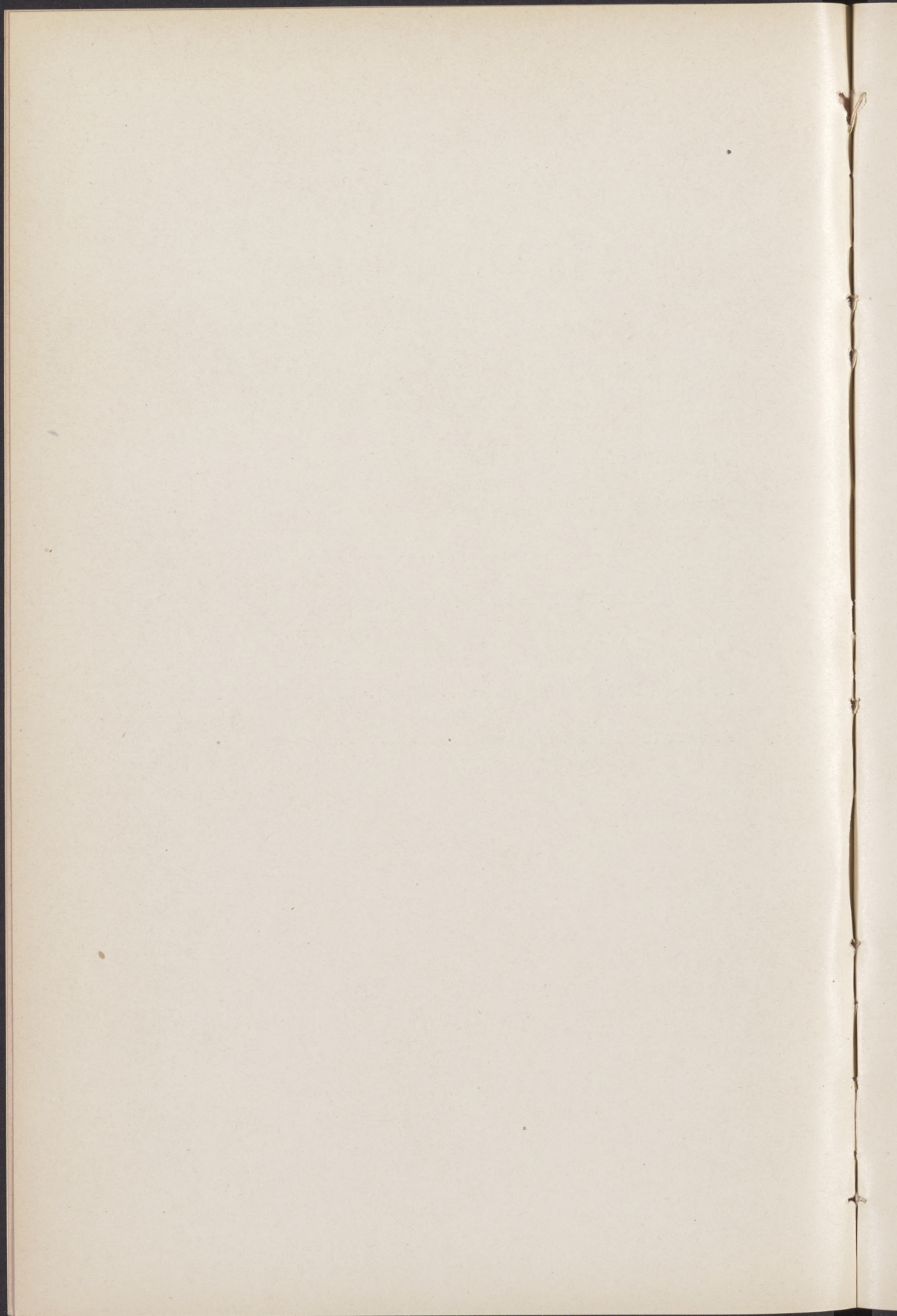


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In Chancery of New Jersey.

Filed July 10, 1928.

<p><i>Between</i> THOMAS E. DAY, <i>Complainant,</i> <i>and</i> HELLER BROTHER COMPANY, a corporation, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Bill, &c.</i> <i>Complaint.</i></p>
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To His Honor Edwin Robert Walker, Chancellor of the State of New Jersey: 20

1. Complainant, Thomas E. Day, of the City of Newark, Essex County, New Jersey, complaining, respectfully shows unto your honor:

That on September 23, 1925, he entered into a contract with Heller Brothers Company, a corporation of the State of New Jersey, the defendant herein, a copy of which contract is as follows:

(Letter-head of Heller Bros.) 30

September 23, 1925.

Mr. Thomas E. Day,
78 Prospect Street,
East Orange, N. J.

Office of the president.

Dear Sir: —F. B.

We hereby agree to sell you and you agree to buy all of our Steel Scrap for the next three months at the top price prevailing in the current 40

Complaint

issue of The Iron Age, under the classification of "Heavy Melting Scrap, Yard."

It is understood that our yard is to be kept reasonably free from scrap under this arrangement.

Yours very truly,

HELLER BROTHERS COMPANY.

10

(Signed) Frederick Baker

Frederick Baker

LDB:G

President.

2. Complainant accepted said letter and the offer and agreement therein contained, on the date thereof and thereafter, on September 25, 1925, expressed said acceptance in writing by letter to Heller Brothers Company as follows:

20

(Letter-head of Thomas E. Day)

September 25th.

Messrs. Heller Brothers Company,
Newark, N. J.

Dear Sirs:

30

We have approximately \$200.00 to our credit with your Company. We advised your credit department to hold this credit to apply on our purchases of your scrap. We have bought all your scrap for the next Three Months from September 23rd as shown in the contract of Sept. 23rd signed by your President Mr. Fredrick Baker.

Yours very truly,

(Signed) THOMAS E. DAY.

40

3. At and prior to the time of the making of said contract complainant and Frederick Baker, president of the defendant Heller Brothers Com-

Complaint

pany, negotiated concerning the terms thereof, both as to price, material involved therein, delivery and other particulars.

4. The true agreement between the parties as intended to be expressed by the writing set forth in paragraph one hereof was that the defendant sold and complainant purchased, not only the steel scrap then in, on and about the premises of the defendant company at Newark, New Jersey, but also material of like kind and quality which would accumulate and result from the operation of defendant's plant for the three months following the making of said contract. 10

5. As a part of said negotiations, complainant inspected with the representatives and agents of the defendant company the steel scrap then in, on and about the premises of the defendant and his intention in making said contract and the intention of the defendant in the making thereof was that all of such accumulation of such steel scrap was to be sold to, and purchased by the complainant. 20

6. In the month of October, 1925, one or more new officers were elected by the defendant company and said officers, or some of them, denied to the complainant the right to remove the steel scrap then on said premises and still do deny and refuse possession of the same and contend that said contract is not as herein alleged by complainant, but that by its wording complainant's rights were strictly limited to such steel scrap as might have accumulated for the three months following the date of said contract. 30

7. After such refusal complainant sought to prove and recover his damages in an action at law brought by him against the defendant herein. Upon a trial of said action, oral evidence was offered 40

Complaint

to prove that said contract was not in fact the full expression of the real transaction and the intent of the parties, but it was ruled by the Court that said contract was not ambiguous and that the offered testimony of complainant and others in that respect was inadmissible. A mistrial was allowed and said action, although still pending cannot be tried and concluded until relief is afforded by this Honorable Court.

8. Complainant charges that said contract and the wording thereof are the result of mutual mistake, error or oversight, that the parties thereto in fact agreed that all of the then present accumulation, as well as the future accumulation of steel scrap, for a period of three months following the making of said contract was sold to and purchased by the complainant, that the sale and purchase of the then present accumulation of said material was a large and essential part of said contract and that both complainant and defendant's agent, in the making of said contract had agreed and understood that the entire premises were to be cleared and freed from all steel scrap then present and thereafter to accumulate on defendant's premises for a period of three months.

