

31 MAR.T.1925

N.J. Court of Errors & Appeals

Between

DUPONT CHEMICAL COMPANY,
Complainant-Appellant,

vs.

MARTIN D. BUCKLEY, TRADING AND DOING BUSINESS
UNDER THE NAME AND STYLE OF MATHES
VINEGAR COMPANY,
Defendant-Appellee.

BILL FOR INJUNCTION

ON BRIEFS

STATE OF THE CASE

J. FORMAN SINNICKSON,
WALTER H. BACON,
Solicitors for Complainant-Appellant.

EDWARD T. MAGOFFIN,
THOMAS G. HILLIARD,
Solicitors for Defendant-Appellee.

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Filed September 15, 1924.

E. B. L. (V. C.)

IN CHANCERY OF NEW JERSEY

To the Honorable Edwin Robert Walker, Chancellor of
of the State of New Jersey: 10

The complainant, DuPont Chemical Company, a corporation organized under the laws of the State of Delaware, and duly authorized to transact business in the State of New Jersey, respectfully shows that:

1. On or about February 5, 1920, complainant and one Martin D. Buckley, trading and doing business under the name and style of Mathes Vinegar Company, hereinafter referred to as the defendant, entered into a contract, whereby complainant agreed to sell and defendant agreed to purchase certain specified and designated wooden tanks. 20

2. The tanks, which were the subject matter of this contract, were inspected and examined by the defendant in person and by employees of complainant, and were stated by both parties to the contract to be made of cypress wood, and said tanks were referred to in the contract, which was verbal, and in the subsequent confirmatory orders and writings, as cypress tanks. 30

3. Some of said tanks were dismantled and shipped to defendant and at least one of them was erected or partly erected by him, and he then stated to complainant that he had discovered the fact to be that the wood in said tank was not cypress, and upon further examination, complainant discovered that it did not have any

cypress tanks, and that the tanks which both complainant's employees and defendant had examined and stated to be cypress tanks were not in fact built of cypress wood, and that the contract between complainant and defendant was entered into as the result of a mutual mistake as to the physical existence of the subject matter of the contract, or as the result of said mistake on the part of complainant, and of fraudulent concealment of knowledge on the part of the defendant, if, as a matter of fact, he discovered upon his examination of the tanks
10 before shipment that they were not cypress.

4. Upon the discovery of said mistake, complainant tendered back to defendant the deposit which he had made on account of the purchase of the supposed cypress tanks, but defendant refused said tender and insisted that complainant was obliged to furnish him cypress tanks. Complainant is ready and willing to refund said deposit.

5. Defendant afterwards commenced suit against
20 complainant in the New Jersey Supreme Court, claiming damages to the amount of \$60,000 for the alleged breach of contract to furnish him cypress tanks, which suit is now at issue, and is on the trial list of the Salem County Circuit Court, which opens on September 16, 1924.

6. Complainant is not and has never been a manufacturer of or dealer in wooden tanks, and the transaction between complainant and defendant was a sale of designated personal property which, as defendant well knew,
30 complainant was offering for sale and selling in its business of disposing of used and second-handed material in and from various plants in New Jersey and elsewhere, which had been erected for war time purposes and were no longer needed, that is, complainant was, on February 5, 1920, engaged in business only as a seller of used material, as defendant well knew, and in making the contract in question, the particular tanks, which were the subject matter of the contract, were designated, ex-

amined, and inspected, and the contract of sale referred to those and not to any other tanks, and the contract was entered into by complainant in the belief that the designated tanks were of cypress wood, and if defendant did not believe they were of cypress wood, he fraudulently concealed the fact from complainant.

7. Complainant did not make any contract with defendant to acquire nor to manufacture cypress tanks, but the contract was one dealing with tanks then in existence and which were supposed to be made of one kind of wood when, as a matter of fact, they were of another and different kind of wood. 10

8. All of the tanks shipped by complainant to defendant had been first inspected by defendant by feeling, examining, cutting slivers from staves, and otherwise, and defendant had rejected some tanks as not being cypress and had accepted the tanks which were afterwards shipped to him by complainant.

9. Complainant is informed by counsel and, therefore, says, that it cannot safely go to trial in said cause before the Salem County Circuit Court for the reason that it has an equitable defense to said suit, as above set forth, which, under the rules of common law practice, it will not be permitted to present in an action at law. 20

10. Complainant is also informed by counsel and, therefore, says, that it is entitled to a decree cancelling said contract as having been entered into by a mutual mistake of fact, or as the result of mistake of fact on its part and of fraudulent concealment of fact on the part of the defendant. 30

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

1. That Martin D. Buckley, trading and doing business under the name and style of Mathes Vinegar Company, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the contract between the complainant and defendant entered into on or about February 5, 1920, for the sale and purchase of cypress tanks be cancelled.

3. That the said Martin D. Buckley, trading, etc., as Mathes Vinegar Company, his counsel, attorneys, solicitors, officers and agents, and each and every of them, may be restrained and enjoined from proceeding further against complainant in the said action at law commenced by defendant against complainant in the New Jersey Supreme Court, and now pending and at issue therein, for the recovery of \$60,000 damages for the alleged breach by complainant of said contract for the sale and purchase of cypress tanks.

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

J. FORMAN SINNICKSON,
Solicitor for and of Counsel with Complainant.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

CHARLES G. HOOKEY, of full age, being duly sworn, says:

I reside at Buffalo, New York.

30 In 1920 I was sales manager of the Chemical Equipment Division of the DuPont Chemical Company, the complainant named in the foregoing bill of complaint, and I am now for this purpose the duly authorized agent of said corporation.

I have read the foregoing bill of complaint and the facts therein stated relative to said corporation and its dealings with Martin D. Buckley are true of my own knowledge.

The DuPont Chemical Company was organized for the purpose of salvaging and liquidating the assets of the E. I. duPont de Nemours & Co., which had been previously used in the manufacture of military explosives.

Among these assets were a number of wooden tanks which had been used for holding water. In the work of disposing of this surplus material, these tanks were advertised for sale with other material. These tanks were believed by me to be made of cypress wood. Our inventory showed these to be cypress. In response to this advertisement, Martin D. Buckley called on me at the office of said company, in Wilmington, Delaware. He asked if we had such tanks and I showed him our inventory card. I told him that some of these tanks were at Carney's Point, New Jersey, others at Hopewell, Virginia, and others at Haskell, New Jersey. The bulk of the newest tanks were at Carney's Point, New Jersey, which was the point nearest to Wilmington. I told Mr. Buckley that these tanks must be inspected by him and approved by as to kind, quality and condition before we would accept shipping instructions. To this he assented.

I gave him the price of these tanks, the dimensions and the number, and he went away.

He returned on a subsequent day and said he desired to look at the tanks, as he did not want anything but cypress tanks. For the purpose of making this inspection I sent one of our salesmen with Mr. Buckley to Carney's Point.

I do not know of my personal knowledge what took place on this visit of inspection except as reported to me by the salesman on his return. I am not sure of the date of his first visit but believe it to have been on or about February 5, 1920, when Mr. Buckley first called at my office. The day his first payment was made, after the inspection, was February 9, 1920.

Orders were placed by Mr. Buckley for cypress tanks after this inspection, and he made a payment on account

of the purchase price. Ten of these were for immediate shipment and the balance were to be shipped not before May 1, after inspection and approval by him.

I afterwards wrote Mr. Buckley a formal acknowledgment of his order and in reply received from him a letter, of which the following is a true copy:

“W. E. Mathes Vinegar Co.

Manufacturers of
Evaporated Apples, Pure Cider Vinegar
Sweet Cider

10

Albion, N. Y., Feb. 23rd, 1920.

Dupont Chemical Co.

Wilmington, Delaware.

File S-JJC

Gentlemen: (Attention Mr. C. G. Hookey)

20

Your letter of the 19th at hand. In reference to the 42 cypress tanks, will accept those and under the same conditions as the ones at Hopewell, Va., and will inspect them as soon as possible; at any rate, before time for shipment, in order to avoid any misunderstanding, and if they are in as good condition as the ones inspected at Carney's Point when I was there, I will accept them as per your invoice No. 10174.

Thanking you for all past favors, I beg to remain,

Yours very truly,

M. D. BUCKLEY.”

30

The DuPont Chemical Company was not a manufacturer of or dealer in wooden tanks. The sale made to Buckley was a sale of designated tanks. We did not agree to sell him any tanks except those which he examined and inspected and agreed to take. If the tanks which he saw were not cypress tanks, he did not state that fact to me. I believed that what were sold him were cypress tanks, and I understood that what he wanted to buy were cypress tanks, and I did not have

any reason to believe that the tanks which he inspected were not cypress tanks.

The DuPont Chemical Company did not make any contract with Mr. Buckley to buy or manufacture any tanks for him. The contract related solely to the particular tanks which were offered him as a part of our salvage operations.

I did not know that there was any question about material of which these tanks were constructed until I received a letter from Mr. Buckley about April 1, 1920, in which he said that none of the ten tanks shipped him from Carney's Point were cypress. 10

If they were not cypress, then our records were wrong, and all the information which I had on the subject was wrong because these tanks in the different plants were all alike except as to size, and if the ones we shipped Mr. Buckley were not cypress, then the DuPont Chemical Company did not have any cypress tanks, and the sale to Mr. Buckley was the result of a mistake which we made as to the kind of wood of which these tanks were constructed. 20

CHARLES G. HOOKEY.

Subscribed and sworn to before me this eleventh day of September, A. D. 1924.

SAMUEL IREDELL,
M. C. C. of N. J.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

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J. FORMAN SINNICKSON, of full age, being duly sworn, says:

I am a counsellor-at-law of the State of New Jersey, and am attorney of record for the defendant in a suit now pending and undetermined in the New Jersey Supreme Court, wherein Martin D. Buckley, trading and doing business under the name and style of Mathes Vinegar Company, is plaintiff, and DuPont Chemical Company is defendant.

This suit was brought for the recovery of damages alleged to amount to \$60,000 for the breach of a contract of sale and purchase of cypress tanks. I filed an answer in this suit and the cause is now at issue. It has been noticed for trial several times and for several terms it was not noticed for trial.

10 A notice has been served for the first day of the September Term of the Salem County Circuit Court, which opens on September 16, 1924, and I am advised that the plaintiff intends to move the trial of the cause at that time.

J. FORMAN SINNICKSON.

Subscribed and sworn to before me this eleventh day of September, A. D. 1924.

SAMUEL IREDELL,
M. C. C. of N. J.

20 STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

JOHN J. CARRIGAN, of full age, being duly sworn, says:

I reside at Pennsgrove, New Jersey, and am now in the employ of the DuPont Company. In 1920 I was in the employ of the DuPont Chemical Company as a salesman. Charles G. Hookey was the division head of the department of that company with which I was connected.

