INDEX

	Page
Bill of Complaint	1
Affidavit of John P. McDonald	12
Agreement of June 5, 1924—St. Francis Hotel Company and Jack P. McDonald	20
Stipulation	27
Temporary Agreement of March, 1924	28
Order Vacating Restraints, etc.	31
Notice of Motion to Dismiss Bill of Complaint as Amended	34
Memorandum of Vice-Chancellor	37
Notice of Appeal	39
Amended Notice of Appeal	41
Petition of Appeal	43
Answer to Petition of Appeal	45

BILL OF COMPLAINT.

Filed March 24, 1930.

In Chancery of New Jersey

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

The complainant, John P. McDonald, residing in the City of Newark, in the County of Essex and State of New Jersey, respectfully shows that:

1. On or about March 1, 1924, defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, represented to the complainant that they were the sole owners and holders of all of the capital stock of Plaza Hotels Company, a corporation organized under and existing by virtue of the Laws of the State of New Jersey; that said corporation was the owner in fee simple of certain premises situated in the City of Newark, Essex County, New Jersey, on which was erected a certain hotel commonly known as the Hotel St. Francis; that said premises and hotel building had been leased by said corporation to the Marshall Land Company, a corporation; that said Plaza Hotels Company had acquired for the sum of $150,000, from said Marshall Land Company the leasehold rights of said Marshall Land Company together with all the personal property contained in said hotel building and the good will and trade-name used in connection with said hotel business as the Hotel St. Francis.

2. Complainant is informed and believes, and charges the fact to be that said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant were

at that time and still are the owners and holders of all the capital stock of said Plaza Hotels Company; that on or before March 1, 1924, said Plaza Hotels Company had acquired the leasehold rights of said Marshall Land Company together with all the personal property contained in said hotel building and the good will and trade-name used in connection with said hotel business as the Hotel St. Francis for the sum of $150,000, and that as part or all of the purchase price of such acquisition said Plaza Hotels Company executed a mortgage, covering the personal property contained in said building, to secure the sum of $152,500, which said mortgage was duly paid and cancelled of record on May 15, 1929.

3. Said representations were made by the said defendants in order to induce complainant to enter into the agreements hereinafter set forth, and complainant entered into said agreements in reliance upon said representations.

4. On or about said March 1, 1924, said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant as parties of the first part, and complainant as party of the second part, entered into an agreement in writing in which the parties of the first part were designated as the stockholders, and the party of the second part as the employee; and wherein and whereby it was mutually agreed, among other things:

> "2. On or about June 1st, Nineteen Hundred and Twenty-four if the employee shall have operated the said hotel without loss after paying the expenses of operation which will include the rent, insurance and other charges payable under the lease originally made with the Marshall Land Company, and

after paying or setting aside the sum of Sixteen Hundred and Sixty-six Dollars and Sixty-six Cents ($1666.66) per month for the payment due and owing from the Plaza Hotels Company to the Marshall Land Company on account of the purchase price of the said leasehold and assets, then the parties agree as follows:

(a) To incorporate a Company to be known as the St. Francis Hotel Company, under the laws of the State of New Jersey, with such terms in the certificate of incorporation and by-laws and such details of organization as will be agreeable to the majority of the parties hereto. The said company shall have a paid in capital of Ten Thousand Dollars ($10,000.00) of which the employee will have a one-fourth interest. The other parties hereto will loan and advance the funds for him to pay his subscription and hold his obligation and the stock as collateral security for the repayment of the amount. This sum will be payable out of the profits only.

(b) To cause a lease to be made between the Plaza Hotels Company and said St. Francis Hotel Company for the balance of the term of the original Marshall Land Company lease and with all the same terms, covenants and conditions regarding the amount of rental, taxes, insurance and other charges to be paid by the lessee but with such unsubstantial modifications as will be required by the stockholders so that irrelevant matters in the said lease will be eliminated.''

The provisions of the lease with the Marshall Land Company relating to rent as far as the

complainant can recall it, the lease now being in the possession of the defendants and the complainant not having a copy thereof, are, that it is for a period of twenty-one years with the annual rental of $40,000 for the first five years; $42,500 for the following five years; $45,000 for the following five years, and $50,000 for the following six years; the lease commencing in 1919 and to terminate in 1940; and in addition, taxes and insurance.

5. In reliance on the aforesaid representations and upon the further representations made by the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, to the effect that they had caused to be formed a corporation of the State of New Jersey, known as St. Francis Hotel Company, that said corporation had paid in capital of $10,000, that one-fourth of the stock of said corporation had been issued to complainant and was being held by said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant as collateral security for the repayment of the sum of $2,500, advanced by them for the payment of said one-fourth of the stock, that the Plaza Hotels Company had executed and delivered to said St. Francis Hotel Company, a lease of said premises and building and the personal property contained therein for the balance of the term of the original lease to the Marshall Land Company upon substantially the same terms, covenants and conditions as contained therein, complainant entered into the purported agreement hereinafter set forth.

6. Complainant charges that all of the said representations set forth in paragraph 5 of this bill of complaint were false, and were known by

said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant to be false, and were made to induce the complainant, in reliance thereon, to enter into the purported agreement hereinafter set forth, pursuant to a willful, unlawful, corrupt and nefarious conspiracy and scheme on the part of said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant to mulct and defraud complainant of the benefits and rights accruing to him under and by virtue of the said agreement of March 1, 1924, and further to obtain the services of complainant at a fraction of their value for their own benefit, advantage and use.

7. On or about June 5, 1924, complainant executed and delivered to said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, at their express solicitation and request, a certain paper purporting to have been executed by St. Francis Hotel Company, a corporation of New Jersey, and signed on its alleged behalf by said Joseph Kruvant as President, by said Harry Kruvant as Vice-President, and allegedly attested by said Joseph H. Mayzel as Secretary. Prior to the signing thereof, by complainant, said alleged officers of said alleged corporation represented to complainant that the said alleged corporation had been duly incorporated pursuant to the terms of the agreement of March 1, 1924, and that they were the officers of said alleged corporation which had been duly and lawfully organized and was duly and lawfully in existence and functioning as such corporation. Complainant charges that said representations in this paragraph set forth were false and known to the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant to be untrue, and were made pursuant to the conspiracy described in paragraph

6 of this bill of complaint. A copy of said agreement, dated June 5, 1924, is attached hereto.

8. Believing that said misrepresentations were true and that said purported agreement of June 5, 1924, was pursuant to and in partial performance of the terms and covenants of the agreement dated March 1, 1924, complainant executed and delivered the same to the said Harry Kruvant and immediately entered into the performance of his duties as general manager of said hotel business as set forth therein, and faithfully, diligently and skilfully performed the same until on or about November 11, 1929, when he was prevented from continuing such performance by being unlawfully and unjustifiedly discharged and ousted from his duties by the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, who were and are the sole stockholders, directors and officers of a corporation or corporations then and now engaged in running said hotel business. One of said corporations, known as St. Francis Hotel Company, was incorporated on or about February 29, 1928, under the laws of the State of New Jersey, and all of the capital stock thereof is either held by said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, or by persons acting for them, all pursuant to the said conspiracy described in paragraph 6 of this bill of complaint.

9. During the period complainant was managing the said hotel business, the same was profitable, earning large net profits, after deducting all legal and reasonable expenses chargeable against the income (including rent at the rate reserved in the original lease to the said Marshall Land Company, a monthly payment of

$1,666.66, on account of payments accruing to the said Marshall Land Company in order to pay to said Marshall Land Company the purchase price of said leasehold, equipment and personal property, together with lawful interest on the unpaid balance of such purchase price, all taxes, insurance and other carrying charges. That during all of this time, the defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, withdrew from the operation of the hotel large sums of money, the exact amounts of which being unknown to the complainant at this time because of the refusal of said persons to permit complainant to inspect the records of the hotel business.

10. Complainant charges that said Joseph H. Mayzel, Harry Kruvant and Joseph Kruvant have unlawfully and fraudulently paid to themselves out of the earnings of said hotel business large sums.

11. Complainant charges that despite and contrary to the terms of said agreement of March 1, 1924, said Joseph H. Mayzel, Harry Kruvant and Joseph Kruvant directed or caused to be diverted to themselves, to the Plaza Hotels Company and St. Francis Hotel Company, or one or more of them, all the earnings of the said hotel business, and have informed complainant that there are no funds with which to pay the debts of the said hotel business, nor to set up the reserve fund referred to in paragraph 4 of the agreement, of June 5, 1924.

12. Complainant charges that said Plaza Hotels Company, acting by said Joseph Kruvant as president and said Joseph H. Mayzel as secretary, unlawfully and without authority mort-

gaged all the goods and chattels of St. Francis Hotel Company used in said hotel business, the good will and trade-name used in connection with said hotel business as "Hotel St. Francis," among other things, to the Workingmen's Building and Loan Association of the City of Newark, a corporation of New Jersey, to secure the sum of $350,000 loaned by said building and loan association to said Plaza Hotels Company; that no part of said sum has been used in or advanced to said hotel business.

13. Complainant charges that said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, Plaza Hotels Company and St. Francis Hotel Company have failed and refused, and still fail and refuse to render an accurate accounting to complainant of the earnings of said hotel business.

14. Complainant charges that the acts hereinbefore referred to were all done pursuant to and in furtherance of said conspiracy described in paragraph 6 of this bill of complaint.

15. Complainant charges that the term of the said lease to the Marshall Land Company expires on June 5, 1940.

16. Complainant charges that the assets of said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant and Plaza Hotels Company are all heavily encumbered; that said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant have stated and still claim that St. Francis Hotel Company has no assets with which to pay its accrued and accruing debts; that complainant is informed there are numerous suits pending against said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant; that unless the assets of

said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, Plaza Hotels Company and St. Francis Hotel Company are immediately preserved by the intervention of this court, their assets will be dissipated to the great harm, detriment and disadvantage of the complainant; that said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant and Plaza Hotels Company were and are in justice and equity trustees of all the earnings of the said hotel business for the benefit of the complainant, among others.

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

1. That Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant, Plaza Hotels Company, a corporation of New Jersey, and St. Francis Hotel Company, a corporation of New Jersey, who are the defendants in this suit may answer (without oath) this bill of complaint and the statements therein made.

2. That the said purported contract dated June 5, 1924, between St. Francis Hotel Company, an alleged corporation of New Jersey, and complainant be decreed to be null and void and of no effect, and that the same be delivered up by the defendants for cancellation.

3. That this Court may order the said defendants Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant, Plaza Hotels Company and St. Francis Hotel Company to make discovery of and account for all income from the said Hotel business since June 5, 1924, and also for all the personal property used in connection therewith.

4. That this Court may order said defendants Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant to make discovery of and account for all moneys taken by them from the income of said hotel business.

5. That this Court may order said defendants Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant and Plaza Hotels Company to make discovery of and account for all moneys and/or property taken by them, or any one or more of them, from the income or assets of said hotel business.

6. That this Court may decree that said Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant and Plaza Hotels Company received and are holding moneys taken by them from the income of the business of the said hotel, as trustees for the complainant among others, and that said defendants as such trustees may be ordered by this Court to account to the complainant therefor.

7. That this Court may by its order remove said defendants as such trustees and appoint a new trustee or a receiver to administer such trust.

8. That this Court may order the said defendants, Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant, Plaza Hotels Company and St. Francis Hotel Company to specifically perform the said contract dated May 1, 1924, and the contract of June 5, 1924, if the Court should find that the latter contract is in force and effect; and that the defendants Plaza Hotels Company and St. Francis Hotel Company and the defendants Joseph H. Mayzel, Joseph Kru-

vant and Harry Kruvant as the officers of said corporations, execute a lease from the said Plaza Hotels Company to the St. Francis Hotel Company for the premises on which said hotel business is conducted upon the same terms and conditions as in said lease to said Marshall Land Company, and that said defendant, Plaza Hotels Company, and the said individual defendant, individually and as its officers, execute to the defendant St. Francis Hotel Company a bill of sale of all the personal property used in connection with the said hotel business, free and clear of the said chattel mortgages and any other liens and encumbrances whatsoever, and that the defendants Plaza Hotels Company and Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant cause the said chattel mortgages to be cancelled of record, and that all the defendants account to the complainant for one-fourth of the profits and earnings of said hotel business, and that the defendants, St. Francis Hotel Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant cause one-fourth of the capital stock of the defendant St. Francis Hotel Company to be issued to the complainant.

9. That the rights of the complainant under and by virtue of said contract of March 1, 1924, and the contract of June 5, 1924 (if the Court should find that the same is in force and effect), and the legal relations of the complainant with all the defendants may be declared and determined by this Court.

10. That pending this suit, this Court may appoint a receiver or receivers *pendente lite* of all the assets, real and personal, of the defend-

ants Plaza Hotels Company, and of the St. Francis Hotel Company.

11. That this complainant shall have such other and further relief in the premises as may be agreeable to equity and conscience.

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

KALISCH & KALISCH,
Solicitors for and of Counsel
with Complainant.

IN CHANCERY OF NEW JERSEY.

Between JOHN P. McDONALD, *Complainant,* *and* JOSEPH H. MAYZEL, *et als.*, *Defendants.*	*On Bill, &c.* *Affidavit.*

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

JOHN P. McDONALD, of full age, being duly sworn according to law, upon his oath deposes and says:

I am the complainant in the above-entitled matter. On or about March 1, 1924, defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, represented to me that they were the sole owners and holders of all of the capital

stock of Plaza Hotels Company, a corporation organized under and existing by virtue of the laws of the State of New Jersey; that said corporation was the owner in fee simple of certain premises situated in the City of Newark, Essex County, New Jersey, on which was erected a certain hotel commonly known as the Hotel St. Francis; that said premises and hotel building had been leased by said corporation to the Marshall Land Company, a corporation; that said Plaza Hotels Company had acquired for the sum of $150,000 from said Marshall Land Company, the leasehold rights of said Marshall Land Company together with all the personal property contained in said hotel building and the good will and trade-name used in connection with said hotel business as the Hotel St. Francis, I am informed and believe that the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant were at that time and still are the owners and holders of all the capital stock of said Plaza Hotels Company; that on or before March 1, 1924, said Plaza Hotels Company had acquired the leasehold rights of said Marshall Land Company together with all the personal property contained in said hotel building and the good will and trade-name used in connection with said hotel business as the Hotel St. Francis for the sum of $150,000, and that as part or all of the purchase price of such acquisition said Plaza Hotels Company executed a mortgage, covering the personal property contained in said building, to secure the sum of $152,500, which said mortgage was duly paid and cancelled of record on May 15, 1929; said representations were made by the said defendants in order to induce me, the complainant, to

enter into the agreements hereinafter set forth, and I entered into said agreements in reliance upon said representations.

On or about said March 1, 1924, said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant as parties of the first part, and I, as party of the second part, entered into an agreement in writing in which the parties of the first part were designated as the stockholders, and the party of the second part as the employee; and wherein and whereby it was mutually agreed among other things:

"2. On or about June 1st, Nineteen hundred and Twenty-four if the employee shall have operated the said hotel without loss after paying the expenses of operation which will include the rent, insurance and other charges payable under the lease originally made with the Marshall Land Company, and after paying or setting aside the sum of Sixteen Hundred and Sixty-six dollars and sixty-six cents ($1666.66) per month for the payment due and owing from the Plaza Hotels Company to the Marshall Land Company on account of the purchase price of the said leasehold and assets, then the parties agree as follows:

(a) To incorporate a company to be known as the St. Francis Hotel Company, under the laws of the State of New Jersey, with such terms in the certificate of incorporation and by-laws and such details of organization as will be agreeable to the majority of the parties hereto. The said company shall have a paid in capital of Ten Thousand Dollars ($10,000.00) of which the employee will have a one-fourth interest.

The other parties hereto will loan and advance the funds for him to pay his subscription and hold his obligation and the stock as collateral security for the repayment of the amount. This sum will be payable out of the profits only.

(b) To cause a lease to be made between the Plaza Hotels Company and said St. Francis Hotel Company for the balance of the term of the original Marshall Land Company lease and with all the same terms, covenants and conditions regarding the amount of rental, taxes, insurance and other charges to be paid by the lessee but with such unsubstantial modifications as will be required by the stockholders so that irrelevant matters in the said lease will be eliminated.''

The provisions of the lease with the Marshall Land Company relating to rent as far as I can recall it, the lease now being in the possession of the defendants and I not having a copy thereof, are, that it is for a period of twenty-one years with the annual rental of $40,000 for the first five years; $42,500 for the following five years; $45,000 for the following five years, and $50,000 for the following six years; the lease commencing in 1919 and to terminate in 1940; and in addition, taxes and insurance.

In reliance on the aforesaid representations and upon the further representations made by the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, to the effect that they had caused to be formed a corporation of the State of New Jersey, known as St. Francis Hotel Company, that said corporation had paid in capital of $10,000, that one-fourth of the stock

of said corporation had been issued to me and was being held by said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant as collateral security for the repayment of the sum of $2,500, advanced by them for the payment of said one-fourth of the stock, that the Plaza Hotels Company had executed and delivered to said St. Francis Hotel Company, a lease of said premises and building and the personal property contained therein for the balance of the term of the original lease to the Marshall Land Company upon substantially the same terms, covenants and conditions as contained therein, I entered into the purported agreement hereinafter set forth.

All of the said representations set forth in paragraph 5 of the bill of complaint were false and were known by said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant to be false, and were made to induce me, in reliance thereon, to enter into the purported agreement hereinafter set forth, pursuant to a willful, unlawful, corrupt and nefarious conspiracy and scheme on the part of said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant to mulct and defraud me of the benefits and rights accruing to him under and by virtue of the said agreement of March 1, 1924, and further to obtain the services of me at a fraction of their value for their own benefit, advantage and use.

