

New Jersey Court of Errors and Appeals

Between:

WALTER H. RICKEY

Complainant-Respondent

AND

THE MOON CLAY & KAOLIN CO.

et als.,

Defendants-Appellants

On Bill, &c.

On Appeal

BRIEF FOR RESPONDENT.

As stated substantially in appellant's brief, complainant filed his bill to enforce his rights in an option on certain lands of defendant Moon, in which option complainant and defendants, Conard and Muschert each had a one-third interest, which lands, however, had been conveyed by defendant Moon—contrary to the option—to defendant The Moon Clay & Kaolin Co., organized and owned by defendants Conrad and Muschert, in which company complainant had no interest.

After complainant had borrowed of one Watson \$3,000.00 on the security of the option, complainant and defendants Conrad and Muschert entered into a "three party" agreement, by the terms of which it was stipulated that the option should be exploited for their mutual benefit and the profits divided equally between them, after first deducting as "expenses" of the enterprise, the

\$3,000.00 loaned by Watson to complainant on an assignment of the option as collateral security, \$5,000.00 to be paid by defendant Muschert to defendant Conard for his services to be rendered in furtherance of the exploitation of the option, and the further sum of \$2,000.00 to be advanced for the prosecution of the option. The latter sum never was advanced so that \$8,000.00 was the sum to be deducted as expenses when profits should come to be divided.

On the making of the loan of \$3,000.00 by Watson to complainant, the latter gave to defendant Muschert an agreement to pay him 10 per centum of the profits to be realized on the option as compensation for procuring the loan from Watson. This was before the execution of the "three party" agreement, and as stated by the Vice Chancellor was superseded by and merged in the latter.

The option gave the right to all that could be secured for certain lands of defendant Moon above a price named in the option. Subsequently to the execution of the "three party" agreement, defendant Moon gave to complainant an agreement to pay 10 per centum on the price to be secured by the sale of the lands embraced in the option agreement, if sold, and 20 per centum if taken by condemnation proceedings by the Pennsylvania Railroad Company, which was expected to cross the lands with its proposed new line.

This latter, commission agreement, defendants Conrad and Muschert insisted was understood by all the parties to be in lieu of the original option, and that the terms of the "three party" agreement should apply to the profits, i. e., the commission under the commission agreement, just as originally it applied to the profits to be made under the option agreement.

Complainant insisted that the commission was in addition to, but did not displace, the option agreement and was procured at the suggestion of

defendant Conrad, in order to enable complainant to raise money on the strength of the option as showing that something would be realized by complainant and his associates no matter what the price for which the lands covered by the option might be sold.

The question at issue here was eliminated by developments at the hearing.

The lands covered by the option and by the commission agreement, were conveyed by the defendant Moon to the defendant Moon Clay & Kaolin Company for \$206,000.00 in capital stock.

Defendants Conrad and Muschert both testified, (p. 118, l. 1; p. 166, l. 20; p. 168, l. 18; p. 169, l. 1) that it was agreed between them and complainant, that complainant should be entitled to one-third of 10 per centum on \$206,000.00, the price at which the lands were taken over by the Moon Clay & Kaolin Company, after deducting \$8,000.00 as expenses according to the "three party" agreement, that defendants Conrad and Muschert agreed to relieve defendant Moon from his obligation to pay the 10-per centum commission under the commission agreement in consideration of the conveyance of the lands to the corporation for the \$206,000.00 of capital stock, and that they personally assumed the obligations to pay complainant his one-third of the commission under the terms of the "three party" agreement.

Defendants Conrad and Muschert having thus admitted liability to complainant on their version of the contractual relations between them, and the complainant having claimed in his bill the right to a one-third share in any profits that might yet be made out of the property, in short, the right to come in equally with defendants Conrad and Muschert, by virtue of the option agreement which he claimed still to be in force, the Vice-Chancellor ruled that the *complainant must elect* on which grounds he would stand, whether he would pro-

ceed on the strength of the case alleged in the bill or on the case presented by the testimony of defendants Conrad and Muschert.

Complainant elected to stand on his right to one-third of the commission on \$206,000.00, the price at which the lands were sold to the Moon Clay & Kaolin Company.

Then the Vice-Chancellor suggested an amendment of the bill to conform to the new situation, and it was amended accordingly.

The issue then became simply whether complainant had been paid by defendants any part of his one-third of the commission and, if so, how much. The court was thus relieved of all occasion to pass upon the other question raised by the pleadings and the proofs. Complainant abandoned his claim under the option agreement and his contention that the lands had been conveyed to the Moon Clay & Kaolin Company without his knowledge and in fraud of his rights, not because of any failure in proofs but because the court forced him to his election—*and he chose an admitted liability to himself to one he must establish*. The record strangely does not set forth the Vice-Chancellor's announcement that complainant must make his election. The opinion states (p. 217), "Upon the court's suggestion, the complainant asked leave to amend, which was granted." This application to amend was preceded by the direction to elect and by the election.

Counsel for the appellant presents figures which seek to show that complainant admittedly became entitled to \$4,200.00 as his one-third share in the commission, it had been paid by \$1,750.00 alleged to have been paid by defendant Conrad on account of commission and by commission due defendant Muschert under the agreement of complainant to pay him 10 per centum of the profits complainant might realize out of the option, which agreement was made prior to the "three party" agreement.

As held by the Vice-Chancellor this 10 per cent. agreement with defendant Muschert was eliminated by the third party agreement. It is, therefore, out of the question to figure 10 per centum commission against the complainant under the agreement ante-dating the three party agreement. Moreover, even if the agreement were not superseded, it called for 10 per centum on the profits made by the complainant and this would be \$420.00 not \$2,060.00 as given in the brief of appellant's counsel.

It would be a waste of time to discuss the testimony of the case excepting so far as it bears on the question of payment to complainant of some part of his \$4,200.00.

The other matters are out of the case by virtue of the election made by complainant as required by the court. Prior to the election made, complainant's position was, and but for that election still would be, that he is entitled to share on a one-third basis in whatever profits might be made out of the lands after allowing the owner, defendant Moon, the price specified in the option agreement, that the transfer of title to the defendant Moon Clay & Kaolin Company was in fraud of his rights under the option. Necessarily this claim was, as stated, abandoned when he elected to accept the basis of adjustment of their differences presented by the testimony of defendants Conrad and Muschert.

On the question of payment, to complainant of the \$4,200.00 his share of the commission the Vice-Chancellor found the proofs to be in favor of complainant (p. 218-19).

The brief of appellants seeks to cast doubt on complainant's testimony as against that of defendant Conrad, because of complainant's "unclean dealings" in that he and defendant Conrad, as he claims, were to share in the \$5,000.00 paid by defendant Muschert, without the latter's knowledge.

The obvious reply to this attempted discrediting of complainant is that if the dealings were "unclean", the defendant Conrad was a participant equally with the complainant. If, therefore, the transaction tends to discredit, it discredited the defendant Conrad equally with complainant.

But was there anything "unclean" in this circumstance? Let it be remembered that the option was procured by complainant alone. It was his "deal". Neither defendant Conrad or Muschert was in it. Complainant was likely to need legal assistance to carry it through. Hence he first brought in defendant Conrad by an agreement that they would share equally between the two whatever profit complainant might realize from the enterprise. Conrad giving his legal "services" (p. 106). Defendant Muschert had no interest in the matter. Then complainant borrowed from Watson, through Muschert, \$3,000.00, and assigned the option to Watson as collateral, and gave Muschert an agreement to pay him 10 per centum of what profits complainant might realize for having procured the loan from Watson. Thus far Muschert had no control over the option and his interest was restricted to 10 per centum of the possible profits. Defendant Conrad testified (p. 106) that he demurred to the assignment to Watson because of his own half interest, that therefore complainant settled with him by paying \$300.00, and he, Conrad, was out of it. Complainant, however, urged him (p. 106, l. 29) to continue as before, *he still wanted me to take the same position in the matter but I declined for awhile.*"

Subsequently, however, (p. 107, l. 1) he told complainant "I wouldn't go any further without some money; he would have to pay me in cash. Subsequently an arrangement was made by which Muschert furnished the money for me and then the tri-party agreement was drawn by me."

The agreement provided for payment to defendant Conrad of \$5,000.00 which was to fully compensate him for services yet to be rendered—nothing has been done by him as yet. This \$5,000.00 was defendant Muschert's contribution to be refunded as interest out of the first profits to be realized, for a one-third interest in the deal instead of his 10 per centum interest by previous arrangement. Complainant was "supplying the deal" (p. 202). By the terms of the paper which defendant Conrad drew (p. 107, l. 5) it was to be paid to him. It essentially formed part of, was a sort of advance instalment of the gains to complainant and defendant Conrad which they had originally agreed to share equally (p. 106). Conrad was to "take the same position in the matter" (p. 106, l. 33) and the "same position" would call for an equal division of this \$5,000.00 between them. It was, it is repeated, the price defendant Muschert paid for sharing on a one-third basis in the deal which complainant and defendant Conrad—now equal in interest, though originally complainant was alone—brought to defendant Muschert. That it was called compensation to defendant Conrad does not change the fact. The latter chose the phraseology.

It could make no difference to defendant Muschert whether the \$5,000.00 was to be divided between complainant and Conrad or was to be kept by the latter. He understood that he put up that much to acquire a one-third interest, and it was agreed that \$2,000.00 more should be advanced by him when needed, but this last \$2,000.00 was to be expended only on the joint order or common agreement of three parties to the agreement. Thus it is clear that defendant Muschert clearly understood that the \$5,000.00 came to defendant Conrad, or to Conrad and complainant for letting him into the deal, that he was to have no interest in its disposition, but that the additional \$2,000.00, if ad-

vanced was to be expended only for the promotion of their common enterprise. For the \$5,000.00 defendant Conrad promised his services so far as they might be needed, and complainant likewise pledged his services, by the terms of the three party agreement.