30 The first time I saw Martin D. Buckley was in the early part of February, 1920. I was acting under instructions from Mr. Hookey to take Mr. Buckley over to our Carney's Point plant to inspect certain wooden tanks, in the purchase of which Mr. Buckley was interested. I took from the inventory which we had in the office a memorandum of the number, size and location of the tanks which we had for sale in this plant. This inventory showed that the tanks were listed as cypress

tanks and I believed that they were cypress tanks. Throughout the conversation I had with Mr. Buckley, these tanks were referred to as cypress tanks.

When Mr. Buckley and I reached Carney's Point, we went to the office, obtained an automobile, and drove about the plant and looked at the tanks. Mr. Buckley told me he did not want anything except cypress tanks. I did not know anything about the different kinds of wood and could not determine by personal inspection of these tanks whether they were or were not constructed of cypress wood. All I knew about the matter was what I had been told, and that was that the tanks we had for sale were cypress tanks. 10

When we arrived at Plant No. 1, the first tanks we saw had not been dismantled. Mr. Buckley obtained a knife and cut a splinter from one of the staves of the first tank. He examined it, and I asked him if the tank was cypress and he said it was. There were four tanks at this location and he looked at all of them. He said they were all cypress. While we were there at Plant No. 1, there was a tank erected outside of the building in which the four tanks were located, which tank was not on my list. Mr. Buckley said he was anxious to get all the cypress tanks he could and he walked over to the other tank and looked at it. I asked him if it was cypress, and he said it was not. 20

We then went to another location on Plant No. 2 and inspected some more tanks which were on my list as cypress tanks, and which I thought were cypress. Some, if not all, of these tanks were dismantled. He examined the staves and appeared to be satisfied. This inspection covered all the tanks we then had listed as cypress tanks at Carney's Point. 30

We went back to Wilmington together and he went to the office with me. He talked with Mr. Hookey about the matter and gave the orders, which I wrote up. One of these orders called for ten cypress tanks, for immediate delivery, and covered ten of the tanks which Mr. Buckley and I had inspected that day, and with which

he had expressed satisfaction as to kind and quality. The other orders were for delivery not before May 1. If the tanks which we saw that day and which were inspected by Mr. Buckley and afterwards purchased by him were not cypress tanks, I did not know it, and he did not tell me they were not cypress tanks. The only tank he told me was not cypress was the one outside the building at Plant No. 1, which was not on my list and which tank I did not sell to him, and is not included in the orders which I took from him.

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JOHN J. CARRIGAN.

Subscribed and sworn to before me this thirteenth day of September, A. D. 1924.

SAMUEL IREDELL,
M. C. C. of N. J.

—————
[ENDORSED.]

IN CHANCERY OF NEW JERSEY.

20

Between

DUPONT CHEMICAL COMPANY,
Complainant,
and

MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant.

30

BILL FOR INJUNCTION AND RELIEF.

J. FORMAN SINNICKSON, Solicitor,
Mecum Bldg., Salem, New Jersey.

Service of the within bill and affidavits duly acknowledged this 15th day of September, 1924.

T. G. HILLIARD,
Solicitor of Defendant.

Filed September 15, 1924.

IN CHANCERY OF NEW JERSEY.

Between

DUPONT CHEMICAL COMPANY,
Complainant,
and

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,
Defendant.

ON BILL FOR
INJUNCTION.

ORDER TO SHOW
CAUSE AND
RESTRAINING
ORDER.

10

This matter being opened to the Court by J. Forman Sinnickson, solicitor of the complainant, and the Court having read the bill of complaint in the above-entitled cause and the affidavits thereunto annexed;

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It is, on this 15th day of September, 1924, ordered, that the defendant, Martin D. Buckley, trading and doing business under the name and style of Mathes Vinegar Company, show cause before the Chancellor at the Chancery Chambers, in the City of Camden, on Monday, September 22, 1924, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said defendant should not be restrained and enjoined according to the prayer of said bill.

It is further ordered, that the said defendant, his 30
counsel, attorneys, solicitors, officers and agents, and each of them, in the meantime, and until the further order of this Court in the premises, desist and refrain from proceeding further against complainant in an action at law commenced by defendant against complainant in the New Jersey Supreme Court and now pending and at issue therein for the recovery of \$60,000 damages for the alleged breach of the contract mentioned in

said bill of complaint for the sale and purchase of certain cypress tanks.

It is further ordered, that true but uncertified copies of said bill of complaint and affidavits thereunto annexed, and of this order, be served on the defendant or his attorneys in said suit, or one of them, within one day from the date hereof, which service may be by registered mail.

E. R. WALKER,
C.

10 Respectfully advised.
E. B. LEAMING, V. C.

A true copy.
J. FORMAN SINNICKSON,
Solicitor of Complainant.

[ENDORSED.]

IN CHANCERY OF NEW JERSEY.

20 Between
DU PONT CHEMICAL COMPANY,
Complainant,
and

MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant.

ON BILL FOR INJUNCTION.

30 ORDER TO SHOW CAUSE AND RESTRAINING ORDER.

J. FORMAN SINNICKSON, Solicitor,
Mecum Bldg., Salem, New Jersey.

Service of the within order acknowledged this 15th
day of September, 1924.

T. G. HILLIARD,
For Plaintiff-Defendant in Chancery Proceeding.

Filed October 4, 1924.

IN CHANCERY OF NEW JERSEY.

Between	}	ANSWER TO BILL OF COMPLAINT.	10
DUPONT CHEMICAL COMPANY,			
Complainant,			
and			
MARTIN D. BUCKLEY, trading and			
doing business under the name	}	ANSWER TO BILL OF COMPLAINT.	10
and style of MATHES VINEGAR			
COMPANY,			
Defendant.			

The defendant, Martin D. Buckley, trading and doing business under the name and style of Mathes Vinegar Company, answering the bill of complaint herein, says: 20

I. Paragraph 2 of the bill of complaint is denied, but the defendant admits that the tanks which were the subject matter of this contract were stated by employees of the complainant to be made of cypress wood and that said tanks were referred to in the contract as cypress tanks, and that said tanks were inspected and examined by defendant in person, but the defendant avers that the inspection and examination made by him was solely directed toward ascertaining the number of holes and the number of nails in said tanks and the general condition thereof, and the defendant further avers that the defendant, with respect to the character of the wood of which said tanks were built, relied solely upon complainant's said statements that the same were of cypress wood. 30

II. Paragraph 3 of said bill of complaint is denied, but the defendant admits that some of said tanks were dismantled and shipped to defendant and that at least one of them was erected by him, and that he then stated to complainant that he had discovered the fact to be that the wood in said tank was not cypress.

10 III. The defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 4 of the bill of complaint, but the defendant admits that complainant tendered back to defendant the deposit which he had made on account of the purchase of the tanks and that the defendant refused said tender and insisted that complainant was obliged to furnish him cypress tanks.

20 IV. The defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 6 of said bill of complaint, but the defendant admits that the transaction between complainant and defendant was a sale of designated personal property.

V. Paragraph 7 of the bill of complaint is denied, but the defendant admits that complainant did not make any contract with the defendant to acquire or to manufacture cypress tanks and that the contract was one dealing with tanks then in existence.

30 VI. Paragraph 8 of the bill of complaint is denied except that the defendant admits that all of the tanks shipped by complainant to defendant had been first inspected by defendant by feeling, examining, cutting slivers from staves, and otherwise, but the defendant avers that such examination by him had been directed solely toward ascertaining the number of holes and the number of nails in said tanks and the general condition of the wood of which the same were built, and that in respect to whether or not the same were built of cypress

wood defendant was relying solely upon the representation of complainant that the said tanks were built of cypress wood.

VII. The defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 9 and 10 of said bill of complaint.

VIII. The defendant denies the allegations contained in the unnumbered paragraph of the bill of complaint that complainant is without adequate remedy in the courts of law. 10

The defendant further answering the bill of complaint herein says:

IX. That complainant must have known, or should have known, at least as early as the 28th day of November, 1920, at which time the defendant commenced suit against complainant in the New Jersey Supreme Court, claiming damages to the amount of \$60,000 for complainant's breach of the contract of sale of said tanks, each and every of the alleged allegations of fact set forth by complainant herein, and that the complainant has been guilty of laches in the premises, in that, if the complainant ever had any such alleged cause of action as is alleged in the bill of complaint herein, the same could and should have been asserted against this defendant promptly and at least as early as on or about the 1st day of January, 1921. 20

The defendant, therefore, prays: 30

That the bill of complaint may be dismissed and that judgment may be rendered for the defendant for costs and that the defendant have such other and further relief as may be equitable.

EDWARD T. MAGOFFIN,
Solicitor of the Defendant,
Martin D. Buckley.

16

ANSWER.

[ENDORSED.]

IN CHANCERY OF NEW JERSEY.

Between

DUPONT CHEMICAL COMPANY,
Complainant,

and

10 MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant.

ANSWER TO BILL OF COMPLAINT.

EDWARD T. MAGOFFIN,
Attorney for Defendant,
60 Evergreen Place, East Orange, N. J.

20

30

Filed October 6, 1924.

IN CHANCERY OF NEW JERSEY

Between

DUPONT CHEMICAL COMPANY,
Complainant,

AND

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,
Defendant.

10

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.

MARTIN D. BUCKLEY, being duly sworn, deposes and 20
says: I am the defendant herein and reside in Rochester,
New York. I am the plaintiff in the action at law where-
in the complainant is defendant, which action is referred
to in the bill of complaint herein. That action at law was
begun by me against the complainant on or about the 28th
day of November, 1920, and would have been tried Sep-
tember 17th, 1924, except for the order of this Court
herein staying it.

On February 5th, 1920, I went to Wilmington, Dela- 30
ware, for the purpose of negotiating with complainant
the purchase of certain cypress tanks, which, as I had
learned through Mr. Nathan L. Allen, of Walker Broker-
age Co., Rochester, N. Y. complainant was offering for
sale. At complainant's offices I was referred to Mr.
Charles G. Hookey, who was introduced to me as com-
plainant's sales manager, and who, in response to my ques-
tions, told me that he had been in communication with
Mr. Allen the day before and that he had been advised
of my visit.

At this interview I informed Mr. Hookey that I was a manufacturer of vinegar and that I desired to purchase any tanks suitable for vinegar storage which complainant might desire to sell. I told Mr. Hookey that the only tanks which could be used for the storage of vinegar were cypress tanks, and that I would not be interested even in cypress tanks if the same had contained any chemicals. I asked Mr. Hookey not to waste my time by talking to me of any tanks which would not meet the above description. Mr. Hookey replied that complainant had on hand
10 a large number of cypress tanks which had been used for varying periods of less than two years duration in the storage of water only, and that I was welcome to examine them.