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

1. That said contract be reformed and the true intent and meaning of the parties be expressed in the reformation or amendment thereof, so that the same shall read substantially as follows:

"We hereby agree to sell to you, and you agree to buy all of our present accumulation of steel scrap and all of the steel scrap accumulating for the next three months x x x x"

Complaint

Instead of the words beginning and ending with the first and last words in the above quotation as the same appears in said contract.

2. That the defendant may be compelled to answer this bill of complaint and each statement herein made, as fully and particularly as if thereunto specially interrogated. 10

3. That the state's writ of subpoena be issued out of and under the seal of this Honorable Court commanding the defendant, by a certain day, to appear and answer this bill of complaint and to abide by such orders or decree as the Chancellor may make in the premises.

4. That such other and further relief either by way of reforming, amending or clarifying the terms of said contract or other or incidental relief as the nature of the case may require or be agreeable to equity and good conscience may be awarded to complainant. 20

W. HOWARD DEMAREST,
Solicitor for and of Counsel
with Complainant.

30

40

Thomas E. Day—direct

IN CHANCERY OF NEW JERSEY

Between

THOMAS E. DAY,

Complainant,

and

HELLER BROTHERS COMPANY, a
corporation,

Defendant.

10

Transcript of testimony and proceedings in the above entitled cause, before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Monday, November 4, 1929. 20

Appearances—

For Complainant—W. Howard Demarest, Esq.

For Defendant—Joseph Kahrs, Esq.

THOMAS E. DAY, complainant, sworn.

Direct examination by Mr. Demarest.

Q Are you the complainant in this case? A Yes. 30

Q Where do you live? A Elizabeth, New Jersey.

Q Did you do business with Heller Brothers, with respect to purchasing scrap from them in 1925 and at other times? A Yes.

Q When you dealt with them, who was the officer with whom you dealt? A Mr. Frederick Baker, president. 40

Thomas E. Day—direct

Q Did you deal with him on this particular occasion when you bought this scrap mentioned in the letter of September 23? A Yes.

Q Is this signed by Mr. Baker? A Yes.

10 *Mr. Demarest.* I offer in evidence letter addressed to Mr. Thomas E. Day, dated September 23, and signed "Heller Brothers Company, Frederick Baker, President."

(Marked Exhibit C-1.)

Q Did you reply to that letter.

Mr. Demarest. You have the original, Mr. Kahrs?

Mr. Kahrs. I admit that is a copy.

A Yes.

Q Is this a copy of your reply? A Yes, sir.

20 *Mr. Kahrs.* I offer the carbon copy of the reply in evidence, by consent.

(Marked Exhibit C-2.)

Q At the time the letter of September 23 was given to you by Mr. Baker, had you examined the scrap that was to be purchased? A Yes, sir.

Q What had been done about ascertaining what the scrap was to be purchased, and by whom? A I called on Heller Brothers the date of that contract—I think it was September 25; the date I just forget.

30 *Court.* Twenty-third?

Witness. Twenty-third.

A (Continuing.) And I called previous to that; he told me to come back about that date, any day I could see him.

Q Mr. Baker? A Yes; he had showed me the scrap before and wanted me to remove all the material from the plant. He wanted the cash for it; so I called at his office on the morning of this contract,

40 and he assigned a man named William D. Bartlett,

Thomas E. Day—direct

his assistant, and he said to "go out and look at the scrap again, and make me an offer on it, make me a bid for this scrap, and arrange on the price with Mr. Bartlett," which I did. I made him an offer of price something less than what the contract is. He and I both went into Mr. Baker's office, and I told him what I had offered, and he picked up the Iron Age, and he checked the price, and he told me that I was too low, that he wanted more money. So we traded and bargained, and the contract we agreed on a price—the prevailing price in the Iron Age, and he called Mr. Bartlett in the office again, and —Mr. Bartlett stepped out—and said, "Draw a contract up with Mr. Day," and told him the price of this contract. Mr. Bartlett brought the letter in and he passed it over to me for approval, which I said was all right, and he took it back and he added a little note on the top of that contract, and he made his signature to it. 10

Q You mean the words "and you agree to buy" inserted in ink? A Yes, I asked him to initial that. 20

Q And it is initialed on the margin? A Yes.

Q When the scrap was inspected, was it bought on this same day, or had the scrap been inspected on more than one occasion? A It had been inspected on more than one occasion, but it was all inspected on this day of the contract. 30

Q When did you first inspect it with reference to this purchase? A On September 14, I think.

Q And who was with you when you inspected it on that day? A Mr. Baker.

Q And how did you come to make the inspection on that date? A I owed the Heller Brothers thirteen hundred dollars on previous scrap purchased; there was a little error in the account; they claimed it was fifteen. I returned from Canada on 40

Thomas E. Day—direct

September 13 and went immediately to Heller Brothers, and gave them a check for fifteen hundred dollars on account, and I asked Mr. Baker then if he would sell me the scrap, and he said yes, and there was some talk about it. I told him that he should have the money in the bank, rather than a
10 big accumulation of stock, and he said, "How much scrap have we on the plant?" and I told him they had at that time fifteen thousand dollars worth of scrap, and I told him that it was good business to have the money in the bank, rather than in a scrap pile, and he thought that I was right, and he said, "We will go out and look at the scrap," and on that day he told me to come back on a later day.

Q When he said, "We will go out and look at the scrap"? A Yes.

20 Q Did he go with you? A Yes.

Q Where did you go? A All over the plant; on both sides of the plant—in the file works, and steel mill, and forge plant and milling works.

Q And was some of the scrap under cover and some outside? A Some was under cover and some outside.

Q Was any figure mentioned as to the tonnage of this scrap, between you and Mr. Baker at that time? A I told Mr. Baker that he had over a
30 thousand tons of material on the plant.

Q No contract that day? A No contract that day.

Q Why not? A He said he wanted to receive bids from other dealers.

Q And when you returned, did you see Mr. Baker before you saw Mr. Bartlett? A Oh, yes.

Q And where did you and Mr. Bartlett go with reference to this scrap? A We went all over the
40 plant.

Thomas E. Day—cross

Q Anything said by Mr. Baker as to whether he desired to sell you this entire accumulation? A I don't understand that question.

Q Did he say he wanted to sell you the scrap already accumulated?

Mr. Kahrs. I object to leading questions.

Mr. Demarest. I withdraw the question. 10

Q What was the intention of yourself and Mr. Baker as to what scrap should be purchased?

Mr. Kahrs. I object.

Court. He may state what his intention was. I suppose the other man's intention may have to be judged by what was done.

Mr. Kahrs. Should we not judge the entire situation?

Court. It clearly appears now that the intention of this man was to buy whatever scrap was there. I don't think it is necessary to go further, if you object. I will permit the question, if you insist on it, but I don't think it was necessary. 20

Q What was your intention as regards what you were to buy? A I was to remove all the steel scrap from the plant that he showed me and all scrap that was to accumulate in the next three months, and that was what I had been doing in the past. 30

Mr. Kahrs. I object to the last, and ask that it be all stricken out.

Court. Strike it out.

Cross examination by Mr. Kahrs.

Q You say that after the exchange of letters you went to the place of business of Heller Brothers? A Yes, sir. 40

Thomas E. Day—cross

Q When? A If I understand you right, Sir—

Q Let us come to a clear understanding. The so-called agreement was made September 23; when did you next go to their place of business? A About October first.

Q Whom did you see then?

10

Mr. Demarest. I object to the question. Your Honor, we are now approaching a situation having to do with a time that cannot affect the question before this court.

Court. I don't know whether it does or not. What is the purpose of it, Mr. Kahrs?