There was, therefore, no fraud or no deception of defendant Muschert, if, in fact, complainant and defendant Conrad had an understanding that the \$5,000.00 should be equally divided between them. The agreement, doubtless would have been signed just the same had it stated that the \$5,000.00 was to be paid to complainant and Conrad.

Defendant Muschert first paid defendant Conrad \$2,000.00 (p.209).

Conrad, the following day, (opinion p. 219) paid complainant \$1,000.00.

Muschert next paid Conrad \$1,500.00 and Conrad paid complainant \$750.00.

No further payments were made to complainant.

The brief of appellants says "it taxes one's credibility why Rickey never demanded from Mr. Conrad the balance if he was to receive \$2,500.00 out of the \$5,000.00."

Complainant testified that he did (p. 200, l. 25) that Conrad said he had not been paid the balance, that his first information that it had been paid was in the letter from defendant Muschert (p. 53), (p. 201).

Complainant refers to the opinion of the court (pp. 218-219) on this point. The court had the witnesses before it. The circumstances corroborate the complainant. No memorandum of a loan or advance of the \$1,750.00 was given. The checks are presumtively payments, not loans. The original and subsequent arrangement between complainant and defendant Conrad are entirely consistent with the alleged understanding that the \$5,000.00 be equally divided. They are altogether

inconsistent with the notion that defendant was to keep the \$5,000.00 for his sole use.

It is contended in appellants' brief that complainants failure to press for the payment of the balance of the \$2,500.00 is evidence that it was not due him from the defendant Conrad. His knowledge that the whole of the \$5,000.00 had been paid came after he had been "frozen out" and the payment of the money by friendly solicitation could no longer be looked for, and when an adjustment of the affairs of the parties by litigation appeared to be inevitable, and what shape such litigation would take was uncertain. Moreover, complainant's desire to get established his one-third right in the exploitation of the property naturally would dwarf, for the time being, his interest in the amount due from defendant Conrad, if, in fact, he deemed it collectible. Failure to sue for the money in advance of the main action is of no significance.

Counsel for appellants urges in his brief that complainant failed to base his bill of complaint on the commission agreement because of his knowledge that these offsets "would leave nothing due him."

The complete answer to this is that when the court imposed the necessity of electing whether to amend and proceed on the basis of the commission agreement, complainant elected so to amend and proceed notwithstanding these alleged offsets.

Counsel for appellants says: "If Rickey's testimony had been believed by the Vice-Chancellor why should there have been a suggestion of amendment?" The suggestion of the court had nothing to do with the credibility of any of the testimony. The court simply required the complainant to decide whether he would take the defendants at their word as they testified and hold them liable for 10 per centum on \$206,000.00.

The complainant having decided to accept the

liability to him confessed by the defendants by their testimony, and to abandon the claim made in his bill and supported by his proofs, there was no occasion for further evidence in rebuttal of or in explanation of testimony of defendants' witnesses. The case was now narrowed down to the question of whether the \$4,200.00 had been paid to complainant. There is no significance, therefore in the absence of proofs counter to the evidence of defendants, as to the case made out by the bill as originally filed.

The contention of appellants that the agreement of February 26th, 1914, by which complainant agreed to give to defendant Muschert 10 per centum of the profits to come to complainant from the option as brokerage for procuring the loan of \$3,000.00 by Watson, is wholly untenable. This agreement was undoubtedly superseded by and merged in the three party agreement of April 16th, 1914. Opinion of Vice-Chancellor, p. 218, l. 20.

The bill of complaint does not set this contract "up as a valid obligation against Rickey." It merely sets it forth as part of the history of the case (p. 8. paragraph 6).

The bill then (p. 9. paragraph 8) sets out the three party agreement of April 16th, 1914, which by its express terms providing for the division of the profits after deducting the \$3,000.00 loaned by Watson, the \$5,000.00 to be paid to Conrad and the additional \$2,000.00 to be advanced and expended "by the consent of all three parties to the agreement", as expense, equally among the complainant and defendants Conrad and Muschert excludes, absolutely, the prior agreement of February 26th, 1914, by the terms of which Muschert was to get 10 per centum of the profits realized by complainant. The two agreements undeniably are mutually exclusive. One cannot be carried out without destruction of the other. It is not possible to give to complainant and to Muschert each one-

third of the profits after deducting \$10,000.00 expenses, and at the same time compel complainant to pay to Muschert 10 per centum of complainants share of profits. Things which are mutually exclusive, exclude each other.

The agreement of February 26th, 1914, was not submitted by complainant to Judge Marshall as an existing agreement. It, or a copy, was shown to Judge Marshall with copies of all the agreements made by complainant. This was done that Judge Marshall might be informed of the situation (p. 149, l. 20).

There is not a line in the pleading or in the evidence that shows any change of attitude on the part of the complainant, as to the agreement of February 26th, 1914, with Muschert, after the amendment of complainant's bill.

Complainant is at a loss to know what appellants mean by the statement that "the action of the complainant in setting this agreement up estops him alleging after the status of the affairs changed that it was no longer a binding and controlling agreement."

The agreement was not "set up". "The status of the affair" has not changed so far as this agreement is concerned.

Complainant agrees with appellants on the statement of the account down to the one-third due him \$4,200.00.

The \$1,750.00 alleged to have been paid by Conrad cannot be allowed

No allowance can be made to Muschert under 10 per centum agreement of February 26, 1914, but even if it could be claimed by Muschert it would be 10 per centum of \$4,200.00 not of \$20,600.00, as appellants claim.

Complainant is entitled to interest on the \$4,200.00 from February 9th, 1916, the date of conveyance of the lands, and is chargeable with interest on the \$3,000.00 note from Feb-

ruary 26th, 1914, as provided in the decree of the court (p. 36).

The decree should be affirmed.

JOHN T. VAN CLEEF
LINTON SATTERTHWAITE
*Solicitors and counsel of Complainant-
Respondent.*

ADDENDUM

Counsel for Defendants-Appellants having amended his brief after the brief of Counsel for Complainant-Respondent had been printed and bound, by claiming interest on the \$5,000.00 payment made by defendant Muschert to defendant Conrad, the answer of Complainant-Respondent is as follows:

“ The claim for interest on the \$5,000.00 payment cannot be allowed for the compelling reason, that the three party agreement by its express terms, says, that the \$5,000.00 and the \$3,000.00 and the \$2,000.00 which was to have been advanced, but was not, should be deducted from the proceeds as “expense” of the enterprise, before dividing profits. There is no mention of interest and none is permissible under the contract. It is plain that the defendant Muschert, who was to be reimbursed for his out-lay, out of the proceeds before profits should be divided, looked to his share of those profits for his compensation for the use of the money invested in the enterprise by him. ”

JOHN T. VAN CLEEF
LINTON SATTERTHWAITE
*Solicitors and counsels of Complainant-
Respondent.*

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In Chancery of New Jersey

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Between

Walter H. Rickey,

Complainant-Appellee,

and

The Moon Clay & Kaolin Co.,

et als.

Defendants-Appellants.

} Notice of Appeal.

20

The complainant hereby appeals from the final decree made in the above stated cause, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated,

A. V. DAWES,
Solicitor of the Appellants.

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Petition of Appeal.

Filed Jan. 24, 1918.

NEW JERSEY COURT OF ERRORS AND APPEALS

	<i>Between</i>	}	Petition of
	Walter H. Rickey,		
	Complainant-Appellee,		
10	<i>and</i>		
	The Moon Clay & Kaolin Co.,		
	et als.		Appeal.
	<i>Defendants-Appellants.</i>		

The petitioner of The Moon Clay & Kaolin Co., William M. Muschert, J. Lefferts Conard and Elwood W. Watson, the appellants in the above stated cause respectfully shows that your petitioners find themselves aggrieved by a final decree in the Court of Chancery by Edwin Robert Walker, esquire, Chancellor of the State of New Jersey, bearing date the 27th day of December A. D. 1917, made in a cause wherein Walter H. Rickey was complainant and the said The Moon Clay Kaolin Co., William M. Muschert, J. Lefferts Conard, Elwood W. Watson and John J. Moon were defendants in this respect that the said decree adjudges that the said William M. Muschert and J. Lefferts Conard should pay this complainant the sum of

And your petitioners humbly appeal from the said decree to the Court of Errors and Appeals upon the grounds that the said decree should have adjudged that the complainants' bill should be dismissed with costs and it should have adjudged that the said Elwood W. Watson under the assignment set forth in the complainant's bill of complaint to him by the complainant was entitled to have a first lien upon the rights and commission of the complainant to the extent of \$3,000.00 with lawful interest from February 26, 1914, and that the defendant, William M. Muschert, under the agree-

Petition of Appeal.

ment dated February 26, 1914, and set forth in complainant's bill of complaint was entitled to have a lien upon the rights and commissions of the complainant to the extent of \$2,060.00, with interest from February 26, 1914, and that the defendant J. Lefferts Conard was entitled to have from the commissions of the complainant the sum of \$1,750 from 1914.

Your petitioners therefore pray that the decree of his Honor, the Chancellor may be reversed set aside and for nothing holden. And that your petitioners may have such further relief in the premises as may be just and honest. 10

A. V. DAWES,
Solicitor for and of Counsel with the Appellants.

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Answer.

Filed Feb. 7, 1918.

NEW JERSEY COURT OF ERRORS AND APPEALS

	<i>Between</i>	
	Walter H. Rickey,	} On Appeal.
	Complainant-Appellee,	
10	<i>and</i>	} Answer.
	The Moon Clay & Kaolin Co.,	
	et als.	
	<i>Defendants-Appellants.</i>	

The answer of Walter H. Rickey, complainant-appellee above named, to the petition of appeal of the above named appellants.