On or about June 5, 1924, I executed and delivered to said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, at their express solicitation and request, a certain paper purporting to have been executed by St. Francis Hotel Company, a corporation of New Jersey, and signed on its alleged behalf by said Joseph

Kruvant as President, by said Harry Kruvant as Vice President, and allegedly attested by said Joseph H. Mayzel as Secretary. Prior to the signing thereof, by me, said alleged officers of said alleged corporation represented to me that the said alleged corporation had been duly incorporated pursuant to the terms of the agreement of March 1, 1924, and that they were the officers of said alleged corporation which had been duly and lawfully organized and was duly and lawfully in existence and functioning as such corporation. These representations were false and known to the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant to be untrue, and were made pursuant to the conspiracy described in paragraph 6 of the bill of complaint. Believing that said misrepresentations were true and that said purported agreement of June 5, 1924, was pursuant to and in partial performance of the terms and covenants of the agreement dated March 1, 1924, I executed and delivered the same to the said Harry Kruvant and immediately entered into the performance of his duties as general manager of said hotel business as set forth therein, and faithfully, diligently and skilfully performed the same until on or about November 11, 1929, when I was prevented from continuing such performance by being unlawfully and unjustifiedly discharged and ousted from my duties by the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, who were and are the sole stockholders, directors and officers of a corporation or corporations then and now engaged in running said hotel business. One of said corporation, known as St. Francis Hotel Company, was incorporated on or about Febru-

ary 29, 1928, under the laws of the State of New Jersey, and all of the capital stock thereof is either held by said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, or by persons acting for them, all pursuant to the said conspiracy described in paragraph 6 of the bill of complaint.

During the period I was managing the said hotel business, the same was profitable, earning large net profits after deducting all legal and reasonable expenses chargeable against the income (including rent at the rate reserved in the original lease to the said Marshall Land Company, a monthly payment of $1,666.66, on account of payments accruing to the said Marshall Land Company in order to pay to said Marshall Land Company the purchase price of said leasehold, equipment and personal property, together with lawful interest on the unpaid balance of such purchase price, all taxes, insurance and other carrying charges. That during all of this time, the defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, withdrew from the operation of the hotel large sums of money, the exact amounts of which being unknown to me, the complainant, at this time, because of the refusal of said persons to permit me to inspect the records of the hotel business; that the said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant have unlawfully and fraudulently paid to themselves, out of the earnings of said hotel business, large sums; that despite and contrary to the terms of said agreement of March 1, 1924, said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant directed or cause to be diverted to themselves, to the Plaza Hotels Company and

St. Francis Hotel Company, or one or more of them, all the earnings of the said hotel business and have informed me that there are no funds with which to pay the debts of the said hotel business, nor to set up the reserve fund referred to in paragraph 4 of the agreement, of June 5, 1924; that said Plaza Hotels Company, acting by said Joseph Kruvant as president and said Joseph H. Mayzel as secretary, unlawfully and without authority mortgaged all the goods and chattels of St. Francis Hotel Company used in said hotel business, the good will and trade-name used in connection with said hotel business as "Hotel St. Francis," among other things, to the Workingmen's Building and Loan Association of the City of Newark, a corporation of New Jersey, to secure the sum of $35,000 loaned by said building and loan association to said Plaza Hotels Company; that no part of said sum has been used in or advanced to said hotel business; that said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, Plaza Hotels Company and St. Francis Hotel Company have failed and refused, and still fail and refuse to render an accurate accounting to me of the earnings of said hotel business; that all these acts were done pursuant to and in furtherance of the said conspiracy described in paragraph 7 of the bill of complaint; that the term of the said lease to the Marshall Land Company expires on June 5, 1940.

The assets of said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant and Plaza Hotels Company are all heavily encumbered; that said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant have stated and still claim that St.

Francis Hotel Company has no assets with which to pay its accrued and accruing debts; that there are numerous suits pending against said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant; that unless the assets of said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, Plaza Hotels Company and St. Francis Hotel Company are immediately preserved by the intervention of this Court, their assets will be dissipated to my great harm, detriment and disadvantage; that said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant and Plaza Hotels Company were and are in justice and equity trustees of all the earnings of the said hotel business for the benefit of myself, among others.

Sworn and subscribed to before me this 8th day of March, 1930.

THIS AGREEMENT made this fifth day of June, Nineteen Hundred and Twenty-four, by and between,

ST. FRANCIS HOTEL COMPANY, a corporation of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, party of the first part (hereinafter known as the Employer), and

JACK P. MCDONALD, of the City of Newark, County of Essex and State of New Jersey, party of the second part, (hereinafter known as the Employee).

For and in consideration of the sum of One Dollar, lawful money of the United States, each

to the other in hand paid, the parties hereto agree as follows:—

1. The Employer hereby engages the Employee to perform the services hereinafter mentioned for a period beginning June 5th, 1924 and ending June 5th, 1940, to the full and complete satisfaction of the Employer, provided, however, and this instrument is made upon the express condition that the aforesaid employment may be terminated before June 5th, 1940, in the manner hereinafter mentioned. The Employee shall perform the duties of General Manager of the hotel business of the Employer in connection with the St. Francis Hotel, East Park Street, Newark, N. J., and shall perform such services as may from time to time be required by the Employer or its executive officers, and will undertake and perform all services as may be incidental or necessary to the faithful and skillful transaction of his work, and will during the term of this contract, faithfully and diligently devote his entire time and render his services entirely to the Employer to the best of his ability, subject at all times to the direction of the Employer; and during said term will not engage in any business, service or employment of any kind, or be engaged in any venture or enterprise directly or indirectly, excepting the business of the Employer. The Employee will furnish a Fidelity bond whenever required by the Employer, premiums for which bond will be assumed by the said Employer.

2. The authority herein conferred upon the Employee is expressly limited as follows:—

(a) The said Employee shall not have the power or authority to execute written leases on

behalf of the Employer or to make any tenancy for more than one month without the written consent of the Employer or its duly authorized agent, and shall not be empowered to purchase fixtures or make repairs to the said building without such written consent. The Employee shall be empowered to purchase indispensable and requisite supplies in the normal course of business but will make no extraordinary purchase without the aforesaid consent.

(b) The Employee agrees to cause accurate records to be kept of all receipts and disbursements and to furnish to the Employer a detailed statement of the operation of the said hotel business whenever required so to do, and it is agreed between the parties hereto, that upon the severance of the relationship of the parties hereto, all books, papers, and other property used or received by the Employee while in the employ of the Employer shall become and be the property of the Employer and shall be surrendered and delivered up upon demand.

3. As and for the compensation of the Employee and during such weeks as he will be employed in the service of the Employer, the said Employer agrees to pay to him the sum of One Hundred Dollars ($100.00) per week, and the personal board and lodging of the Employee. In addition to said weekly compensation, it is agreed that the Employee shall be entitled, subject to the conditions hereinafter mentioned, to receive twenty-five per cent (25%) of the net profits resulting from the operation of the said hotel business in the following manner:—

(a) There shall first be deducted out of the profits of the said business, the sum of One Hundred and Fifty Thousand Dollars ($150,000),

which the parties hereto establish as the value of the leasehold, the equipment and personal property used in connection with the hotel business, and which sum of One Hundred and Fifty Thousand ($150,000), shall be paid at the rate of Twenty Thousand ($20,000) Dollars annually for both principal and interest; said payment to be made either monthly or quarterly as the Employer may direct; it being the intention that the interest shall be computed annually on unpaid balances and the balance out of each Twenty Thousand Dollars annual payment shall be credited on the total principal of One Hundred and Fifty Thousand ($150,000) Dollars.

(b) There shall also be deducted all rentals, taxes, insurance and other carrying charges required to be paid by virtue of the lease between the Plaza Hotels Company and the Employer, bearing even date herewith, and after a reservation of at least five per cent (5%) per annum for equipment on the basis of a valuation of $150,000.00, and after the deduction of reasonable salaries for actual services performed by the executive officers of the Employer, there shall be created a reserve fund constituting the actual net profits, which fund shall be retained until June 5th, Nineteen Hundred and Forty, unless the employment is terminated earlier than that date, in which case the Employee will, upon the termination of the employment, be entitled to receive in cash one-quarter of such reserve fund in accordance with the last computation thereof made. Should the Employee remain in the service of the Employer until June 5th, 1940, the Employee will be entitled to a one-quarter ownership in the furniture and personal property attached to the hotel business or used in connec-

tion therewith, but will at no time have any interest in the realty.

4. The Employer will not be responsible to the Employee for any moneys expended by him in the prosecution of his services, for entertainment or other expenses or outlays made incidentally to the performance of the services herein contemplated to be done and performed by the Employee.

5. It is expressly understood and agreed that should occasion arise during the term of this agreement and in the operation of a relationship created by this agreement wherein the Employer shall modify any of the terms, covenants and conditions therein contained, such temporary modification shall not be construed as an amendment of this agreement unless the parties hereto reduce such amendment to written form and make the same expressly a part thereof.

6. The Employee will in the proper performance of the duties herein devolving upon him be the custodian of many valuable documents, records, instruments and papers belonging to the Employer or to its clients. The Employee agrees to deliver up all or any of the said documents and instruments, on demand, and agrees further to carefully and safely guard, keep and maintain all of the said records, instruments and documents while the same are in his custody and control. The Employee agrees to promptly account at the office of the Employee for all moneys and collections received by him belonging to the Employer. All systems and methods designed or devised by the Employee during the relationship shall belong to the Employee.

7. It is further agreed that the failure of the Employer to insist upon the strict performance by its Employee of the terms, covenants and conditions contained in this agreement on his part, in any one or more instances, shall not be construed as a waiver of the Employer's rights so far as subsequent non-performance are concerned, and this agreement shall be regarded as continuing in full force and effect and any waiver of the Employer shall be deemed by the parties to operate only as a waiver in the particular instance involved.

8. This agreement shall come to an end upon the happening of the following events:—

(a) In the event that during the first year of the term of this agreement, the business of the Employer will be operated at a loss, taking into consideration the payments to be made of Twenty Thousand Dollars ($20,000) annually or Five Thousand Dollars ($5,000) every three months, and deductions as aforesaid, and if said loss occurs at any time during the first year, the agreement shall on thirty days' written notice come to an end.

(b) After the first year, if the operation of the business of the Employer shall not permit the creation of a reserve fund, pursuant to the terms of paragraph (3b), in the sum of at least Ten Thousand Dollars ($10,000) per annum, this agreement shall be at an end. It is, however, understood that at any time that the business of the Employer shall be operated at a loss during the entire term, this agreement shall, at the option of the Employer, be at an end upon thirty days' written notice.

(c) Upon thirty days' notice being given, the Employer shall have a right to be represented

during the said period of thirty days by its own manager.

IN WITNESS WHEREOF the party of the first part hereto has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereunto affixed, and the party of the second part has hereunto set his hand and seal the day and year first above written.

Signed, Sealed and Delivered
in the presence of

ST. FRANCIS HOTEL COMPANY.

By

By Joseph Kruvant,
President.

Harry Kruvant,
Vice-Pres.

J. P. MacDonald.

Attest:

JOSEPH H. MAYZEL,
Secretary.

STIPULATION.

Filed April 3, 1930.

IN CHANCERY OF NEW JERSEY.

Between
JOHN P. McDONALD,
Complainant,
and
JOSEPH H. MAYZEL, *et als.,*
Defendants.
} *Stipulation.*

It is hereby stipulated and agreed by and between Kalisch & Kalisch, solicitors of complainant, and Kanter & Kanter, solicitors of certain defendants, that with the approval of the Court, the service now made of a copy of the temporary employment agreement running from March 1st to June 1st, 1924, shall be considered as though the bill of complaint filed in the above-entitled cause had been amended with a recital of the complete temporary employment agreement, and service of a copy of said agreement is hereby acknowledged by the solicitors for the defendants, Plaza Realty Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

KALISCH & KALISCH,
Solicitors of Complainant.

KANTER & KANTER,
Solicitors of Defendants, Plaza Realty Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

Agreement of March, 1924.

THIS AGREEMENT made this day of March, Nineteen Hundred and Twenty-four, by and between,

JOSEPH H. MAYZEL, JOSEPH KRUVANT and HARRY KRUVANT, of the City of Newark, County of Essex and State of New Jersey, parties of the first part (hereinafter known as the Stockholders), and

JACK P. MCDONALD, of the City, County and State aforesaid, party of the second part (hereinafter known as the Employee),

WHEREAS the stockholders are the owners of the capital stock of Plaza Hotels Company which is the owner of the record title to the premises commonly known as the St. Francis Hotel, East Park Street, Newark, New Jersey, and

WHEREAS the said Plaza Hotels Company has acquired the leasehold rights of the Marshall Land Company in said premises, together with all the personal property therein contained, and the parties hereto desire to form a Company under the laws of the State of New Jersey, for the operation of a hotel and the employment of the said employee as its general manager, and

WHEREAS the parties desire to establish a probationary period to ascertain whether the services of the employee will be satisfactory.

NOW, THEREFORE, it is agreed as follows:

1. The stockholders employ the said Jack P. McDonald for a period of three months from March 1st, Nineteen Hundred and Twenty-four as General Manager of the said Hotel. The said Employee will receive a salary of One Hundred Dollars ($100.00) per month and personal board and lodging. The Employee will make no purchase of equipment other than those already pur-

chased, except to the extent of Five Hundred Dollars ($500.00) and then upon the written order of one of the parties of the first part. No purchase of supplies will be made except when indispensable and then in the normal course of business.

2. On or about June 1st, Nineteen Hundred and Twenty-four if the Employee shall have operated the said hotel without loss after paying the expenses of operation which will include the rent, insurance and other charges payable under the lease originally made with the Marshall Land Company, and after paying or setting aside the sum of Sixteen Hundred and Sixty-six Dollars and sixty-six cents ($1666.66) per month for the payment due and owing from the Plaza Hotels Company to the Marshall Land Company on account of the purchase price of the said leasehold and assets, then the parties agree as follows:

(a) To incorporate a Company to be known as the St. Francis Hotel Company, under the laws of the State of New Jersey, with such terms in the Certificate of Incorporation and by-laws and such details of organization as will be agreeable to a majority of the parties hereto. The said company shall have a paid in capital of Ten Thousand Dollars ($10,000) of which the Employee will have a one-fourth interest. The other parties hereto will loan and advance the funds for him to pay his subscription and hold his obligation and the stock as collateral security for the repayment of the amount. This sum will be payable out of the profits only.

(b) To cause a lease to be made between the Plaza Hotels Company and said St. Francis

Company for the balance of the term of the original Marshall Land Company lease and with all the same terms, covenants and conditions regarding the amount of rental, taxes, insurance and other charges to be paid by the lessee but with such unsubstantial modifications as will be required by the stockholders so that irrelevant matters in the said lease will be eliminated.

(c) To enter into an agreement with the Employee substantially in accordance with the agreement hereto attached. It is, however, expressly understood and agreed that none of the parties hereto shall be considered bound unless that all execute and deliver the proposed certificate of incorporation, lease and employment agreement.

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

Signed, sealed and delivered
in the presence of:

(Signed) Joseph Kruvant.
(Signed) Joseph H. Mayzel.
(Signed) Harry Kruvant.
(Signed) J. P. McDonald.

ORDER VACATING RESTRAINTS, ETC.

Filed June 3, 1930.

IN CHANCERY OF NEW JERSEY.

Between	*On Bill, &c.*
JOHN P. McDONALD, *Complainant,*	*Order Vacating Restraints, etc.*
and	
JOSEPH H. MAYZEL, *et als., Defendants.*	

This cause having been (on April 1, 1930, the return day of the order to show cause, made in this action on March 24, 1930) opened to the Court by Messrs. Kalisch & Kalisch, in the presence of Messrs. Kanter & Kanter, solicitors of the defendants, Plaza Hotels Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant; and the solicitors of said last-named defendants at said time and place having moved to compel the complainant to amend his bill of complaint by adding thereto, in full, the contract referred to in paragraph 4 of the bill of complaint, and the Court having ordered that such amendment be made, and that the bill be deemed amended by having annexed thereto a copy of said last-mentioned agreement, as if the same were in said bill of complaint specifically referred to; and the solicitors of said last-named defendants at said time and place, with the approval of the Court and also with the consent of the solicitors of the complainant, then orally moving the dismissal of the bill of complaint, as amended; and the Court then

directing that respective counsel submit briefs, which has since been done; and the Court then also having given leave to the solicitors of the said last-named defendants to submit answering affidavits, in respect to the factual questions requiring determination, in the event that the Court should conclude not to grant the motion to dismiss the bill of complaint as amended; and the Court having heard and considered the arguments of respective counsel, as well as the briefs submitted by them; and the Court having also read and considered the affidavit of the complainant submitted with the bill of complaint and the additional affidavit of Mr. John J. Quigley, the additional affidavit of John P. McDonald and the additional affidavit of Mr. David Lustig, all submitted in behalf of the complainant upon the return day of the aforesaid order to show cause, and the affidavits submitted in behalf of the last-named defendants; and the Court now being of opinion that this order should now be made,

It is thereupon, on this third day of June, A. D. 1930, ORDERED that the order to show cause, made in this cause on March 24, 1930, be, and the same hereby is, vacated and discharged.

It is further ORDERED that the motion made on behalf of the defendants, Plaza Hotels Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, to dismiss the bill of complaint as amended, be, and the same hereby is, denied.

It is further ORDERED that counsel for said last-named defendants shall, within ten days from the date hereof, file their formal notice of the motion made in behalf of the last-named defendants to dismiss the bill of complaint as

amended, and that the filing thereof shall be deemed to have been made as of April 1, 1930.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

NOTICE OF MOTION TO DISMISS BILL OF COMPLAINT AS AMENDED.

Filed June 13, 1930.

IN CHANCERY OF NEW JERSEY.