20

Mr. Kahrs. The purpose is this: of course, we are in the Court of Chancery. Here is an agreement that was made in September, 1925, between Mr. Day and the corporation. I am going to offer to show that Mr. Baker, the then president, was a temporary officer in this respect, that during the previous year this company, in order to change its financial structure, caused to be issued some mortgage bonds, placed through a bond house in New York. The bond house in New York insisted upon putting their man in as president for the term of one year—a man who had no financial interest in this company, and that had no previous experience, and who just drew a salary, and that man was Mr. Baker.

30

Court. What difference does that make?

Mr. Kahrs. I think it makes this difference: if Mr. Day had been dealing with an individual, that would have been one thing, but after the agreement was made—and the agreement is very clear as to its terms; not only the letter that Mr. Baker signed, but the letter of acceptance, by Mr. Day, in which he states,

40

Thomas E. Day—cross

“We have all of your scrap for the next three months from September 23, as shown in the contract”—

Court. I don't think it is clear, inasmuch as one court has construed it to mean just exactly opposite from what I would construe it to mean; so I don't think it is clear. It cannot be clear, if different persons take different views of what it means. I think it means that whatever scrap was there and whatever was accumulated; that is the way I would interpret it. 10

Mr. Kahrs. If that is so, then complainant will be denied the relief of changing the terms—

Court. No, I say that is the way I would construe it, but the Court of Law has already construed it differently. 20

Mr. Kahrs. (Continuing) —because I think in a court of chancery we are entitled to have this construed. We construe it just that way, that we had all of your scrap for the next three months—the accumulation for the next three months.

Court. We are getting away from the point. The question was directed to what took place on October first. Has that anything to do with the making of the contract? 30

Mr. Kahrs. It seems to me it has something to do with it, as to whether relief should be granted to the complainant, under the circumstances; because when complainant went to the place of business, and one of the employees having this contract before him, and construing it according to its terms—not Mr. Baker—denied that Mr. Day was entitled to the accumulated scrap. Then that was September, 1925, and three years later the suit is started. 40

Thomas E. Day—cross

You see the position it places the defendant in.

10 *Court.* I don't see any objection to your proving that your clients refused to let the man take out the scrap that had already accumulated before, but that I understand is part of complainant's allegation in the bill, and it is admitted in the answer; so what is the use of proving it?

20 *Mr. Kahrs.* I am not attempting to prove it now, but that is why I think I am entitled to ask this question, because that is my position in this matter, that it is unfair and inequitable to ask us—they should have been placed in the position of electing. We had our choice of delivering all the scrap on hand in compliance with Mr. Day's demand, or else we could have deliberately breached our contract and suffered the consequence. What we did was to live up to the terms, as we thought the terms of the contract. Three years later the market changes, and they come in and ask this court to place it in a position so that we cannot go back and sustain our original position.

30 *Court.* If you show some interpretation by this witness contrary to what is now interpreted, I will permit you to show it. But if it is simply a question then of the denial of his right to take scrap which had accumulated, I don't see where there is any necessity of proving that, because it is admitted in the answer.

Mr. Kahrs. We don't quite admit it in the answer. The question was, whom did he deal with at that time?

40 *Court.* It is a question whom he dealt with on the twenty-first of September.

Thomas E. Day—cross

Mr. Kahrs. The question was broader than that. We are now coming in three years later—four years later. The suit was started over three years later, and it seems to me that we should ask the court, and your Honor should take into consideration the unfairness to us, at that late day, and now at this late day— 10

Court. That isn't the question at all, whether the contract is unfair or whether it is not. The question is whether the contract as set out in this complaint is the real contract which was entered into. I am not concerned with the fairness or with its unfairness, because that isn't before me.

Mr. Kahrs. At the same time, isn't it one of the elements for consideration in a court of equity, when complainant is here asking for relief? 20

Court. He is not seeking to enforce the contract here.

Mr. Kahrs. If the terms of the contract are so changed, and then if we get back to the court of law, the question of fairness or unfairness of the terms of the contract cannot be raised by us. We are bound by the terms.

Court. Perhaps not. 30

Mr. Kahrs. And so in a court of equity I think the court should take into consideration all the circumstances.

Court. Well, I can only repeat that you are attempting to prove an interpretation by this witness contrary to what he now seeks to have put upon the contract. I will not permit you to do it, because the interpretation of the parties themselves sometimes is controlling in the case of an ambiguous instrument, but if you 40

Thomas E. Day—cross

are merely seeking to show that you refused to deliver, what you have already admitted—a fact which you have already admitted in the answer—

10 *Mr. Kahrs.* I haven't admitted that, and I don't take that position now. I abide by your Honor's ruling, if I am not permitted to show with whom Mr. Day dealt.

Court. The contract wasn't made on October first.

Mr. Kahrs. No, but he says he went to this place—

Court. What difference does it make if he went there a dozen times afterwards?

Mr. Kahrs. Very well.

20 Q How many times did you return?

Mr. Demarest. I object.

Court. Mr. Kahrs, the sixth paragraph of the bill of complaint says that in the month of October the defendant company denied the complainant the right to remove the steel scrap then on the premises.

Paragraphs six and seven are admitted. That is a direct admission of the allegations of that paragraph, Mr. Kahrs.

30 *Mr. Demarest.* I think Mr. Kahrs is looking at the pleadings in the original chancery suit brought by us in this case, where we came before the court and asked for specific performance of this contract. Vice-Chancellor Backes denied preliminary injunctive relief and commanded that they deliver us this merchandise. Then we went to law, and we struck this interpretation snag, and now we are back in the court of chancery again.

40 *Court.* I am willing to hear any testimony or any evidence that either party offers respect-

Thomas E. Day—cross

ing the making of this contract, or respecting its interpretation by the parties after it was made.

Mr. Kahrs. So I take it that my last question remains unanswered, how many times complainant went to the place of business of the defendant?

10

Court. Unless it is directed to one of those things which I have just suggested.

Mr. Kahrs. The inquiry was "how many times did you go there?"

Court. That particular question I cannot see any objection to, because the answer doesn't get us anywhere. Let him answer the question.

How many times did you go there after this contract was made?

Witness. Somewhere about thirty or forty times.

20

Q Within that period? A Within the period of—up until March, last year.

Q How many times did you go within three months after September 23?

Mr. Demarest. I object. What Mr. Kahrs is doing now is fortifying himself against the trial at law, and I don't think it is proper in this case.

30

Court. I don't know that the time does not appear.

Mr. Demarest. We have the testimony he presented in the court of law. I am not seeking now additional material.

Court. The materiality of the question does not appear now, but I will permit it subject to your showing that it does appear later. If it doesn't appear to be material later, the answer will be stricken out.

40

Thomas E. Day—cross

Q Do you remember the question? A How many times did I go to the plant?

Q Within three months after the making of this contract? A Probably fiffiteen or twenty times.

Q You say on the twenty-third of September, when the Baker letter was written and signed by him, Mr. Baker went around the plant with you?
10 A He went around the plant?

Q Do I understand he went around the plant?

Court. On the twenty-third of September.

A He did not go around the plant with me on September 23.

Q And so you had no discussion with Mr. Baker as to the quantity of scrap on that day? On that day you had no discussion with him? A Yes, I did.
20

Q Before Mr. Bartlett took you around the plant? A Yes.

Q And you say Mr. Bartlett pointed out to you the scrap on hand? A Yes, sir.

Q And what scrap did he point out? A All the scrap that was on the premises of the Heller Brothers at North Newark, covering about six city blocks, I think.

Q But he pointed out to you only the scrap that was on Heller Brothers plant, didn't he? A The Heller Brothers and the Vixen File Company.
30

Q There was some scrap on the Vixen File Company's plant? A I think it is all Heller Brothers Company.