20 This appellee, Walter H. Rickey, not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto nevertheless says that he admits that a final decree was on the 27th day of December, 1917, made and entered in the Court of Chancery in said cause for the purpose mentioned in said petition as is therein stated; 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 the said final decree is agreeable to equity and prays that the same may be affirmed with costs to be adjudged to this appellee.

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JOHN T. VAN CLEEF,
Of Counsel with Complainant-Appellee.

Bill.

Filed July 11, 1917.

IN CHANCERY OF NEW JERSEY

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

The complainant, Walter H. Rickey, of the City of Trenton, County of Mercer and State of New Jersey, respectfully shows that: 10

1. On the 14th day of August, 1913, the defendant, John J. Moon, was the owner of certain premises, situate in the Township of Hamilton, County of Mercer and State of New Jersey, bounded and described as follows, to wit:

TRACT NO. 1. *Beginning* at the northwest corner of a lot of land now or late of Benjamin South, and runs thence South $62\frac{1}{2}$ degrees east 10 chains and 2 links to a stake in line of lands of said South; thence along his line south 31 degrees west 4 chains and 50 links to land now or late of Samuel Evans and Evan Evans; thence along last mentioned lands north 83 degrees and 10 minutes west 9 chains and 75 links to a stump; thence north $30\frac{1}{2}$ degrees west 11 chains and 95 links to a stake; thence south $63\frac{1}{2}$ degrees east along land formerly of John Smith 9 chains and 46 links; thence along said lands north 31 degrees east 1 chain and 49 links to the Beginning. Containing 9 acres of land, more or less. 20

TRACT NO. 2. *Beginning* at a White Oak Tree corner to land of Amos Lanning and in line of John Welsh and runs thence (1) along said Welsh line south $80\frac{1}{2}$ degrees east 7 chains and 27 links to a stake corner to land remaining to said Daniel South; thence (2) along said South line south 24 degrees east 17 chains and 90 links to a stake in line of land of Samuel Steepy; thence (3) along said Steepy line north $84\frac{1}{2}$ degrees west 19 chains and 90 links to a Black Oak Tree in line of the aforesaid Amos Lanning; 30

Bill.

thence (4) along said Lanning line north 19 degrees east 16 chains and 55 links to the place of Beginning. Containing 21 acres and 45-100 of an acre of land.

- TRACT No. 3. *Beginning* at a stone known as the Birch corner, and runs thence (1) along other lands of Daniel South (or Mrs. South) 24 degrees east 9 chains and 13 links to a stone standing by the side of the lane or road way
 10 leading to Daniel South's dwelling; thence (2) along lands of same south sixteen (16) degrees and 30 minutes west, 7 chains and 63 links to a stone standing about 3 feet from an Oak Tree; thence (3) north 81 degrees and 45 minutes west 1 chain and 48½ links to a stone corner of lands of Samuel Steepy and Joseph South; thence (4) along the line of said Joseph South 24 degrees west 17 chains and 90 links to a stake or stone in middle of a ditch corner to said Joseph South and in line of lands belonging to John Welsh by which it runs; (5) south 79 degrees and 20 minutes east 7 chains and
 20 70 links to the place of Beginning. Containing 9 acres and 35-100 of an acre be the same more or less.

- TRACT No. 4. *Beginning* at a stone standing in Evan Evans line, and a corner to lot of land sold by said Risdon to Joseph Singley and runs thence along said Singley's line and line of land running to said James H. Risdon south 5 degrees west 14 chains and 23 links to a stone; thence north 14½ degrees east 11 chains and 27 links to corner of Rhed lot; thence along the same north 16 degrees east 3 chains to Evans line; thence along his line south 86 degrees 40 minutes
 30 east 21 chains and 30 links to the place of Beginning. Containing 31 acres and 92-100 of an acre of land.

TRACT No. 5. *Beginning* at Three Birch Saplings corner to Lewis Evans, deceased; thence North 84 degrees 30 minutes west, 10 chains 66 links to old White Oak; thence South 13 degrees 30 minutes west, 20 chains 25 links; thence South 20 degrees 30 minutes east, 10 chains 91 links to a

Bill.

stake; thence North 13 degrees 30 minutes east, 19 chains 50 links to the place of Beginning. Containing 20 acres, 16 perches, more or less.

2. On or about the said 14th day of August, 1913, the said John J. Moon entered into an agreement in writing with this complainant, for an expressed consideration of \$1.00, and the further sum of \$6,000.00 per acre, to be paid by the complainant for the best clay lands, and \$1,000.00 per acre to be paid for the balance of said described lands, therein mentioned as "hereinafter conveyed," to be paid to the said John J. Moon, and the delivery of a general warrantee deed by the said defendant John J. Moon to the complainant, when requested to do so by the complainant, at any time within the period of two years from the date of said agreement. Said deed or deeds, as expressed in said agreement, "to be executed and delivered with free and clear title to the premises hereinafter described." The said John J. Moon in and by said agreement agreed to convey to the complainant, by general warrantee deed, for the consideration aforesaid, "all or any part of said premises," and in and by said agreement did, as expressed therein, "bargain, sell and agree to convey to the said" complainant "or to his heirs and assigns forever" the lands above described and which were thereafter described in said agreement; together with all and singular the buildings, improvements and appurtenances, "to have and to hold the buildings, lands, hereditaments and premises hereby granted and every part and parcel thereof, with the appurtenances, unto" the complainant "his heirs and assigns, to the only proper use, benefit and behoof of his" the said complainant, "heirs and assigns forever." The said agreement contained the usual covenants of full warrantee usually contained in a warrantee deed; as by reference to which deed, duly acknowledged and recorded in the office of the Clerk of the County of Mercer in Book 360 of

Bill.

Deeds for said County, on pages 249, &c., or a certified copy thereof, will more largely and certainly appear.

10 3. On or about February 25th, 1914, the said defendant, John J. Moon, entered into a further agreement, in writing, between himself and this complainant, by which he extended the time for the consummation of the agreement above referred to for a further term of two years, or, as expressed in said agreement of extension "until the deal now pending is closed."

20 4. The deal referred to in said agreement of extension was the negotiation for the purchase of a right of way across the lands above described by the Pennsylvania Railroad Company, or one of its subsidiary companies, for an extension of a new freight line across the State of New Jersey, then pending, the surveyed route of which crosses the lands above described, which deal or negotiations have not yet been consummated, and this complainant respectfully shows that said extension of said agreement still holds good.

5. That on or about the 26th day of February, the complainant approached the defendant William M. Muschert, and requested of him a loan or advancement of the sum of \$3,000.00, offering to secure him by an assignment of a part of the interest of complainant in said contract of sale or deed of conveyance of August 14th, 1913.

30 6. The said defendant William M. Muschert agreed to procure a loan of the said sum of \$3,000.00 for the benefit of complainant upon said security, but applied for and secured the advancement of said sum of money to complainant by Ellwood W. Watson; thereupon the complainant, on said 26th day of February, entered into an agreement with the said defendant William M. Muschert by which the said complainant assigned to the said Muschert, in consideration of his services in procuring the said loan of \$3,000.00 to be paid to complainant, and as brokerage or

Bill.

pay for securing said loan to be made or credit to be extended to complainant, all the one-tenth part of the profits due or to become due to complainant on account of his right, title and interest in the contract or deed of conveyance, and the said complainant agreed to furnish to the said Muschert a statement of all said profits, verified by affidavit if required, and to allow the said Muschert, or an accountant selected by him, to examine all books, papers or account of complainant relating to operations under said contract or deed of conveyance; to which contract of assignment, duly executed by complainant and the said defendant Muschert, this complainant begs leave, for greater certainly, to refer. 10

7. That on the same date, the 26th day of February, 1914, complainant, at the request of the said defendant Muschert, executed a deed of assignment to Ellwood W. Watson of all of complainant's right, title and interest of, in and to said contract of sale or conveyance of said lands by said John J. Moon, dated August 14th, 1913, together with a written extension dated February 25th, 1914, said deed of assignment further expressing as follows: "this assignment being made, however, as collateral security for a note of even date herewith, for the payment of \$3,000.00 with interest to the said Ellwood W. Watson by the said Walter H. Rickey and Carl Rickey, and any and all renewals of said note"; to which deed of assignment, to be produced before the court, complainant for greater certainty begs leave to refer. 20

8. That on the 16th day of April, 1914, the said defendant William M. Muschert, this complainant and the defendant J. Lefferts Conard, as the first, second and third parties respectfully, entered into an agreement in writing, in consideration of the mutual covenants therein contained, in which it was recited that this complainant held an option on the property above described and then in the possession of the defendant John J. Moon, pursuant to which said option 30

Bill.

a deed for the said property had been duly executed and delivered by the said John J. Moon to complainant, and recorded in the Clerk's office of Mercer County, and then in possession of the defendant William M. Muschert, by virtue of an assignment thereof, made by this complainant "to secure a personal loan in the sum of \$3,000.00," referring to the deed hereinabove first mentioned, in and by which agreement of April 16th, 1914, it was stipulated that the said defendant William M. Muschert should hold the said assignment for the mutual benefit of the three parties to said last mentioned agreement, to wit, the said Muschert, complainant and the said Conard; that said assignment should be a first lien against any moneys received as profits from the promotion of said operation, whether in the form of commission or otherwise; that any moneys advanced by the said defendant Muschert, pursuant to said agreement last mentioned, should be a lien and payable first out of said profits, after the lien first above mentioned.

It was further stipulated in said last mentioned agreement that the said defendant Muschert agreed to advance, for the benefit of the promotion of "the said operation" a sum not to exceed \$5,000.00, to be paid to the said defendant Conard covering expenditures and expenses to the date of the said agreement, and a further sum not exceeding \$2,000.00 for the purpose of furthering the interests of said operation, which last mentioned sum should be expended only by consent of all three parties, to said agreement.