Between	*On Bill, &c.*
JOHN P. McDONALD, *Complainant,*	*Notice of Motion to Dismiss Bill of Complaint as Amended.*
and	
JOSEPH H. MAYZEL, *et als., Defendants.*	

To the complainant in the above-entitled cause, or whom it may concern:

PLEASE TAKE NOTICE that on Tuesday, April 1, 1930, or as soon thereafter as counsel can be heard, before the Chancellor, at the Chancery Chambers, 1060 Broad street, Newark, N. J., we shall, in behalf of the defendants, Plaza Hotels Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, move to dismiss the bill of complaint as amended (the amendment consisting of an addition to the bill of complaint of the contract referred to in paragraph 4 of the bill of complaint), on the following grounds:

FIRST.—Said amended bill of complaint discloses no cause of action cognizable in this Court, in favor of the complainant as against the defendants, in whose behalf this motion is made.

SECOND.—Said amended bill of complaint is devoid of any equity in favor of the complainant

against the defendants in whose behalf this motion is made.

THIRD.—Said amended bill of complaint discloses no cause of action in favor of the complainant and against Plaza Hotels Company, and is devoid of any equity in favor of the complainant against the last-mentioned defendant, because (a) the contract sought to be enforced by the complainant was not made by him with said defendant, (b) the contract sought to be cancelled by the complainant was not made by him with the said last-named defendant, and (c) the complainant, in effect, by his amended bill of complaint, is attempting to set forth matters for the equitable intervention of this Court which are not within the jurisdiction of this Court.

FOURTH.—Said amended bill of complaint discloses no cause of action in favor of the complainant and against the defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, and is devoid of any equity in favor of the complainant against the last-named defendants because (a) the contract mentioned in paragraph 4 of the bill of complaint, cannot, and should not, be specifically enforced, (b) the contract, mentioned in paragraph 4 of the bill of complaint, if breached by said last-mentioned defendants, does not give cause for an accounting in this Court, (c) the contract of June 5, 1924, was not made by the complainant with the last-mentioned defendants, (d) the allegations made with respect to the contract of June 5, 1924, do not give rise to this Court's equitable interventions, and (e) complainant, in effect by his amended bill of complaint, is at-

tempting to set forth matters for the equitable intervention of this Court which are not within the jurisdiction of this Court.

This notice of motion is filed pursuant to the leave granted by the last paragraph of the order, made in this cause, dated June 3, 1930.

Newark, N. J., June 12, 1930.

Yours, etc.,

KANTER & KANTER,
Solicitors of Defendants, Plaza Hotels Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

MEMORANDUM OF VICE-CHANCELLOR.

COURT OF CHANCERY OF NEW JERSEY

Chambers of
MAJA LEON BERRY
Vice Chancellor

Toms River, N. J.
May 21, 1930.

Kalisch & Kalisch
790 Broad Street
Newark, N. J.
Kanter & Kanter
1060 Broad Street
Newark, N. J.

Dear Sirs:

In the matter of MACDONALD v. MAYZEL, ET ALS. I have examined the bill of complaint, the annexed schedules and the original agreement of March 1, 1924, referred to in the bill of complaint in connection with the motion to dismiss the bill. This motion is denied. The bill is maintainable for the purpose of an accounting, if for no other reason and the conduct of the defendant Plaza Hotel Company in acquiescing in the employment of the complainant and in the actual payment of his salary over a period of years, taken in connection with the fact that the agreements which are the subject of the suit were executed by all of the individual stockholders, officers and directors of the company, is sufficient at least to warrant the Court in retaining the bill against that company.

I have also read and considered the affidavits and answering affidavits submitted in connec-

tion with the application for appointment of a receiver. The circumstances disclosed by these affidavits do not warrant the appointment of a receiver nor will any account be ordered pendente lite. The financial standing of the three individual defendants and the Plaza Company as disclosed by the answering affidavits is a sufficient guarantee of the complainant's rights in the event that a decree is finally made in his favor, to warrant the vacation of any restraint imposed by the original order to show cause and such will be the order of this court.

Very truly yours,

Maja Leon Berry.

NOTICE OF APPEAL.

Filed June 27, 1930.

IN CHANCERY OF NEW JERSEY.

Between JOHN P. McDONALD, *Complainant,* *and* JOSEPH H. MAYZEL, *et als.*, *Defendants.*	*On Bill, &c.* *Notice of Appeal.*

The defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, hereby appeal from so much of the order, made in the above-entitled cause, on June 3, 1930, as denies the motion made on behalf of the defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, to dismiss the bill of complaint as amended, to the Court of Errors and Appeals in the last resort in all causes.

Newark, N. J., June 25, 1930.

KANTER & KANTER,
Solicitors for and of Counsel with, Defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

Notice of Appeal.

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

ELIAS A. KANTER,
Of Counsel with Defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

Service of the within notice of appeal is hereby acknowledged this 25th day of June, A. D. 1930.

KALISCH & KALISCH,
Solicitors of Complainant.

AMENDED NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between

JOHN P. McDONALD,
Complainant,

and

JOSEPH H. MAYZEL, *et als.*,
Defendants.

On Bill, &c.

Amended Notice of Appeal.

The defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, hereby appeal from so much of the order, made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, made in the above-entitled cause, on June 3, 1930, as denies the motion made on behalf of the defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, to dismiss the bill of complaint as amended, to the Court of Errors and Appeals in the last resort in all causes.

Newark, N. J., July 3, 1930.

KANTER & KANTER,
Solicitors for and of Counsel with Defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

Amended Notice of Appeal.

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

ELIAS A. KANTER,
Of Counsel with Defendants, Plaza Hotels Company, a corporation, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

Service of the within amended notice of appeal is hereby acknowledged this 3rd day of July, A. D. 1930.

KALISCH & KALISCH,
Solicitors of Complainant.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN P. MCDONALD, *Complainant-Appellee,* *vs.* JOSEPH H. MAYZEL, JOSEPH KRUVANT, HARRY KRUVANT and PLAZA HOTELS COMPANY, a corporation, *Defendants-Appellants.*	*On Appeal from the Court of Chancery.* *Petition of Appeal.*

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant and Plaza Hotels Company, a corporation, the appellants in the above-entitled cause, respectfully show that:

1. Petitioners find themselves aggrieved by an interlocultory order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable Maja Leon Berry, Vice-Chancellor, bearing date June 3rd, 1930, in a certain cause in said Court of Chancery wherein the said John P. McDonald was the complainant and the said Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant, Plaza Hotels Company, a corporation, and St. Francis Hotel Company, a corporation, were the defendants, and particularly from that portion of the aforesaid interlocutory order which denies the motion, made on behalf of the defendants, Plaza Hotels Company, Jo-

seph H. Mayzel, Joseph Kruvant and Harry Kruvant, to dismiss the bill of complaint, as amended.

2. The petitioners hereby appeal from that part of said order aforesaid, made by the Chancellor (on the advice of the Honorable Maja Leon Berry, Vice-Chancellor), on the ground that that portion of the order is erroneous, in that the motion, made on behalf of the defendants, Plaza Hotels Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, to dismiss the bill of complaint as amended, should have been granted with counsel fee and costs in favor of the said defendants against the complainant.

Petitioners therefore pray that the aforesaid interlocutory order of the Chancellor, insofar as it orders that the motion made on behalf of the defendants, Plaza Hotels Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, to dismiss the bill of complaint as amended, may be reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

KANTER & KANTER,
Solicitors for and of Counsel
with Defendants-Appellants.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN P. MCDONALD, *Complainant-Appellee,* *vs.* JOSEPH H. MAYZEL, JOSEPH KRUVANT, HARRY KRUVANT and PLAZA HOTELS COMPANY, a corporation, *Defendants-Appellants.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

The answer of John P. McDonald, the above-named appellee, to the petition of appeal of Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant and Plaza Hotels Company, a corporation, the above-named appellants.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an interlocutory order was, on the 3rd day of June, 1930, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said interlocutory order, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said interlocutory order is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

KALISCH & KALISCH,
Solicitors for and of Counsel with Appellee.

Answer to Petition of Appeal.

Service of copy of the within answer to petition of appeal is hereby acknowledged this 14th day of July, 1930.

KANTER & KANTER,
Solrs. of Petitioner.

OUTLINE OF THE BRIEF.

	Page
Statement of Proceedings under Review	1
The Allegations of the Bill of Complaint	3
Complainant's Prayers for Relief.....	8
POINT I. The Amended Bill of Complaint is Devoid of Any Equity, and States No Cause of Action, Against Plaza Hotels Company.....	10
Reason #1. Plaza Hotels Company did not Execute the Contract which is the Basis of this Action (pages 11-14, of this brief)	
Reason #2. Plaza Hotels Company did not Ratify the Contract which is the Basis of this Action (pages 15-20, of this brief)	
Reason #3. The Bill of Complaint presents no obligation Requiring Specific Performance by Plaza Hotels Company (pages 21-25, of this brief)	

See continuation of this outline on reverse side of this leaf.

PAGE

POINT II. The Amended Bill of Complaint is Devoid of Any Equity, and States No Cause of Action, Against Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant 26

Reason #1. The Real Gravamen of the suit against the Three Individual Defendants is for Legal Cause, or Causes, of action; the Averments of the Bill, in Terms of Equitable Pleadings or Relief, are colorable only, and the Court of Chancery has no jurisdiction, in the guise of adjudicating a suit in equity, to take jurisdiction of a law suit
(pages 27-35, of this brief)

Reason #2. The bill is not maintainable Against the Three Individual Defendants as a Suit for Specific Performance
(pages 36-41, of this brief)

Reason #3. The bill is not maintainable Against the Three Individual Defendants as a Suit for the Cancellation of the Contract of June 5, 1924
(pages 42-44, of this brief)

Reason #4. The bill is not maintainable as a Suit for an Accounting
(pages 45-59, of this brief)

Conclusion: The order, refusing to dismiss the bill of complaint as to appellants, should be reversed, to that extent 60

New Jersey Court of Errors and Appeals

JOHN P. MCDONALD, *Complainant-Appellee,* *vs.* JOSEPH H. MAYZEL, JOSEPH KRUVANT, HARRY KRUVANT and PLAZA HOTELS COMPANY, a corporation, *Defendants-Appellants.*	*On Bill, etc.* *On Appeal from Chancery.*

STATEMENT OF THE PROCEEDINGS UNDER REVIEW.

The bill of complaint in this action was filed by the complainant, McDonald, against five defendants; only four of the defendants named are represented by counsel before this Court, and *it is only these four defendants, Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant and Plaza Hotels Company, a corporation, who are prosecuting the present appeal.* The bill of complaint (State of Case, pages 1-12) on the return day of the order to show cause, was ordered to be amended (State of Case, page 31, lines 30-35), such amendment consisting of an addition to the bill of complaint, consisting of an agreement dated March , 1924 (State of Case, pages 28-30); such amendment was also accomplished by a stipulation of counsel, printed on page 27 of the State of the Case. The amended bill of complaint, as now before this court, therefore, consists of the following matter:

(a) The bill of complaint itself, State of Case, pages 1-12.

(b) Agreement, dated March , 1924, referred to in paragraph 4 of the bill of complaint, which agreement is printed on pages 28-30 of the State of the Case.

(c) Agreement, dated June 5, 1924, referred to in paragraph 7 of the bill of complaint, which agreement is printed on pages 20-26 of the State of the Case.

To the amended bill of complaint, the present appellants, in the court below, gave notice of motion, to dismiss (State of Case, pages 34-36). Each of the appellants, as the notice of motion will disclose, made such motions to dismiss separately, on various grounds, stated in behalf of each of such parties severally; for present purposes, such grounds, variously stated, are that the bill of complaint is devoid of equity as to each moving defendant and that the bill of complaint, as to each moving defendant, fails to state an equitable cause of action. The motion to dismiss was made orally on the return day of the order to show cause (State of Case, page 31, lines 35-40); the court below, in disposing of the motion, gave leave to file the formal notice of motion thereafter (State of Case, bottom of page 32 and top of page 33).

The court below denied the motion to dismiss the bill of complaint (State of Case, pages 31-33, particularly at page 32, lines 30-35); the grounds for such denial are printed in the memorandum of the Vice-Chancellor (State of Case, pages 37-38).

From the refusal of the Court to dismiss the amended bill of complaint, as against the present appealing defendants, the present appeal is taken (State of Case, page 39).

The questions before the Court, briefly summarized, are, therefore: Does the bill of complaint present an equitable cause of action against the three individual defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant? Does the bill of complaint present an equitable cause of action against the corporate defendant, Plaza Hotels Company? The questions are thus subdivided because, as to the three individual defendants, the statements of fact and the propositions of law are common to them; the statements of fact and the propositions of law, involving the corporate defendant, are, however, in general, distinct and different from those involving the individual defendants.

Of course, to present the questions properly, an analysis of the allegations of the amended bill of complaint is required.

THE ALLEGATIONS OF THE BILL OF COMPLAINT.

The bill of complaint is as follows:

1. In substance, by paragraphs 1-4 of the bill of complaint (State of Case, pages 1-4), it is averred that on or about March 1, 1924, *the three individual and personal defendants,* that is, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, representing themselves to be the owners of all the capital stock of the Plaza Hotels Company, entered into a contract which, by amendment, has now been made part of the bill of complaint. **It will be observed, and it is stressed, no contract was made by the complainant with Plaza Hotels Company; the contract was merely with three individuals, as individuals.** That contract (dated March 1924,

printed on pages 28-30 of the State of the Case), in substance, was as follows:

> A. The *three individuals engage* McDonald for a period of three months from March 1, 1924, as a general manager of the hotel, known as St. Francis Hotel, upon a stipulated salary.
>
> B. The *individuals* agree, subject to certain conditions, (first) to incorporate a company on or about June 1, 1924, to be known as the St. Francis Hotel Company "with such terms in the certificate of incorporation and by-laws and such detail of organization *as will be agreeable to a majority of the parties hereto,*" in which new company McDonald is to have a one-fourth interest of the entire capitalization of $10,000.00, to be paid for in a definite manner, (second) "*to cause a lease to be made between the Plaza Hotels Company* and said St. Francis Company," and (third) to enter into an agreement substantially in accordance with the agreement "hereto attached," it being "*expressly understood and agreed that none of the parties hereto shall be considered bound unless that all execute and deliver the proposed certificate of incorporation, lease and employment agreement.*" (The Court will observe that the proposed employment agreement is not annexed to this main contract, so what its terms were to be, as far as the present case is concerned, is uncertain.)

In substance, therefore, the agreement of March, 1924, was an ordinary contract of employment, with the complainant as the employee *of the three indivduals,* with the further agreement on their part thereafter *to cause another agreement*

to be made with a corporation thereafter to be formed; and to lend money, etc.

2. Paragraphs 2 and 3 of the bill of complaint aver, in substance, that Mayzel, Joseph Kruvant and Harry Kruvant were, and still are, the owners of all the capital stock of Plaza Hotels Company, the representations as to such ownership being made to induce the complainant to enter into the agreement, as above outlined (State of Case, pages 1 and 2). It is *not* claimed that such representations were false, and it is charged that, in fact, such representations were true.

3. Paragraph 5 of the bill of complaint avers, in substance, that, subsequently, the three individuals, Mayzel, Joseph Kruvant and Harry Kruvant, untruthfully represented to the complainant that they had formed the St. Francis Hotel Company with a capitalization of $10,000, had issued $2,500 of the stock to the complainant, and that a lease had been executed between the Plaza Hotels Company and the newly organized St. Francis Hotel Company (State of Case, page 4, lines 15-35).

4. Paragraphs 6 and 7 of the bill of complaint aver, in substance, that, because of the complainant's reliance upon the untruthful representations, *made by the three individual defendants,* and on or about June 5, 1924, at the solicitation of the three individuals, *the complainant executed a contract between himself and the supposed existing St. Francis Hotel Company,* a copy of which employment contract is now printed on pages 20-26 of the State of the Case. The latter agreement provides that the St. Francis Hotel Company (*which is not before this court on this appeal*) was to be the employer, for McDonald

to receive $100.00 per week and his lodging, and subject to various substantial deductions and a reserve for equipment, officers' salary, etc. one-quarter of the reserve fund, so created, on June 5, 1940, unless the employment is sooner terminated; in paragraph 8 of that agreement, it was expressly provided that it should come to an end "if the operation of the business of the employer should not permit the creation of reserve fund * * * in the sum of at least $10,000 per annum," and should also come to an end "at any time that the business of the employer shall be operated at a loss," upon thirty days' notice. *There is no allegation in the bill of complaint that this contract between St. Francis Hotel Company and McDonald, the complainant, is in any way being sought to be enforced.*

5. Paragraph 8 of the bill of complaint, in substance, avers that McDonald worked "as general manager of *said* hotel business" until November 11, 1929, on which date has was "unlawfully and unjustifiedly discharged and ousted from his duties by the *said Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant*" (State of Case, page 6, lines 5-33); it is also averred in that paragraph of the bill of complaint that the St. Francis Hotel Company was incorporated on or about February 29, 1928, with the three individuals, or persons acting for them, holding all of the stock.

6. Paragraph 9 of the bill of complaint avers, in substance, that while complainant was managing "the *said* hotel business," the same was profitable, with the inference that the profits were large enough to meet the rent charge, carrying charges, etc. (bottom of page 6 and top of page 7, in State of Case).

7. Paragraph 10 of the bill of complaint, in substance, avers that Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant have paid themselves large sums "out of the earnings of *said* hotel business." (State of Case, page 7, lines 19-23).

8. Paragraph 11 of the bill of complaint avers, in substance, that "contrary to the terms of said agreement of March 1, 1924," the three individuals, diverted to themselves, to the Plaza Hotels Company and to St. Francis Hotel Company, "all the earnings of *said* hotel business" (State of Case, page 7, lines 25-35).

9. Paragraph 12 of the bill of complaint, in substance, avers that the Plaza Hotels Company mortgaged all the goods and chattels used in the hotel to the Workingmen's Building and Loan Association for a loan by the latter to the former (State of Case, bottom of page 7 and top of page 8).