Q But some Vixen File Company scrap was also pointed out to you? A I cannot tell you whether it was Vixen File or Heller Brothers.

Q Didn't you just say, a few moments ago, that some Vixen File Company scrap was pointed out to you?
40

Thomas E. Day—cross

Court. On the Vixen File Company plant?

Mr. Kahrs. Yes, on the Vixen File Company plant.

A I may be mistaken; I am not sure whether it was Vixen File or Heller Brothers.

Q What did you mean when you said that before? A Because we know the plant from the name— 10

Q What did you mean when you said before that some scrap from the Vixen File Company plant was shown to you? A There was a plant there making files, and they called it the Vixen File or Heller Brothers.

Q You know that is a separate company, don't you? A I don't know; I am not sure; I cannot swear to that. 20

Q Don't you know as a matter of fact, from your many previous visits, that the Vixen File Company is a separate corporation? A Absolutely not.

Q You don't know, you say? A No.

Q Why did you mention Vixen File Company before? A For a matter of identification of the piles of scrap.

Q Was that some of the scrap you would identify as the Vixen File Company scrap? A Yes. 30

Q. You also know that there was a Heller Tool Company there? A Yes.

Q And you know that is a separate corporation? A I know that is a separate corporation.

Q You have dealt with the Heller Tool Company in the purchase of scrap previously? A Yes.

Q And some of the scrap that was pointed out—that you referred to in your testimony, was the Heller Tool Company scrap? A No. 40

Thomas E. Day—cross

Q Wasn't some of it the Vixen File Company scrap? A No, sir.

Q How do you know it wasn't? A Because I bought all that scrap, with the exception of the File Company, from Heller Brothers Company; they sold it to me, and I took delivery and I paid them for it. I was billed on their invoices for it, and I have the invoices with me. When it was
10 billed as "Vixen," it was billed as "Vixen" on Heller's billheads.

Q Then your previous experience taught you that there was a Vixen Company, and you bought the scrap from them and paid them for it? A I never bought any scrap from Vixen Company.

Q What did you mean when you just said that it was billed by the Vixen Company?

20 *Court.* He didn't say so. He said that was billed as "Vixen" scrap, on the Heller billheads, and bought from the Heller Company.

Q Did you ever pay Vixen? A No, sir.

Q You are quite sure about that? A Absolutely.

Q You know the portion of the property up there used by the Vixen Company, don't you? A Yes.

30 Q How much of this scrap that you said was pointed out to you was on the portion of the property owned by the Vixen Company, or used by the Vixen Company? A The scrap of the Vixen Company was not on the property known to me as the Vixen Company.

Q It was not? A It was put in with the Heller scrap, on top of that material.

40 Q Then it is your understanding, or was your understanding, that no part of the scrap bought under this agreement was contained on the premises

Thomas E. Day—cross

used by the Vixen Company; is that so? A That is my understanding.

Q That is, what you saw that day? A Yes; I never removed any material out of the buildings of the Vixen Company.

Q You are not answering my question.

Court. Then it was not your intention that any of the scrap on the premises used by the Vixen Company was to be included in the terms of this contract; isn't that so? 10

Witness. No, that is not so.

Q Didn't you just tell us, a few moments ago, that no scrap of the Vixen Company was included in this contract? A All the scrap on the Heller plant, as generally taken by me, was my understanding of what I was to receive, and Mr. Baker's intention of what I was to receive. 20

Q And none of the scrap on the Vixen plant was to be received by you; isn't that so? A I was to take it; I never received any material of Mr. Baker—

Q Come on; let us get along here. I am trying to find out from you whether it was the intention that you were to take the scrap on that portion of the premises occupied by the Vixen Company, under this contract. A Yes, I was to take what was on the property; of probably the Vixen Company—I cannot swear it was their property or not. 30

Q Didn't you tell us just a few moments ago, that you were not to take the Vixen scrap? A No, I did not say that.

Q Was any scrap pointed out to you on the Vixen property? A No, not as known to me as the Vixen property.

Q You know the Vixen property? A I know a building there, a three or four-story building that 40

Thomas E. Day—cross

they had a few floors in, a small plant, and that material—scrap was taken out and put in the pile, out of that building.

Q That was a separate pile, wasn't it? A It was piled with the other material alongside, and then the pile intermingled.

10 Q There was a difference between the kind of scrap? A Yes.

Q What was the scrap of the Vixen Company? A There were turnings; there were pieces of files.

Q How do you classify the Vixen scrap? The scrap that you agreed to take under this contract was heavy milling scrap. That is a term quite common in the trade, isn't it? Isn't heavy milling scrap common in the trade? A Yes.

20 Q It designated a certain quality of scrap? A Yes.

Q What was the kind of scrap of the Vixen Company? A Borings and turnings and files.

Q That isn't classified as heavy milling scrap, is it? A No.

Q That is classified as what? A Steel scrap.

Q It commands an entirely different price, doesn't it? A Not to me; I sell it all at the same price.

30 Q It is not different in the market? A It is according to what market. What market have you reference to?

Q In any market. A No.

Q You mean to say that as a general rule in the trade these two different kinds of scrap yield the same price? A They did, the place I sold it to.

40 Q I am not asking you that. You know very well I am not. You are just trying to fence with me, Mr. Day. I will reframe the question. Do you mean to say that in the trade, the two different kinds of scrap which you have told us about, yield

Thomas E. Day—cross

the same price? A No, they do not yield the same price.

Q There is quite a difference in the price, isn't there? A Well, I just cannot understand that question. I know the scrap iron business.

Q You are an experienced scrap dealer? A Yes; absolutely; I know the prices. 10

Q And I am asking you if it is not a fact that there is a wide difference between the prices of those two kinds of scrap? A No, sir.

Q If there isn't a wide difference, there is a difference, isn't there? A The market changes on those from day to day; sometimes one brings more price than the other; there is a difference.

Q There is a difference? A Yes.

Q As a rule? A Yes. 20

Q What was the tonnage that you say that was pointed out to you up there?

Mr. Demarest. I object to the question. We are not concerned in this inquiry as to the quantity of material.

Court. You have already brought that out. He testified originally that there were a certain number of tons of scrap there that were shown to him. 30

Mr. Demarest. I did; I forgot that.

A There were between a thousand and fifteen hundred tons of material.

Q How many tons would you estimate were included in the Vixen scrap pile? A If I remember correctly, about one hundred tons.

Q How many in the Heller Tool Company? A I didn't buy any material from the Heller Tool Company. 40

Thomas E. Day—cross—re-direct—re-cross

Q You know the portion of the property occupied by the Heller Tool Company, don't you? A Yes.

Q And wasn't any part of the scrap on their part? A Not very much material.

10 Q But you make no demand for that? A I never bought that material.

Q I say you make no demand for that material? A No, sir.

Re-direct examination by Mr. Demarest.

Q When you bought, did you buy heavy milling scrap only? A No, sir.

Q What did you buy? A I bought all steel scrap on their plant; I was to take the heavy, the turnings and all material together at one price.

20 *Re-cross examination* by Mr. Kahrs.

Q Why was it designated, then, heavy milling scrap? A Really, sir, I don't remember that; I don't remember anything designated as heavy milling scrap.

Q You don't? A No.

30 Q You say it was not your intention, at that time, when this contract was made, to limit your purchase only to heavy milling scrap? A It was not; it was all the steel scrap on the plant of the Heller Brothers Company.

Q That is what you would like to have this court—in that regard you would like to have this court change that contract between you and say that was the intention that day? A If I understand—the way I understand, I bought all the steel scrap on the plant of the Heller Brothers Company.

Q And that was your intention on that day? A Yes.

40 Q And has been your intention ever since? A Yes.

Thomas E. Day—re-cross—re-direct

Court. In the scrap which you removed—
you did remove some scrap afterwards?

Witness. Not under this contract.