To this I replied that I would like to see them, but that inasmuch as I was not an expert on wood and could not be sure of knowing the difference between cypress wood and other wood I would have to rely on his statement that they were cypress tanks which had contained no chemicals, and that it must be clearly understood that the
20 only purpose of my examination would be to determine for myself the number of pipe holes in the tanks, whether or not nails had been driven in them, and their general superficial condition. In this connection I explained to Mr. Hookey that for vinegar storage purposes all holes would have to be very carefully plugged with cypress wood and that any iron nails in the tanks would be eaten away by the vinegar, which would make the tank leak.

Mr. Hookey then told me that he knew the tanks were cypress and that they had contained no chemicals and that he believed that there were but two or three pipe holes in each of them. Thereupon Mr. Hookey and I having discussed the size of the tanks, complainant had for sale, he made me a price on them and introduced me to his assistant, Mr. Carrigan, telling me that Mr. Carrigan would escort me to Carney's Point to see some of the tanks which had been the subject of our conversation.
30

Mr. Carrigan and I then went to Carney's Point where he showed me a number of tanks which he stated were

cypress tanks. There were from 8 to 12 pipe holes in each of them and I stated to Mr. Carrigan my disappointment at finding that this was the case. Mr. Carrigan then called Mr. Hookey on the telephone and stated to me that Mr. Hookey had said that if I was disappointed in this matter I might return to Wilmington for further discussion as to the price.

During the course of the visit aforesaid to the Carney's Point plant of the complainant, and with reference to the wood of which the tanks were made, I told Mr. Carrigan that I was not sure that I knew cypress wood when I saw it and that as to the fact that the tanks were cypress I was relying entirely upon complainant's warranty to that effect. 10

It is true as stated in Mr. Carrigan's affidavit that I cut small slivers of wood from one or more of the tanks shown to me, but this was done by me only with reference to determining the general condition of the wood, and I did not know that the tanks shown to me at Carney's Point and later at Haskell and Hopewell were not in fact cypress tanks. Since complainant was willing to warrant that they were cypress I was satisfied to accept the warranty without examination and did so in reliance on the same. 20

It is not true, as stated by Mr. Carrigan in his affidavit, that I informed him that some of the tanks he showed me were cypress and that some were not. The only rejection of any tanks that I could be said to have made occurred when, in going through the plant, I noticed some large tanks located away from the direction in which we were going, and called them to Carrigan's attention, asking him if they too were cypress tanks, and saying that, if so, I would be willing to purchase them with the others. Mr. Carrigan replied that these tanks which I called to his attention were not cypress tanks, and I then said that, if that were so, I was not interested in them. I never at any time determined for myself or attempted to determine for myself that any of these tanks were or were not cypress, and I did not know whether they were cypress 30

or not. I relied solely on the statements of Mr. Hookey and of Mr. Carrigan that the tanks were cypress and purchased them as such.

It is my recollection that all the tanks that were shown me at Carney's Point were set up, some of them attached to complainant's machinery and some of them filled with water. None of them was in use at the time, but apparently they were in the same condition and position as when they had been in use. I do not remember any case where the tanks shown to me had been taken
10 apart and dismantled. Many of the tanks were set up on an elevation of several feet from the floor. Some of them extended up through to the upper floor. It was possible to examine the entire circumference of the tanks and Mr. Carrigan and I walked around them and I examined them as to their apparent general condition and as to pipe holes and presence of nails. In some buildings we went up to the upper floor and from a distance had a look into the inside of some of the tanks. All of them were in buildings of the complainant as I remember it
20 and there was no artificial light in use therein when my visit was made. The interior of the plant was not bright, but on the contrary, was rather dark.

An examination of these tanks under these conditions for the purpose of determining the wood of which they were made would have been impossible, in my opinion, for anyone not an expert tank and wood man. I am not such an expert and have not at any time bought cypress tanks without either taking an expert with me, or else in-
30 sisting, as in the present case, upon a warranty from the seller.

Thereafter I returned with Mr. Carrigan to Mr. Hookey's office at Wilmington and I told him that I could not use the tanks that I had seen at the price mentioned, because it would be considerable expense to plug the eight to twelve holes in each tank. Mr. Hookey then reduced his price.

I asked him how many more cypress tanks he had, and after looking up some records Mr. Hookey replied

that he would have to telephone the complainant's Haskell, New Jersey, plant to find out whether the cypress tanks at that plant had been sold or not. He called that plant on the telephone in my presence and told me that he was informed that the Haskell tanks were still on hand. He stated that there were still more tanks at Hopewell, Virginia, which were at that time on a tower some twenty or thirty feet high and were filled with water. As to these tanks and as to the Haskell tanks he stated that he knew them to be cypress tanks which had been used for storage of water only, and that he believed their general condition with reference to holes and nailing to be as good as the condition in these respects of the Carney's Point tanks which I had seen and that I might examine them as I had examined the Carney's Point tanks. He also told me that all of the tanks he was showing to me or talking to me about had been purchased by complainant as cypress tanks and that an examination and report by complainant's expert showed that the Carney's Point tanks which I had seen were cypress. He also told me that inspections made by complainant at the time of appraisal of complainant's plants at Haskell, New Jersey, and at Hopewell, Virginia, showed that the tanks located in those plants which had been the subject of our conversation were cypress tanks. 10

Thereafter, at prices then and there agreed on, I agreed to purchase all of the cypress tanks complainant had on hand at Carney's Point, N. J., at Haskell, N. J., and at Hopewell, Va., and on behalf of complainant, Mr. Hookey gave me memoranda of the sale of some of these tanks, with the privilege to me, as soon as complainant should have determined the exact number it had for sale, of inspecting them to satisfy myself that the Haskell and Hopewell tanks were in substantially the same condition as to holes and nails as the tanks previously inspected by me at Carney's Point. 20 30

At that time and on February 5, 1920, I paid complainant 10%, or \$1,424.80, of the purchase price of 80 tanks, which was the estimated number that I was

purchasing. (Complainant not being certain whether it had 10 or 13 tanks at Hopewell, Va.) In Mr. Hookey's affidavit, on page 2 thereof, it is stated that this payment was made by me on February 9, 1920. This is incorrect. The payment was made as aforesaid on the day of my visit to Carney's Point with Mr. Carrigan and was made to complainant shortly after my return from that visit. I now have in my possession the cancelled check representing that payment and the same bears date February 5, 1920.

10 Subsequently I received from complainant memoranda of sale of the other tanks and as it developed the actual number purchased as per these memoranda of sale and letters received from complainant was 83.

So that the Court may see the character of the memoranda aforesaid at different times furnished me by complainant, I annex hereto and mark Exhibit A, a copy of a so-called salesman's order delivered to me on February 5, 1920, by complainant. This particular order refers to the 10 tanks which were actually shipped to me and which turned out to be pine tanks.

I also annex hereto and mark Exhibit B a memorandum, numbered 9955, subsequently received by me from complainant referring to the same tanks.

There were received by me memoranda of sale and salesman's order similar to Exhibits A and B, supra, covering each and every one of the 83 tanks which were the subject of my contract with complainant. I do not annex copies of all of the same hereto because those not annexed are substantially identical with Exhibits A and B, supra, and to annex them all would unduly extend this affidavit.

Annexed hereto marked respectively Exhibits C and D are letters from complainant received by me, respectively dated February 10, 1920, and February 19, 1920, in which letters some of the aforesaid memoranda of sale were enclosed.

Some time prior to March 13th, 1924, I inspected some of complainant's tanks at its Haskell, New Jersey,

plant. Said inspection was had pursuant to my arrangement with Mr. Hookey that I would make at Haskell, New Jersey, the same kind of inspection that I had made at Carney's Point. Most of the tanks shown me at Haskell, New Jersey, were elevated to a considerable height in the air and the general condition of the tanks in respect to holes, nails and superficial condition appeared to be similar to the tanks I had seen at Carney's Point and to be in accord with our agreement.

Subsequently I received from complainant a letter, copy whereof is hereto annexed marked Exhibit E. This 10 letter is dated March 13, 1920.

Almost two months later and after the discovery by me that the 10 tanks actually shipped to me were not cypress, but pine, complainant sent me a telegram, dated May 3, 1920, copy of which is hereto annexed, marked Exhibit F.

Subsequent to my inspection trip to Haskell, N. J., I made a similar trip to Hopewell, Va., where I inspected the 13 cypress tanks which complainant informed me it had discovered that it there had on hand in place of the 20 original estimate of 10. The tanks I inspected at Hopewell, Va., were likewise elevated to a considerable height in the air and attached to complainant's machinery and equipment. Upon inspection by me they proved, with respect to holes and nails, to be in the same general condition as the tanks previously inspected by me at Carney's Point and at Haskell, I accordingly accepted the Hopewell tanks as I had accepted the tanks located in New Jersey.

The inspections aforesaid made by me at Haskell, N. J., and at Hopewell, Va., were made by me under the same general conditions and for the same purpose as the inspection at Carney's Point, previously referred to. 30

It is true that I wrote to complainant a letter, a copy of which is contained at page 2 of Mr. Hookey's affidavit, but the inspection referred to in that letter was, as explained above, to be made by me solely for the same purpose as my inspection of the tanks at Carney's Point

and did not in any respect concern any examination made or to be made by me for the purpose of determining whether the tanks were of cypress wood. This question was, so far as I was concerned, removed entirely from the case by reason of the warranty of the complainant that the tanks were of cypress.

10 Eventually 10 tanks were shipped to me by complainant under our agreement. These tanks were, in accordance with our agreement, taken apart by complainant before shipping for reassembling by me. Upon their arrival, the tank man I had engaged to put the staves together, discovered that the tanks were not cypress but pine.

I thereupon wrote to complainant a letter, dated March 30, 1920, copy of which is annexed hereto, marked Exhibit G and made a part hereof.

Under date of April 9, 1920, I received from complainant a letter, copy of which is hereto annexed marked Exhibit H.

20 Thereafter under date of May 18, 1920, I was advised by complainant that none of the tanks were made of cypress and that it was unable to furnish cypress tanks.

Thereafter and on or about the 28th day of November, 1920, I began the action at law against the complainant for damages for breach of warranty which is now pending in the Supreme Court of this State.

30 I respectfully ask that the stay and injunction heretofore granted by this Court be dissolved and that I be permitted to proceed as speedily as may be with the trial of said law action.

MARTIN D. BUCKLEY.

Sworn to before me this 25th day of September, 1924.