10. Paragraph 13 of the bill of complaint, in substance, avers that the defendants "refuse to render an *accurate* accounting" to the complainant "of the earnings of *said* hotel business" (State of Case, page 8, lines 15-21).

11. Paragraph 14 of the bill of complaint, in substance, avers that "the acts hereinbefore referred to" were performed in furtherance of "*said* conspiracy," mentioned in paragraph 6 of the bill of complaint which "conspiracy," as reference to paragraph 6 of the bill of complaint discloses, was "to defraud complainant of his rights under the agreement of March 1, 1924, and to obtain (*i. e.*, for the three individuals) the complainant's services at a fraction of their true value *for their own benefit*" (State of Case, page 8, lines 22-25).

12. Paragraph 15 of the bill of complaint, in substance, avers that "the said lease to the Marshall Land Company expires on June 5, 1940" (State of Case, page 8, lines 25-30).

13. Paragraph 16 of the bill of complaint, in substance, avers that the assets of Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant and Plaza Hotels Company are heavily encumbered; Joseph H. Mayzel, etc., have stated "that *St. Francis Hotel Company* has no assets with which to pay its accrued and accruing debts"; numerous suits are pending as "complainant is informed," without stating even the basis or the source of his information, against Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant; and that Joseph H. Mayzel, Joseph Kruvant, Harry Kruvant and Plaza Hotels Company are trustees of the complainant (State of Case, bottom of page 8 and top of page 9).

The foregoing represents an anlaysis of every allegation of the bill of complaint; it has been made somewhat extensive because of the necessity of referring thereto hereafter, and in order to avoid unnecessary repetition. The foregoing allegations of the bill of complaint are followed by prayers for relief.

COMPLAINANT'S PRAYERS FOR RELIEF.

The prayers for relief (pages 9-12) in the State of the Case), while many and varied, exclusive of the general and formal prayers, are, in substance, as follows:

A. That the contract of June 5, 1924, between St. Francis Hotel Company and complainant "be decreed to be null and void and of no effect, and that the same be delivered up by the defendants for cancellation" (State

of Case, page 9, lines 25-30). The contract thus prayed to be cancelled is the contract which, it is alleged, was procured by fraudulent misrepresentations, but, at the same time, it is the very contract which the complainant also asks to be specifically performed.

B. That all the defendants "specifically perform the contract of March 1, 1924, and the contract of June 5, 1924, *if the Court should find that the latter contract is in force and effect*" (prayer No. 8, bottom of page 10 and top of page 11 of the State of the Case).

C. That an accounting be ordered of "all the income from the *said* hotel business" (prayer No. 3, at bottom of page 9 of State of the Case), and that an accounting may be had of all the monies and assets of the hotel business (prayers Nos. 4, 5 and 6, on page 10 of the State of the Case).

D. That a receiver, or receivers, be appointed.

The foregoing, in substance, is an analysis of all the prayers contained in the amended bill of complaint, excepting the purely formal portions; certain specific parts will be adverted to more fully hereafter.

SCOPE OF THE ARGUMENT.

The argument in this brief will be devoted to two principal propositions:

First: The amended bill of complaint is devoid of any equity, and states no cause of action, against Plaza Hotels Company.

Second: The amended bill of complaint is devoid of any equity, and states no cause of action, against Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

POINT I.

THE AMENDED BILL OF COMPLAINT IS DEVOID OF ANY EQUITY, AND STATES NO CAUSE OF ACTION, AGAINST PLAZA HOTELS COMPANY.

In arguing this proposition, we shall, for the sake of clarity, divide the argument into three main sub-divisions, or reasons, as follows:

Reason #1: Plaza Hotels Company *did not execute* the contract which is the basis of this action.

Reason #2: Plaza Hotels Company *did not ratify* the contract which is the basis of this action.

Reason #3: The bill of complaint presents no obligation requiring specific performance by Plaza Hotels Company.

Reason No. 1.

Plaza Hotels Company did not execute the contract which is the basis of this action.

We cannot stress too strongly that nowhere in the amended bill of complaint is there any allegation that Plaza Hotels Company ever entered into any contractual relation with the complainant. The only basis upon which the complainant rests his claim against the Plaza Hotels Company is the assertion that the contract of March, 1924, was made by the stockholders, and all the stockholders, of that company, and, for that reason is binding upon the company, as its contract. **There is no averment in the bill that the Plaza Hotels Company ever entered into any agreement with McDonald.** In order to fasten any liability on this defendant, counsel for the complainant is driven to the argument that the contract of March, 1924, *which was executed only by the individuals, as individuals, in their individual capacity,* AND NOT IN BEHALF OF THE PLAZA HOTELS COMPANY, is, in fact, the contract of the Plaza Hotels Company. That contract (State of Case, pages 28-30) *does not even purport* to be made in behalf of the Plaza Hotels Company. It is purely an engagement, on behalf of three individuals, personally to do or to cause certain acts to be done, and among those acts, it is noteworthy to observe, is the promise of the contracting parties to lend to McDonald, the complainant, a sum of money, which clearly, the corporation, Plaza Hotels Company, did not even have the legal capacity to do. The language of the agreement is that the individuals would do certain things; there is no covenant made by the Plaza Hotels Company. Passing for the moment from the utter incapacity of the Plaza Hotels Company, as

a matter of law, from making this agreement, and eliminating entirely the consideration that the contract was not executed by, or in behalf of, Plaza Hotels Company, *the bill of complaint fails to show the authority of the individuals to make this contract for the principal now sought to be held.* Whether that contract (assuming the corporation's capacity to make it) should be entered into was a matter for action by the board of directors, *as a board,* and not for the determination of individuals, acting as individuals. Counsel for the complainant, in the court below, argued, as he will again probably argue in this court, that because the three individuals who made the contract were the sole stockholders of all the stock of the Plaza Hotels Company (State of Case, page 1, line 20), that contract is the contract of the company. The law, however, is to the contrary.

The rule of law applicable to this phase of the case is thus given in 14A C. J., page 360, Sec. 2222:

> "The mere fact that persons are stockholders gives them no authority individually to represent the corporation as its agent in dealing with third persons, *even though they own a majority of the stock, and even though the stockholders all unite in the action.*" (Italics ours.)

And on page 361 of the same article, section 2223, it is further stated:

> "The mere fact that a person holds a majority, or controlling interest, of the stock gives him no authority to act as agent for and bind the corporation in dealings with third persons, *especially where the contract is made in his own name, and not in the name of the corporation.*" (Italics ours.)

In the case of *Reed* v. *Trenton,* decided by this court, Justice Voorhees, speaking for the court, said:

> "*The contract of a stockholder made in his own name is not binding upon a corporation, the stock of which he owns and controls.* Clement *v.* Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. Rep. 747; Thompson on Corporations (2d Ed.) No. 1386." (Italics ours.) *Reed* v. *Trenton,* 80 N. J. E. 503.

Justice Dixon, speaking for our Supreme Court, declared the same principle, when he said:

> "Nor did the fact that he (meaning the stockholder) owned almost all of the company's stock, although coupled with his official authority, entitle him to contract for the corporation outside of the course of its ordinary business. Stokes *v.* New Jersey Pottery Co., 46 N. J. L. 237." *Demarest* v. *Spiral Riveted Tube Co.,* 71 N. J. L. 14.

The underlying principle of these decisions to the effect that the individual act of the stockholders (and even the individual act of all the directors) is not binding as the corporate act was also followed by Vice-Chancellor Backes in two recent cases of *Moffatt* v. *Niemitz,* 6 A. R. 100, with citation of authorities, and *Bahr* v. *Orr,* 6 A. R. 923.

In the court below, counsel for the complainant, in support of his contention that the Plaza Hotels Company must be held liable on the contract of March, 1924, cited the following general quotation from the opinion of Vice-Chancellor Leaming, in the case of *Arnold* v. *Searing,* 73 N. J. Eq. 262:

> "There appears to be no dissent to the general proposition that a corporation cannot complain of a transaction to which all

> of the stockholders assent with full knowledge of the facts; * * *."
>
> *Arnold* v. *Searing,* 73 N. J. Eq. 262, particularly at page 265.

An examination of that case, however, discloses that the quotation, taken as a single excerpt from that case, while it may be a correct statement of law, is, by no stretch of the imagination, authority, even inferentially, for the proposition that a contract made by all the stockholders of a corporation is the contract of the corporation. In that case, cited above in this paragraph, the suit was by a "non-assenting" stockholder to recover from promoters certain secret profits which they had obtained, and which they desired to retain because the newly formed corporation (and its stockholders) had assented to the procurement of those profits by the promoters, Vice-Chancellor Leaming analyzed the "merger" agreement and the "syndicate" agreement, involved in that case, and pointed out that the complainant was not an "assenting" stockholder, and, therefore, was entitled to question the promoters' acts, notwithstanding the *apparent* approval of the transaction. Certainly, this case is no authority for the complainant.

It is, therefore, urged that as the bill of complaint fails to disclose any liability on the part of Plaza Hotels Company, because it did not execute any contract, the bill of complaint should have been dismissed as to the Plaza Hotels Company.

Reason No. 2.

Plaza Hotels Company did not ratify the contract which is the basis of this action.

Counsel for the complainant, however, conceding that the contract of March, 1924, was not executed by the Plaza Hotels Company, may, nevertheless, urge that such contract was *ratified* by the Plaza Hotels Company. Such an argument, however, overlooks the cardinal and essential meaning of "ratification." There can be no "ratification" unless the contract, for which ratification is claimed, though originally unauthorized by the principal, was, in fact, made **in behalf of the principal** by the agent.

The rule is thus stated in *Corpus Juris*:

> "Ratification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or *entered into in his behalf by another who at the time assumed to act as his agent* in doing the act or making the contract, without authority to do so." (Italics ours.)
>
> 2 C. J. "Agency," Sec. 77, page 467, and cases there cited.

The contract which the three individuals entered into was *not* entered into *in behalf of* the Plaza Hotels Company; it was their *individual undertaking.* If X were to make a contract with M whereby X agrees to procure the Pennsylvania Railroad Company to transport freight from New York to some point in South Africa, it would, of course, be clear that he was then acting for himself, and perhaps even expecting to get the Pennsylvania Railroad Company to perform the contract of carriage. X, in the case supposed, is not purporting to act in behalf of the Pennsylvania Railroad Company. That fact

is made even clearer if it were to be assumed that the Pennsylvania Railroad Company instituted a suit against M for M's breach of contract in failing to deliver the merchandise for transportation, and the loss of profits resulting from such breach; it would, of course, be a complete answer for M to say that he contracted with X, and not with the Pennsylvania Railroad Company. The fact that, in the case at bar, *the three individuals* were stockholders of the Plaza Hotels Company does not change the legal result; they *did not contract in behalf of the company, but in their own individual capacity, and for their own individual benefit.*

This court, in the case of *Brown Realty Co.* v. *Myers,* 89 N. J. L. 247, affirmed the doctrine for which we contend that the contract, for which ratification is said to have occurred, must originally have been entered into in behalf of the principal. In the cited case, the plaintiff company brought suit against the defendant, Myers, for the alleged deceit of his agent. Myers was the owner of real estate which he had leased to a Mr. Fisher, who found the lease burdensome. Fisher wrote to a Mr. Darling, recommending the property and making statements allegedly fraudulent. Mr. Darling in turn communicated with a Mr. Brown, an officer of the plaintiff company. This court further assumed "in favor of the plaintiff that Darling was acting for it, and that Fisher's representation to Darling was equivalent to a representation to the plaintiff," which consideration necessitated the determination of whether Fisher was the agent of Myers. There was no express authority, but the plaintiff relied upon various acts of Myers as proof of ratification, but, to quote language from the opinion, "the difficulty is that what Fisher had done he

had done for himself, *not ostensibly as agent for Myers.*" Justice Swayze, speaking for this court, further said:

> "The doctrine of ratification is not applicable except where an agent *has assumed to act for a principal,* but without authority. (Citing cases.)" (Italics ours.)
>
> *Brown Realty Co.* v. *Myers,* 89 N. J. L. 247.

In the case of *Schlessinger* v. *Forest Products Co.,* 78 N. J. L. 637, this court applied the doctrine that ratification is not applicable to a case where a person who makes the contract was not, at the time, and did not profess or assume to be, acting on behalf of a principal. In the cited case, which from a legal standpoint is strikingly similar to the case at bar, a Mr. Freeman proposed to organize a corporation, which was later, in fact, incorporated as the defendant company, Forest Products Co., of which Mr. Freeman was one of the incorporators and directors. As the result of plaintiff's letters addressed to the defendant, and Freeman's reply (on the stationary of the defendant company), a contract resulted, the contract being embodied in a letter signed by Mr. Freeman, not in behalf of the company but as an individual; the substance of the contract was that a commission was to be paid to the plaintiff upon a certain order obtained from a Mr. Gaffinel, the order having been given to Mr. Freeman. Subsequently, Freeman transferred his business, including various contracts, to the defendant company. Suit was brought by the plaintiff for commissions on the theory that Freeman's acts as agent had been ratified by the defendant company. There was a judgment for the plaintiff, following the charge of the trial court, but the judgment was reversed, with the

opinion written by Justice Swayze, in part as follows:

> "*Freeman did not even hold himself out as agent,* but wrote and signed all letters as an individual * * *. It would be difficult to show more clearly an intent to become individually responsible. * * * The difficulty is that the *doctrine of ratification is not applicable* to a case *where the person* who makes the contract was not at the time, and *did not profess or assume to be, acting on behalf of a principal.* * * * There should have been a non-suit." (Italics ours.)
>
> *Schlessinger* v. *Forest Products Co.,* 78 N. J. L. 637;
>
> See also *Randolph* v. *General Investors' Co.,* 97 N. J. E. 493.

In the court below, counsel for the complaint, in furthering his argument on the subject of "ratification," referred to the case of *Clement* v. *Young-McShea Amusement Co.,* 69 N. J. E. 347, decided by Vice-Chancellor Bergen. It is of interest to note that that case was reversed by this court in 70 N. J. E. 677, and that, even in the opinion of the Vice-Chancellor, insofar as it was not criticized by this court, the decision supports our view, rather than the view of complainant's counsel. Vice-Chancellor Bergen, in disposing of the case before him, said:

> "It is a well settled rule that if a corporation ratifies an act performed by an agent *on its behalf,* such act will be treated as the act of the corporation, altho the agent may have had no authority to bind it; and where the directors of a corporation, having notice of an unauthorized act performed on their behalf by one of their officers, remain silent and take no steps to disaffirm the act, they may generally be charged with the consequences of such act on account of their acquiescence or ratification; nor have they the right to await the result and, if profitable

to them, insist on its validity, or, if unfavorable, reject it." (Italics ours.)

Clement v. *Young, etc., Co.,* 69 N. J. E. 347, particularly at page 351.

Of course, as we stress the fact that it is necessary, in order to have a ratification, that the contract must have been made by the agent *in behalf of* the principal, the decision of Vice-Chancellor Bergen, insofar as it has not been criticized by this court, is authority for our view, and does not support the complainant, because, in the case at bar, there was no contact made, or purported to be made, *in behalf of* Plaza Hotels Company.

Counsel for the complainant, in the court below, also adverted to the decision of this court in the case of *Bennett* v. *Millville Imp. Co.,* 67 N. J. L. 320, as supporting complainant's theory of "ratification." Our opinion is that that case, both on the facts and on the law, is against the complainant in the case at bar. In the Bennett case, the president of the defendant company, *in behalf of* the defendant company, employed the plaintiff (Justice Garretson, in this court, pointed out that "In New York the rule is that a contract which apparently is a corporate contract, being duly signed by the president, is presumed to be a corporate contract until the want of authority of the president is shown by the corporation"). When the defendant company was sued for breach of the contract, it pleaded the general issue together with a notice of recoupment and set-off; at the trial, it objected to the introduction of evidence to show "that Wood had acted as its president, * * * until the plaintiff had proved the incorporation of the defendant and authority of the president to act in the matter." Justice Garretson pointed out

why proof of the corporation's existence was unnecessary and why, under the law of New York (where the contract was made), the authority of the president to make the contract was presumed; Justice Garretson then said:

> "Where a contract made *in the name of a corporation* by its president is one that the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified." (Italics ours.)
>
> *Bennett* v. *Millville Imp. Co.*, 67 N. J. L. 320.

In other words, this case is also authority (as being corollary) for the proposition that in order that there may be a "ratification" of the contract, it is necessary that the contract be made, in the name of, or in behalf of, the principal sought to be charged. That situation does not prevail in the case at bar because there is no contract made in the name of, or in behalf of, Plaza Hotels Company.

Neither is the case of *Ritz Realty Corporation* v. *Eypper & Beckmann, Inc.*, 101 N. J. E. 403, affirmed by this court in 6 A. R. 1023, 141 Atl. 921, not yet officially reported, cited by complainant's counsel in the court below, authority for his view. In that case, as the second sentence of the opinion indicates, *the contract was made in behalf of the corporation, vendor, and in its name;* the defense urged was that no authority had been shown in the person who executed the contract, in behalf of the corporation, so to execute it. The corporation was held to the contract because (last paragraph of the opinion) "the president of the company had the apparent authority to bind it." In the case at bar, the

contract or contracts, sought to be enforced, were not made in behalf of the corporation, nor in its name, nor is it purported to be signed by any officer in its behalf.

On the authority of the cases, cited under this subdivision in Point I, the case at bar is devoid of any contract "ratified" by Plaza Hotels Company.

Reason No. 3.

The Bill of Complaint presents no obligation requiring specific knowledge by Plaza Hotels Company.

The contract of March, 1924, taking a construction thereof most favorable to the complainant, is that the three individuals would procure the Plaza Hotels Company, the owner of the property, on or about June 1, 1924, to execute a lease between the owning company and the St. Francis company (that is the newly organized operating company) "for the balance of the term of the original Marshall Land Company lease," State of Case, pages 2 and 3; the bill of complaint also avers that "the said lease to the Marshall Land Company expires on June 5, 1940" (State of Case, page 8, lines 25-30); the period of the lease would therefore be about sixteen years. In other words, the present bill of complaint is an attempt to compel the Plaza Hotels Company to execute a lease for sixteen years.