Court. Didn't you take any?

Witness. No; they refused to allow me to
have any.

Court. You didn't take any of the accumu- 10
lations after the—

Witness. No, sir.

Re-direct examination by Mr. Demarest.

Q Why was the wording "heavy milling scrap"
not included in your contract? A That is the
price that I paid for all the scrap that was in the
plant of the Heller Brothers.

Court. The contract calls for steel scrap, 20
"all our steel scrap," and the answer says, "We
have bought all your scrap." The payment is
to be made under the classification of heavy
milling scrap.

Mr. Demarest. We rest.

Mr. Kahrs. I move for a dismissal of the
bill of complaint.

Court. Your motion is denied.

Mr. Kahrs. You see the position that leaves 30
us in. At the opening I said I would not make
a point of Mr. Baker's absence, and two weeks
ago, at the hearing, I tried to have him come
over, because he had previously agreed to come
over, and then left for Arizona, and has not
yet returned.

Mr. Demarest. If your present objection is
to the fact that there has not been offered in
evidence Mr. Baker's testimony, I will be glad
to put it in.

Mr. Kahrs. That isn't my objection. The 40

10 testimony was taken by Mr. Demarest as to a particular point. There wasn't an obligation on my part to bring out all of Mr. Baker's testimony at that particular hearing. He was to be used as our witness. He was used by Mr. Demarest as his witness. When we took his testimony in New York. Mr. Baker had expressed a willingness to come over and give his testimony, and now hasn't returned from Arizona, and that leaves us in the position of not being able to show what transpired on that day.

20 *Court.* It may be unfortunate, Mr. Kahrs, but it seems to me that your own statement of the case would not warrant me in granting any further time. You are not asking for further time, as I understand it, anyway, but you have had an opportunity to examine Mr. Baker on the point that you want now to examine him on, namely, the time when Mr. Demarest examined him; you could have examined him then, not in the presence of the Court. There was no objection to your examining him at that time. You wouldn't do it; you took a chance of getting him here.

Mr. Kahrs. That is true.

30 *Court.* You didn't have him here last week when this case was called, so that if he had been called then—but the case was not called; it was set down for hearing last week, but not reached, but if you had been reached, you wouldn't have had Mr. Baker here. It was suggested that in the meantime you could arrange for his presence here to-day and you haven't done it. You say he is hostile, so perhaps it is just as well that you didn't have him
40 come here; I don't know.

Thomas E. Day—re-direct—Arthur C. Heller, direct

Mr. Kahrs. As to the points developed this morning, I would want him. I appreciate the position I am in, and the viewpoint that your Honor takes. I cannot even in the back of my mind criticize that.

Court. If you have no testimony to offer, I shall have to dispose of the case as it stands. 10

Mr. Kahrs. I would like to ask Mr. Heller a few questions.

ARTHUR C. HELLER, sworn for defendants.

Direct examination by Mr. Kahrs.

Q You are employed by Heller Brothers Company? A Yes.

Mr. Demarest. Before this witness proceeds to testify, my understanding of the practice in equity has been where a motion to dismiss a bill is made after complainant's case is in, that the defendant must rest upon his motion; otherwise, we are— 20

Court. It is not a hard and fast rule; I did not ask Mr. Kahrs if he rested his case, which I might have done, but I didn't ask him, and I think the matter is largely in the discretion of the Court. I will permit him to go on, in spite of the fact that he moved to dismiss. 30

Mr. Kahrs. Thank you, Sir. I say frankly, I took my chance on that when I made the motion, but I would like to proceed with the questioning of this witness.

Q You are employed by Heller Brother Company? A Yes.

Q In what capacity? A Purchasing agent.

Q How long have you been there? A Five years. 40

Arthur C. Heller—direct.

Q So that you were there in September, 1925?

A Yes.

Q When Mr. Baker was president of the company? A Yes.

Q And how long had he been president? A Almost a year.

10 Q Do you remember when his term expired? A It was in December.

Q Of what year? A Of 1925, I think it was about that time.

Q And did he discontinue connections with the company? A Yes.

Q As officer or employee? A Yes.

Q You know Mr. Day? A Yes.

20 Q Did you see him in September, 1925, at your place of business? A I may have seen him several times.

Q Do you know whether you saw him between September 23 and the first of October? A I don't recall as to dates.

Q You recall when this agreement was signed by Mr. Baker? A Yes.

Q You saw the contract? A Yes; it was called to my attention.

30 *Court.* Were you there when it was made?

Witness. I wasn't right in his office; I was in the main office.

Court. What do you mean? You saw it afterwards?

Witness. I saw it afterwards.

Q And you read it? A Yes.

40 Q Did Mr. Day come for the purpose of getting some scrap?

Mr. Demarest. I object to the question as immaterial.

Court. I think you are now getting on the same point which we discussed before, Mr. Kahrs. If it is merely for the purpose of proving here that he came there to get scrap and was refused, that is a fact which already appears in the evidence. 10

Mr. Kahrs. Then I cannot go on with this witness. I will have to take him from the stand.

I have no further testimony.

Court. I will advise a decree for the complainant. My construction of the contract is that it was intended to sell—the defendants were to sell, and the complainant was to buy, all the scrap that was physically on the premises at the time the contract was made, and which was shown to the complainant by the defendant, and all scrap which accumulated there for the succeeding three months. 20

(Counsel fee of two hundred and fifty dollars allowed to solicitor of complainant.)

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New Jersey State Library

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Final Decree

IN CHANCERY OF NEW JERSEY

Filed December 16, 1929.

10	<p><i>Between</i></p> <p>THOMAS E. DAY,</p> <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>HELLER BROTHERS COMPANY, a</p> <p style="text-align: center;">corporation,</p> <p style="text-align: right;"><i>Defendant.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Final</i></p> <p><i>Decree.</i></p>
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20 This cause coming on to be heard before Honorable Maja Leon Berry, Vice-Chancellor, to whom the cause was referred to by order of the Chancellor entered on September 19, 1928, in the presence of W. Howard Demarest, Solicitor for the complainant, and Lintott, Kahrs and Young (Mr. Kahrs) Solicitors for the defendant, and the pleadings and proofs having been read and heard and the argument of counsel having been considered, and it appearing that the complainant is entitled to the relief prayed for in the bill of complaint.

30 It is thereupon on this 4th day of November, A. D. 1929, ordered, adjudged and decreed that the contract existing between the complainant and defendant as evidenced by letters passing between the parties dated September 23, 1925 and September 25, 1928, be and the same is hereby construed and interpreted to mean, and that the intent of the parties thereto was that it should mean, that the defendant sold and the complainant bought all of the steel scrap physically on the premises at the time the contract was made, and as shown to the complainant by the defendant, together with all the

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Final Decree

scrap that was to accumulate for the succeeding three months.

And it is further ordered, adjudged and decreed that said contract as so evidenced be, and the same is hereby reformed so that the first paragraph of the letter from the defendant to the complainant dated September 23, 1925, shall read ("We hereby agree to sell to you and you agree to buy all of our present accumulation of steel scrap and all of the steel scrap accumulating for the next three months at the top price prevailing in the current issue of the Iron Age, under the classification of Heavy Melting Scrap Yard.") The second paragraph to remain unchanged. 10

And it is further ordered, adjudged and decreed that defendant pay to the complainant or to his solicitor, a counsel fee of \$250 together with costs to be taxed. 20

Respectfully advised,

E. R. WALKER,
C.

MAJA LEON BERRY,
V. C.

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Notice of Appeal

IN CHANCERY OF NEW JERSEY

Filed December 16, 1929.