It was further stipulated that the said defendant Muschert agreed on the execution of said last mentioned agreement to pay to the said Conard the sum of \$2,000.00, parcel of said sum of \$5,000.00 above mentioned, the balance to be paid at the convenience of the defendant Muschert, or when necessity therefor should appear.

It was further stipulated that the complainant herein

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agreed "that the option, contract, agreement and deed held by him by and with the said John J. Moon shall be and is hereby assigned to the said party of the first part absolutely, to be held by the said party of the first part pursuant to these articles of agreement, and for the mutual benefit of all three parties hereto."

It was further stipulated that the complainant should give his time, skill and attention whenever occasion might require, for the promotion of the operation therein referred to, and do all in his power to promote the profits of said enterprise and render such assistance as he might be required to do by either of the other parties. 10

It was further stipulated therein that the said defendant Conard should use his time, skill and understanding for the promotion of said enterprise for the best interests of the parties thereto jointly, and that no expense or out-lay of money should be incurred in connection therewith, excepting by consent of the other parties to said agreement, and that said sum of \$5,000.00 should be in full satisfaction of all obligations of either of the other parties thereto to any party or parties of any kind, manner or description, contracted by the said defendant Conard. 20

It was further stipulated that all moneys from whatever source the same might be obtained or paid to either of the parties to said agreement, whether by order of any court or voluntarily by the parties paying the same, should be forthwith turned over to the said defendant Muschert, who, for said purpose, should act as treasurer of "the within enterprise"; and the consent of the three parties thereto was given that the said defendant Muschert should ask, demand, sue for and collect any sum of money received in the promotion of the operation therein referred to, and to be paid out only on the consent of all the parties thereto, with the exception of the sum of \$10,000.00 which it was agreed the said de- 30

Bill.

10 defendant Muschert should deduct from the moneys received for reimbursement for said sum or sums so advanced or to be advanced in furtherance of said agreement. Complainant further shows that said sum of \$10,000.00 mentioned, included said sum of \$3,000.00 advanced by the said Ellwood W. Watson to complainant at the request of the defendant Muschert, and for which, as complainant understands and believes and therefore charges, the defendant Muschert became responsible to the said Ellwood W. Watson.

It was further stipulated and agreed in said last mentioned agreement as follows:

20 "It is hereby further agreed by and between each of the parties hereto with the other that all the profits to be derived from the sale of the lands in said option described, whether by sale, division or condemnation proceedings, shall be divided among the three parties hereto, share and share alike, after the deduction of the said sum of Ten Thousand Dollars hereinbefore mentioned, which said sum shall be regarded as expenses and first deducted out of the said profits; that the said division of profits may be made at such time after the same accrue, as shall be agreed upon by all the parties to this agreement, all being present at the distribution in person or by proxy, who shall act only with written authority.

30 And it is further agreed by and between the parties hereto that no sum or sums of money is to be accepted on behalf of the parties to this contract, or a sum fixed for the sale of the said lands or any part thereof on behalf of the parties to this contract by any of the parties hereto, except when such sum or sums have been agreed to previously by all the parties hereto, and the written consent of each of the said parties fixing said sum filed with the said party of the first part.

Bill.

And it is further agreed by and between the parties hereto that a violation of this contract by either of the parties shall work a complete forfeiture of all his interests therein, and he thereupon agrees that all writing, writings, papers, data and the paraphernalia of any kind in his possession shall be delivered to the remaining parties to this contract forthwith on demand."

As by reference to said agreement, in writing, bearing date April 16th, 1914, to be produced before the court, complainant begs leave, for greater certainty, to refer. 10

9. Complainant further shows that he has endeavored faithfully to carry out his part of the said agreement, whenever requested so to do, and in every way to promote and advance the interest of the enterprise growing out of said operation or conveyance of lands referred to in said agreement.

10. That on or before the 15th of February, 1915, without the knowledge, consent, understanding or acquiescence of complainant, the defendant John J. Moon attempted to convey to the defendant William M. Muschert, by deed bearing said last mentioned date, with full warrantee of covenants, for the consideration therein expressed of \$10,000.00, said lands and premises hereinabove described, and included in said deed to this complainant of August 14th, 1913, as by reference to said pretended deed, duly recorded in the Mercer County Clerk's office in Book 378, pages 177, &c., will more fully and at large appear. 20

11. That on or about the 5th day of February, 1916, the said defendant William M. Muschert, and Ethel, his wife, executed a quit claim deed to the said John J. Moon for the same premises for the expressed consideration of \$1.00, as by reference to which deed, recorded in said Clerk's office in Book 388 of Deeds, pages 216, will more fully appear; that said last mentioned deed contains no words of 30

Bill.

grant, and complainant is advised that whatever, if any, legal title to said premises passed to the said defendant Muschert, by said deed of February 15th, 1915, from said defendant John J. Moon, still remains in said defendant Muschert, notwithstanding the execution of said quit claim deed of February 5th, 1916.

10 12. That on or about February 9th, 1916, the said defendant John J. Moon executed a deed, purporting to convey the said premises, for an expressed consideration of \$206,000.00, to the defendant The Moon Clay and Kaolin Company, a corporation, with covenants of true and lawful ownership, that the premises were unencumbered, and with full right to convey, and with full covenants of warrantee, as by reference to said last mentioned deed, recorded in said Clerk's office in Book 388 of Deeds, pages 217, &c., will more fully and at large appear.

20 13. Complainant further shows that the only stockholders of The Moon Clay and Kaolin Company were the defendant William M. Muschert and the defendant J. Lefferts Conard, and the defendant John J. Moon and that the said defendant The Moon Clay and Kaolin Company, through all its stockholders, and all its officers, had full knowledge of the said contract or deed between the defendant John J. Moon and this complainant, and full knowledge of all the intermediate agreements hereinabove referred to, and full knowledge of all the rights of this complainant in the said premises or the option therefor, and that said corporation is
30 chargeable with notice thereof.

14. This complainant further shows that said attempted conveyance by the said defendant John J. Moon to the defendant William M. Muschert and by the said Muschert again to the said Moon, and again by the said Moon to the said The Moon Clay and Kaolin Company, were in direct violation of the rights of complainant, in the premises, and

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were intended to defeat complainant's said rights and to exclude him from any enjoyment in the profits which might be realized by the development of the enterprise contemplated in said agreement or deed from the defendant John J. Moon to this complainant of August 14th, 1913, and any subsequent agreements as hereinabove set forth between this complainant and the other defendants for the development of said property for the mutual benefit of the defendants Muschert, Conard and this complainant. 10

15. That the defendants Muschert and Conard controlling the defendant The Moon Clay and Kaolin Company, are engaged in exploiting said premises, mining clay therefrom and reaping the profits and benefits therefrom, and refusing to account to this complainant therefor or permit him any share or interest therein, and treat complainant with respect to said premises as though he has no part or parcel in the same, or in the participation of any profits to be derived from the operation or development thereof, although complainant has repeatedly requested that they cause said premises to be re-conveyed to the said defendant Muschert to be held in trust for the benefit of said defendant Muschert, this complainant and the said defendant Conard, in accordance with the terms of the agreement above set forth, and which agreement this complainant has never renounced or rescinded or forfeited or abandoned or failed to perform his part therein. 20

16. This complainant further shows that the defendant Muschert, the defendant Conard, by procuring the pretended conveyance of said premises by the said defendant Moon to the defendant Muschert, and the subsequent conveyance of said premises to the said defendant The Moon Clay and Kaolin Company, have worked a forfeiture of their rights under the last paragraph of the said contract of April 16th, 1914, as hereinabove set forth. 30

Bill.

17. Complainant further shows that notwithstanding the said pretended conveyances of said premises by said Moon to said Muschert, and by the said Muschert to said Moon, and by the said Moon to the Moon Clay and Kaolin Company, they are void and of no effect, being in violation of the rights of this complainant in the premises, and that the rights of this complainant are in equity the same as if the said pretended conveyances had not been made, to wit, the rights of this complainant and the said defendants Muschert and Conard to have a more formal conveyance of the same from the defendant Moon upon the payment of the consideration, in accordance with the terms expressed in said deed of August 14th, 1913, between the defendant John J. Moon and this complainant, and to have the profits to be realized from said conveyance equally divided between the defendant Muschert, this complainant and the defendant Conard, upon the reimbursement or re-funding to the defendant Muschert of the sum of \$8,000.00, parcel of the sum of \$10,000.00 above mentioned, to be advanced by the defendant Muschert, of which sum only \$8,000.00 was advanced, as this complainant is informed and believes and therefore charges.

18. This complainant further shows that said agreement of April 16th, 1914, between the defendant Muschert, this complainant and the defendant Conard, is still in force and effect.

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

30 1. That The Moon Clay and Kaolin Company, by its proper officers, the said William M. Muschert, the said J. Lefferts Conard and the said John J. Moon, who are the defendants to this suit, may answer this bill of complaint, without oath, and each statement therein made.

2. That the said conveyance of the premises hereinabove described from the defendant John J. Moon to the defendant

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William M. Muschert, and by the said William M. Muschert to the said John J. Moon, and by the said John J. Moon to the said The Moon Clay and Kaolin Company, may be declared null and void and be set aside, and that the said defendants, or one of them, may be declared to hold the title to said premises in trust for the mutual benefit, interest and profit of the defendant Muschert, this complainant and the defendant J. Lefferts Conard, subject to the terms of the agreements above mentioned. 10

3. That an account may be made of any moneys received from the development or operation of said property, or any profits made thereon, by the defendant The Moon Clay and Kaolin Company, or by any of the other defendants hereto.