But, the memorandum by force of which such liability is sought to be imposed, was not signed by the party against whom the liability is sought, nor by his agent thereunto lawfully authorized,

and hence is within the interdiction of the first section of the statute of frauds, following:

> "That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to, or out of any messuages, lands, tenements or hereditaments, made or created, or hereafter to be made or created, by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding; except nevertheless all leases not exceeding the term of three years from the making thereof."
>
> 2 C. S. of N. J., page 2610, Sec. 1.

In a case analogous to the case at bar, this court applied the statute in *Clement* v. *Young-McShea Amusement Co.*, 70 N. J. Eq. 677, the opinion being by Justice Dixon. In the cited case, the defendant had brought suit in ejectment. The lease had been made with the tenant, Clement, who went into possession, had fitted up the demised premises at a very large expenditure, and had remained in possession for about four years out of a total term of ten years. The lease was not signed by the owner, but bore the signature of Young's agent, in behalf of Young, as the lessor. As a matter of fact also, Young had included all the rents collected in his reports to the owning company. When the suit at law for ejectment was instituted, Clement brought a suit in the Court of Chancery to enjoin the prosecution of the law suit. Such relief was granted him by the Court of Chancery, but this

court reversed the decree, and, speaking by Justice Dixon, in part, said:

> "The written instrument upon which the complainants base their claim was incapable of creating the term of years therein mentioned, either against the company or against Young, the lessor, because of the first section of the statute of frauds. * * * *Even if it (that is the lease) had been signed by Young himself under his authority from the company, it would have had no greater force against the latter, because the authority was not conferred by writing.*" (Italics ours.)
>
> *Clement, et al.* v. *Young-McShea Amusement Co.*, 70 N. J. Eq. 677.

As this court has refused (by indirection, in failing to halt a suit for ejectment) to effectuate a lease for a period exceeding the statutory term, when not signed by the owner or his agent in writing authorized to do so, it follows that, in the case at bar, such a defective contract, if indeed there be a contract, cannot be specifically enforced.

Since the case of *Schenck* v. *Spring Lake Beach Improvement Co.*, 37 N. J. Eq. 44, which was decided by Vice-Chancellor Van Fleet, and approved by this court in later decisions, this court has repeated the doctrine that specific performance cannot be had of a contract, which, by force of the statute of frauds, is invalid against the principal sought to be charged, and that oral evidence cannot be admitted to show that the real principal is the defendant, the owner of the land, and not the contracting party. Recently, in *Randolph* v. *General Investors' Co.*, 97 N. J. Eq. 493, in reversing a decision in the Court of Chancery, where the real owner of the property was directed specifically to perform a contract of sale, because of the finding

of fact that, although the contract was not signed by the owner—corporation, it was in fact the undisclosed principal of the parties who had signed the memorandum, this court, speaking by Chief Justice Gummere, said:

> "The principal ground upon which a reversal is sought is that, even if the finding of fact by the Vice-Chancellor is justified by the proofs submitted to him, the evidence was incompetent, and the decree before us cannot be supported, for the reason that an undisclosed principal cannot be held liable on a contract for the sale of land executed by an agent in his own name and under his own seal. The learned Vice-Chancellor does not discuss this question in his opinion, although it was argued before him, contenting himself with the declaration that, in his view, there is no merit in it. We disagree with this conclusion, and consider that the soundness of appellant's contention has been settled in his favor by the earlier decisions of our courts. * * * The exposition of the legal principles controlling in cases of this kind, as set forth in the decisions above quoted from, meets without entire approval. The logical conclusion to be drawn therefrom is that *every written contract made by an agent, in order to be binding on his principal, must purport on its face to be made by the principal, and must be executed in his name, and not in the name of the agent; and that, consequently, it cannot be shown by parol that an alleged agent, who is stated in the body of the contract to be a party thereto, and who signed the instrument as a principal, in fact signed as agent for another, thus convert a contract, which on its face is his own, into the contract of his alleged principal.*" (Italics ours.)
>
> *Randolph* v. *General Investors' Co.*, 97 N. J. Eq. 493.

It follows, from an application of these principles, that there was no contract in this case

which could be specifically enforced against Plaza Hotels Company.

The defense of the statute of frauds is, in the Court of Chancery, available upon demurrer, when the defect in the contract sued on appears on the face of the bill, as it does in this case. A few of the cases illustrative of this proposition are: *Van Duyne* v. *Vreeland,* 11 N. J. Eq. 370, decided by Chancellor Williamson; *Force* v. *Dutcher,* 13 N. J. Eq. 401, decided by Chancellor Zabriskie; *Wirtz* v. *Guthrie,* 81 N. J. Eq. 271, decided by Vice-Chancellor Emery, and *Douma* v. *Powers,* 92 N. J. Eq. 25, decided by Vice-Chancellor Stevenson. Under the present practice demurrers have been abolished, and the objections are made on motion (in accordance with rule 67 of the Court of Chancery), as was done in the case at bar.

In addition to all of the foregoing, we refer to the authorities cited in Point II, herebelow made, as applicable to dismiss the bill as to Plaza Hotels Company.

It is, therefore, contended, and respectfully submitted, that, as to the Plaza Hotels Company, the bill of complaint should have been dismissed because

(First) *The contract* upon which any liability is attempted to be predicated against Plaza Hotels Company *was not made by it;* such contract was made by three individuals for their individual and personal benefit.

(Second) *The contract* upon which any liability is attempted to be predicated against Plaza Hotels Company *was not made in its behalf;* such contract was made by three individuals for their individ-

ual and personal benefit, and in their own behalf, not even purporting to be in behalf of the corporate defendant.

(Third) *The contract* upon which any liability is attempted to be predicated against Plaza Hotels Company *was not ratified by it,* being, as a matter of law, incapable of "ratification."

(Fourth) The bill of complaint presents no obligation requiring specific performance by Plaza Hotels Company.

The bill of complaint, therefore, was void of any equity, and disclosed no cause of action, against Plaza Hotels Company.

POINT II.

THE AMENDED BILL OF COMPLAINT IS DEVOID OF ANY EQUITY, AND STATES NO CAUSE OF ACTION, AGAINST JOSEPH H. MAYZEL, JOSEPH KRUVANT AND HARRY KRUVANT.

In arguing this point, we shall, for the sake of clarity, divide the argument into the following main subdivisions, or reasons:

Reason #1: The real gravamen of the suit against the three individual defendants is for legal cause, or causes, of action; the averments of the bill, in terms of equitable pleadings or relief, are colorable only, and the Court of Chancery has no jurisdiction, in the guise of adjudicating a suit in equity, to take jurisdiction of a law suit.

Reason #2: The bill is not maintainable against the three individual defendants as a suit for specific performance.

Reason #3: The bill is not maintainable against the three individual defendants as a suit for the cancellation of the contract of June 5, 1924.

Reason #4: The bill is not maintainable as a suit for an accounting.

Reason No. 1.

The real gravamen of the suit against the three individual defendants is for legal cause, or causes, of action; the averments of the bill, in terms of equitable pleadings or relief, are colorable only, and the Court of Chancery has no jurisdiction, in the guise of adjudicating a suit in equity, to take jurisdiction of a lawsuit.

As the analysis of the amended bill of complaint in this case, already hereinbefore made, under the caption of "The Allegations of the Bill of Complaint," indicates, and as more fully shown, under this reason in the paragraph commencing with the words "Just what are the allegations" (on page 34 hereof) the real gravamen of the complainant's suit, taking the pleadings most favorably to the complainant, is, at best, an action at law, either for breach of contract, and possibly, for deceit; it requires, of course, no argument in this court to demonstrate that such actions are purely legal causes of action. The only possible confusion that may arise in this case is due to the fact that the complainant has used *forms* of equitable pleading in the statement of his alleged cause of action, but this fact cannot alter the real nature of his case.

It is well settled, we think, as the cases hereinafter cited conclusively demonstrate, that the Court of Chancery has no jurisdiction to hear or determine a cause of action, cognizable in the courts of law, even though relief is prayed for in terms of equity, or under the color of equitable relief.

That the proposition above made is the law of this State, was forcibly enunciated by this court in the case of *Smith* v. *Board of Chosen Freeholders of Essex County,* 48 N. J. E. 627. It there appeared that the money of the freeholders had, by its County Collector, been deposited in the bank, subject to withdrawal by the check of the County Collector, or his successor, countersigned by the County Auditor. Smith had been the County Collector for a number of years. When his successor was elected, such successor drew a check upon the bank, duly countersigned by the auditor and duly presented for payment. The bank refused payment because the check was not signed by the depositor, "Joseph M. Smith, Collector." The bill was thereupon filed by the Board of Freeholders against the old collector and the bank to recover the money deposited in the name of Smith. To this bill Smith demurred, assigning as one cause for demurrer that the bank had a complete and adequate remedy at law. The demurrer was overruled, an appeal taken, and this court reversed the decree for the bank. This court, speaking by Justice Magie, said:

> "Under such circumstances, he (the old collector) could have brought no action at law or otherwise for the balance in question. On the contrary, upon proof before a jury in the court of law of the facts stated in the bill, in an action by respondent (the Board of Freeholders) against the bank, I

> think it would have been the duty of the court to direct a verdict in favor of the respondent. Such an action would have been an appropriate and complete remedy for respondent. I have reached this conclusion with great reluctance. * * * *But the line of division between legal and equitable remedies is fixed in this state by a long course of precedents, and even legislative authority is forbidden to intermingle these remedies by the constitutional prohibition against interference with the ancient jurisdiction of the courts.* When such an objection as we have been considering is advanced and established, we are bound to give effect to it. The result is that respondent, on its own statements, has an adequate and complete remedy at law, and may not, therefore, maintain this bill against appellant." (Italics ours.)
>
> *Smith* v. *Board of Chosen Freeholders of Essex County,* 48 Eq. 627.

Clearly, in the cited case, the "equities" of the situation were appealing not only to the Vice-Chancellor who heard the case but to the Court of Errors and Appeals. The latter, however, decided, as indicated above (and as we believe correctly), that since there was a complete and adequate remedy at law, the Court of Chancery had no jurisdiction to entertain the suit.

In the case of *San Giacomo* v. *Oraton Inv. Co.,* 6 A. R. 1365, 143 Atl. 329 (not yet officially reported), the bill was filed for an accounting and for the recovery of interest paid under protest, the question before the Court being "whether or not a legal rate of interest on the unpaid balance of a mortgage should run after the maturity date, or whether no interest was due to the defendant"; *that case was tried without protest before the Vice-Chancellor,* who advised a decree dismissing the bill. It will be observed, and it is

now stressed, that the nature of *the equitable relief sought* was *for an accounting, and that the case was tried, with the jurisdiction of the Court admitted.* On the appeal of the complainant, this Court said:

> "We think the bill should have been dismissed on the ground that *the Court of Chancery had no jurisdiction over the subject-matter. It could not hear and determine a pure legal question cognizable by the common-law courts. The appropriate remedy is by a suit at law.* The system of courts set up in New Jersey under the Constitution, Art. 6, Sec. 1; the jurisdiction of the equity and common-law courts is separate and distinct. The common-law courts have exclusive jurisdiction to hear and determine controversies resting upon a purely legal basis and determined by the principles of the common law, such as a money claim or a simple debt and the like, whether due or not. *The jurisdiction of the equity courts cannot be conferred over this class of subjects, by consent of counsel or acquiescence of a Vice-Chancellor. The Court of Chancery was not competent to adjudicate the claim. The first requisite to constitute jurisdiction is, the court must have cognizance of the class of cases to which the one to be adjudged belongs.* This principle is elementary and needs no citation of cases. The decree dismissing the bill of complaint in this case should be affirmed on the ground that the Court of Chancery had no jurisdiction to entertain the bill of complaint or hear and determine the controversy." (Italics ours.)
>
> *San Giacomo* v. *Oraton Inv. Co.*, 6 A. R. 1365, 143 Atl. 329 (not yet officially reported).

These remarks are applicable to the case at bar, because, from the analysis of the nature of the alleged cause of action, it has been shown that the alleged cause of action is one that is cogniz-

able in, and can be tried by, a court of law. It is true that the prayers for relief are for "accounting," "injunction," etc., etc., but it is not the nature of the prayers of the bill which determines the question of jurisdiction; the determining factor is the cause of action presented, and when that cause of action is one which is a legal cause of action, the Court of Chancery has no jurisdiction, even where the relief sought (as in the cited case) is an equitable remedy, *e. g.,* accounting. This rule is so well founded as to have moved the Court in the case cited to have affirmed the decree of the Vice-Chancellor on the ground of lack of jurisdiction in the Court below (even where the case had been tried without protest), notwithstanding the fact that the nature of the relief there sought was "accounting."

A reiteration of the principle that the Court of Chancery does not acquire jurisdiction because of the nature of the relief claimed by the complainant, where, in point of fact, the gravamen of the suit is a legal cause of action, was made by this court in the case of *Bailey* v. *B. Holding Co., Inc.,* 7 A. R. 414, 144 Atl. 870, and in *Grunt, et al.* v. *Olsan,* 7 A. R. 415, 144 Atl. 870, neither of which cases has been officially reported. In each of the cases cited, the complainant was the purchaser of real estate and brought suit in the Court of Chancery to recover the deposit and his fees expended for searching the title. The opinions in this court do not fully disclose the character of the bill, filed in the causes, but we have examined the states of the cases, in this court, in each of the cited cases, to determine the nature of the equitable relief demanded by the bills of complaint. In the Bailey case, the prayer of the bill of complaint, among other things, was

"that an account may be taken of the amounts paid by the complainant to defendant" (page 11, lines 20-25, in the State of the Case in the Bailey case). In the Grunt case, the prayer of the bill of complaint, among other things, was "that a decree may be made directing the defendants to repay said sum * * *, that the entire sum be impressed as a lien upon the lands * * *, and that, in the meantime, the defendants be enjoined and restrained from disposing of, or encumbering, in any way the said lands and premises" (page 4 in the State of the Case in the Grunt case). In each of the cited cases, however, this court held that the bills were not sustainable because *"the Court of Chancery had no jurisdiction to hear and determine the subject matter involved in this case."* In other words, the form of the remedy pursued was held as not sufficient to give the Court of Chancery jurisdiction in a cause where it had no jurisdiction, and this result was reached notwithstanding the prayers which were prayers purely of equitable cognizance.

A still more recent application of the same principle was made by this court in the case of *Slomkowski* v. *Levitas,* 106 N. J. E. 266. The complainant in that case also pleaded for the return of the "down money" paid by him on account of a land purchase, and among the prayers for relief was one specifically for the rescission of the contract and another to impress a lien upon the lands. The decree in the Court of Chancery resulted in the determination that "the said contract * * * be, and is hereby, rescinded, and is void and of no effect," and further determined *"that the* complainants shall have a lien against said premises for said amount." That decree, however, was reversed,

this court holding that the complainant *"had a complete remedy at law and for that reason the court below was without jurisdiction."* In other words, another attempt to clothe a legal cause of action with the attributes of an equitable suit was not countenanced by this court, notwithstanding the prayer for rescission and lien impressment, which are frequent matters for Chancery jurisdiction. The complainant in that cause was not allowed to convert his cause of action at law into an equitable suit on the ground of the necessity of impressing a lien, and he was not permitted to claim the necessity of rescission when the facts afforded him a complete defense at law.

Still another instance where this court ordered the dismissal of a bill of complaint, notwithstanding the fact that it was couched in terms for the intervention of equitable relief (the prayers of the bill being for the cancellation of a lease, a mandatory injunction for the surrender of premises, cancellation of a mortgage, restraint against the commission of waste, and similar "equitable" objects) is found in *Snyder* v. *Freehold Theatre Co.*, 150 Atl. 415 (not yet officially reported). Justice Lloyd, speaking for this court, said:

> "Fundamentally, however, we think the case presented no grounds for the intervention of a court of equity, and that that court was wholly without jurisdiction in the cause. It was the ordinary case of a landlord complaining of a breach of contract on the part of his tenant and of a trespass in the carrying away of some of the personal equipment of the leased premises. * * * The breaches of the contract are alone the subject of complaint. For these, the lease itself as well as statutory and common law provide complete redress."
>
> *Snyder* v. *Freehold Theatre Co.*, 150 Atl. 415 (not yet officially reported).

On this phase of the case, we believe that a fair summary of the rule here under consideration is given in *Corpus Juris* "Equity," as follows:

> "But the courts (that is courts of equity) will refuse to entertain jurisdiction, where the averments which confer it are wholly colorable, and relief is asked through a purely equitable remedy for the mere purpose of giving jurisdiction, in order to grant other relief which may be obtained at law."
> 21 C. J. "Equity, page 40, and cases there cited.

In the case at bar, the complainant, we respectfully contend, has attempted by averments, which are purely colorable, to foist jurisdiction of his cause upon the Court of Chancery.

Just what are the allegations which complainant makes against the three individual defendants? Stripped of all legal verbiage, the complainant says:

> The three individuals entered into a contract with me, dated March 1, 1924, by the terms of which they engaged me, for a period of three months, at a stipulated salary, as the general manager of a hotel. These three individuals further agreed that, if the hotel was operated without loss and with a certain profit, they, the three individuals, would (a) incorporate a new company with a capital stock of $10,000.00, (b) would lend me $2,500.00, (c) would cause the new company to enter into a lease with the owner of the hotel property, and (d) would "enter into an agreement with the employee substantially in accordance with the agreement hereto attached," it being understood, however, that "none of the parties hereto shall be considered bound unless that all execute and deliver the proposed certificate of incorporation, lease and employment agreement."