10	<p><i>Between</i></p> <p>THOMAS E. DAY,</p> <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>HELLER BROTHERS COMPANY, a</p> <p style="text-align: center;">corporation,</p> <p style="text-align: right;"><i>Defendant.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Notice of</i></p> <p><i>Appeal.</i></p>
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20 The defendant, Heller Brothers Company, a corporation, hereby appeals from the final decree made in the above entitled cause on November fourth, nineteen hundred and twenty-nine, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. Dated December 11th, 1929.

LINTOTT, KAHRs & YOUNG,
Solicitors for and of counsel with the
Defendant, Heller Brothers Company,
a corporation.

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

JOSEPH KAHRs,
Of Counsel with defendant, Heller Brothers
Company, a corporation.

Service of the within Notice of Appeal is hereby acknowledged this 12th day of December, 1929.

40 W. HOWARD DEMAREST,
Solicitor for Complainant.

*Petition of Appeal*NEW JERSEY COURT OF ERRORS AND
APPEALS

Filed December 16, 1929.

<i>Between</i>		
THOMAS E. DAY, <i>Complainant-Appellee,</i>	}	<i>On Appeal</i>
<i>and</i>	}	<i>from Court of</i>
HELLER BROTHERS COMPANY, a corporation,	}	<i>Chancery.</i>
<i>Defendant-Appellant.</i>	}	<i>Petition of</i>
		<i>Appeal.</i>

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To the Honorable, The Court of Errors and Appeals in the Last Resort in All Causes: 20

The petition of Heller Brothers Company, a corporation, the appellant in the above entitled cause respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey (advised by Maja Leon Berry, Vice-Chancellor), bearing date November 4th, 1929, in a certain cause in said Court of Chancery wherein the said Thomas E. Day was complainant and the said Heller Brothers Company, a corporation, was defendant, in this respect, to wit: That the said decree adjudges that the contract existing between the complainant and defendant as evidenced by letters passing between the parties dated September 23rd, 1925, and September 25th, 1928, be and the 30

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Petition of Appeal

same is hereby construed and interpreted to mean, and that the intent of the parties thereto was that it should mean, that the defendant sold, and the complainant bought, all of the steel scrap physically on the premises at the time the contract was made, and as shown to the complainant by the defendant, together with all the scrap that was to accumulate for the succeeding three months. Said decree further adjudges that said contract as so evidenced be, and the same is hereby reformed so that the first paragraph of the letter from the defendant to the complainant dated September 23rd, 1925, shall read, "We hereby agree to sell to you and you agree to buy all of our present accumulation of steel scrap and all of the steel scrap accumulating for the next three months at the top price prevailing in the current issue of the Iron Age, under the classification of "Heavy Melting Scrap Yard," the second paragraph to remain unchanged.

2. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in the following respects, to wit:

(a) Said final decree as entered does not coincide with the relief as prayed for in the complaint, but in effect reforms the contract in an entirely different manner.

(b) That under said final decree, the defendant Company is ordered to sell all the scrap on the premises, without the particular premises being described and without the ownership of said scrap being designated, whereas only the scrap belonging to the defendant Company was involved in the contract.

Petition of Appeal

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as this Court shall seem proper.

LINTOTT, KAHR & YOUNG, 10
Solicitors for and of Counsel
with Appellant.

Service of a copy of the within Petition of Appeal is hereby acknowledged this 12th day of December, 1929.

W. HOWARD DEMAREST,
Solicitor for Complainant-Appellee. 20

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Amended Notice of Appeal

IN CHANCERY OF NEW JERSEY

Filed December 20, 1929.

10	<p style="text-align: center;"><i>Between</i></p> <p style="text-align: center;">THOMAS E. DAY,</p> <p style="text-align: center;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">HELLER BROTHERS COMPANY, a</p> <p style="text-align: center;">corporation,</p> <p style="text-align: center;"><i>Defendant.</i></p>	}	<p style="text-align: center;"><i>On Bill, &c.</i></p> <p style="text-align: center;"><i>Amended</i></p> <p style="text-align: center;"><i>Notice of</i></p> <p style="text-align: center;"><i>Appeal.</i></p>
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20 The defendant Heller Brothers Company, a corporation, hereby appeals from the final decree made in the above entitled cause by the Chancellor, on the advice of Honorable Maja Leon Berry, on the fourth day of November, nineteen hundred and twenty-nine, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30 Dated: December 19, 1929.

LINTOTT, KAHR & YOUNG,
Solicitors for and of Counsel with
defendant Heller Brothers Com-
pany, a corporation.

Amended Notice of Appeal

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

JOSEPH KAHR,
*Of Counsel with the defendant,
Heller Brothers Company, a
corporation.*

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Service of a true copy of the within Amended Notice of Appeal is hereby acknowledged this 19th day of December, 1929.

W. HOWARD DEMAREST,
Solicitor for Complainant.

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*Answer to Petition of Appeal*NEW JERSEY COURT OF ERRORS AND
APPEALS

10	<p style="text-align: center;"><i>Between</i> THOMAS E. DAY, <i>Complainant-Appellee,</i> <i>and</i> HELLER BROTHERS COMPANY, a corporation, <i>Defendant-Appellant.</i></p>	}	<i>Answer to Petition of Appeal.</i>
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The answer of the above named appellee, Thomas E. Day, to the petition of appeal of the above named appellant.

20 This appellee not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a final decree was on or about November 4th, 1929, made and entered in the Court of Chancery in this cause as mentioned in the said petition, but as to the substance and form thereof this appellee prays to refer thereto when the same shall be produced. And this appellee is advised and believes that said decree is agreeable in

30 Equity and prays that the same may be affirmed with costs to be adjudged to this appellee.

W. HOWARD DEMAREST,
*Solicitor for and Counsel with
 Thomas E. Day, Appellee.*

Service of the within Answer to Petition of Appeal is hereby acknowledged this 18th day of December, 1929.

40 LINTOTT, KAHR & YOUNG,
Solicitors for Defendant-Appellant.

New Jersey Court of Errors and Appeals

Between

THOMAS E. DAY,

Complainant-Appellee,

and

HELLER BROTHERS COMPANY,

a corporation,

Defendant-Appellant.

*On Bill, etc.,
Brief of
Defendant-
Appellant.*

BRIEF IN BEHALF OF HELLER BROTHERS COMPANY, A CORPORATION, DEFENDANT-APPELLANT.

Bill filed in the Court of Chancery in behalf of Thomas E. Day seeking reformation of a contract made with Heller Brothers Company, a corporation of the State of New Jersey, for the sale of certain scrap.

FACTS.

On September 23rd, 1925, Heller Brothers Company addressed a letter to Thomas E. Day, a copy of which letter is as follows:

September 23, 1925.

Mr. Thomas E. Day,
78 Prospect Street,
East Orange, N. J.

Office of the president.

Dear Sir:

—F. B.

We hereby agree to sell you and you agree to buy all of our Steel Scrap for the next three months at the top price prevailing in the current issue of The

Iron Age, under the classification of "Heavy Melting Scrap, Yard."

It is understood that our yard is to be kept reasonably free from scrap under this arrangement.

Yours very truly,

HELLER BROTHERS COMPANY,

(Signed) FREDERICK BAKER,

Frederick Baker,

President.

On September 25, 1925, Thomas E. Day acknowledged receipt of the above letter in the following manner:

September 25th.

Messrs. Heller Brothers Company,
Newark, N. J.

Dear Sirs:

We have approximately \$200.00 to our credit with your Company. We advised your credit department to hold this credit to apply on our purchases of your scrap. We have bought all your scrap for the next Three Months from September 23rd as shown in the contract of Sept. 23rd signed by your President Mr. Frederick Baker.

Yours very truly,

(Signed) THOMAS E. DAY.

After the exchange of these letters, Day claimed the scrap then in, on and about the premises of Heller Brothers Company at the time the aforesaid agreement was made, contending that this scrap was included in the agreement, together with the accumulations for the next three months commencing with September 23rd, 1925.