4. That a decree may be made setting aside said conveyances as aforesaid, and decreeing that said lands and premises shall be held under the terms of said deed of August 14th, 1913, from the said defendant John J. Moon to this complainant, and under the terms of the agreement of April 16th, 1914, between the defendant William M. Muschert, this complainant and the defendant J. Lefferts Conard, for the mutual benefit and profit of the defendant William M. Muschert, this complainant and the defendant J. Lefferts Conard, as aforesaid. 20

5. That this complainant may have such other and further relief as equity may require.

6. That writs of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises. 30

JOHN T. VAN CLEEF.

Solicitor and of Counsel with Complainant.

Notice of Motion to Strike Out Bill.

Filed Aug. 7, 1917.

IN CHANCERY OF NEW JERSEY

	<i>Between</i>		
	Walter H. Rickey,	} <i>Complainant,</i>	On Bill, &c.
10	<i>and</i>		
	The Moon Clay and Kaolin Com-	} <i>Defendants.</i>	Notice of Motion to Strike Out Bill.
	pany, a corporation, William		
	M. Muschert, J. Lefferts Con-		
	ard and John J. Moon,		

20 TAKE NOTICE that on behalf of the defendant, John J. Moon, I shall move before his Honor the Chancellor at the State House in Trenton on Tuesday, the fourteenth day of August inst. at the hour of 10.30 o'clock in the forenoon to strike out the bill of complaint filed in the above stated cause on the ground that it appears in and by the said bill of complaint that Ellwood W. Watson holds the right, title and interest of the complainant of, in and to said contract of sale of conveyance set forth in the said bill of complaint and that thereby said Ellwood W. Watson is a necessary party complainant in said action. That by reason of the absence of the said Ellwood W. Watson as a party to said suit, the complainant is not entitled to have or maintain his action

30 against the said John J. Moon.

To JOHN T. VAN CLEEF, Esq.,
Sol'r of Complainant.

ERWIN E. MARSHALL,
Sol'r for Defendant, John J. Moon.

Order Amending Bill.

Filed Aug. 17, 1917.

IN CHANCERY OF NEW JERSEY

<i>Between</i>	}	On Bill, &c.	10
Walter H. Rickey,			
	}	Order Amending	
<i>and</i>	}	Bill.	
The Moon Clay and Kaolin Com-			
pany, a corporation, et als.,			
<i>Defendants.</i>			

This matter coming on for hearing on application to strike out bill for want of proper parties, in the presence of Aaron V. Dawes, of counsel with the defendants The Moon Clay and Kaolin Company, William M. Muschert and J. Lefferts Conard, and of Erwin E. Marshall of counsel with the defendant John J. Moon, and of John T. Van Cleef and Linton Satterthwaite of counsel with complainant, and the matter having been heard in court; 20

It is, on this fourteenth day of August, A. D. 1917, ordered that the complainant's bill be and hereby is amended by adding in the first paragraph of the prayer of said bill the name of Ellwood W. Watson as a party defendant to said bill; and by adding at the end of the second paragraph of the prayer of said bill the following words, to wit: "including the payment of said sum of \$3,000.00 with interest to the defendant Ellwood W. Watson"; and by adding at the end of the fourth paragraph of the prayer of said bill the following words, to wit: "subject to the payment of \$3,000.00 to the defendant Ellwood W. Watson, as aforesaid." 30

It is further ordered that the defendants to this bill file their answer within ten days after service of a copy of this order upon them respectfully.

Respectfully advised,

JOHN H. BACKES, V. C.

E. R. WALKER, C.

Answer.

Filed Aug. 25, 1917.

IN CHANCERY OF NEW JERSEY

	<i>Between</i>		}	<i>Answer.</i>
	Walter H. Rickey,	<i>Complainant,</i>		
10	<i>and</i>		}	
	Moon Clay & Kaolin Company,			
	William M. Muschert, J. Lef-			
	ferts Conard and John J. Moon,	<i>Defendants.</i>		

The answer of John J. Moon, one of the defendants, to the bill of complaint of Walter H. Rickey, complainant.

20 1. This defendant answering says, that he admits paragraphs 1, 5, 6 and 7 to be true, and denies paragraphs 14 and 16 of the bill of complaint.

2. He admits that there was a paper writing entered into on the 14th day of August 1913, and begs leave to refer to the writing itself as the best evidence of the contents thereof. He says, however, that the same was voluntary on his part and without any consideration received from the complainant, Walter H. Rickey.

30 3. He further answering says that he executed the paper writing mentioned in the complainant's bill as dated the 25th day of February, 1914, but he says that there was no consideration for the signing of the said agreement and that the same was not binding on this answering defendant.

4. He denies that there were any negotiations pending for the purchase of a right of way, as alleged in paragraph 3 of the complainant's bill of complaint.

5. He admits the execution of a deed to the defendant,

Answer.

William M. Muschert, and says that it was executed with the knowledge, consent, understanding and acquiescence of Walter H. Rickey, the complainant, and that the allegations to the contrary in his said bill of complaint are untrue.

6. He says that the property was re-conveyed to him and denies that the deed to him by William M. Muschert and Ethel his wife, so re-conveying it to him, was not effectual as alleged in said bill of complaint, but on the contrary claims that the effect of the said deed was to vest the title of the said premises in this answering defendant. 10

7. He further says that he conveyed this property to the Moon Clay & Kaolin Company for the consideration of \$206,000.00 in the stock of the company.

8. He says that the complainant, Walter H. Rickey, had full knowledge of the negotiations for the transfer of the title from this answering defendant to the said Company; that the negotiations for the same were conducted by the said complainant and the defendants, Muschert and Conard; that the understanding between them and this complainant was that upon the conveyance of the property to the said Company the said complainant was entitled to 3 1-3 per cent. of the proceeds of the sale to be paid by the said Company or Muschert and Conard, to the complainant. 20

That prior to the conveyance of the said property this answering defendant had entered into an agreement in writing to allow the complainant and the defendants, Muschert and Conard, 10 per cent. of the consideration for the sale of the said property, and that under the terms of the agreement between the complainant, Rickey, and the defendants, Muschert and Conard, this agreement enured to the benefit of the two defendants, Muschert and Conard, to the extent of 3 1-3 per cent. each and the other 3 1-3 per cent. to the complainant. 30

9. This defendant further answering says, that the said

Answer.

Rickey has received from the defendants, J. Lefferts Conard and William M. Muschert, more than his share in the said commissions and that there is nothing due and owing to the said complainant under the said commission agreement.

And this defendant prays that complainant's bill may be dismissed as to him.

ERWIN E. MARSHALL,
Solicitor of the defendant, John J. Moon.

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Answer.

Filed Aug. 25, 1917.

IN CHANCERY OF NEW JERSEY

<i>Between</i> Walter H. Rickey, <i>and</i> Moon Clay & Kaolin Company, William M. Muschert, J. Lef- ferts Conard and John J. Moon,	}	<i>Complainant,</i> On Bill, &c. Answer. <i>Defendants.</i>	10
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The joint and several answer of the Moon Clay & Kaolin Company, William M. Muschert and J. Lefferts Conard to the bill of complaint of Walter H. Rickey, complainant.

These defendants, answering, say that— 20

1. They admit paragraphs 1, 5, 6 and 7 to be true.

2. They deny paragraphs 14 and 16.

3. These defendants, further answering, admit that there was a writing entered into on the 14th day of August, 1913, between John J. Moon and the complainant, Walter H. Rickey, but these defendants crave leave to refer to the said writing, and the various stipulations therein contained, for greater certainty as to the meaning and effect of the said paper writing; these defendants say, however, that no consideration whatever was paid by the complainant to the defendant, John J. Moon, for and on account of the same, and that there was no consideration moving from the plaintiff to the defendant for the execution of the said paper writing by the defendant, John J. Moon, to the complainant. 30

4. These defendants, further answering, admit that on the 25th day of February, 1914, the said John J. Moon en-

Answer.

tered into a writing, but they submit that the said writing did not validly extend the time within which the complainant should have the privilege of purchasing the said lands mentioned in paragraph 1 of the complainant's bill or that the said paper writing was of any legal effect whatsoever, as these defendants are advised as against the deed to the defendant company.

10 5. These defendants, further answering, say that there were no negotiations pending for the purchase of a right of way, as alleged in paragraph 3 of the complainant's bill of complaint, at the time that the said paper writing was executed by John J. Moon mentioned in the said paragraph.

6. These defendants, further answering, say that the agreement mentioned in paragraph 8 of the complainant's bill was entered into, but they beg leave, for greater certainty and a correct exposition of the terms thereof, to refer to the writing itself as to the contents thereof.

20 7. These defendants, further answering, say that a deed, with full warranty, for the consideration of \$10,000, was executed and delivered by the defendant John J. Moon to the defendant, William M. Muschert, which conveyed the lands and premises mentioned in paragraph 1 of the complainant's bill, but these defendants deny that the same was executed without the knowledge, consent, understanding or acquiescence of the complainant, as he alleges in said paragraph of his bill of complaint; and, on the contrary, these defendants say that the truth is that the complainant had full knowledge
30 of the execution and delivery of the said deed, as well as its objects and purposes.

8. These defendants, further answering, say that the defendant, William M. Muschert, and his wife, Ethel, executed a deed for the said premises, which re-conveyed them to the defendant, John J. Moon, but these defendants deny that the said deed was ineffectual to re-vest the title of the

Answer.

said premises in John J. Moon, and deny that the legal title remains in the defendant, William M. Muschert, as in the 11th paragraph of his bill of complaint he alleges.