HENRY T. HALL,
Attorney at Law, State of New Jersey.

EXHIBIT A.

SALESMAN'S ORDER

ORDER BUREAU

Date 2-5-20 Salesman

Carney's Pt. MILL

SHIP 6 days

M. O. No. 10

To Mathes Vinegar Co.

At Albion

County

State N. Y.

VIA Freight Collect.

(Complete description of material sold.)

Quantity	Material	Unit Price	Card No. Pro.	20
2	Cypress Tanks 8'x16'-3" staves	\$100.00 Ea.	M-1239	
4	" " 8'9"x16' " "	\$100.00 "	M-2933	
2	" " 8'x15'6", 2½" "	\$100.00 "	M-2021	
2	" " 8'x16'- 2" "	\$100.00 "	M-4522	

All tanks equipped with round iron hoops and lugs.

ALL TANKS SHIPPED TO BE CYPRESS. All tanks sold have been used for water only and not for chemicals.

Charge to

Place

30

F. O. B. Carney's Point. Terms, 10% cash with order.

Bal. Sight Draft B/L.

Approved

EXHIBIT B.

DUPONT CHEMICAL COMPANY, INC.

P. W. Date 2-9-20

Issued at WILMINGTON

Agent HOOKEY.

CARNEY'S POINT MILL

9955

10 Ship (date) 2-16-20 Expect to ship M. O. No.

ORDER OF DUPONT CHEMICAL Co. NOTIFY

To MATHES VINEGAR Co.

Agency No.

At ALBION County ORLEANS State NEW YORK

Via FREIGHT COLLECT. PRR-NYC Rate

SALES ACCOUNT—CARNEY'S POINT—MECHANICAL

20 2—Cypress Tanks 8 Ft. X 16 Ft. 3 In. Staves P.C. #M-1239
 4—Cypress Tanks 8 Ft. 9 In. X 16 Ft. 3 In. Staves P.C. #M-2933
 2—Cypress Tanks 8 Ft. X 15 Ft. 6 In. 2½ In. Staves P.C. #M-2021
 2—Cypress Tanks 8 Ft. X 16 Ft. 2 In. Staves P.C. #4522

ALL TANKS EQUIPPED WITH ROUND IRON HOOPS AND
LUGS.

30 ALL TANKS SHIPPED TO BE CYPRESS. ALL TANKS
SOLD HAVE BEEN USED FOR WATER ONLY—AND NOT
FOR CHEMICALS. THE DAY SHIPMENT GOES FOR-
WARD MAIL ORIGINAL B/L WITH REST OF SHIPPING
PAPERS TO ORDER BUREAU. NOTE ACCTG. DEPT.
DRAW SIGHT DRAFT ON MATHES VINEGAR Co. THRU
CITIZENS' NATIONAL BANK—ALBION—NEW YORK.

SHIP AND SHOW ON B/L AS—WOODEN TANKS.

CK. TO TREAS. 2-9-20 AMT. 100.00 ON ACCT.

Charge to MATHES VINEGAR Co.

Place ALBION, NEW YORK.

Price 100.00 each. F. O. B. CARNEY'S POINT, N. J.

Terms BAL. SIGHT
DRAFT B/L ATTH.

THIS IS AN ACKNOWLEDGMENT of your order, number shown below, for which we thank you, and indicates the manner in which we interpret same. Kindly examine and advise promptly if not correct. When corresponding, please refer to the order number.

10

EXHIBIT C

DUPONT CHEMICAL COMPANY,
INCORPORATED
Wilmington, Delaware

February 10, 1920. 20

File S-JJC

MATHES VINEGAR COMPANY,
Albion, New York.

GENTLEMEN :

You will receive, with this letter, our formal acknowledgement #9955, 9956 and 9958, covering cypress tanks recently purchased by you. We are having a re-inventory made of this material, on our several plants, and will advise you within the next week the exact number of tanks we will be able to furnish. 30

Yours very truly,

SALES DEPARTMENT,
By: C. G. HOOKEY.

JFC.

EXHIBIT D

DUPONT CHEMICAL COMPANY,
INCORPORATED
Wilmington, Delaware

February 10, 1920.
File S-JJC

MATHES VINEGAR COMPANY,
Albion, New York.

10 GENTLEMEN :

You will find enclosed our formal acknowledgement #10,174, covering 42 cypress tanks. This MO with the two orders previously forwarded you, covers all cypress tanks we have available at Carney's Point. You will note we have marked this order, shipped not before May 1st unless instructions are received before that date.

Very truly yours,

20

SALES DEPARTMENT,
MECHANICAL DIVISION,
C. G. HOOKEY.
By: J. J. CARRIGAN.

EXHIBIT E

DUPONT CHEMICAL COMPANY,
INCORPORATED
Wilmington, Delaware

30

Haskell, New Jersey,
March 13, 1920.

MATHIS VINEGAR Co.,
Albion, New York.

(Attention Mr. Buckley)

DEAR SIR:

OUR FILE DC-206-L-EBC: M.O. 9957—TANKS

Referring to the purchase of tanks that your Mr. Buckley inspected at this Plant, shipping instructions on

order as of May 1st, 1920, are we to understand that shipment is to go forward after this date? Please make reply attention of the writer.

Yours very truly,

C. R. DE BOW, Superintendent
Per: H. T. MCKEAG.

EBC MEO

EXHIBIT F

10

266NYMC 817P 28 IEX

Du-Wilmington, Del., May 3, 1920

M. D. BUCKLEY, 209 East Main St.

Roch

We have cancelled your order for tanks at Haskell, N J recent reports show them to be in bad condition this will eliminate your making inspection at Haskell.

DUPONT CHEM CO., CARRIGAN

20

EXHIBIT G

March 30, 1920.

DUPONT CHEMICAL COMPANY,
Wilmington,
Delaware.

GENTLEMEN:

Attention Mr. C. G. Hookey 30
SALES DEPARTMENT

I beg to advise you that the tanks shipped from your place at Carney's Point, N. O. No. 9955, are all hard pine and not one of them, or any part of them, are cypress. I am very much surprised but I have had an expert trying to set those tanks up and he is unable to do anything with them, as the stock works so hard and on account of the sap the wood is beginning to show signs rotting already

and their scarcely worth the trouble of putting them up for vinegar tanks. I suggest that you have some one examine them, if you wish.

Now, if this is true of all the tanks that you have listed me, or in other words sold me for cypress tanks, I am very sorry for I have depended upon them and have put to a great inconvenience, besides the price of stock, cypress timber has advanced very materially, since I purchased those tanks from you. I cannot account for your records showing that those tanks were made from cypress, when they are made from southern hard pine.

I am very sorry, but wish you would let me hear from you at once.

Thanking you for all past favors, I beg to remain

Yours very truly,

EXHIBIT H

20

DUPONT CHEMICAL COMPANY,
INCORPORATED
Wilmington, Delaware

April 9, 1920.
File S-CGH

W. E. MATHES VINEGAR COMPANY,
Albion, New York.

GENTLEMEN:

Attention: Mr. M. D. Buckley

30 We have delayed answering your kind letter of March 30th because of an expensive but determined effort that we made in order to investigate the conditions and the material of the wood tanks that we have located at our various plants so that there will not be a recurrence of the unfortunate situation as now existing over the tanks which we have shipped you.

We at once stopped all shipments on your order when we received your letter. We would feel obligated to you if you will accept one of these tanks that you now have

free of all charges and try same out as a storage tank for vinegar. We would be deeply interested in learning what the result would be. Because of the uses that these tanks have been put we feel that what little sap was in them when they were bought has been thoroughly boiled out.

We will be glad to hear from you on this proposition and then will act according to the results obtained by you. In any event you may rest assured that we will do everything possible to make the matter right.

Yours very truly,

SALES DEPARTMENT,
MECHANICAL DIVISION.
By: C. G. HOOKEY.

10

grp

• IN CHANCERY OF NEW JERSEY.

Between

DUPONT CHEMICAL COMPANY,
Complainant,
and

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,
Defendant.

20

30

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.

NATHAN L. ALLEN, being duly sworn, deposes and says:

I reside in the City of New York and was until recently in the employ of Walker Brokerage Company, of Rochester, New York. I am now in the employ of Fed-

erated Fruit & Vegetable Growers, Inc., of No. 90 West street, New York City. Walker Brokerage Company sold merchandise on a commission basis and while in the employ of that concern I was in charge, among other departments, of sales of tanks.

On December 12th, 1919, there was received by Walker Brokerage Company from DuPont Chemical Company, of Wilmington, Delaware, the complainant herein, a letter dated December 11th, 1919, enclosing a catalogue of steel and wooden tanks which it was offering for sale.

Many of the tanks mentioned in the catalogue were stated therein to be of cypress.

As the representative of Walker Brokerage Company I had some correspondence with DuPont Chemical Company on the subject of these tanks and under date of January 27th, 1920, received from DuPont Chemical Company a further list of cypress tanks and pine tanks which as stated in said letter were being offered by DuPont Chemical Company for sale at its Haskell, New Jersey, and Carney's Point, New Jersey, plants. Knowing that Mr. Martin D. Buckley, of Albion and Rochester, New York, was likely to be interested in cypress tanks, I took up with him the matter of this offering by DuPont Chemical Company, and on February 4th, 1920, I had an interview with Mr. Buckley on this subject. At this interview Mr. Buckley stated to me in substance that he would buy the cypress tanks which I told him DuPont Chemical Company was offering if he could be assured that they were in fact cypress tanks which had not held any chemicals.

I told him that I was confident that they were cypress tanks and he thereupon authorized me at his expense to telephone to Wilmington for the purpose of ascertaining whether DuPont Chemical Company would guarantee them to be cypress tanks which had never contained any chemicals.

On that day I telephoned to the DuPont Chemical Company, at Wilmington, Delaware, and either asked

to be connected with Mr. Hookey, whose name appeared on DuPont Chemical Company's letters of December 11th, 1919, and January 27th, 1920, previously referred to, or else was told that Mr. Hookey, of the Sales Department, was the man for me to talk to in reference to tanks.

I inquired of the gentleman who was connected with me at the other end of the wire and who informed me that he was Mr. Hookey, of the DuPont Chemical Company, whether DuPont Chemical Company would guarantee that the cypress tanks referred to in its catalogues and lists aforesaid were of cypress rather than of some other wood, and whether DuPont Chemical Company would guarantee that said tanks had never contained chemicals. 10

Over the telephone Mr. Hookey informed me that he knew that the tanks were cypress and that they had contained no chemicals and that the DuPont Chemical Company would guarantee those facts to any buyer I might send to him.

