chance or any time to say anything at that time. You see, he wanted to get away from there and get over to his office and think the matter over, talk it over with his partner about what machines he wanted and this and that and other details.

"Q. Well, was that the purpose of meeting the next day? A. That was the purpose of meeting together with the papers that were all to be drawn up" (Case, p. 42, lines 13-28).

Goldsmith, referring to the same conference, said:

"Q. What was the conversation? A. Why, Mr. Salzburg stated that he was interested in a special sort of equipment of that property, I think it was generators or transformers, and he wanted to be sure that he got that material, because he had somebody interested in it and he wanted to get it at the price—at the purchase price of the scrap value price (Case, p. 56, lines 35-40; p. 57, line 3). \* \* \*

"Q. I see. Was there anything else said there at that time that you can recollect? A. Yes. Mr. Salzburg stated that he was in a hurry and he wanted to consult with Mr. Gross, and, rather than make the necessary settlement right there, based on the arrangement, he would want to consult Mr. Gross, and he said he would make an appointment for the same time, two o'clock the next day, in Mr. Frank's office" (Case, p. 57, lines 19-28).

Upon this testimony the Vice-Chancellor held that no agreement had been entered into because

the details were incomplete and the understanding was that a meeting was to be held the following day at which further conference details were to be arranged and the result of the negotiations incorporated in a written agreement (Case, pp. 97-98).

The Court's determination is supported by the authorities in this State in which the rule has been stated as follows:

"Even in a case between private individuals where no writing is required if it appears that the parties although they have agreed on all the terms of their contract mean to have them reduced to writing and signed before the bargain shall be considered complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side. *Water Commissioners of Jersey City v. Brown*, 32 N. J. L. 504."

This rule in somewhat different language, but expressing the same thought, is approved in the later cases.

*Runyon v. Wilkinson Gaddis Company*,  
57 N. J. L. 420;  
*Cable v. English*, 115 A. 374;  
*Kuskin v. Guttman*, 130 A. 829; affirmed  
90 N. J. E. 887, 132 A. 922;  
*Donnelly v. Curry Hardware Co.*, 66 N. J.  
L. 388.

In the case last cited, plaintiff was about to bid for a contract to erect a pavilion. He submitted to the defendant the plans and specifications, asking them to fix a price at which they would agree to perform the metal work and received from the defendant a communication to the effect that the work would be performed for \$2,650. Using this price as a basis, the plaintiff submitted his bid

for the work and received the contract. The following day the defendant's manager was informed of the fact that the plaintiff had been the successful bidder and the suggestion was made that a written contract would be prepared to be executed by the manager the following day, to which the plaintiff received the response, "All right." The following day the manager was again called and informed by the plaintiff that sufficient opportunity was not afforded to prepare the contract, but that same would be prepared for execution by the following morning, to which again came the response, "All right." The following morning the manager called the plaintiff and informed him that the defendant would be unable to perform the work and would, therefore, refuse to enter into the proposed contract. The plaintiff was required to procure the performance of the work by a third party at a higher price and later sued to recover the difference.

Upon this testimony motion was made by the defendant for a direction of verdict, which was refused, but on appeal Mr. Justice DIXON citing with approval the language of *Water Commissioners v. Brown, supra*, said:

"The conversations over the telephone between the plaintiff and the defendant's manager, as well as the testimony of the plaintiff himself, make it clear that a written contract was expected by both parties. Indeed, it cannot reasonably be determined that the parties had agreed upon all the matters which they would expect to have included in their bargain, for the time allowed for the beginning and completion of the work and the mode of payment are generally provided for expressly in such arrangements, and on these points their negotiations had been silent, awaiting probably the outcome of the plaintiff's proposal for the erection of the building.

"We, therefore, think that no contract was made for the defendant, and that the motions mentioned should have prevailed."

The appellant seems to concede the rule as here stated, but makes the contention that the facts in the present case bring it within the rules laid down in *Wharton v. Stoutenburg*, 35 N. J. E. 273, and the later case of *Trenton, etc., Traction Corporation v. Trenton, etc.*, 90 N. J. L. 378.

In the *Wharton* case, it was held that it was a question of fact for the Court to determine whether the facts in the particular case indicated that all negotiations had been completed and the contract, therefore, definite and complete in all its terms, so that the writing would be required merely for the purpose of greater certainty or to satisfy some requirement of law. An examination of that decision will indicate that all of the negotiations had been completed, all of the terms and conditions agreed upon a part performance by one or both parties and that the writing was, therefore, a mere formality.

Likewise in the *Trenton, etc., Traction Corporation* case, the same situation was presented.

In the present case, however, an examination of the excerpts of testimony previously recited clearly indicates that the negotiations were far from complete.

Citron says that at the time of the conference he did not know the price which had been bid by the Salzburg Company (Case, p. 31, lines 10-40). Although it was necessary to dismantle the plant consisting as it did of rails laid in the street and heavy machinery, no arrangement was made as to who should superintend such dismantling, Citron saying that opportunity was not afforded to discuss this problem because Salzburg desired to discuss it with his associate Gross, and that was

to be the subject of further discussion and negotiation the following day when the contract was to be drafted and executed (Case, p. 34, lines 15-25). No agreement was made as to the manner of financing the proposition (Case, p. 33, lines 15-40; p. 34, lines 1-15) and Citron's answers indicate that that was another matter to be considered on the following day (Case, p. 14, lines 30-40; p. 15, lines 1-20).