What is there about the foregoing statement of facts that justifies the intervention of a Court of Chancery? It is a simple contract which, if breached, gives the complainant a suit for damages at law. The three months' period has long expired. If the complainant has not received the stipulated salary, the remedy at law is plain and ample. If the covenant "to incorporate a company" has not been fulfilled, the remedy at law is also complete. If the covenant to lend the complainant money has not been met, a suit for damages will afford ample redress. If the individual defendants have not entered into the contract "hereto attached," the remedy at law is equally plain. **But above all, the bill fails to show any cause for complaint, because, as the contract indicates, "none of the parties hereto shall be considered bound unless that all execute and deliver the proposed certificate of incorporation, lease and employment agreement."** The bill of complaint does not allege, and as a matter of fact the bill of complaint negatives the idea that, *all* the parties executed the additional instruments. As the complainant failed to execute the additional instruments, which was the condition precedent upon which not only the defendants, but the complainant also, was to be bound, his case is reduced to a contract of employer and employee for a definite term of three months, at a stipulated wage, with the rights and remedies that flow from such relationship. By reason of the cases already cited, and their application to this state of facts, we contend that there is no ground presented for the intervention of equity.

The complainant, however, may claim to be entitled monetary relief for the reason that the contract of June 5, 1924 (State of Case, page 20,

et. seq.), was entered into by him because of the untruthful representations made by the three individual defendants, as alleged in paragraph 5 of the bill. In other words, taking such pleading most in favor of the complainant, the complainant presents only a legal cause of action for deceit. Such was the ruling in *Krueger* v. *Armitage,* 58 N. J. E. 357, which was approved by this court in *Polhemus* v. *Holland Trust Co.,* 61 N. J. E. 654.

Summarizing, and applying the principles of the cases hereinabove cited to the facts of the case at bar, it is respectfully contended that the facts alleged in the bill of complaint are, at best, statements of common law actions only, over which the Court of Chancery has no jurisdiction, and that the bill is "colorable" only.

Reason No. 2.

The bill is not maintainable against the three individual defendants as a suit for specific performance.

Counsel for complainant may, in this court, contend, as he has contended in the court below, that the suit at bar is maintainable as a suit for specific performance. Such contention, however, overlooks the nature of contracts which can be specifically ordered to be performed, and overlooks also the covenants of the contract whereof specific performance is sought to be decreed.

It will be observed that the contract of March, 1924, executed by the three individual defendants, contains various covenants on their part, *each of which covenants will be analyzed to show that they are incapable of being ordered specifically to be performed.*

The first covenant of the three individual defendants (State of Case, bottom of page 28 and top of page 29) is that they will employ the complainant for a period of three months from March 1, 1924, at a certain stipulated salary. No time will be wasted in citing authorities, or in pointing out reasons, why this covenant cannot be specifically enforced at this time. The reading of the covenant itself is sufficient argument against the idea of specific performance thereof.

The second covenant of the three individual defendants (State of Case, page 29, lines 10-30) is that they will incorporate a new company, under the laws of the State of New Jersey "*with such terms in the certificate of incorporation and by-laws as will be agreeable to a majority of the parties hereto.*" Any decree that the Court of Chancery might make in this case, would be nugatory, because this part of the covenant, by its very terms, as far as the scope and operation is concerned, is dependent upon the will of the parties, and not upon any decree of the court. Professor Pomeroy (Sec. 1405, Vol. 4, pages 3330-3334, "Equity Jurisprudence"), in speaking of the essential elements and incidents of a contract for specific performance, says that "The contract must be such that its specific enforcement would not be nugatory." The courts, in application of this principle, have held that contracts to form corporations will not be specifically enforced; see *Loewenberg* v. *DeVoigne,* 145 Mo. App. 710, 123 S. W. 99; *Rudiger* v. *Coleman,* 199 N. Y. 342, 92 N. E. 665; *Davis* v. *Wynne* (Tex. Civ. App.), 190 S. W. 510.

The third covenant of the three individual defendants (State of Case, page 29, lines 33-37) is that they will "loan and advance" to the complainant $2,500.00. It is almost an elementary

rule of law in this State that a court of equity will not compel the specific performance of an agreement to borrow or lend money. Chancellor Runyon in the case of *Conklin* v. *People's B. & L. Association,* dismissed a bill of complaint seeking to enforce the performance of a contract to lend money. The Chancellor there said:

> "This Court will not compel specific performance of an agreement to borrow or lend money."
>
> *Conklin* v. *People's B. & L. Association,* 41 N. J. E. 20.

A careful examination of subsequent cases fails to show that this principle has been modified or overruled in any way.

The fourth covenant of the three individual defendants (State of Case, page 29, lines 39-40) is that they will "cause a lease to be made between the Plaza Hotels Company and the newly to-be-formed St. Francis Company." In other words, the assent of other parties, who are not parties to the contract, is necessary for the performance of this covenant. It appears by the averments of the bill of complaint that the hotel premises are owned by the Plaza Hotels Company. As title to the property to be leased was in this corporation, a stranger to the contract, its consent to the lease would be necessary. But, our Courts have held that specific performance will be denied where it appears that the decree would be futile, where title to the real estate is in a stranger to the contract; such was the ruling, in this court, in the case of *Friedlander* v. *Lehr,* 98 N. J. E. 359, and in the cases cited in the first paragraph of that opinion.

A further application of the principle that the Court of Chancery cannot compel the specific performance of a contract involving the assent

or act of a third person not a party to the contract is the case of *Northampton* v. *Gibbs, et. al.,* decided by Vice-Chancellor Buchanan, 101 N. J. E. 442. In that case the Board of Education made a contract with Gibbs for the construction of a school building, and by the terms of the contract, Gibbs agreed "to provide a satisfactory bond * * * by a surety company acceptable to the Board * * * insuring the fulfillment of all the provisions of the contract * * * and the defending and settlement, without expense to the Board, of liens, claims for personal injury, * * *." Gibbs delivered a bond to the Board, executed by the co-defendant, Continental Casualty Company, which was filed without the Board noticing that it was not in conformity with the provisions of the contract. After suit had been brought against the Board, the insufficiency of the bond was first brought to its notice. It then filed a bill in the alternative praying for reformation of the bond or for the specific performance of the contract to furnish a proper bond. After disposing of the question of reformation adversely to the Board, Vice-Chancellor Buchanan said:

> "Neither does it seem that complainant is entitled to any decree that defendants shall furnish an additional or substitute bond in the language desired. Such a decree could not be made against the defendant Casualty Company, because there is no promise or agreement by it either to furnish such a bond itself or to procure that the defendant Gibbs shall furnish such a bond. * * * As to the defendant, Gibbs, while decree for specific performance could be made against him, it will not be made, because it would be useless on account of the impossibility of his performing it. Equity will not do a vain thing."
>
> *Board, etc.* v. *Gibbs,* 101 N. J. E. 442.

In the case at bar, the impossibility of procuring performance arises from the fact that the Plaza Hotels Company, not a party to the contract cannot be directed to do what it never agreed to do.

This Court has recently held, in the case of *Klausner* v. *Watson,* 98 N. J. E. 359, that specific performance of a contract will not be decreed against the vendor who is not the equitable owner of the land by him agreed to be conveyed. The application of this principle in the case at bar is clear. Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant are not either the legal or equitable owners of the hotel property; that ownership resides in the Plaza Hotels Company. Hence, no decree of specific performance should be made against these three individuals who are not either the legal or equitable owners of the title to be leased.

The covenant to cause the lease to be made between the Plaza Hotels Company and the St. Francis Hotel Company is also rendered indefinite and uncertain, because it is coupled with the provision that the proposed lease shall have "such unsubstantial modifications as will be required by the stockholders so that irrelevant matters in the said lease will be eliminated" (State of Case, page 30, lines 10-12). The Court of Chancery will not decree specific performance of a contract which is uncertain. See *Neptune Fisheries Co.* v. *Cape May Real Estate Co.,* 89 N. J. E. 552, decided by this court; also *Myers* v. *Metzger,* 63 N. J. E. 779, also decided by this court; *Nichols* v. *Williams,* 22 N. J. E. 63, decided by Chancellor Zabriskie; and *McKibbin* v. *Brown,* 14 N. J. E. 13, decided by Chancellor Green, which holds also that where "the matter still rests in treaty," specific performance will be denied; in the case at bar, the modifications

of the stockholders are matters resting "in treaty."

The fourth and final covenant of the contract whereof specific performance is sought is that the three individuals will "enter into an agreement with the Employee substantially in accordance with the agreement hereto attached" (State of Case, p. 30, ll. 12-14). **No agreement, or copy of agreement, is attached to the principal contract.** This covenant, therefore, "to enter into an agreement, etc.," is indefinite and uncertain, the reasoning and the cases cited in the last preceding paragraph being here also applicable.

The foregoing is a complete analysis of each and every covenant in the contract of March, 1924, and, as shown, there is not one covenant in that contract that is the subject matter of a specific performance decree. Whatever right there may be to such a decree, which is by no means admitted, is completely destroyed by the last sentence of the contract. That sentence reads: "It is, however, expressly understood and agreed that none of the parties hereto shall be considered bound unless that all execute and deliver the proposed certificate of incorporation, lease and employment agreement" (State of Case, page 30, lines 15-20). There is no averment in the bill of complaint that the complainant executed the certificate of incorporation and lease. The averment is to the contrary, that he, the complainant, did not execute the certificate of incorporation and that he did not execute the lease. Under such circumstances, neither he, the complainant, nor any of the defendants appear to be bound to the provisions of the contract. This sentence of the contract is in the nature of an alternative provision, at the very

least, and when a contract contains such a provision, it will not be specifically enforced. See *Armour* v. *Connolly,* 49 Atl. 1117 (not officially reported), decided by Vice-Chancellor Emery; *Crane* v. *Peer,* 43 N. J. E. 557, decided by then Advisory Master Pitney; *St. Mary's Church* v. *Stockton,* 8 N. J. E. 520, decided by Chancellor Halsted, and *Gelman* v. *Rutgers Realty, etc., Co.,* 6 A. R. 735, also decided in the Court of Chancery.

In brief, therefore, there is no phase of the contract of March, 1924, which can be, or ought to be, the subject of a specific performance decree.

In closing this reason, we beg leave to stress the fact that the contract of March, 1924, is not enforcible specifically against the Plaza Hotels Company, for the reasons given in Point I hereof (page 10 hereof). A decree for specific performance of the contract of June 5, 1924, cannot be made against the three individual defendants, because they are not the persons who executed that contract with the complainant; whether that contract can be specifically enforced as between the complainant and the St. Francis Hotel Company is not under discussion, and must be litigated as between those parties; that question has not been, and is not being, litigated by the three individual defendants.

Reason No. 3.

The bill is not maintainable against the three individual defendants as a suit for the cancellation of the contract of June 5, 1924.

The complainant, however, may perhaps still claim that he wishes the contract of June 5,

1924, annulled by the Court of Chancery, and for that reason, assert that the bill is maintainable. A complete answer to that suggestion is that *the three individual defendants are not parties to that contract,* and it is these three individual defendants who press the motion to dismiss. Another meritorious answer to the possible suggestion that an annulment of that contract is needed lies in the fact that the alleged fraud, inducing the execution of that contract, offers a complete defense if any suit were brought thereon; see *Sheldon Co.* v. *Harleigh Cemetery Association,* 73 N. J. L. 115. Of course, it is to be remembered that, as the ground for rescission is claimed against St. Francis Hotel Company, *and not the three individual defendants,* the fact that such a prayer is contained in the bill is no ground for refusing to dismiss the bill as against the three individual defendants. Furthermore, there is no allegation in the bill of complaint that the agreement of June 5, 1924, unrescinded or uncancelled, would or might cause him any injury, irreparable or otherwise; for that reason, the prayer for rescission of that contract is purely colorable. In the case of *McArthur* v. *McArthur,* 19 Atl. 1904 (not officially reported), *where, as in the case at bar, there was no pretense that the defendants were taking any steps to enforce the contracts* (*sought to be cancelled*), Advisory Master Gummere held that *a bill in equity to compel cancellation was not maintainable.* Such ruling is in accordance with the weight of authority, as shown in *Corpus Juris* "Cancellation of Instruments," where it is stated:

> "Where no injury at all is caused or threatened, to the complainant by the existence of the instrument uncancelled and in other hands, a court of equity will not inter-

> fere. * * * *The mere fact that it is more convenient for parties to maintain an action or to make a defense in equity than at law will not justify a resort to the former jurisdiction if the remedy is complete and adequate in the latter.*" (Italics ours.)
>
> 9 C. J. "Cancellation of Instruments," page 1163, and cases there cited.

In the case at bar, not only does the complainant fail to show the necessity of a cancellation of the instrument, but he shows affirmatively that there is no necessity to cancel it, first, because, as he alleges, the St. Francis Hotel Company had not been, on June 5, 1924, the date of the purported contract, incorporated (see paragraphs 5, 6 and 7 of the bill of complaint, wherein it is charged that the representation that St. Francis Hotel Company had been incorporated was untrue), and, secondly, because if the contract of June 5, 1924, were attempted to be assigned (which is neither charged nor intimated), there is as complete defense to any enforcement of that contract in the hands of the assignee as there is if suit were brought thereon directly by the purported, and non-existent, St. Francis Hotel Company. This is not a case where bonds or other securities, fraudulently procured, are sought to be "rescinded," or cancelled, because of the danger that bona fide purchasers for value might acquire rights greater than those possessed by the original holder; any assignee of the contract now under consideration could gain no better rights than the original, and apparently non-existent, St. Francis Hotel Company.

Reason No. 4.

The bill is not maintainable as a suit for an accounting.

Because of the suggestion of the Vice-Chancellor that the present suit may be tenable as a suit for an "accounting" (see Vice-Chancellor's opinion, page 37 of the State of the Case), the remaining portion of this brief will be devoted to demonstrating that such view is erroneous.

It has already been shown that an action, which is essentially an action at law, cannot in the guise of a suit in equity, be converted into such a suit. The cases hereafter cited will show the particular application of the same principle, specifically that *a law action cannot be converted into an equitable suit for "accounting."*

In the case of *Nesbit* v. *St. Patrick's Church, etc.,* 9 N. J. E. 76, decided, in 1852, by Chancellor Williamson, the complainant alleged that he had entered into a written contract (a building contract) with the defendant, received various sums of money on account of the contract price, the aggregate of which receipts could not be definitely determined, that a considerable sum of money was due to the complainant, and prayed for an accounting, for a discovery as to receipts and vouchers, and that the defendant be decreed to pay the amount due to complainant. The bill of complaint, on demurrer, was stricken out, the Court holding that the bill was not maintainable as a suit for an accounting, and that jurisdiction could not be taken on the ground of discovery, or of preventing a multiplicity of suits. The Chancellor, at page 80 of the opinion, said:

> "Upon what ground can this court take jurisdiction of the case? * * * If this bill can be maintained on the ground of the accounts between the parties, then a Court

of Chancery has jurisdiction of every case when a debt has been contracted and payments made upon it. Courts of Chancery assumed the jurisdiction in cases of accounts, in consequence of the inadequacy of the remedy at law. The bill in equity is the substitute for the action of account at law, which, in consequence of its intricacy, and the delay and expense attending it, and even then failing to do complete justice, has become obsolete. Can this court get jurisdiction of the case, either upon the ground that by reason of the complexity of the accounts the relief at law is imperfect or inadequate, or on the grounds of *discovery,* or of suppressing multiplicity of suits? * * * It would be a mere pretext for assuming jurisdiction and of transferring the forum of litigation from a court of law to a court of equity, to say that there is any propriety in the court's retaining the case by reason of the nature of the accounts; and there is just as little reason for retaining it on the ground of discovery. What discovery is really needed? * * * The peculiar power of this court to compel a discovery, is not required in the case, that the ends of justice may be attained. Is it invoked as a mere pretence to give the court jurisdiction, and change the forum of litigation?''

Nesbit v. *St. Patrick's Church, etc.,* 9 N. J. E. 76, 80.

Another case, strikingly similar to the case at bar, and which, though decided only in the Court of Chancery, is strongly persuasive, is the case of *Debevoise* v. *H. & W. Co., et. al.,* 67 N. J. E. 472. In the cited case, complainant alleged that as president of defendant corporation he was entitled to a salary of $2,000 per annum, and, in addition, to 25 per cent. of the net profits after 10 per cent. had been set aside for dividends; that during his incumbency he had borrowed $1,000 from defendant on stock pledged; and

that, in determining the percentage for the last year of his employment, the inventory had been improperly taken and various other improprieties in the method of ascertaining the amounts due between the parties. The prayer of the bill was for discovery as to the profits and losses, and an accounting as to the amount due to the complainant, and for an injunction to restrain the sale of stock pledged for a loan, and for the re-delivery of the pledged security. Vice-Chancellor Bergen, after stating the facts above outlined, says:

> "This is the complainant's case fully stated, and I fail to see the slightest ground for equitable interference. He bases his claim for equitable relief upon two grounds —the necessity for an accounting and discovery. I have considered the question of the complainant's right to require the defendants to account in this court, and am fully convinced that the legal remedy is so plain, ample, and effective that the right to exercise a discretion and retain this bill for the purpose of an accounting cannot be supported. * * * According to the settled law in this state, to justify an equitable accounting, the accouts must be so complicated and intricate that a court of law cannot deal with them properly, having regard to the rights of litigants. If it can, the superior right of that court to hear and determine such matters is recognized. Bellingham *v.* Palmer, 54 N. J. Eq. 136, 33 Atl. 199. And in Cranford *v.* Watters, 61 N. J. Eq. 284, 48 Atl. 316, Vice-Chancellor Pitney, after a most exhaustive consideration of this question formulated what seems to me a true and satisfactory test to be applied to the question, whether the account is such as to give equity jurisdiction, in the following words: 'Are the issues so numerous and so distinct, and the evidence to sustain them so variant, technical, and voluminous, that a jury is incompetent to intelligently deal with

them and come to a just conclusion?' *Tested by this rule, the complainant has not presented such a state of facts as to confer equity jurisdiction. The issues are not numerous, the evidence required to sustain them is not variant, technical, or voluminous, and a jury could come to a just conclusion.*" (Italics ours.)