9. These defendants, further answering say that on the 9th day of February, 1916, John J. Moon conveyed the premises mentioned in paragraph 1 of the complainant's bill of complaint to this answering defendant, the Moon Clay & Kaolin Company, for the consideration of \$206,000., in the stock of the company; that the stockholders of the said company were William M. Muschert, J. Lefferts Conard and John J. Moon, and the defendant, the Moon Clay & Kaolin Company, admits that it had constructive knowledge of the option agreement so-called, purporting to be set forth in paragraph 2 of the complainant's bill of complaint, from the records of the Clerk's office of the County of Mercer; that the defendant, the Moon Clay & Kaolin Company, denies that it is chargeable with the knowledge of the stockholders and officers of the said corporation of the several agreements mentioned in the bill of complaint, or that it is chargeable with their knowledge which they obtained in transactions which were other than corporate transactions. 10 20

10. These defendants, further answering, say that it is true that the Moon Clay & Kaolin Company is engaged in mining and utilizing the property conveyed to it by John J. Moon, as it has a full right to do; and it says that it has not refused to render any account to the complainant, or to allow him participation in the profits to be derived from the mining of clay therefrom, as he alleges in his bill of complaint, but the defendant, the Moon Clay & Kaolin Company, says that the said complainant never requested them to account therefor, or claimed that he had any right to any account therefor from the said company, and these defendants submit that the said complainant is not entitled to any account therefor; that he has never paid any consideration for 30

Answer.

the said property, or offered to pay any consideration therefor, and never claimed to these defendants to have any right in the premises so conveyed.

11. These defendants, further answering, say that the truth is that Walter H. Rickey had full knowledge and information of the negotiations which eventuated in the transfer of the title from John J. Moon to the Moon Clay & Koalin Company.

12. These defendants, further answering, say that at the time of the transfer of the title from John J. Moon to the Moon Clay & Kaolin Company, the complainant Walter H. Rickey, had before that time secured from the defendant, John J. Moon, a contract in writing, allowing him and the defendants, Muschert and Conard, 10 per cent. of the commissions on the sale of the said land; that the said Walter H. Rickey was acting under the terms of the said agreement for ten per cent. of the proceeds of sale in conjunction with the defendants, William M. Muschert and J. Lefferts Conard, each of whom is entitled under the agreement between the complainant and these defendants to 3 1-3 per cent. commissions; that the said complainant, Walter H. Rickey, has received from the defendants, J. Lefferts Conard, John J. Moon and William M. Muschert, more than his share of the said commissions, and that after the execution of the said agreement for commissions, the defendants, John J. Moon, Muschert and Conard, and the complainant acted entirely under the commission agreement, and regarded the writing of August 14, 1913, as superseded thereby.

13. These defendants, further answering, say that under the terms of the writing dated April 16, 1914, the said agreement for commissions enured to the benefit of the two defendants, Muschert and Conard, and the complainant, and the said defendants and complainant so acted thereafter.

14. These defendants, further answering, say that the

Answer.

said complainant, Walter H. Rickey, knew that the Moon Clay & Kaolin Company, when it purchased said land, was contemplating expending and would expend large sums of money in permanent improvements and machinery for developing the clay on the said tracts of land, and that its officers and agents would earn and would receive salaries commensurate with the abilities and skill required for operating the mining of clay on the said land; that these expenditures of their moneys and incurring of the expenses would only be repaid in the event that the enterprise turned out prosperously, and that the complainant is estopped by his knowledge of their transactions in claiming any share other than his 3 1-3 per cent. commission, which has already been advanced to him. 10

A. V. DAWES,
Solicitor of Defendants, Moon Clay & Kaolin Company,
William M. Muschert, and J. Lefferts Conard. 20

Replication.

Filed Oct. 6, 1917.

IN CHANCERY OF NEW JERSEY

	<i>Between</i>		
	Walter H. Rickey,		} On Bill, &c.
10	<i>and</i>	<i>Complainant,</i>	
	The Moon Clay and Kaolin Com-		} Replication.
	pany, a corporation, William		
	M. Muschert, J. Lefferts Con-		
	ard and John J. Moon,		
		<i>Defendants.</i>	

The complainant joins issue on the answer filed by the de-

20 above stated cause.

JOHN T. VAN CLEEF,
Solicitor of Complainant,
Trenton, N. J.

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Replication.

Filed Oct. 6, 1917.

IN CHANCERY OF NEW JERSEY

Between

Walter H. Rickey,

*Complainant,**and*The Moon Clay and Kaolin Com-
pany, a corporation, William
M. Muschert, J. Lefferts Con-
ard and John J. Moon,*Defendants.*

On Bill, &c.

10

Replication.

The complainant joins issue on the answer filed by the
defendant John J. Moon, in the above stated cause.

JOHN T. VAN CLEEF,

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Solicitor of Complainant,
Trenton, N. J.

30

Amendment to Complainants Bill.

Filed Dec. 11, 1917.

IN CHANCERY OF NEW JERSEY

	<i>Between</i>		}	On Bill, &c.
	Walter H. Rickey,	<i>Complainant,</i>		
	<i>and</i>		}	Amendment to Complainants Bill.
10	The Moon Clay and Kaolin Com-			
	pany, a corporation, William M. Muschert, J. Lefferts Con- ard and John J. Moon,	<i>Defendants.</i>		

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

The complainant, Walter H. Rickey, for amendment to the bill filed in the above stated cause, respectfully shows that

20 after the execution of the agreement between the complainant, the defendant William M. Muschert and the defendant J. Lefferts Conard, bearing date April 16th, 1914, referred to in said bill of complaint, the said John J. Moon executed and delivered to complainant an agreement agreeing to pay to the complainant and others ten per centum on such price as might be received, satisfactory to himself, for his lands mentioned in the said bill of complaint, if they should be sold at voluntary sale, and twenty per centum on the price received on said lands if they should be sold under condem-

30 nation proceedings, and that it was agreed between the complainant and the defendants William M. Muschert and J. Lefferts Conard that said commission should be divided when received from the sale of said premises in the same proportion between the complainant and the said two defendants, as is provided in said agreement of April 16th, 1914.

And this complainant further shows by way of amendment to said bill that the conveyance of said premises made

Amendment to Complainants Bill.

by the said John J. Moon to the said Moon Clay and Kaolin Company was for the consideration of \$206,000.00 paid for in capital stock of such corporation, and at the time of said conveyance the said defendants William M. Muschert and J. Lefferts Conard agreed that the price for which said property was conveyed to the said Moon Clay and Kaolin Company, to wit, \$206,000.00, should be the price upon which said ten per centum should be reckoned, as being payable by the said John J. Moon under the terms of said agreement made with this complainant for the payment of ten per centum of said purchase price of said premises, and further that they, the said defendants Muschert and Conard, would assume the payment of said ten per centum of said purchase price at \$206,000.00 to the relief of the said John J. Moon from his undertaking to pay the same if he would agree to convey such premises for the price aforesaid, as in fact he did so convey said premises. 10

This complainant therefore shows that the said defendants William M. Muschert and J. Lefferts Conard thereby became liable to pay to this complainant one-third of the ten per centum on said purchase price, to wit, \$20,600.00, after deducting the sum of \$8,000.00 therefrom in accordance with said agreement of April 16th, 1914, and that said sum has not been paid by said defendants to the complainant though the complainant has requested that the same be paid to him as his share of the commission resulting from the sale of said premises. 20

This complainant therefore, by way of amendment to the prayer of said bill of complaint, prays that a decree be made directing the said defendants William M. Muschert and J. Lefferts Conard to pay to this complainant one-third the said sum of \$20,600.00 after deducting the sum of \$8,000.00 as aforesaid. 30

JOHN T. VAN CLEEF,
Solicitor and of Counsel with Complainant.

Amendments to Answer.

Filed Dec. 26, 1917.

IN CHANCERY OF NEW JERSEY

	<i>Between</i>		}	On Bill, &c.
	Walter H. Rickey,			
		<i>Complainant,</i>	}	Amendments to Answer.
	<i>and</i>			
10	The Moon Clay and Kaolin Com- pany, et al.,	<i>Defendants.</i>		

Answer of The Moon Clay and Kaolin Company, William M. Muschert and J. Lefferts Conard and Elwood Watson, the defendants, to the amendments filed to this cause to the bill of complaint.

20 These defendants say, that after the formation of the agreement for commissions between the complainant and John J. Moon, referred to in this answer, the defendants, William M. Muschert and J. Lefferts Conard, in conjunction with the complainant, negotiated with John J. Moon for the purchase of the clay lands for The Moon Clay and Kaolin Company for the \$206,000 to be paid in the stock of the said company; and the defendants, J. Lefferts Conard and William M. Muschert, offered to the complainant his option to compute the commissions on the basis of the par value of the stock, \$206,000, or on the amount which the company should afterwards receive in case of sale or condemnation of the said lands by the prospective railroad company, subject to the deductions from the complainant's 3 1-3 per cent. of said sum, of the following items: namely, \$3,000 with interest from the date of loan; also the 10 per cent. due William M. Muschert by the complainant under the assignment to the complainant mentioned in paragraph 6 of the complainant's bill of complaint, and the further sum of

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Amendments to Answer.

\$1,750.00 which had been loaned by the defendant, J. Lefferts Conard, to the complainant, Walter H. Rickey, on the understanding that the same were to be repaid out of the complainant's share of profits in the said commission agreement, the said complainant then and there being insolvent and unable to pay the same except therefrom.