I then told Mr. Hookey that my client, Martin D. Buckley, of Albion and Rochester, New York, would probably go to see him in reference to the purchase of DuPont Chemical Company's cypress tanks, and that I would let him know the time of Mr. Buckley's arrival. 20

Subsequently and on the same day I sent Mr. Hookey a telegram, a copy of which is as follows:

"Rochester, N. Y., 2/4/20.

Mr. Hookey
DuPont Chemical Co.
Wilmington, Del. 30

per our telephone conversation this morning
our man on way will be in your office tomorrow morning reference tanks.

WALKER BROKERAGE CO., INC.

NA HB 3.05pm
charge Allen"

NATHAN L. ALLEN.

Sworn to before me this 26th day of September, 1924.

JOSEPH FIELL,

A foreign Commissioner of Deeds
of New Jersey in New York.

(SEAL)

Expires June 4, 1925.

IN CHANCERY OF NEW JERSEY.

Between

10 DU PONT CHEMICAL COMPANY,
Complainant,

and

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,

Defendant.

20

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.

EDWARD T. MAGOFFIN, being duly sworn, deposes and says:

I am an attorney and counsellor at law of the State of New Jersey and the solicitor of the defendant above named. I am also attorney for Martin D. Buckley, the defendant above named, in the action brought by him
30 and now pending in the Supreme Court of the State of New Jersey wherein Martin D. Buckley is plaintiff and the complainant above named is the defendant, and I am familiar with all of the proceedings heretofore had in said law action, as well as in the above entitled cause.

All of the necessary preparations for trial of said law action had been made and the witnesses of the defendant above named (plaintiff in said action at law) were notified to be on hand for the trial thereof at

Salem, New Jersey, on the 17th day of September, 1924, when the restraining order herein was made and entered.

I annex hereto and make a part of this affidavit the pleadings in said law action.

EDWARD T. MAGOFFIN.

Sworn to before me this 3rd day of October, 1924.

HENRY T. HALL,
Attorney at Law, State of New Jersey.

10

Exhibit annexed to affidavit of Edward T. Magoffin.

NEW JERSEY SUPREME COURT.

SALEM COUNTY.

TRANSCRIPT OF PLEADINGS FOR TRIAL.

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,

Plaintiff,

against

DUPONT CHEMICAL Co., a cor-
poration,

Defendant.

20

EDWARD T. MAGOFFIN, ESQ.,
Atty. for Plaintiff.

J. FORMAN SINNICKSON, ESQ.,
Atty. for Defendant.

30

Summons issued November 27th, 1920.

Plaintiff who resides in the County of Monroe, State of New York, for his amended complaint against the defendant above named, respectfully alleges:

I. That at all the times hereinafter mentioned plaintiff then was and still now is trading and doing business at Albion, Orleans County, New York, under the name and style of Mathes Vinegar Company, engaged in the manufacture and sale (and incidental storage) of vinegar.

10 II. Upon information and belief that at all the times hereinafter mentioned defendant then was and still now is a corporation of the State of Delaware, transacting and doing business in the State of New Jersey, at Penn's Grove, Salem County, and that defendant had at all the times hereinafter mentioned duly complied with all of the laws of the State of New Jersey relating to the transaction of business in said State by foreign corporations.

III. That on or about the 5th day of February, 1920, it was mutually agreed by and between plaintiff and defendant as follows:

20 That defendant should sell and deliver to plaintiff, as hereinafter set forth, such number of wooden tanks of the various sizes and of the quality and description hereinafter set forth, said number being then and there estimated by defendant to be 80, more or less, as defendant then had on hand at its mills, located respectively at Carney's Point, New Jersey, Hopewell, Virginia, and Haskell, New Jersey, and, as an inducement to plaintiff to purchase, defendant then and there represented and warranted to plaintiff that said tanks were in good condition and were cypress tanks suitable for the storage
30 of vinegar, for which purpose defendant knew that plaintiff desired said tanks, and defendant further represented and warranted to plaintiff that said tanks were equipped with round iron hoops and lugs and that said tanks had theretofore been used as containers of water only and not of chemicals, 10 of the said tanks to be delivered by defendant to plaintiff f. o. b. one of defendant's mills, as hereinbefore set forth, with sight draft and bill of lading attached, on or about the 16th

day of February, 1920, and the balance thereof to be delivered by defendant to plaintiff f. o. b. defendant's mills as hereinbefore set forth with sight drafts and bills of lading attached, on or about the 1st day of May, 1920; that the plaintiff should accept said tanks and should pay defendant therefor at the rate per tank as specified in the schedule hereto annexed, made a part hereof and marked Exhibit A, and that plaintiff should pay freight charges thereon from the points of shipment to Albion, New York; that said price to be paid by plaintiff to defendant in accordance with said Exhibit 10
A and based upon the delivery of 80 tanks as estimated was the sum of \$14,248, and was payable as follows: 10% thereof at the time of making said agreement and the balance thereof on the receipt by plaintiff of bills of lading and sight drafts as aforesaid.

IV. That plaintiff purchased said tanks relying upon the warranties aforesaid, and after notifying defendant, prior to the making of said agreement that plaintiff required said tanks for use beginning on the opening of 20
the vinegar storage season and on or about the 1st day of September, 1920, as containers of vinegar.

V. That defendant, on or about the 5th day of February, 1920, actually had on hand at its respective mills aforesaid tanks asserted by defendant to be tanks of the quality and description required by the terms of said agreement as follows:

At Carney's Point, New Jersey, 64 tanks; at Hope-
well, Virginia, 13 tanks; at Haskell, New Jersey, 6 tanks, 30
making a total of 83 tanks.

VI. That plaintiff, on or about the 5th day of February, 1920, duly paid to defendant the sum of \$1,-
424.80, pursuant to the terms and conditions of said agreement and that plaintiff at all times and in all respects duly performed each and every of the terms and conditions of said agreement on his part to be performed.

VII. That on or about the 24th day of February, 1920, defendant shipped from Carney's Point, New Jersey, 10 tanks billed to the order of DuPont Chemical Co., notify Mathes Vinegar Company, Albion, New York, with bill of lading and sight draft for the sum of \$900 attached, which said sum was the agreed price of said 10 tanks less the 10% thereof theretofore paid to defendant by plaintiff. That thereafter said 10 tanks arrived in Albion, New York, and that plaintiff paid to defendant said draft for \$900, and that plaintiff likewise paid the freight charges on said shipment of 10 tanks from the point of shipment thereof.

VIII. That none of said 10 tanks was a cypress tank as represented and warranted by defendant to plaintiff, but on the contrary that said 10 tanks and all of them were of an inferior grade and quality of wood, to wit, pine, and that each and every of said 10 tanks was wholly unsuited to and useless for the storage of vinegar and not in conformity with the terms and conditions of said agreement, and that each of said 10 tanks was of much less value than would have been the case if the said tanks had been cypress tanks.

IX. That within a reasonable time after plaintiff discovered that said tanks were not cypress tanks, and on or about the 20th day of March, 1920, plaintiff duly notified defendant that said tanks and all of them were not cypress tanks but pine tanks, and that said tanks and all of them were not tanks such as defendant was required to deliver to plaintiff pursuant to the terms and conditions of said agreement.

X. That thereafter plaintiff duly demanded of the defendant that defendant perform the terms and conditions of said agreement on its part to be performed, and that defendant deliver to plaintiff pursuant to the terms and conditions of said agreement tanks in the number and of the description required by said agreement. That

thereafter and on or about the 18th day of May, 1920, defendant notified plaintiff that it was unable to deliver to plaintiff any tanks of the quality and description required by said agreement, and that defendant has wholly failed, refused and neglected to deliver to plaintiff any of the tanks required by said agreement, to plaintiff's damage in the sum of \$60,000.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of sixty thousand (\$60,000) dollars, with interest thereon from the 1st day of May, 1920, 10 together with the costs and disbursements of this action.

EDWARD T. MAGOFFIN,
 Attorney for Plaintiff.
 Office and Post Office Address:
 No. 60 Evergreen Place,
 City of East Orange,
 State of New Jersey.

Exhibit A.

20

Defendant's Mill	No. of Tanks	Size	Size Staves	Purchase Price
Carney's Point				
New Jersey	2	13'x17'6"	3"	\$170. each
"	2	13'x16'	"	" "
"	4	12'10"x18'3"	"	" "
"	4	10'8"x18'	"	" "
"	2	8'x16'	"	\$100. "
"	4	8'9" x 16'3"	"	" "
"	2	8'x15'6"	2½"	" "
"	2	8'x16'	2"	" "
"	28	13'6"x18'	—	\$170. "
"	8	8'6"x16'	—	\$100. "
"	4	8'x16'	—	" "
"	2	9'6"x14'	—	" "
Hopewell, Virginia	10 more or less.			Actually there were
	13	20'x15'	3"	\$400. "
Haskell, New Jersey	2	8'5"x16'	2"	\$100. "
"	"	"	2	8'x16'
"	"	"	2	8'x16'
"	"	"	2	13'6"x12'
			3"	\$100. "

30

Filed July 24, 1922.

The defendant, organized under the laws of the State of Delaware, and having its principal office at Wilmington, in the State of Delaware, and having its principal place of business in the State of New Jersey, at Carney's Point, in the County of Salem of said State, answering the complaint in the above cause says:

(1). Defendant admits the first paragraph of the complaint so far as it has any knowledge, information or belief.

10 (2). The defendant admits the second paragraph of the complaint.

(3). The defendant denies all of the allegations in the third paragraph of the complaint, except that defendant admits that on or about the 5th day of February, 1920, defendant agreed to sell and deliver to plaintiff, as set forth in the said paragraph of the complaint, and for the price set forth, eighty (80) more or less, wooden tanks that defendant had on hand at its mills located respectively
20 at Carney's Point, N. J., Hopewell, Va., and Haskell, N. J., but with the express understanding and agreement between defendant and plaintiff that plaintiff would inspect said tanks as to quality, condition and material of which they were made, and after such inspection accept the same before shipment.

Defendant further admits that it represented to plaintiff that said tanks had been used as containers of water only, and not of chemicals.

30 (4). Defendant denies the fourth paragraph of the complaint.

(5). Defendant denies the fifth paragraph of the complaint.

(6). Defendant admits the sixth paragraph of the complaint, except it denies that said payment of one thousand four hundred and twenty-four dollars and eighty

cents (\$1424.80) was made pursuant to the terms and conditions of the agreement as set forth in the complaint.

(7). Defendant admits the seventh paragraph of the complaint.

(8). Defendant denies the eighth paragraph of the complaint.