DeBevoise v. *H. & W. Co., et. al.*, 67 N. J. E. 472.

Another well reasoned case in the Court of Chancery, on this subject, is *Bellingham* v. *Palmer*, 54 N. J. E. 136. Vice-Chancellor Reed there ruled that while improved methods of procedure in courts of law will not strip a court of equity of its jurisdiction in matters of account, still *where* there is no trust relationship involved, and *jurisdiction rests solely upon the ground of complicated accounts, the present method of procedure in the law courts will be regarded, in deciding whether the accounts are so complex that such courts cannot try them.* In that case, the bill was filed to compel an accounting, but, notwithstanding the large number of items involved the questions of proper debits, credits, allowances and various offsets for many reasons, there was a denial of the relief sought. Vice-Chancellor Reed said:

"The question is whether the facts are such as to warrant this court in assuming jurisdiction in this contest, and directing the defendants to account in a court of chancery. The equitable jurisdiction to compel an account rests upon three grounds: First, the existence of a fiduciary or trust relation; second, the complicated character of the accounts; and, third, the need of discovery. No fiduciary or trust relation is exhibited in this cause. Therefore the right to an account cannot be rested upon that ground. Nor is the bill one purely for discovery. The discovery asked is only incidental to the

main relief sought, namely, an account. The bill, therefore, cannot be supported as one for discovery, and must rest upon the right to an account; for the rule is entirely settled that where discovery is sought as a mere incident to some other main relief, and if the principal relief is denied, the suit must be dismissed. Railroad Co. *v.* Hoppock, 28 N. J. Eq. 261; Jewett *v.* Bowman, 29 N. J. Eq. 174; Foley *v.* Hill, 2 H. L. Cas. 28-37, 42. *Jurisdiction, therefore, if it exists at all, must rest upon the complicated character of the accounts, and the intricate character of the accounts must be such that, if the case is tried at nisi prius, it cannot be tried with any certainty that an accurate result would be reached.* Bliss *v.* Smith, 34 Beav. 508; Railway Co. *v.* Nixon, 1 H. L. Cas. 111; Foley *v.* Hill, 2 H. L. Cas. 28; Crane *v.* Ely, 37 N. J. Eq. 564. What will constitute this complexity of accounts is a matter on which little light can be obtained from an examination of the English reports. Every case seems to rest upon its own special features. It is impossible, said Lord Collingham in Railway Co. *v.* Martin, 2 Phil. Ch. 758, with precision, to lay down rules or establish definitions as to the cases in which it may be proper to exercise jurisdiction. *The criterion is whether the degree of intricacy is such as to deprive a court of law, by reason of its method of procedure, of the ability to properly investigate and decide. In applying this test, I think, regard should be had to the alteration in the method of trial in a court of law.* When equity first assumed jurisdiction of complicated accounts, there was in a court of law no power to examine a party, to obtain discovery before trial, or to have an account stated by a referee. Now, it is true that in those instances where a court of equity has acquired jurisdiction over a class of cases, by reason of the absence of a legal remedy, it will not be deprived of such jurisdiction, either by the operation of a statute conferring similar

jurisdiction upon the common-law courts, or by the adoption by the common-law courts of the principles and practice of the courts of equity. Frey *v.* Demarest, 16 N. J. Eq. 236. Therefore, in cases of account between persons holding a fiduciary relation, the right to an account in equity exists unchanged, although a court of law has now improved methods of procedure, by which some of those matters can now be tried, and would exist unchanged, although the jurisdiction of courts of law should become complete in its procedure, and suitable for the trial in such cases. *But in cases of account, other than those just mentioned, the jurisdiction of the court of chancery is a discretionary jurisdiction. The superior right of a court of law is admitted, so long as that court can properly deal with the matters litigated.*

"Now, in determining whether a court of law can adequately deal with an account, *I do not perceive why the present, and not the past, method of legal procedure should not be regarded.* This is the rule in regard to bills for new trials exhibited in the court of equity. The propriety of such bills is not tested by the restricted power of courts of common law to grant new trials at the time when such bills were first entertained, but is tried by the present liberal practice of the court in this respect. As was observed in Executors of Powers *v.* Administrator of Butler, 4 N. J. Eq. 465, 'upon examination of the numerous authorities, it will be seen that as the courts of law have extended their jurisdiction over those subjects the courts of equity have withdrawn their jurisdiction from them.' This remark was reiterated in the case of Hannon *v.* Maxwell, 31 N. J. Eq. 318-329, decided by the court of appeals. So it seems to me that the question is whether a court of law can now adequately deal with the account. *The question is simple adequacy of the remedy, and that should be decided by the present processes*

of legal investigation. As already remarked, these processes have become radically changed; so changed, in fact, that the remarks of Judge Finch, in his opinion in the case of Marvin *v.* Brooks, 94 N. Y. 71-80, are almost as pertinent here as in the State of New York. Speaking of the jurisdiction of a court of equity in matters of account resting upon their complexity, and also for discovery, he observed 'that the necessity for a resort to equity is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by the examination of the adverse witnesses before trial, and the production and deposit of books and papers, almost as complete a means of discovery as can be furnished by a court of law.' The power to refer, the power to previously examine witnesses, and the power to obtain an inspection and copies of books and papers in actions at law, must be taken into account, when the question of equity jurisdiction rests upon the single ground of the inadequacy of a court of law to reach satisfactory results in the trial of a legal cause of action. These improved methods of procedure do not strip this court of jurisdiction in instances of complicated accounts; but, when the degree of complexity which will put the case beyond the capacity of the law court to try is to be ascertained, then the present mode of trial is certainly a factor of importance. There are still many cases in which a court of equity and a master can afford a fuller measure of relief than can a court of law dealing with the report of a referee; but there are also cases, of which courts of equity would once have assumed jurisdiction, which I think should now be remitted to the legal tribunals. In my judgment, the present account is not one for equitable cognizance. *As already observed, the quantity of manufactured goods that was furnished by the complainant is entered in complainant's own*

books. The cash paid to him each week was within his own cognizance, and could have been, but was not, entered on his books. So of the rents, the amount of which he knew. *So of the repairs* which he had had made. These are entered upon defendants' books, and, so far as appears, are all entered. So far, the account appears to be one of great simplicity, involving the simple addition of the sums charged. The only *contested items* involve purely legal questions—First, *whether,* under the contract between the parties, *the complainant was to pay for the twine* used by him; second, *whether there was an assent by complainant to the charge for damages for defective goods,* or a right to make such deduction, arising from the contract between the parties. I see no difficulty in trying the case at law. Indeed, if sitting at circuit, I would not, as matters now appear, order a reference. If the complainant can compel these defendants to account, I see no reason why each of the 500 employees to whom wages have been paid on account cannot compel the employer to do the same, or why any person, after a few weeks' dealing with a grocer on credit, has not the same privilege. There is characteristic force in the remarks of Chief Justice Marshall in his opinion in Fowle *v.* Lawrason's Ex'r, 5 Pet. 495, that 'it cannot be admitted that a court of equity may take cognizance of every action for goods, wares, merchandise sold and delivered, or of money advanced, where part payments had been made, or of every contract, express or implied, consisting of various items, for which different sums of money have become due, and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in

> all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. But, in transactions, not of this peculiar character, great complexity should exist in the account, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction.' I am constrained to hold that there should be a decree denying the accounting." (Italics ours.)
>
> *Bellingham* v. *Palmer,* 54 N. J. E. 136.

The essential point of the decision in the Bellingham case, quoted in full above, is that where jurisdiction in the Court of Chancery is rested upon the grounds of complicated accounts, the present method of procedure in the law courts will be regarded in determining whether the accounts are so complexed that the courts of law cannot try them. *It is respectfully contended that the nature of the accounts, involved in the case at bar, is certainly no more complex than were those in the Bellingham case.* **It is significant to observe that the bill of complaint (in the case at bar) does not charge that the accounts are complex, intricate or incapable of being resolved by suit at law.** The Bellingham case, above cited, was cited with approval in the Court of Chancery in *DeBevoise* v. *H. & W. Co., et al.,* 67 N. J. E. 472. It was also cited with approval in the case of *Daab* v. *New York Cent. & H. R. R. Co.,* 70 N. J. E. 489, where Vice-Chancellor Stevenson, in sustaining a demurrer to a bill for an accounting, where discovery under oath was waived, said:

> "It is often dangerous in these days, when the remedial powers of courts of law are being expanded, not only by legislation, but by natural development, for a court of equity to say in advance that a court of law is incompetent to do justice in any particular case of which it has jurisdiction."

The Bellingham case was also cited with approval by Vice-Chancellor Stevenson in *Streeter* v. *Braman,* 76 N. J. E. 371, where it was emphasized that "the present and not the past method of legal procedure should be regarded" as the deciding principle to be applied to bills for an accounting. As far as a very careful search has gone, it fails to disclose where the principle here contended for has in any manner been disapproved by this court; we believe that the chancery decisions here cited, while not binding upon this court, are, because of their reasoning, very persuasive.

Another learned Vice-Chancellor, Vice-Chancellor Stevenson, also reaffirmed these principles (which the Court of Chancery, out of a decent regard to the courts of common law, should not, and we assert, cannot, ignore) in *Daab* v. *New York Cent. & H. R. R. Co.,* 70 N. J. E. 489. The bill there was for an accounting; the bill was demurred to and the demurrer sustained. The action was founded on a written contract, and the various claims were (1) for monies due under the contract for stevedoring, (2) for extra work, the bill alleging "that the accounts of said extra work are complicated and intricate," and (3) for damages for defendant's breach of contract, giving plaintiff exclusive right to stevedoring. Vice-Chancellor Stevenson, in disposing of the bill, said:

> "The primary rights which the complainant seeks to enforce in this suit are all strictly legal rights arising from contractual obligations of the defendant, express or implied. The courts of law of the state have full jurisdiction of every item of the complainant's claim, and also have full jurisdiction of these items, when taken together in a mass, as constituting a single case for adjudication. A court of equity,

on the other hand, has no jurisdiction whatever of any item of the complainant's claim when taken by itself alone, but, at most, can only acquire concurrent jurisdiction with the courts of law, of the aggregated mass of items which make up the complainant's claim, in case it shall appear that this entire claim is so intricate and complex that the legal machinery of courts of law is not competent to deal with it, so that the remedy at law has become inadequate * * * **Inasmuch as the primary rights of the complainant for the enforcement of which this suit is brought are strictly legal, the mere fact that the bill prays for a discovery presents no ground for extending the jurisdiction of this court to compel the defendant to account.** * * * In determining whether the machinery of the courts of law is adequate to accomplish justice in a case like this, we must take into consideration that legal machinery as it exists today. We must look at the legal machinery which the law courts must set in operation for the purposes of this case, and not the legal machinery which the courts of law would have set in operation if a case like this had been presented to them a hundred years ago. * * * *I do not admit that this court can take jurisdiction of an action for unliquidated damages for the breach of a contract, of which, if simple in character, the courts of law would have exclusive jurisdiction, on the ground that the items of damages are numerous and complex, or for any other reason impossible of accurate ascertainment by a court of law.* See *Courter* v. *Crescent Sewing Machine Co.*, 60 N. J. Eq. 413, 45 Atl. 609 (1899). * * * Taking every well-pleaded allegation of the bill to be true, I think the case exhibited is one which a court of law, with its modern methods of procedure, including orders for the production of books, examination of parties before trial, and the statement and settlement of accounts by references, may dispose of in as complete

accord with all the principles of justice as would be possible in a court of equity. *It seems to me in this peculiar class of cases, where the complainant is endeavoring to have an action at law tried in a court of equity, because of its alleged intricacy and complexity in respect of matters of fact, the bill must do more than show a case which might on trial in a court of law prove intricate and complex, so as to make the legal procedure applied to its determination inadequate.* Where the defendant denies the right of the complainant to try his legal action or actions in the Court of Chancery, the complainant must show at least presumptively, that the alleged intricacies and complexities will appear so as to embarrass, if not defeat, the useful operation of the machinery of the court of law in which the legal action might be brought. *In such a case, in brief, I think the complainant must show that his remedy at law in fact is inadequate, and not merely that such remedy may in the end* turn out to be inadequate. * * * **If this bill should be adjudged to present a case of equitable cognizance, I think that large numbers of actions of law on contracts of various kinds, which our law courts are constantly disposing of with complete recognition and enforcement of all the rights of the parties, could be transferred at the election of either party to the Court of Chancery. The prospect of such a transfer of jurisdiction is somewhat appalling.** * * * I do not think that such a mere effort, an unsuccessful effort to deceive the complainant as to the amount of his earnings, can give a court of equity jurisdiction of an action to recover the amount actually earned and unpaid. If such were the case, then it seems to me that the jurisdiction of a court of equity on the ground of fraud might be extended to a very large number of strictly legal litigations in which one of the parties has practiced some deception in the way of

concealment or suppression of evidence." (Italics ours.)

Daab v. *New York Cent. & H. R. R. Co.*, 70 N. J. E. 489.

These principles have found sanction in this court in the case of *Franklin Township* v. *Crane*, 80 N. J. E. 509. The suit there was for an accounting against a tax collector to obtain a decree for monies, collected and received by him over a period of *about thirteen years*, aggregating over $150,000.00, alleged have been unlawfully disbursed, and for a discovery of the receipts and disbursements. A demurrer was filed to the bill; the demurrer was overruled, and an appeal taken to this court, and this court, in disposing of the contention that the Court of Chancery had jurisdiction, because of the nature of the relief sought, quotes, with approval, from Pomeroy's "Equity Jurisprudence," as follows:

> Respecting the feature of accounting above excepted from the general rule, he adds, as follows, viz.: 'Whenever an action at law will furnish an adequate remedy, **equity does not assume jurisdiction because an accounting is demanded, or needed, nor because the case involves or arises from fraud, nor because a contribution is sought from persons jointly indebted, nor even to recover money held in trust, where an action for money had and received will lie'** " *Franklin Township* v. *Crane*, 80 N. J. E. 509. (Italics ours.)

Another instance, passed on by this court, where the complainant below, very strikingly similar to the case at bar, attempted to bring an action, in the guise for an accounting, for what was really an action for damages for breach of a contract, is the case of *Courter* v. *Crescent Sewing Machine Co.*, 60 N. J. E. 413. In that case, a very complicated breach of contract was

alleged in the bill of complaint, with prayer for an accounting, damages for loss of profits, incidental discovery, payment of the amount due to the complainant and for general relief; a demurrer to this bill, for one of equity, was overruled. This court, in reversing the decision of the Vice-Chancellor, and declaring that the demurrer should have been sustained, said that "For such relief there is no precedent and no equitable support." In other words, an action for breach of contract, no matter how complicated, either on questions of law or on questions of fact, cannot be tried in the Court of Chancery, even where the relief prayed for is equitable in form.

From the cases cited under this portion of Point II, it has been demonstrated that this suit is not tenable as a suit for an accounting.

This bill, in the case at bar, it seems to us, is an example of the not very ingenious attempt to convert a legal cause of action into the semblance of an equitable bill of complaint. No great ability is required in converting practically any legal cause of action into the semblance of an equity suit. The tendency to "rush" into the Court of Chancery is to be deplored, particularly as such tendency exhibits a proper lack of comprehension as to the scope and relief of legal remedies properly pursued. It would, of course, be utterly silly to institute a suit in the Court of Chancery by an employer against an employee for monetary damages, and claiming by way of equitable relief (a) an accounting of the monies due under the contract, (b) a direction for the payment of such sum (c) a determination of the losses to be suffered by reason of the continuing breach, (d) restraint of any alienation of property of the employer, pending the determination

of the suit, (e) discovery, (f) prayer for process of subpoena, etc., etc., *ad infinitum*. Such a case, of course, is really one that is cognizable at law, but which the pleader has "converted" into an equitable suit by the flimsy pretext of asking for "equitable relief," when all that the pleader is entitled to is a judgment for money damages, and possibly, if the employer is a non-resident, the process of attachment. A simple suit in replevin might be similarly "converted" into a so-called equitable action. X, the owner of an automobile which has been unlawfully detained by M, might, against such defendant, and with perfect truth, declare that, if the automobile be left in the possession of the defendant, its loss or destruction might occur; relief might then be sought (a) for an injunction to restrain the use or conversion of the automobile, (b) for an "accounting" of the profits of the defendant, resulting from the use of the automobile, while it was in his possession, and (c) for a mandatory injunction, directing the return of the automobile to the complainant. The absurdity of such a suit, it seems to us, is manifest. Such absurdity, it further seems to us, is manifest in the bill of complaint in the case at bar.

Summarizing, therefore, the several reasons discussed under this point, we contend that the bill of complaint is devoid of any equity, and fails to state any cause of action, against the three individual defendants, and should, therefore, have been dismissed, because (1) the suit against them is a possible action at law in the guise of a suit in equity, (2) the bill is not maintainable for specific performance, (3) the bill is not maintainable as a suit for cancellation of an instrument, and (4) the bill is not maintainable as a suit for an accounting.

CONCLUSION.

The order of the Court of Chancery, insofar as it fails to direct the dismissal of the bill of complaint against Plaza Hotels Company, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, should be reversed.

Respectfully submitted,

KANTER & KANTER,
Solicitors for and of Counsel
with Defendants-Appellants.

ELIAS A. KANTER,
Of Counsel.

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

New Jersey Court of Errors and Appeals

JOHN P. MCDONALD, *Complainant-Appellee,* *vs.* JOSEPH H. MAYZEL, JOSEPH KRUVANT, HARRY KRUVANT and PLAZA, HOTELS COMPANY, a corporation, *Defendants-Appellants.*	*On Bill, &c.* *On Appeal from the Court of Chancery.*

BRIEF OF COMPLAINANT-APPELLEE.