According to Frank there had been considerable discussion concerning certain parts of the machinery which Salzburg desired should be turned over to him. The amount that was to be paid for those specific items had not been fixed (Case, p. 40, lines 30-40; p. 41, lines 19-30), and Frank says further that these negotiations were not completed because Salzburg wanted the opportunity to think the matter over and to discuss the details with his partner, and that the purpose of arranging a meeting for the following day was evidently to complete the negotiations and then reduce the final agreement to writing (Case, p. 42, lines 10-30).

The testimony of Goldsmith was to the same effect (Case, p. 56, lines 35-40; p. 57, lines 1-3; p. 57, lines 19-30).

These few brief references to the testimony given by complainant's witnesses clearly and unquestionably indicate that no definite, complete agreement had been arrived at and the decision in the present case is not, therefore, controlled by the decisions cited in appellant's brief, but to the contrary is controlled by the authorities previously cited by the appellee.

## POINT II.

**Conceding that an agreement was made as contended by the appellant, it was collusive and unenforceable in a court of equity.**

Disregarding the testimony of the appellee and considering that offered by the appellant, the situation presented is that the Electric Company was desirous of obtaining competitive bids and to make the award of the contract to the highest bidder. If the testimony of the appellant be considered as true, without knowledge of the officers or agents of the Electric Company, the three bidders who were supposed to reconsider their previous offers got together and then decided that instead of doing that which the Electric Company expected and had the right to expect, that they would leave their bids unchanged, the highest bidder taking the two unsuccessful bidders into a partnership or joint venture. From that moment on, whatever was said or done was the result of the collusive agreement made and under the familiar doctrine, that he who comes into equity must come in with clean hands, a court of equity is not required to give relief to one who has sustained damage arising out of the fraudulent agreement and for this reason, although it was not the basis of the Court's decision, this Court has the right to refuse redress.

## POINT III.

**The evidence clearly showed that no agreement or joint venture had been entered into and the Trial Court was, therefore, justified in refusing the relief prayed.**

Although the complainant and its witnesses contend that the agreement of joint venture had been entered into, their testimony is not convincing.

Citron admits that at the time when he says the agreement was made, he did not know the price which had been bid and had no knowledge of it even at the time of trial (Case, p. 31, lines 30-35).

It is inconceivable that any business man would agree to go into a venture and pay 1/3 of the amount which he and his partners were willing to spend without having definite knowledge of what he would eventually be required to pay. Certainly if these three concerns had made an agreement to purchase one for the benefit of the other there would be no longer any need for secrecy as to the purchase price.

Citron, however, admits that he never asked the price during the conference and claims that never thereafter did he seek knowledge concerning it. In this he is clearly contradicted by Tuttle, the attorney for the Electric Company, certainly not an interested witness, who says that it was either Citron or Frank, and he believed that it was Citron, who asked the price given by the successful bidder and that he refused to divulge it because Salzburg objected to the information being given.

Although the contention is made by the witnesses for the complainant that the agreement was that there was to be no change in the price previously offered, the fact is that the price was changed because the appellee offered for the personal property the amount which it had previously bid for both realty and personalty (Case, p. 69, lines 35-40; p. 70, lines 1-38).

Excluding the real estate, the bid of Citron and Frank was considerably lower than the amount finally offered by the appellee for the personal property. The bidders were evidently shrewd business men, whose natural desire would be to purchase the property at the lowest possible price. The natural course for them to pursue if they had

collusively agreed not to raise the price would be for each during the conference to have informed the others of the price which had been bid, so that it might then be known who was the highest bidder. If that course had been pursued, it would have been readily ascertained that the offer of the Salzburg Company of an amount in excess of \$38,000 for the personal property far exceeded that which had been offered for the same property by Citron and Frank. The Salzburg bid had been in a lump sum for realty and personalty and without a change could not have been considered, because of the company's determination to withdraw the real estate. The result would have been that the Salzburg bid would not be considered, leaving Citron and Frank as the only bidders on personalty, making it necessary for the Electric Company to award the contract to the highest bidder between them, the result being that the amount eventually bid would have been far less than that which the Salzburg Company was thereafter required to pay.

There are numerous other inconsistencies in the testimony of the witnesses for the complainant which brand their evidence as unconvincing. An examination of the testimony will so reveal, but for the purpose of brevity such discrepancies are not particularly alluded to. Without, however, considering them, it seems sufficient to say that when hard-headed business men will attempt to convince a court that they were willing to pay a much higher price for an article than the amount for which the same could have been obtained that their story is unbelievable, should not be considered and that the Vice-Chancellor was therefore justified in giving it no credence.

For all of the reasons urged, we respectfully submit that the decision should be affirmed.

Respectfully submitted,

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with Appellee.