And these defendants further answering say, that the complainant, during all the negotiations with The Moon Clay and Kaolin Company, always acknowledged that these said items mentioned in the preceding paragraph of this answer were valid and subsisting offsets or deductions from any moneys which might be coming to the said complainant on the said commission agreement. 10

And these defendants further answering say, that the said complainant, in the year 1916, repudiated the said commission agreement and understanding with John J. Moon and the defendants, William M. Muschert and J. Lefferts Conard, and filed his bill of complaint in this cause to annul the deed of John J. Moon to The Moon Clay and Kaolin Company, and filed a lis pendens against the lands mentioned in the bill of complaint alleging that the said clay lands were subject to the so-called option agreement mentioned in paragraph 2 of the complainant's bill of complaint. 20

These defendants further answering say, that the said complainant being insolvent and being justly indebted to the said Elwood Watson in the sum of \$3,000 with interest from the 26th day of February, 1914, and to William M. Muschert in the further sum of \$2,060.00 with interest, for services by the defendant, William M. Muschert, in procuring and guaranteeing the loan made by Elwood W. Watson under the agreement contained in paragraph 6 of the complainant's bill of complaint, and being indebted to the defendant, J. Lefferts Conard in the sum of \$1,750.00, with interest from May, 1914, these defendants consent 30

Amendment to Answer.

that the commissions may be adjusted on the basis of \$206,000, of which 3 1-3 per cent. is due the complainant, deducting therefrom the sums of money mentioned in this paragraph as due Elwood W. Watson, William M. Muschert and J. Lefferts Conard.

10 And these defendants pray to be hence dismissed with their costs and charges, subject to declaration that the lands of the Moon Clay and Kaolin Company are not subject to the agreement of August 14, 1913, and that the complainants have no estate, right title or interest thereon or thereto.

A. V. DAWES,
Solicitor for Defendants.

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Decree.

Filed Dec. 27, 1917.

IN CHANCERY OF NEW JERSEY

<p><i>Between</i> Walter H. Rickey, <i>and</i> The Moon Clay and Kaolin Company, a corporation, et als., <i>Defendants.</i></p>	}	<p>Complainant,, Defendants.</p>	<p>On Bill, &c. Decree.</p>	<p>10</p>
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This matter coming on to be heard in the presence of John T. Van Cleef and Linton Satterthwaite, of counsel with complainant, and Aaron V. Dawes, of counsel with defendants, and the pleadings having been read and testimony taken in open court, and the arguments of counsel having been heard, and the court having considered the pleadings and arguments of counsel and being of opinion that the complainant is entitled to relief against the defendants William M. Muschert and J. Lefferts Conard: 20

It is, on this 27th day of December, 1917, ordered adjudged and decreed, and the Chancellor does by virtue of his office order, adjudge and decree that the defendant William M. Muschert pay to the defendant Elwood W. Watson \$3,000.00, being the amount advanced to the complainant by the defendant Elwood W. Watson February 26th, 1914, and being part of the sum of \$10,000.00 mentioned in an agreement dated April 16th, 1914, between the defendant William M. Muschert, the complainant, and the defendant J. Lefferts Conard, which sum was first to be paid out of the profits or commission accruing to the complainant and the defendants William M. Muschert and J. Lefferts Conard 30

Decree.

on the sale of the lands of the defendant John J. Moon to the defendant, The Moon Clay and Kaolin Company, before a division of said commission between the complainant and said defendants William M. Muschert and J. Lefferts Conard, in accordance with the terms of said agreement of April 16th, 1914.

10 And it is further ordered, adjudged and decreed that the said defendants William M. Muschert and J. Lefferts Conard pay to the complainant the sum of \$4,200.00, being one-third of the commission upon the purchase price of the sale of said lands of said John J. Moon to the said The Moon Clay and Kaolin Company, after deducting the sum of \$8,000. from said commission in accordance with the terms of said agreement of April 16th, 1914, together with interest on said sum of \$4,200.00 from February 9th, 1916, the date of said conveyance of said lands to said company, to the date of this decree, less interest on said sum of \$3,000.00 advanced
20 by the defendant Ellwood W. Watson to the complainant from the 26th day of February, 1914, the date of said advancement or loan of said sum of \$3,000.00, to the date of this decree.

It is further ordered, adjudged and decreed that the said defendant William M. Muschert and J. Lefferts Conard pay said interest on said sum of \$3,000.00, so to be deducted from said sum of \$4,200.00, with interest as aforesaid, to the said defendant Ellwood W. Watson.

30 It is further ordered, adjudged and decreed that the lands conveyed by the defendant John J. Moon to the defendant The Moon Clay and Kaolin Company, as aforesaid, be and the same are hereby released, discharged and freed from all lien or claims for or on account of an agreement or contract of sale between the defendant John J. Moon and the complainant, bearing date August 14th, 1913, and recorded

Decree.

in the Mercer County Clerk's office in Book 360 of Deeds, pages 249, &c.

It is further ordered, adjudged and decreed that neither party complainant nor defendant shall recover costs in this suit.

E. R. WALKER, C.

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Respectfully advised,
JOHN H. BACKES, V. C.

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Conclusions

Filed Feb. 1, 1918.

IN CHANCERY OF NEW JERSEY

	<i>Between</i>		}	Conclusions.
	Walter H. Rickey,	<i>Complainant,</i>		
10	<i>and</i>			
	The Moon Clay and Kaolin Com-	}		
	pany, a corporation, William			
	M. Muschert, J. Lefferts Con-			
	ard and John J. Moon,	<i>Defendants.</i>		

In 1913 the complainant Rickey obtained from the defendant Moon what has been termed an option agreement, whereby Moon agreed to sell to Rickey his clay lands in Hamilton township, at any time within two years, for \$6,000 per acre for the best clay lands, and \$1,000 per acre for the balance. In February of the following year, Moon extended the option for a further term of two years, or "until the deal now pending is closed." The deal was Rickey's negotiations with the Pennsylvania Railroad, for a strip of land for its new freight line across New Jersey, between Philadelphia and New York. Rickey then interested the defendant Muschert and persuaded him to secure a loan of \$3,000 from his friend Watson upon a promise to pay Muschert one-tenth part of the profits on the option agreement. Rickey assigned the option to Watson as collateral security and reduced to writing the ten per cent. agreement with Muschert. He then got from Moon a commission agreement, wherein Moon agreed to pay ten per cent. commission upon all sales of his lands and twenty per cent. upon all receipts from condemnation proceedings. There upon the

Conclusions.

complainant and Muschert and J. Lefferts Conard, the latter then an attorney-at-law of this state, entered into what has been called the three party agreement, wherein it was stipulated that Muschert was to hold the Moon-Rickey agreements (I do not recall whether the commission agreement was specially mentioned) for the benefit of the three, subject to the lien of the Watson loan, and that to promote "the operation" Muschert was to advance to Conard \$5,000 to cover expenditures to date, and a further sum not exceeding \$2,000 for future promotion. The complainant and Conard were to give their attention and efforts, Conard his professional skill, in advancing the enterprise, which was understood to be defending the condemnation proceedings. Out of the profits Muschert was first to retain \$10,000, made up of the \$3,000 borrowed from Watson, the \$5,000 paid to Conard, and the \$2,000 to be then later advanced. The agreement then provided that all of the profits should be divided among the three, share and share alike "after the deduction of the said sum of \$10,000 hereinbefore mentioned, which said sum shall be regarded as expenses and first deducted out of said profits." The condemnation proceedings failed of realization, and then Muschert, Conard and Moon formed the Moon Clay and Kaolin Company, and took over the clay lands for \$206,000 of the capital stock of the company, under arrangement with Moon that he was to sell his holdings to Muschert and Conard for some \$50,000. The clay company is now owned by Muschert and Conard and is operating the clay-pits. The complainant was not permitted to participate. He was practically frozen out. He then filed this bill to impress the trust of the three party agreement, and for an accounting. In their answer the defendants Muschert and Conard set up Rickey's ten per cent. commission agreement, and claimed that they were operating under it in connection with the three party agreement, and

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Conclusions.

on the witness-stand they both expressed themselves as willing to assume Moon's obligation to pay the commission on a sales price of \$206,000, to be divided according to the terms of the three party agreement. Upon the court's suggestion, the complainant asked leave to amend, which was granted.

THE VICE-CHANCELLOR (after argument):

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When the pleadings are amended as directed, this will be a bill for an accounting for profits in a joint venture. The admitted profits are ten per cent. on \$206,000, viz.: \$20,600, and these are to be divided equally between the complainant and Conard and Muschert, after Mr. Muschert deducts \$8,000, viz.: the \$3,000 due to Watson, and the \$5,000 he advanced to Conard. The terms of the agreement were that he was to deduct \$10,000, but this included the \$2,000 which he was to later advance, but did not. The three party agreement shows clearly the final arrangement of the parties, and this was that all over and above \$10,000 (now \$8,000) was to be divided share and share alike. It was urged during the course of the trial and on the argument that the loan from Watson to Rickey should be taken from Rickey's share, but this manifestly was not the bargain. The \$3,000 loan to Rickey, which Muschert secured, and the \$5,000 paid to Conard, and the other \$2,000 which Muschert promised, are treated by the three party agreement as expenses of the enterprise, to be paid out of the profits. In ascertaining what is Rickey's due the total of these sums (\$8,000) is to be deducted and the balance divided. And so with Muschert's ten per cent. agreement for securing the loan from Watson. That is also merged in the three party agreement and controlled by the terms of the division.

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Conclusions.

The claim made by Conard against Rickey that he loaned him \$1750 upon the understanding that it was an advance on account of Rickey's prospective profits and to be deducted upon final settlement, is not sustained by the proofs. The money was paid by Conard to Rickey shortly after the making of the three party agreement and at a time when Rickey was known to be insolvent, and when the prospects of making a profit were none too bright and when Conard could have little hope of repayment if he were lending. The payment to Rickey is shown by two checks of Conard, one for \$1,000, the other for \$750, but Conard took nothing from Rickey to show that they were loans. The presumption is that the checks were given in payment and Rickey says that is why they were given. His testimony is that Conard and he agreed to divide equally the \$5,000 Muschert was to advance under the three party agreement, and I believe him as against the denial and explanation of Conard, and his story is borne out, in a measure, by the fact that the first payment made by Muschert to Conard on the day after the three party agreement was made was for \$2,000, and on the following day Conard gave Rickey his check for \$1,000. On April 30th Muschert gave to Conard another \$1,500, and twenty days later Conard gave Rickey his second check for \$750. There is still \$750 due Rickey from Conard, one-half of the balance collected from Muschert.