(9) Defendant admits the ninth paragraph of the complaint, except that it denies that said tanks were not such tanks as defendant was required to deliver to plaintiff pursuant to the agreement between plaintiff and defendant. 10

(10). Defendant admits that the plaintiff demanded that defendant perform the terms and conditions of the alleged agreement as set out by plaintiff, and that defendant deliver to plaintiff, pursuant to the terms and conditions of said agreement, tanks in the number and of the description required by said alleged agreement.

Defendant further admits that on or about the 18th day of May, 1920, defendant notified plaintiff that it was unable to deliver to plaintiff any cypress tanks, but defendant denies that it was or is required by its agreement with plaintiff to deliver tanks of the description set forth in the complaint; and 20

The defendant further denies that it has wholly failed, refused and neglected to deliver to plaintiff any of the tanks required by said agreement.

Defendant further denies any damage done to plaintiff. 30

FIRST DEFENSE

Defendant avers that the only warrant made by it was that the tanks in question had been used as containers of water only, and not chemicals.

SECOND DEFENSE

Defendant alleges that in the contract of sale between plaintiff and defendant, it was especially agreed that plaintiff was to inspect and accept said tanks before shipment as to quality, condition and material composing the same and that no tanks were to be shipped until after such inspection and acceptance on the part of plaintiff; that in pursuance of said agreement, defendant inspected and accepted the said ten (10) tanks set out in the complaint, and in pursuance of said inspection and acceptance said ten (10) tanks were shipped to plaintiff.

THIRD DEFENSE

Defendant alleges that the contract for the sale and delivery of tanks entered into between plaintiff and defendant was made on the assumption that said tanks were made of cypress wood, and that the fact so assumed was mutually believed by plaintiff and defendant to be true and was the basis on which the contract was made; that such tanks were not made of cypress wood as assumed by plaintiff and defendant, and that the said contract was made in consequence of a mutual mistake of fact with respect to the subject matter of the said contract; that promptly upon the discovery of said mistake by defendant, defendant rescinded the said contract and returned to the plaintiff all moneys which defendant had received thereunder.

30

FOURTH DEFENSE

The sale in question was a present sale of specific, ascertained and existing goods, open to the inspection of the buyer. The defendant did examine the goods.

J. FORMAN SINNICKSON,
Attorney of Defendant.

Filed Nov. 25, 1922.

The plaintiff who resides in the County of Monroe, State of New York, for his reply to the amended answer respectfully alleges as follows:

I. Plaintiff denies the paragraph of the amended answer stated and designated as a first defense.

II. Plaintiff denies the paragraph of the amended answer stated and designated as a second defense.

III. Plaintiff denies the paragraph of the amended answer stated and designated as a third defense. 10

IV. Plaintiff denies the paragraph of the amended answer stated and designated as a fourth defense.

EDWARD T. MAGOFFIN,
Attorney for Plaintiff,

Office and Post Office Address:

No. 60 Evergreen Place, 20
City of East Orange,
State of New Jersey.

Filed Dec. 1, 1922.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office. 30

[SEAL] In testimony whereof I have set my hand and seal of said Court at Trenton, this fourth day of December A. D., nineteen hundred and twenty-three.

EDW. J. KELLEHER,
Clerk.

[ENDORSED.]

IN CHANCERY OF NEW JERSEY.

... . Between

DUPONT CHEMICAL COMPANY,
Complainant,

and

10 MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant.

AFFIDAVITS

EDWARD T. MAGOFFIN,
Solicitor of Defendant,
60 Evergreen Place,
East Orange, N. J.

20

30

Filed October 24, 1924.

IN CHANCERY OF NEW JERSEY.

Between

DUPONT CHEMICAL COMPANY,
Complainant,
and

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,
Defendant.

AFFIDAVIT. 10

STATE OF NEW JERSEY, }
COUNTY OF SALEM, } ss.

WALTER P. BALLINGER, of full age, being duly sworn 20
according to law, deposes and says, I am the Clerk of
the County of Salem.

Summons was issued November 27th, 1920, in the
action at law in the New Jersey Supreme Court, Salem
County, wherein Martin D. Buckley, trading and doing
business under the name and style of Mathes Vinegar
Compay, plaintiff, against DuPont Chemical Company,
a corporation, defendant.

Said action was noticed for trial for the April Term,
1921, of the Salem County Circuit Court. It was again 30
noticed for trial for the September Term, 1921, of the
Salem County Circuit Court.

It was not noticed for trial for the December Term,
1921; April Term, 1922; September Term, 1922; De-
cember Term, 1922; April Term, 1923, and September
Term, 1923.

It was again noticed for trial for the December Term,
1923.

It was not noticed for the April Term, 1924.
It was again noticed for trial September Term, 1924.

WALTER P. BALLINGER.

Sworn and subscribed to before me this 18th day of
October, 1924.

D. HARRIS SMITH,
Justice of the Peace.

10

[ENDORSED.]

IN CHANCERY OF NEW JERSEY.

Between

DUPONT CHEMICAL COMPANY,
Complainant,

and

20 MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant.

AFFIDAVIT.

J. FORMAN SINNICKSON, Sol'r,
Salem, New Jersey.

30

Filed November 10, 1924.

IN CHANCERY OF NEW JERSEY.

Between	}	10
DUPONT CHEMICAL COMPANY,		
Complainant,		
and		
MARTIN D. BUCKLEY, trading and		
doing business under the name	}	20
and style of MATHES VINEGAR		
COMPANY,		
Defendant.		

STATE OF NEW YORK,	}	SS.
COUNTY OF NEW YORK,		

EDWARD T. MAGOFFIN, being duly sworn, deposes and says: 20

I am an attorney and counsellor at law of the State of New Jersey and am the solicitor of the above named defendant, Martin D. Buckley, and am also attorney for said Martin D. Buckley in the action at law now pending between the parties above named in the New Jersey Supreme Court, Salem County, in which said Martin D. Buckley is plaintiff and said DuPont Chemical Company is defendant. 30

For answer to the affidavit of Walter P. Ballinger, which enumerates the terms of court held since November 27th, 1920, when said action was begun, of the New Jersey Supreme Court, Salem County, at which no notice of trial in said action was served on behalf of said Martin D. Buckley, plaintiff therein, I desire to point out the following facts not referred to in Mr. Ballinger's said affidavit:

By the written consent of J. Forman Sinnickson, Esq., an amended complaint in said action was filed therein on July 24th, 1922.

10 Mr. Sinnickson is the attorney in said action of said DuPont Chemical Company, and as I was advised by Thomas G. Hilliard, Esq., of Salem, New Jersey, who is associate counsel with me in said action, the only condition imposed by Mr. Sinnickson upon granting my request for leave to file said amended complaint in said action, out of time, was that the same be not tried at the September, 1922, term of Court. To this request I assented and accordingly did not serve notice of trial for the September, 1922, term.

The answer of said DuPont Chemical Company to the amended complaint was filed herein November 25th, 1922, together with my written consent to the filing of the same more than 20 days after filing and service of said amended complaint.

20 Notice of trial in said action was not served for the December, 1922, term, because I was advised that Mr. Buckley was seriously ill and unable to attend court. Through Mr. Hilliard I communicated this fact to Mr. Sinnickson and inquired whether or not it was necessary for me to produce doctor's certificates as to Mr. Buckley's condition. Through Mr. Hilliard I was advised that Mr. Sinnickson had consented to the case going over for the term. Accordingly notice of trial was not served for the December, 1922, term.

30 Prior to serving notice of trial for the April, 1923, term, I was advised by Mr. Buckley's office that he continued to be ill and that it would not be possible for him to attend court at April, 1923, term. Accordingly notice of trial was not served for that term.

Prior to the September, 1923, term I was advised that Mr. Buckley's illness had been of such long duration—December, 1922, to June, 1923—that it would be impossible for him to be away from his business in September, 1923, which is, as I am informed, the opening of the busy season in Mr. Buckley's business.

Accordingly notice of trial was not served for the September, 1923, term of court.

Notice of trial was served on behalf of Mr. Buckley for the December, 1923, term of court, and said action would have been tried at said term except for the request of Mr. Sinnickson, which came to me through Mr. Hilliard, that the trial be postponed to April, 1924, term by reason of the severe illness of Mr. Sinnickson.

I granted Mr. Sinnickson's request, but when the time came for service of notice of trial for the April, 1924, term I was advised by Mr. Buckley that pressing business required him to be in Europe during the April, 1924, term. Accordingly the case was noticed by me not for April but for September, 1924, term of court. 10

Mr. Buckley returned in time, the case was again prepared for trial on his behalf, and the same would have been tried in September, 1924, but for the restraining order herein.

Three terms a year of the New Jersey Supreme Court are held in Salem County, viz: April, September and December. 20

EDWARD T. MAGOFFIN.

Sworn to before me this 5th day of November, 1924.

HENRY T. HALL,
Attorney at Law, State of New Jersey.

[ENDORSED.]

IN CHANCERY OF NEW JERSEY. 30

Between

DUPONT CHEMICAL COMPANY,
Complainant,

and

MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant.

50

EDWARD T. MAGOFFIN.

AFFIDAVIT.

EDWARD T. MAGOFFIN,
Attorney for Defendant,
Office and P. O. Address,
60 Evergreen Place, East Orange, N. J.

Consent to filing out of time is hereby entered for
complainant.

10

11-10-1924.

J. FORMAN SINNICKSON,
Solicitor for Complainant.

20

30

Filed November 19, 1924.

IN CHANCERY OF NEW JERSEY

Between DUPONT CHEMICAL COMPANY, Complainant, AND MARTIN D. BUCKLEY, trading and doing business under the name and style of MATHES VINEGAR COMPANY. Defendant.	}	ON BILL FOR IN- JUNCTION AND RE- LIEF. HEARING AT RE- TURN OF ORDER TO SHOW CAUSE FOR RESTRAINT. CONCLUSIONS.	10
--	---	--	----

Complainant offered to sell to defendant certain second-hand tanks, representing them to be cypress tanks. Defendant then inspected the tanks and agreed with complainant on a price. The written contract took the form of a sales order in which the tanks ordered are specified as cypress tanks. After shipment it was ascertained the tanks were pine tanks; both parties had theretofore believed them cypress. 20

Action at law has been brought by defendant against complainant for damages. Complainant now seeks an injunction against the pending action at law, and also a rescission of the contract by reason of the mutual mistake.

J. FORMAN SINNICKSON, ESQ., with whom appeared WALTER H. BACON, ESQ., for complainant. 30

EDWARD T. MAGOFFIN, ESQ., with whom appeared THOS. G. HILLIARD, ESQ., for defendant.