This is an appeal by the defendants-appellants from an order of the Court of Chancery advised by Honorable Maja Leon Berry, denying their motion to dismiss the amended bill of complaint filed in the cause. The bill was sought to be dismissed on the grounds generally that it disclosed no cause of action against the defendants, and that it was devoid of any equity in favor of the complainant. The learned Vice-Chancellor refused to dismiss the amended bill of complaint holding that it did set forth substantially a cause of action and equitable rights in favor of the complainant (see memorandum of V.-C. Berry, Case, pp. 37-38).

In the brief submitted by appellants appears their interpretation of the substance of the bill of complaint sought to be dismissed. The entire bill appears in Case, pages 1 to 12, inclusive. Since we feel that appellants in their analysis of it fail to set forth the true tenor of the bill as we see it, we shall attempt here, to give our interpretation of it.

It alleges that on March 1, 1924, the individuals represented themselves as sole owners and holders of all the stock of the Plaza Hotels Co. and that in reality such representation was true; that the Plaza Hotels Co. was the owner in fee simple of the premises upon which the Hotel St. Francis was situated, and that the Plaza Hotels Co. was in possession of the Hotel St. Francis, its personal property and good will; that the Plaza Hotels Co. had acquired the leasehold of the premises where the hotel was situated from the previous owners thereof, the Marshall Land Co., for the sum of $150,000 and the Plaza Hotels Co. executed a chattel mortgage for the sum of $152,000, which was eventually paid, and the mortgage cancelled May 15, 1929; that the individual defendants representing these facts to the complainant, and the complainant relying upon their representations, a contract was entered into between them in which it was agreed among other things, that complainant was to manage and operate the hotel (owned by the Plaza Hotels Co.) for three months, and is satisfactorily, and meeting certain obligations, such as taxes and other carrying charges, then a corporation was to be formed to be known as the St. Francis Hotel Company. The complainant was to receive a one-quarter interest therein and the individual defendants were to advance his subscription of $2,500, such corporation to have a capital of $10,000, and the other three-quarter interest to be held by the three individual defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant.

According to the agreement the complainant was to repay the subscription loan out of the profits. The defendants agreed further that they, as the Plaza Hotels Co., executed a lease to

the St. Francis Hotel Co. according to certain terms therein set forth.

It further appears, in the bill, that three months later, on June 5, 1924, the individual defendants represented to complainant that his services had been satisfactory and that the St. Francis Hotel Co. had been incorporated, and that twenty-five per cent. of the stock in accordance with the agreement had been issued to complainant; that the Plaza Hotels Co. had executed and delivered a lease to the St. Francis Hotel Co. all in accordance with the agreement of March 1st; that these misrepresentations were made merely to induce complainant to enter into a further agreement of June 5th and for the fraudulent purpose of obtaining his services without liability on their part; that on this date, June 5, 1924, a new contract was entered into between the purported St. Francis Hotel Co. (Case, p. 20, l. 25 to p. 26) and the complainant, and complainant believing that substantial performance had been made on the part of the three individual defendants in accordance with the March 1st agreement and their representations, continued with his duties as manager and operator of the hotel and worked in that capacity until November 11, 1929, when he was illegally discharged.

That the proposed St. Francis Hotel Co. at the time said agreement was entered into, was not in existence and was not actually incorporated or attempted to be incorporated until February 29, 1928, and that when it was incorporated the sole stockholders were these individual defendants, and the complainant was not given his agreed one-quarter interest; that during his incumbency as manager the business was profitable and the individual defendants withdrew

large sums of moneys from such profits and complainant carried out substantially all the terms of the agreement on his part; that the moneys and profits were fraudulently and unlawfully withdrawn and paid to the individual defendants and to the Plaza Hotels Co., and that eventually complainant was informed by defendants there were neither funds left to pay the debts of the St. Francis Hotel Co. nor to permit the setting up of a reserve fund from which complainant was to have a twenty-five per cent. interest pursuant to the terms of the June 5th contract.

That the Plaza Hotels Co. by its proper officers mortgaged all the goods and chattels of the St. Francis Hotel Co. as collateral security for a loan to the Plaza Hotels Co. in the sum of $350,000 (an action entirely inconsistent with any lease relationship between it and the purported St. Francis Hotel Co.); that the sole officers, directors and stockholders of the Plaza Hotels Co. were the individual defendants named in this bill, who also were the purported officers, directors and stockholders of the purported and actual St. Francis Hotel Co., and who represented to the complainant that they had executed a lease from the Plaza Hotels Co. to the purported St. Francis Hotel Co. for the operation of the hotel now involved in this dispute; that no legal consideration was ever paid to the St. Francis Hotel Co. for the said mortgage given by Plaza Hotels Co.; that the complainant has been unable to obtain a lawful statement of the accounts between him and the defendants; that the assets of the defendants are heavily encumbered; that the St. Francis Hotel Co. is unable to pay complainant any part of his interest earned in the operation of the hotel, and that unless complainant can be permitted in equity and good con-

science to assert his rights against the Plaza Hotels, Inc., and the three individual defendants his rights will be wholly lost and destroyed.

ARGUMENT.

It is contended first by appellants that the amended bill of complaint is devoid of any equity and states no cause of action against the Plaza Hotels Co. for the reason that the Plaza Hotels Co. did not execute the contract which they assume is the basis of this action, nor did the Plaza Hotels Co. ratify that contract.

We maintain the bill does set forth facts from which an *implied contract* arises, and that it does set forth sufficient facts to require the Plaza Hotels Co. to answer and account. It is true that the contract referred to in the bill of complaint was not actually executed by the Plaza Hotels Co., but it is our contention that the averments in the bill amply set forth that by its conduct, by its receipt and retention of benefits and profits, by its acquiescence, the Plaza Hotels Co. adopted these contracts as its own, and since it had reaped the benefits of complainant's services, it is now estopped to deny that these contracts were made in its behalf.

The Plaza Hotels Co. was the owner in fee simple of the premises known as the Hotel St. Francis. The Plaza Hotels Co. was a close corporation and the individual defendants were sole owners of all its capital stock and also its sole officers and directors. When they approached complainant to obtain his services in operating and managing the hotel, and made all the representations which the bill sets forth they did make, they were very careful.

Complainant was employed not by the corporation Plaza Hotels Co. but by a dummy, a non-existent corporation, the St. Francis Hotel Co. Their conduct was quite obviously for the purpose of securing the complainant's services without making the Plaza Hotels Co. liable. They represented to complainant that they acted as the Plaza Hotels Co. and had entered into a lease with themselves as the St. Francis Hotel Co. of the premises known as the St. Francis Hotel and induced complainant to enter into the contract of June 5th. For a period of five years complainant was permitted to manage and operate the premises known as the Hotel St. Francis and to carry on his part every provision of this contract. He was permitted to deduct his salary and running expenses, to set aside moneys for the payment of rents and mortgages, and to pay taxes and insurance and in fact permitted to act in every way exactly in accordance with this contract.

In 14 A Corpus Juris, page 387, section 2241, the rule is stated:

> "As a general rule where a corporation through its proper officers or board takes and retains the benefits of the unauthorized act or contract of an officer or agent, with full knowledge of all the material facts, it thereby ratifies and becomes bound by such act or contract, together with all the liabilities resulting therefrom * * * Thus the corporation is liable on the ground of ratification where with knowledge of the facts, it accepts the benefits of services rendered under an unauthorized contract of employment.."

In *Egbert* v. *Sun Co.*, 126 Fed. 568, the president contracted for the employment of the plaintiff at a stated salary, the contract reserving the right to terminate the employment by paying

him a sum equal to a year's salary, and the plaintiff entered upon the employment and his services were accepted and paid for at the stipulated salary until the defendant exercised the right given by the contract to dismiss him. By so acting and paying for his services and exercising the privilege given by the contract either with the knowledge of its terms or without inquiring in regard thereto, the board of directors was deemed to have ratified the same in its entirety and the corporation was held liable thereon for the stipulated consideration for the exercise of the power to discharge.

During that entire period the St. Francis Hotel Co. was non-existent, and complainant's purported contract with it was a nullity. The individual defendants and the Plaza Hotels Co., which was the owner and had the right to possession of the premises during that entire period (because no such lease to the purported St. Francis Hotel Co. was ever made) stood by and profited by the relation at the expense of the complainant and it acquiesced by its silence to everything done in its behalf. It received and retained every benefit from the contract and from the complainant's services that would have enured to the benefit of the St. Francis Hotel Co. had it been in existence. By this conduct we maintain that the Plaza Hotels Co. must be deemed to have made the contract of the purported St. Francis Hotel Co. its own contract by implication. It was an adoption of the contract of another as its own.

In 13 Corpus Juris 243, section 8, the rule is stated:

> "Where a person who is a stranger to a contract deliberately enters into relations with one of the parties which are consistent

> only with an adoption of such contract, and so acts as to lead such party to believe that he has made the contract his own, will not be permitted afterwards to repudiate it."
>
> *Wiggins Ferry Co.* v. *Ohio R. Co.*, 142 U. S. 396;
>
> *Swift* v. *Detroit Rock Salt Co.*, 233 Fed. 231.

The corporation is estopped to assert that the three individual defendants acted as individuals and in their own behalf and not in behalf of the corporation, because by its silence it assented in everything which its own officers and directors did with its property and it could not deny that it had knowledge of what was going on because its own officers, directors and stockholders were the very ones who carried on the transaction.

We maintain, therefore, that the true tenor of the bill of complaint is to the effect that the Plaza Hotels Co. adopted the contract made by the defendants, Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, purportedly for the St. Francis Hotel Co. and made that contract its own or that an implied in law contract arose between it and the complainant, but most certainly that it was a party to the conspiracy and fraud, to obtain the complainant's services at a fraction of their value.

II.

Counsel for defendants-appellants next give attention to and urge the proposition that even though the Plaza Hotels Co. received and retained benefits, the fact that the individual defendants did not act expressly in behalf of the corporation which would preclude the main-

tenance of the bill upon any theory of ratification.

We maintain that the bill of complaint is maintainable under the theory of ratification. The Plaza Hotels Co. may be deemed the undisclosed principal in whose behalf the individual defendants made the contracts, and if, as counsel for appellants maintain, the individual defendants could act independently of, and unauthorized by the Plaza Hotels Co. *in reference to the property of the Plaza Hotels Co.* that such unauthorized acts were, by its conduct, ratified by the Plaza Hotels Co.

When the June 5th contract was entered into the three individual defendants knew that their representation that the St. Francis Hotel had been formed was untrue, and their knowledge as individuals must also have been knowledge to them in their capacity as officers and directors of the Plaza Hotels Co. Since there was no such corporation in existence at that time as the St. Francis Hotel Co., the only parties who could possibly be benefited by that contract which was entered into at that time was the Plaza Hotels Co. These individual defendants must have, and the bill alleges that they did have the interest of the Plaza Hotels in mind when making the contract. The Plaza Hotels Co. was the owner of the hotel and it was vitally to its interest that the place should be successfully run and maintained, and this undoubtedly was the purpose of the entire transaction. Plaza Hotels Co. certainly desired their hotel property to be successfully operated.

We cannot stress too strongly, in addition, that when the individual defendants reported that they would, and then that they had made a

lease from the Plaza Hotels Co. to the purported St. Francis Hotel Co. that they must be deemed to have acted as officers and directors of the Plaza Hotels Co. as they at that time represented they were. Their entire course of conduct points to the conclusion that the June 5th contract was made on behalf of the Plaza Hotels Co. as the undisclosed principal.

Since the contract then must be deemed to have been made in behalf of the Plaza Hotels Co., the fact that they received and retained the benefits accruing thereunder for five years, even though such contract was originally unauthorized, constituted a ratification of the act.

Bennett v. *Milleville Imp. Co.*, 67 N. J. L. 320;

Clement v. *Young*, 69 N. J. E. 347, at page 351.

III.

It is next contended by appellants that the amended bill of complaint is devoid of any equity and states no cause of action against Joseph H. Mayzel, Joseph Kruvant and Harry Kruvant, because there is an adequate remedy at law, and there are not sufficient grounds for an accounting. We maintain that the remedy at law is inadequate, or at least concurrent, and that the matter is of equitable cognizance.

The remedy at law would probably be a suit for deceit and recovery would be limited to the actual damage which could be shown to have been suffered by the complainant.

Binghan v. *Fisch*, 89 N. J. L. 688;

Lams v. *Fish*, 86 N. J. L. 321;

Crater v. *Binninger*, 33 N. J. L. 513.

The extent of the share of profits which complainant could claim to have lost as a result of the fraud charged would be almost impossible of ascertainment, and complainant would be greatly embarrassed by lack of adequate proof in a court of law. Whereas in a court of equity the court in holding these defendants as trustees *de son tort,* and in compelling an accounting, could so control the parties as to make discovery of the actual profits realized during the entire five years of complainant's employment, and if as alleged in the bill of complaint his discharge in 1929 was illegal, then his further share in the profits up to the time of the hearing.

In I Corpus Juris 615, section 58, the rule is stated:

> "Where the party has no legal remedy, or where the remedy at law is inadequate or embarrassed either from a defect of proof or through some impediment, a court of equity has jurisdiction of matters of account; and such equities may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the party from resorting to his legal remedy or which renders such remedy difficult, inadequate or incomplete. The mere fact of the existence of a legal remedy which may be made available is not a sufficient objection to the more convenient remedy in equity, and in many cases the latter court assumes jurisdiction on the ground of the greater convenience and adaptability of its peculiar machinery."

No precise rule can be laid down as to when the concurrent jurisdiction of equity will be exercised, as the court of equity seems to reserve in itself large discretion upon the bare question of the adequacy of the legal remedy (I. Corpus Juris. 615).

But the main reliance in the bill of complaint is upon the fraud and unconscionable conduct of the appellants, and the law is well settled in this State that in the cases of fraud, equity has jurisdiction concurrent with law. In *Eggers* v. *Anderson,* 63 N. J. E. at page 265, the Court went into the subject rather thoroughly and among other things stated therein, particularly on page 271:

> "True jurisdiction of equity, in cases of fraud remediable at law, has not been much invoked, but that may be accounted for in a large degree, by the less expensive, equally efficient and in former times more speedy remedy, secured in the courts of law. When resorted to, however, the jurisdiction of equity has not been doubted."

In *Gnichtel* v. *First National Bank of Heightstown,* 66 N. J. E. 88 at page 89, the Court said:

> "But in this State the jurisdiction of equity is not excluded in all cases where there is an adequate remedy at law. There is a class of cases where the jurisdiction of the courts are concurrent, and this class includes suits in which the gravamen is fraud, actual or constructive. The remedy at law may be perfectly adequate and yet the jurisdiction of a court of equity to afford relief exists, although it is not always exercised."

To the same effect also are:

Hubbard v. *International Mercantile Agency,* 68 N. J. E. 434;

Dawson v. *Leschziner,* 72 N. J. E. 1;

Mazzolla v. *Wilkie,* 72 N. J. E. 722;

I Ruling Case Law, sec. 26, page 224;

Annotation 53 A. L. R. 815 also at 816 (where fraud is involved).

It appears to be the rule in this State that the question of the jurisdiction of the courts

of equity, in cases of this kind, are matters of discretion with the Chancellor.

Kuntz v. *Tonnelli,* 80 N. J. E. 373, 382.

In certain cases which affirm the broad jurisdiction of equity in all cases of fraud the discretion has been exercised against retaining the case in equity, and the parties have been relegated to their suits at law.

Krueger v. *Armitage,* 58 N. J. E. 357;
Polhemus v. *Holland Trust,* 59 N. J. E. 93.

And in others the court of equity has exercised the discretion, assumed jurisdiction and administered the appropriate relief.

Eggers v. *Anderson, supra*;
Dawson v. *Leschziner, supra*;
Erdmann v. *Gregg,* 90 N. J. E. 363, and others.

In the case *sub judice,* therefore, we maintain the bill of complaint sets forth fraud and unconscionable conduct as to give the Court of Chancery, jurisdiction. The Vice-Chancellor reviewed the aspects of the bill on the motion to dismiss and in his discretion decided that it was maintainable, and that he would retain jurisdiction.

We maintain further, that if this court can and does exercise the power to review the discretionary action of the Vice-Chancellor on an appeal of this kind, they will find the bill meets all the requirements, for presenting an unconscionable fraud of the sort cognizable by the Court of Chancery, under the cases cited.

If the Chancery Court can retain jurisdiction upon this ground, then it may, as was done in all the above cited cases proceed to give full and

complete relief to the complainant, including an accounting, if necessary.

Coddington v. *Bispham,* 36 N. J. E. page 574, 578;

I *Corpus Juris,* page 615, section 60.

We maintain further that the bill sets up sufficient facts showing that the accounting would be of a complicated character, that it would involve the ascertainment of numerous items and would extend over a long period of time.

I *Corpus Juris* 619, section 63;

Wooley v. *Osborne,* 39 N. J. E. 55.

The rule is well stated in Vol. I *Corpus Juris* 619, section 64.

> "The jurisdiction in cases of complicated accounts is based upon the inadequacy of the legal remedy as where there is an embarrassment in making proof, the necessity for a discovery, or the production of books and papers or where it would be difficult, if not impossible for a jury to unravel the numerous transactions involved, and justice could not be done except by employing the methods of investigation, peculiar to the courts of equity."

Furthermore, in this instance, again the question of whether the Court will assume jurisdiction is a matter largely within its discretion. I *Corpus Juris,* section 63. It seems hardly worth while to quote cases on the well settled principle that a Court's discretionary powers are not subject to review.

CONCLUSION.

It is therefore respectfully submitted that for the reasons advanced herein, the order refusing to dismiss the amended bill of complaint should be affirmed by this court.

Respectfully submitted,

KALISCH & KALISCH,
Solicitors for and of Counsel
with Appellee.

Of Counsel,
ISIDOR KALISCH.