Day upon being advised that there had been no accumulation of steel scrap on the premises of Hel-

ler Brothers Company, instituted a suit in the Essex County Circuit Court wherein he sought damages based upon a breach of contract, and at the trial in the Circuit Court attempted to show by parol testimony that the true intent and meaning of the parties at the time of the making of the purported contract, was that all of the steel scrap then in, on or about the premises of Heller Brothers Company at the time the said contract was made was included in said agreement, together with the steel scrap that would accumulate during the three month period commencing with September 23rd, 1925.

The learned trial Judge ruled that the contract as it stood, was not ambiguous, and meant just what it said, that is, that only the scrap accumulating within the three month period commencing with September 23rd, 1925, was to be sold by Heller Brothers Company and purchased by Thomas E. Day.

Day, through his attorney, withdrew a juror and the trial Court allowed a mistrial, and thereafter Day instituted a suit in the Court of Chancery seeking reformation of the aforesaid agreement.

A final decree was entered reforming the contract.

QUESTIONS.

1. Does the relief as granted in the final decree conform with the allegations and prayers set forth in the bill of complaint and as made out by the proofs.

2. Did the Court exceed its authority in reforming the contract in the manner set forth in the final decree, when it neglected and refused to specifically describe the particular premises whereon the scrap

was located, and when it neglected and refused to specifically designate the particular scrap involved in the contract.

ARGUMENT.

Day in his bill of complaint alleges (see Paragraph Four, page Three of State of Case) that the true agreement between the parties as intended to be expressed by the writing set forth in Paragraph One hereof (meaning Paragraph One of the bill of complaint) was that the defendant sold and complainant purchased, not only the steel scrap *then in, on and about the premises of defendant Company* at Newark, New Jersey, but also material of like kind and quality which would accumulate and result from the operation of defendant's plant for the three months following the making of said contract.

It is to be noted that said allegation specifically designates the steel scrap as "the steel scrap then in, on or about the premises of the defendant Company" wherein the final decree reforms the agreement so that it reads "all of the steel scrap physically on the premises at the time the contract was made, and as shown to the complainant by the defendant, etc." The effect of said decree as it now stands covers scrap on property other than that belonging to Heller Brothers Company which scrap was not involved in the contract as may be clearly seen from the allegation set forth in Paragraph Four of Day's bill of complaint.

The relief sought by Day is specifically set forth in the prayers of his bill of complaint (see pages Four and Five of the State of Case) as follows:

1. That said contract be reformed and the true intent and meaning of the parties be expressed in

the reformation or amendment thereof, so that the same shall read sustantially as follows:

“We hereby agree to sell to you, and you agree to buy all of our present accumulation of steel scrap and all of the steel scrap accumulating for the next three months * * * *”

Instead of the words beginning and ending with the first and last words in the above quotation as the said appears in said contract.

2. That such other and further relief either by way of reforming, amending or clarifying the terms of said contract or other or incidental relief as the nature of the case may require or be agreeable to equity and good conscience may be rewarded to complainant.

The final decree as entered adjudges and decrees that the contract existing between the complainant and defendant as evidenced by letters passing between the parties dated September 23rd, 1925, and September 25th, 1925, be and the same is hereby construed and interpreted to mean, and that the intent of the parties thereto was that it should mean, that the defendant sold and the complainant bought all of the steel scrap physically on the premises at the time the contract was made, and as shown to the complainant by the defendant, together with all the scrap that was to accumulate for the succeeding three months.

The said final decree further adjudged and decreed that said contract as so evidenced be, and the same is hereby reformed so that the first paragraph of the letter from the defendant to the complainant dated September 23rd, 1925, shall read (“We hereby agree to sell to you and you agree to buy all of our present accumulation of steel scrap and all of the steel scrap accumulating for the next three

months at the top price prevailing in the current issue of the IRON AGE, under the classification of "Heavy Melting Scrap Yard.")

The second paragraph to remain unchanged.

Our contention is that the final decree as entered does not conform to the pleadings and to the proofs introduced at the trial, in that the relief sought by Day as set forth in the allegation and prayers of his bill of complaint mention scrap of Heller Brothers Company only, and the relief as granted under the final decree includes all of the steel scrap physically on the premises at the time the contract was made, and as shown to the complainant by the defendant, together with all the scrap that was to accumulate for the succeeding three months.

The point now raised is that said final decree does not mention the ownership and location of the scrap involved in the contract, so that the effect is that Heller Brothers Company are now ordered to sell all the scrap on the premises without the particular premises being described, such as ownership, limitations, etc. It seems very important that the decree should set forth these aforesaid features due to the fact that during the course of the testimony given by Day (see pages 18, 19, 20, 21, 22, 23 and 24 of the State of the Case) scrap located on the premises of the Vixen File Company and Heller Tool Company was discussed, and that Day claims that he also purchased scrap on the premises of these two corporations in addition to that of Heller Brothers Company.

Even if Day did purchase the scrap of these two other corporations he is not entitled to the relief as granted in the final decree because he has failed to allege in his bill of complaint that the scrap of these two corporation was included in the contract.

The decisions of our Courts on this point seem to lay down the well settled rule that the decree must conform to the case made out by the pleadings as well as to the proofs.

In the case of *Newark vs. Erie Railroad Co.*, 76 Eq. 317, the Court of Errors and Appeals hold that.

“The relief afforded by a decree must conform to the case made out by the pleadings as well as the proofs, and that granted under the general prayer must be *secundum allegata et probata*.”

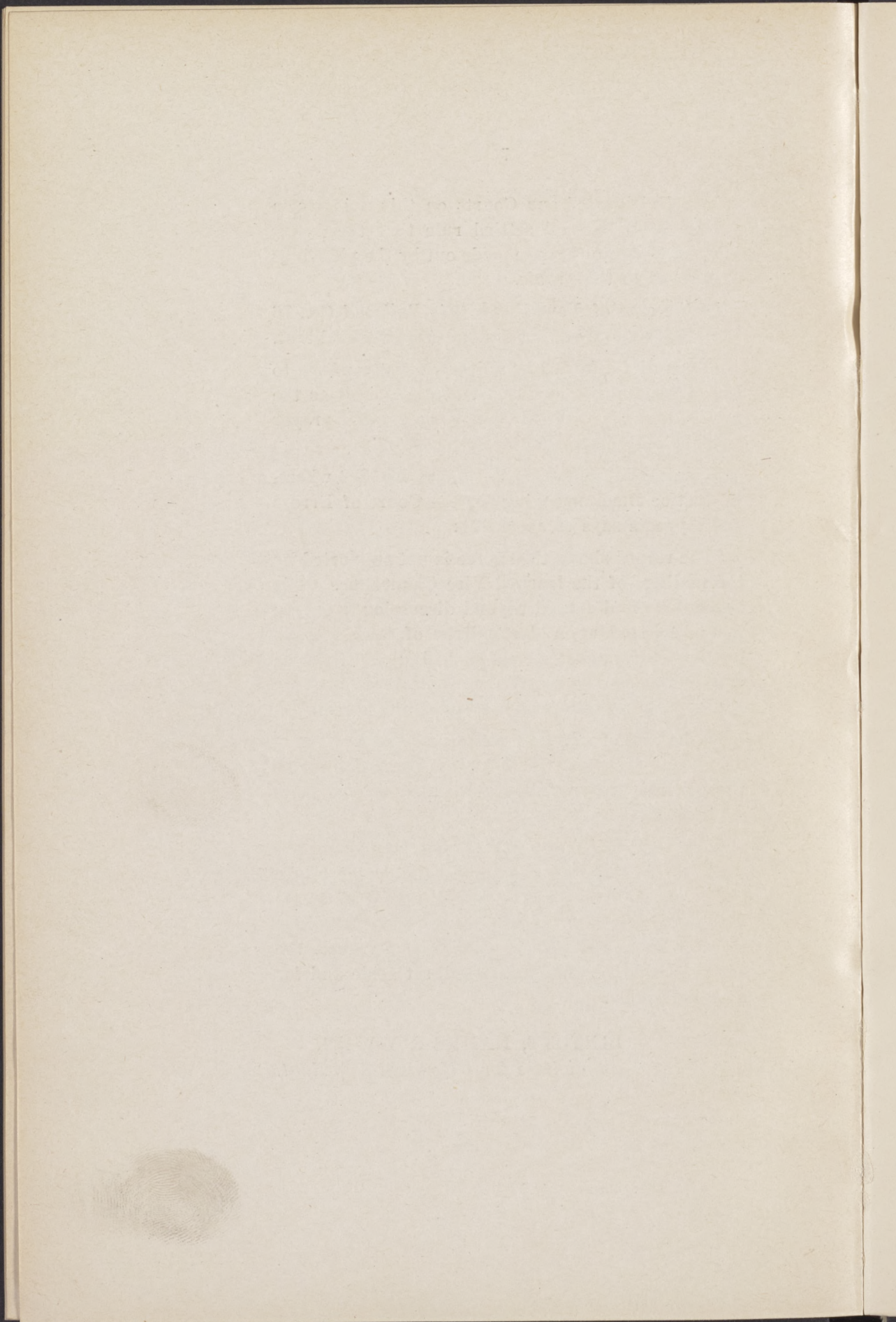
See also *Trainor vs. Le Beck*, 101 Eq. 823 wherein Justice Black speaking for the Court of Errors and Appeals says on page 824:

“The record shows the decree is not supported by the findings of the learned Vice Chancellor. It is elementary and settled beyond discussion, a decree must be based upon the findings of fact, as made by the Court, and without such findings a decree cannot stand. The decree must conform to the case made by the pleadings as well as to the proofs.”

In the case of *Black vs. Kieley*, 23 Eq. 358, it was held that “there can be no decree for relief under the general prayer unless warranted on the facts set forth in the bill.”

It is respectfully submitted that Day is not entitled to the relief granted under the decree of the Court of Chancery for the reason that said decree does not conform to the case made by the pleadings as well as to the proofs, and that therefore, the decree should be wholly reversed, set aside and for nothing holden.

LINTOTT, KAHRS & YOUNG,
Solicitors for Defendant-Appellant.



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

New Jersey Court of Errors and Appeals

Between

THOMAS E. DAY,
Complainant-Appellee,

and

HELLER BROTHERS COMPANY, a
corporation,
Defendant-Appellant.

On Bill, etc.

BRIEF IN BEHALF OF THOMAS E. DAY, Complainant-Appellee.

Facts.

For the purpose of curing omissions of important facts from appellant's statement the following matters are respectfully called to the attention of the Court.

Prior to the making of the letter-contract between the parties Day had transacted business with Heller Brothers Company and in anticipation of the present contract had walked over the ground and through the buildings on two occasions with representatives of Heller Brothers Company, estimated the quantity of scrap on hand, communicated his estimate to the President, Frederick Baker, and had negotiated the purchase with these very material facts in mind.

No question was raised as to the ownership of the premises upon which the scrap was located and no testimony is introduced which negatives the ownership of the scrap by Heller Brothers Company whether located on their own premises or on adjoining premises.

No testimony was offered by Heller Brothers Company which might tend to prove that the premises upon which the exhibited piles of scrap were located belonged to any other person or corporation. Neither was any testimony offered to refute the power and the right of Heller Brothers Company to contract for the sale of all scrap exhibited to Day.

On the contrary it appears (Case, p. 20, l. 10) that by custom, scrap from the Vixen Plant was billed to Day on Heller Brothers Company bill heads.

An examination of the testimony fails to disclose any support for appellant's contention that Day was advised when he appeared to remove the scrap that there was no accumulation of steel scrap on appellant's premises. Day denies the truth of that claim and insists that there was only a refusal to deliver.

ARGUMENT.

Appellant propounds two questions. The first inquires whether the relief is in conformity with the allegations and prayers of the bill as supported by the proofs. The bill alleges the existence of steel scrap which Day claims to have purchased, that the scrap purchased was in, on and about appellant's premises, that all of the scrap then accumulated was sold to him, and that all of the accumulation and future accumulation of steel scrap was intended by both parties to be sold, and the entire premises were to be cleared and freed from all steel scrap by Day and kept so.

The prayers of the bill are that the true intent and meaning be expressed and the wording of the contract reformed to conform to the inten-

tion of the parties, and that complainant have such other and further relief by way of reforming, amending or clarifying the terms of the contract, or other or incidental relief as the nature of the case might require.

In support of this bill Day testifies to every allegation and is met with no contradiction from witnesses for the defense. On the contrary, the only witness who could have testified for the defense, Mr. Baker, is not produced because he is admitted to be hostile to appellant's contentions.

This first query must therefore be resolved against the appellant.

The second question raised by appellant challenges the authority of the Court below in respect to the terms of its decree.

Through this question and the argument following it, appellant attempts to convince this Court that notwithstanding the refusal and neglect of appellant to produce any testimony having to do with the ownership of the land, the ownership of the scrap, the location of the scrap piles or the quantity of scrap located in any given place, the Court of Chancery should nevertheless have attempted to fix and include in its decree further reformations of the contract. Concerning these things the Court had no information and no proof. Appellant had its opportunity to offer proof and could offer none. The Court below, considering complainant's proofs, was compelled to conclude that the premises upon which the scrap piles were located and the building within which scrap had accumulated were the appellant's premises, and could have decided in no other way than to find that Day bought the accumulated

scrap which was exhibited to him, as well as that thereafter to accumulate.

There is nothing in the record to support appellant's contention, stated in the second question that the Court neglected or refused to describe the premises or designate the particular scrap involved in the contract. The Court decided that because of mutual mistake the contract should be construed as prayed by complainant and reformed as prayed by complainant. The essence of appellant's contention seems to be that the Court did not use in its decree the words of the allegations and prayers of the bill exactly as complainant had alleged and prayed. In any given case it is at least presumptuous to think that the Court will adopt counsel's language in making its decree. In this case the Court by its language does not afford relief to the complainant in excess of his allegations and prayers but on the contrary restricts him by determining so far as the nature of the case would permit, what the subject matter of the contract truly was, namely, the scrap which was shown to him by the appellant's representatives and the scrap which should accumulate for three months. In other words, complainant asks that he be adjudged to have purchased all of the accumulated scrap whether shown to him or not, and the Court finds that the intention of the parties must be confined to that material which was exhibited to complainant. Having so found appellant is in the anomalous position of complaining that the Court reduced the extent of complainant's recovery.

The cases cited by appellant do not meet the situation presented to the Court. While it is true that relief by decree must conform to the pleadings and proofs, it is also true that in

cases involving reformation of instruments the real question is whether or not the pleadings sufficiently apprise the defendant of the case to be made out. Appellant does not contend that the bill of complaint did not sufficiently inform it of the case to be made out nor does it allege surprise or misapprehension. The rule therefore as stated in *Cochran v. Burns*, 91 N. J. Equity, page 7, seems to apply.

CONCLUSION.

Appellee contends that this appeal is dilatory and not well founded, that the delays concerning which counsel argued in the Court below have been caused and are being further contributed to by this unwarranted appeal. Every opportunity was extended to appellant to produce its proofs. The Vice-Chancellor having permitted the introduction of testimony after the motion to dismiss (Case, p. 25, l. 24, and Case, p. 27, l. 19) it is fair to assume in view of the statement of appellant's counsel (Case, p. 27, l. 31) that appellant was without a defense below as it is without law or record on this appeal.

Respectfully submitted,

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with Complainant-Appellee.