LEAMING, V. C.:

This is not the kind of mistake from the consequences of which equity relieves. There was no mistake as to the

identity of the tanks; the mistake was in the representation and mutual belief that they were made of cypress wood, an element going to quality or usefulness. If this were not so, equity would be privileged to relieve from the consequences of any honest misrepresentation. Any inspection by defendant which did not discover complainant's error is an immaterial element. In the language of Judge Story: "Where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*." 1 Story's *Eq. Juris. Sec. 151*.

Nor can the equitable notion of mistake arise when the mistake is the result of complainant's negligence. Prof. Pomeroy thus concludes his analysis: "Mistake, therefore, within the meaning of equity, and as the occasion of jurisdiction, is an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, *but without negligence*, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time." 2 *Pom. Eq. Juris. Sec. 839*. The degree of negligence which denies equitable relief is defined in a subsequent section as follows: "Where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of a legal duty, a Court of equity will not interpose its relief." *Ib. Sec. 856*. In *Graham vs. Berryman*, 19 *N. J. Eq. 29, 35*, it is said by Chancellor Zabriskie: "The mistake must be as to a fact, not only not known to the party, but one which he could not, by reasonable diligence, have ascertained." See also: *Hagerty vs. McCanna*, 25 *N. J. Eq. 48*; *Dillet vs. Kemble*, *Ib. 66*; *Voorhis vs. Murphy*, 24 *N. J. Eq. 434*; *Scott vs. Hall*, 60 *N. J. Eq. 451*. The positive representation of

complainant that the tanks were cypress removed any obligation of special care on the part of defendant touching that element of quality.

The restraint contained in the order to show cause will be dissolved.

Submitted: November 13, 1924.

Determined: November 19, 1924.

[ENDORSED.]

10

IN CHANCERY OF NEW JERSEY.

Between

DUPONT CHEMICAL COMPANY,
Complainant,

and

MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant.

20

CONCLUSIONS

LEAMING, V. C.

30

IN CHANCERY OF NEW JERSEY.

	Between	
	DUPONT CHEMICAL COMPANY,	} ON BILL FOR
	Complainant,	
	and	} INJUNCTION.
	MARTIN D. BUCKLEY, trading and	} ORDER DISSOLVING
	doing business under the name	
10	and style of MATHES VINEGAR	
	COMPANY,	
	Defendant.	} PRELIMINARY
		} RESTRAINT.

The order to show cause heretofore made in the above entitled matter, under date of September 15, 1924, having come on to be heard and this matter being opened to the Court by Edward T. Magoffin, solicitor of the defendant, and in the presence of J. Forman Sinnickson, solicitor of the complainant, and the Court having considered the bill of complaint, the affidavits on behalf of the said defendant, Martin D. Buckley, trading and doing business under the name and style of Mathes Vinegar Company, and the answering affidavits on behalf of the said complainant, and the matter having been submitted to the Court by counsel for the respective parties, and the Court having duly considered the matter, and being of the opinion that the said rule to show cause heretofore granted should be discharged and that the restraint thereby imposed upon the said defendant, Martin D. Buckley, trading and doing business under the name and style of Mathes Vinegar Company, should be dissolved;

It is, on this 1st day of December, 1924, ordered, that the rule to show cause, made in this cause on the fifteenth day of September, 1924, be discharged and that the restraint imposed on the defendant, Martin D. Buckley, trading and doing business under the name and style

of Mathes Vinegar Company, by said order of this Court, be, and the same is hereby, dissolved.

Respectfully advised,

LEAMING,
V. C.

[ENDORSED.]

IN CHANCERY OF NEW JERSEY.

10

Between

DUPONT CHEMICAL COMPANY,
Complainant,
and

MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant. 20

ON BILL FOR INJUNCTION.

ORDER DISSOLVING PRELIMINARY RESTRAINT.

EDWARD T. MAGOFFIN,
Attorney for Defendant,
60 Evergreen Place, East Orange, N. J.

30

NOTICE OF APPEAL.

57

ON BILL FOR INJUNCTION.

NOTICE OF APPEAL.

J. FORMAN SINNICKSON, Sol'r,
Salem, N. J.

Service acknowledged by T. G. HILLIARD, for defend- 10
ant, December 6, 1924.

20

30

Filed Dec. 26, 1924.

NEW JERSEY COURT OF ERRORS
AND APPEALS

Between

DUPONT CHEMICAL COMPANY,
Complainant-Appellant,

10

AND

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,
Defendant-Respondent.

ON BILL FOR IN-
JUNCTION.

ON ORDER TO SHOW
CAUSE AND RE-
STRAINING ORDER.

PETITION OF AP-
PEAL.

20 *To the Honorable the Court of Errors and Appeals in
the Last Resort in all Causes:*

30 The petition of DuPont Chemical Company, the ap-
pellant in the above-entitled cause, respectfully shows
that your petitioner finds itself aggrieved by an order
made in the Court of Chancery by his Honor Edwin
Robert Walker, Chancellor of the State of New Jersey,
bearing date December 1, 1924, in a cause wherein
DuPont Chemical Company is complainant and the said
Martin D. Buckley, trading and doing business under the
name and style of Mathes Vinegar Company, is de-
fendant, in this respect: Said order adjudges that a
certain order to show cause and restraining order made
in said cause dated September 15, 1924, restraining the
defendant from proceeding further against complainant
in an action at law commenced by defendant against com-
plainant in the New Jersey Supreme Court and now pend-
ing and at issue therein for the recovery of \$60,000
damages for the alleged breach of the contract mentioned
in the bill of complaint in said cause for the sale and pur-

chase of certain cypress tanks, be discharged, and that the restraint imposed on the defendant, Martin D. Buckley, by said order be dissolved, whereas the said Court of Chancery should have ordered that the said order to show cause be made absolute and the ad interim restraint allowed therein be continued until the final hearing and determination of said cause in said Court of Chancery.

Your petitioner, therefore, prays that the said order made on December 1, 1924, may be reversed, set aside and for nothing holden; and that your petitioner may have such other relief in the premises as to this Honorable Court shall seem meet. 10

J. FORMAN SINNICKSON,
Solicitor for and of Counsel
with the Appellant.

[ENDORSED.]

NEW JERSEY COURT OF ERRORS AND APPEALS 20

Between

DUPONT CHEMICAL COMPANY,
Complainant-Appellant.

and

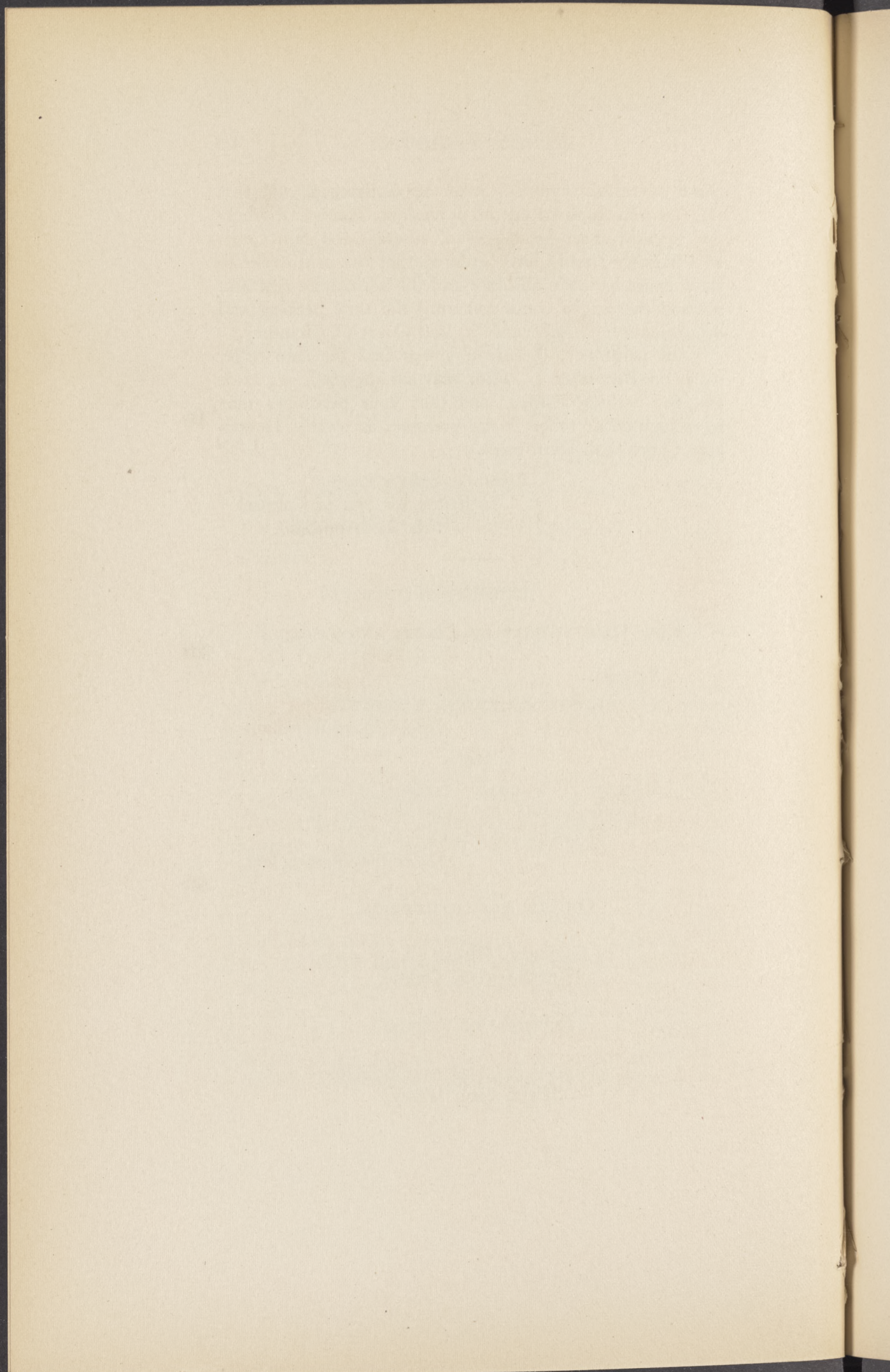
MARTIN D. BUCKLEY, trading and doing
business under the name and style of
MATHES VINEGAR COMPANY,
Defendant-Respondent. 30

ON BILL FOR INJUNCTION.

ON ORDER TO SHOW CAUSE AND
RESTRAINING ORDER.

PETITION OF APPEAL.

J. FORMAN SINNICKSON, Solicitor,
Salem, New Jersey.



NEW JERSEY COURT OF ERRORS AND APPEALS

Between

DU PONT CHEMICAL COMPANY,
Complainant-Appellant,
and

MARTIN D. BUCKLEY, trading and
doing business under the name
and style of MATHES VINEGAR
COMPANY,
Defendant-Respondent.

ON APPEAL FROM
CHANCERY.

BRIEF FOR APPELLANT

I. STATEMENT OF THE CASE.

Complainant filed its bill, seeking cancellation of a contract on the ground of mutual mistake of fact as to the existence of the subject matter of the contract, and to enjoin defendant from further prosecution of an action at law pending in the Supreme Court to recover \$60,000 damages for alleged breach of said contract.

On the filing of the bill, a rule to show cause was granted, with *ad interim* restraint.

Defendant answered the bill, filed counter-affidavits, and after submission of briefs, the Vice Chancellor filed

an opinion which virtually decided the entire controversy adversely to complainant, and an order was entered discharging the rule and dissolving the restraint.

From said order, this appeal was taken:

II. SPECIFICATION OF ERRORS.

1. The injunction should have issued in accordance with the prayer of the bill.
2. The restraint should have been continued pending final hearing.

III. BRIEF OF THE ARGUMENT.

STATEMENT OF FACTS.

Complainant was organized for the purpose of salvaging and liquidating the assets of E. I. du Pont de Nemours & Company, which had been previously used in the manufacture of military explosives.

Among these assets were a number of wooden tanks which had been used for holding water. In the work of disposing of this surplus material, these tanks were advertised for sale with other material. Employees of complainant having the matter in charge believed the tanks to be of cypress wood. They were so listed in the inventory. They were not cypress.

Defendant called at the office of complainant in Wilmington, Delaware, and was told that some of the tanks were at Carneys Point, New Jersey, others at Hopewell, Virginia, and others at Haskell, New Jersey.

Defendant was told that the tanks must be inspected by him and approved by him as to kind, quality and condition before complainant would accept shipping instructions. To this he assented (p. 5).

Defendant visited Carneys Point plant, accompanied by an employee of complainant, and inspected some tanks there. Mr. Buckley obtained a knife and cut a splinter from one of the staves of the first tank inspected. He examined it and said it was cypress. He looked at three other tanks at the same location and said they were cypress. He examined a fifth tank and said it was not cypress. He then went to the other parts of the plant, examined other tanks, and then returned to the office and gave an order for ten of the tanks he had examined and approved that day (p. 9). These ten tanks were afterwards dismantled and shipped and, upon arrival at destination, were found to be pine, not cypress.

No question is raised concerning substitution or error in shipment. The ten tanks shipped and found to be pine were the same ten tanks which had been inspected and approved by defendant at Carneys Point.

Defendant never inspected or approved any other tanks, either at Carneys Point, or at Haskell, or at Hopewell.

Complainant did not have any cypress tanks at any of these plants. Its employees believed the tanks were cypress and so stated.

Defendant did not want anything but cypress tanks and so stated.

He inspected the tanks at Carneys Point before giving the order "by feeling, examining, cutting slivers from staves and otherwise." (p. 14).

There is very little difference between the parties as to what was said and done. The difference is as to the inference to be drawn from their conduct.

Defendant says that what he did was solely for the purpose of ascertaining the condition of the wood, and that as to the kind, he relied upon the warranty of complainant.

Complainant says that it honestly believed the tanks were cypress and that the examination by defendant was sufficient to have disclosed to him whether they were or were not cypress, and that he was likewise mistaken as to the kind, or, if he knew the tanks were pine he fraudulently concealed that important fact from complainant's employees.

Both parties agree that the sale was of second hand, designated, personal property; that complainant did not make any contract with defendant to acquire or to manufacture cypress tanks, and that the contract was one dealing with tanks then in existence (p. 14).

(a) THERE WAS NOT A WARRANTY OF KIND.

Defendant's case is predicated on an express warranty of kind. We are unable to perceive how this claim of an express warranty of kind is justified under the facts.

"Warranty is an express or implied undertaking of the vendor collateral to the contract to sell, that a certain title, quality, condition or characteristic of the goods sold exists." *Elliott on Sales*, page 174.

"An express warranty is any positive affirmation of fact or promise as to the title, quality or condition of the

goods sold, made by the seller, not as praise or commendation or as an opinion or belief as to their quality or value, relying on and induced by which the buyer purchases the goods." *Elliott on Sales, page 177.*

Complainant admits that its agents stated that the tanks were cypress and believed they were cypress. This, however, was not a warranty, because the statement referred to the kind of wood out of which a specified, designated, second hand tank was built. Whether it was or was not of that kind of wood was a matter which defendant could readily determine by the very acts which he admits he performed.

The principles to be applied would, obviously, be quite different had complainant been a dealer in or manufacturer of tanks and had agreed to sell defendant cypress tanks.

The law with respect to the transaction under review is quite different.

"Ordinarily, the sale of a designated, specific second-hand article raises no implied warranty as to the quality, condition or fitness for the purpose intended, of such article, especially where it is subject to inspection at the time of sale." *29 A. L. R., 1231.*

(b) EQUITY SHOULD RELIEVE BOTH
PARTIES FROM THE CONSEQUENCES
OF THIS MUTUAL MISTAKE OF FACT

Following are citations of a few of the authorities indicating that a Court of Equity has jurisdiction to relieve in cases of this character:

The New Jersey Sales Act provides that:

SEC. 73. "In any case not provided for in this Act, the rules of law and equity * * * and in particular the rules relating to * * * the effect of * * * mistake * * * or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods."

SEC. 76. "Specific goods means goods identified and agreed upon at the time a contract to sell or a sale is made."

"All mistakes of fact in agreements, executed or executory, express or implied, must be concerning either the subject-matter or the terms. In the first case, the terms are stated according to the intent of both the parties, but there is an error of one or both in respect of the thing to which these terms apply—its identity, situation, boundaries, title, amount, value, and the like. Such a mistake may relate to any kind of subject-matter, and may occur in a verbal as well as in a written agreement." *2 Pomeroy's Eq. Jur., 3d Ed., Sec. 853.*

"The most important affirmative remedies conferred by an exercise of the equitable jurisdiction on the occasion of mistake are cancellation and reformation. Cancellation is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended." *2 Pomeroy's Eq. Jur., 3d Ed., Sec. 870.*

"On the other hand, in cases of this general class, equity will enjoin the action at law and will determine the

whole cause, whenever the legal remedy is inadequate; and the legal remedy is deemed to be inadequate if the ends of justice would not be satisfied by a mere judgment for the defendant in the action at law, but would require that some distinctive equitable relief, such as a cancellation or a reformation of the instrument sued upon be conferred upon him. If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a Court of Equity will interfere, entertain a suit for such relief, and enjoin the action at law." *4 Pomeroy's Eq. Jur., Sec. 1363.*

"The general rule is, that an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity." *Story, Eq. Jur., 13th Ed., Vol 1, page 150.*

"If a horse should be purchased, which is by both parties believed to be alive, but is at the time of the purchase in fact dead, the purchaser would upon the same ground be relieved by rescinding the contract if the money was not paid, and if paid, by decreeing the money to be paid back." *Story, Eq. Jur., 13th Ed., Vol. 1, page 161.*

"In the case of mutual mistake going to the essence of the contract, it is by no means necessary that there should be any presumption of fraud, on the contrary, equity will often relieve, however innocent the parties may be." *Story, Eq. Jur., 13th Ed., Vol. 1, page 159.*

"From the general principle that contracts can only be effected by mutual assent, it follows, that where, through some mistake of fact, each was assenting to a different contract, there is no valid agreement notwithstanding the apparent mutual assent." *Benjamin on Sales, Page 72, Sec. 50.*

“A party who has given an apparent assent to a contract of sale may refuse to execute it if the assent was founded on a mistake of a material fact, such as the subject matter of the sale, &c. The contract in such case has never come into existence for want of a valid assent.” *Benjamin on Sales, page 528.*

“When there has been a common mistake as to some essential fact forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable.” *Benjamin on Sales, page 529.*

“MISTAKE. The jurisdiction of equity to relieve against the consequences of a mistake of fact has existed from an early period, and is thoroughly established.” *21 Corpus Juris, page 86.*

“The authority of equity to afford relief in cases of mutual mistake is not restricted to contracts and deeds or real estate, but extends as well to sales or other transactions concerning personal property.” *Black on Rescission & Cancellation, Sec. 127.*

“In granting a rescission on ground of mistake, equity proceeds upon the theory that there is a contract, but equity may give relief against the enforcement of such contract if it would be inequitable to permit its enforcement; and not upon the theory that the parties, by reason of such mistake, did not enter into a contract.” *Page on Contracts, Sec. 277.*

See also *Black on Rescission and Cancellation, Secs. 127, 131 (at page 371), 139, 140, 178, 643, 645.*

Obviously, the minds of the parties never met, because the supposed subject matter of the contract did not

exist, hence the contract entered into should be cancelled and not enforced by the defendant.

Defendant has sued complainant for \$60,000 damages for non-performance of a contract which complainant cannot perform. Complainant was not negligent. It was not a manufacturer of or a dealer in tanks. It was engaged in a post-war salvage operation and never did have any cypress tanks. It had taken over, in a salvage operation, a vast quantity of used wartime material. It passed along to defendant such information as was available as to kind, quality and fitness, but insisted that he must inspect and approve each tank before shipment. That he so understood this condition precedent is demonstrated by his letter (p. 6).

Unfortunately for complainant, impossibility of performance is not a good defense at law. *Rubber Works vs. Glass Company*, 92 N. J. L., 461.

Complainant's remedy seems to be in a Court of Equity, and we respectfully insist that the action at law should have been restrained until final hearing on the issue in the Court of Chancery.

Complainant in its bill alleges fraud on the part of defendant in concealing his knowledge of the kind of wood of which the tanks were built. That alone is sufficient to sustain jurisdiction.

(c) LACHES.

Defendant claims that complainant has unduly delayed asking for equitable relief.

The action at law was commenced November 27, 1920 (p. 35).

It was noticed for trial at the April and September Terms, 1921, of the Salem Circuit. It was not noticed again in 1921, nor at all in 1922, nor for the first two Terms in 1923. It was noticed for December, 1923, but not for April, 1924. It was noticed for September, 1924, and complainant then filed the bill.

There are two answers to defendant's contention as to laches.

(a) Defendant has not been prejudiced by the loss of testimony, or means of proof, or changed relations.

(b) Defendant's own delay in bringing on the action for trial justified complainant in its belief that he had abandoned the case.

See *Vliet vs. Cowenhoven*, 83 N. J. E., 234, at page 238.

We respectfully contend that the case should go to final hearing and that in the meantime defendant should be restrained from prosecution of his suit at law.

March Term, 1925.

J. FORMAN SINNICKSON,
WALTER H. BACON,
Of Counsel for Complainant-Appellant.

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