The decree will read that Muschert pay to Watson \$3,000; that the established gross profits are \$20,600, from which \$8,000 is to be deducted, and the balance divided into three parts. One-third will be adjudged to Rickey.

Conclusions.

MR. DAWES: Is there any interest?

10 THE VICE-CHANCELLOR: As I interpret the three party agreement, the profit to be divided was all in excess of \$10,000 net (\$8,000), as it has turned out. That was the stipulation of the parties. The language is plain and explicit. If the written document does not correctly disclose the agreement of the parties, a bill to reform should have been filed.

As to the interest on the Watson loan, Muschert was not to pay more of the loan than the \$3,000 principal. Whatever interest has accrued is Rickey's debt, and the decree may provide that this interest be paid out of Rickey's share.

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Testimony of Walter H. Rickey—Direct.

Docket 43-576.

IN CHANCERY OF NEW JERSEY

<p><i>Between</i> Walter H. Rickey, <i>and</i> The Moon Clay and Kaolin Co., et al.,</p>	<p><i>Complainant,</i></p>	<p>On Bill, &c.</p>	<p>10</p>
<p><i>Defendants.</i></p>	<p><i>Testimony.</i></p>		

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Thursday, the twenty-second day of November, 1917, at 10.30 A. M.,

Before HON. JOHN H. BACKES, Vice-Chancellor.

APPEARANCES: John T. Van Cleef and Linton Satterthwaite, Esqs., for the Complainant; 20

A. V. Dawes, Esq., for the Defendants.

WALTER H. RICKEY, the aboved-named complainant, being duly sworn, testified as follows:

Direct Examination by Mr. Satterthwaite:

- Q. Mr. Rickey, you are the complainant in this case? 30
 A. Yes, sir.
 Q. And you know John J. Moon?
 A. I do, sir.
 Q. How long have you known him?
 A. I suppose I have known Mr. Moon about ten years.

Walter H. Rickey—Direct.

- Q. Did you have any dealings with him in the year 1913?
 A. I did, sir.
 Q. What?
 A. I was assisting Mr. Moon in his clay business.
 Q. In what way?
 A. As an agent to secure the sale of his clays by having potteries purchase his clay.
- 10 Q. A sales agent?
 A. Not receiving any moneys for any benefit I could do for him, but as I knew some of those connected with the potteries, I said I would be very glad to assist him in the sale of his clays.
 Q. Just a friendly act?
 A. Purely a friendly act at that time.
 Q. While engaged in that did you enter into any written agreement with him?
 A. Yes, sir.
- 20 Q. Do you remember about when that was?
 A. The middle of August, 1913.
 Q. This is dated August 14, 1913 (handing witness paper).

30 MR. SATTERTHWAIT: I offer in evidence said paper, indorsed "Conditional sale of land, John J. Moon to Walter H. Rickey," dated August 14, 1913, and recorded in the Mercer County Clerk's Office in Book 360 of Deeds, page 249, &c., is marked "Exhibit C 1."

Q. What was done by you, if anything, after you received that agreement, in pursuance of it, immediately after, I mean?

Walter H. Rickey—Direct.

A. I took up the matter to see if the Pennsylvania Railroad had an idea of going through there; they had made two surveys of the property. I endeavored to secure the knowledge that the Pennsylvania contemplated going through those grounds, and I understood from friends of mine—that they did intend going through there and taking this property. I consulted high officials of the railroad business, and it was said there would be absolutely no question but what they would go through, as they had made their survey. 10

Q. Did you come into possession of any map?

A. I did.

Q. From what source?

A. From my cousin, who was a civil engineer.

Q. What is his name?

A. Carl H. Rickey.

Q. Do you know whether or not he made a survey there?

A. Yes, he made a survey of the entire property, but not of the intended— 20

Q. Did you come into possession of any railroad survey?

A. I did, sir.

Q. From what source?

A. Through a friend of mine.

Q. This paper which I hand you, do you recognize that?

A. I do.

Q. Where did that come from?

A. From Mr. Carl H. Rickey.

Q. Do you know where he got it?

A. He secured it from one of the maps of the Pennsylvania Railroad Company. 30

MR. SATTERTHWAITTE: I offer in evidence said map, being a sketch of the proposed branch P. & N. R. R. Co., Pond Run Road to Millham Junc-

Walter H. Rickey—Direct.

tion, property to be acquired from John Moon bearing the date "Trenton, N. J., July 10, 1913," is marked "Exhibit C 2."

Q. What else did you do, Mr. Rickey?

A. I then went on assisting Mr. Moon with his clay business.

10 Q. With reference to the subject matter of this option or deed, whichever it might be called, what did you do?

A. I then consulted Mr. Conard about the option which I held; Mr. Conard thought the option was a very valuable one; Mr. Conard agreed to take care of the law end of the matter.

Q. What I have reference to now is, before any subsequent agreement—

A. After getting the information I secured and the map of the contemplated purchase of the property, I then
20 simply had to wait until some action would be taken.

Q. This original agreement was for two years by its terms; was anything done afterwards about an extension?

A. Yes, Mr. Moon gave me an extension of the former agreement, to be carried along until the Pennsylvania Railroad Company should purchase the property, as they contemplated doing.

Q. After you had got that agreement or extension, then what was done—to begin with, in that extension it says: "A
30 renewal for the further term of two years," or, as expressed in said agreement of extension, until the deal now pending was closed; what deal was that?

A. The contemplated purchase of the property, the right of way.

Q. About how many acres did that involve?

A. 26½ and a little over.

Walter H. Rickey—Direct.

Q. After you secured that extension, what did you do?

A. I secured a loan from Mr. Muschert—

Q. You applied to him for a loan?

A. I applied to him for a loan.

Q. With what results?

A. With the result that I secured the loan from Mr. Muschert.

Q. You presented what papers? 10

A. That Mr. Moon gave me, the option and the extension.

Q. And you got that money actually from Elwood Watson?

A. Mr. Muschert told me that Mr. Watson was loaning the money, but he afterwards said he had loaned the money to Mr. Watson.

Q. You entered into an agreement with Mr. Muschert to give him 10 per cent. of the profits—

A. Yes. 20

Q. You entered into this three party agreement, this agreement of April 14, that was in three originals, wasn't it?

A. Yes.

Q. And this paper is one of the originals

A. Yes, sir.

MR. SATTERTHWAITE: I offer in evidence said agreement between William M. Muschert, Walter H. Rickey and J. Lefferts Conard, dated April 16, 1914, is marked Exhibit C-3.

30

Q. In that agreement of April 16, 1914, I show you a provision there for advancing \$5,000 to Conard; do you know whether that was advanced?

A. So Mr. Muschert said.

Walter H. Rickey—Direct.

Q. And the 3,000 you had?

A. Yes.

Q. Now, there is a provision also for \$2,000 more to be advanced by your joint arrangement; was that advanced?

A. Mr. Muschert advised me so.

Q. Did you have any knowledge of it?

A. No, sir.

10 Q. After that, what did you next do in regard to this property?

A. I kept on consulting my friends who were in the railroad business, to find out if there was any progress being made by the road to take over this property, and carry out my part of the agreement to the best of my ability, all that I possibly could do.

Q. And you kept in touch with the matter?

A. As close as I could.

Q. When next did you learn anything about it?

20 A. I learned through my cousin, who was searching some records in the course of his business, engineering work, that the property had been conveyed by Mr. Moon to Mr. Muschert.

Q. Had you heard anything about it before?

A. Not a thing.

Q. Or any intimation of it?

A. Not a thing.

Q. Had you ever been consulted about it at all?

A. No, sir, I had not.

30 Q. Then what did you do, if anything?

A. I took the matter up with Mr. Muschert and asked him why a conveyance had been made without consulting me, as per our agreement.

Q. What did he say?

Walter H. Rickey—Direct.

A. He said that it would be better to have the property in his name than in mine, owing to the reverses I had received in 1912.

Q. You had had some financial difficulties?

A. Yes, the failure of the Rickey-Swann Company through the action of the State of Maryland.

Q. And you were liable on some paper?

A. Yes. 10

Q. Were you the Rickey in that company?

A. I was one of the Rickey's; C. H. Rickey was also connected with it.

Q. What further was said by Mr. Muschert?

A. I took Mr. Muschert to do about conveying this property without my knowledge; I then wrote Mr. Muschert?

Q. You were describing the conversation with Mr. Muschert.

A. Mr. Muschert told me my interests would be identically the same as they were under the tri-party agreement. That was in front of The Trenton Trust and Safe Deposit Company. 20

Q. How soon was this after you learned the property had been conveyed?

A. Immediately.

Q. What further did you do after that?

A. I requested Mr. Muschert to give me in writing a statement that my interests were identically the same as with the tri-party agreement. He refused to sign the paper I sent him, but he wrote me a letter stating that my interests would be the same. 30

Q. Here is a letter dated November 2, 1915; is that the letter from Mr. Muschert you received?

A. Yes, sir.

Walter H. Rickey—Direct—Exhibit C-4.

MR. SATTERTHWAITE: I offer it in evidence.

Said letter is marked "Exhibit C 4."

MR. SATTERTHWAITE: I will read it. It is on the letterhead of William M. Muschert, 118 Greenwood Avenue, Trenton, New Jersey.

10

"Trenton, N. J., Nov. 2, 1915.

"Mr. Walter H. Rickey,
23 W. State St.,
Trenton, N. J.

Dear Walter:

20

In answer to your letter of October 30th, in regard to the option on the John J. Moon farm which you transferred to me to secure my claim against you and the payment of the \$3,000 note given to Mr. Watson, will say that the change of title to the land covered by the option will in no way affect the option.

If there should be any money due you from your share in the option, after my claim and the principal and interest of the Watson note are paid, you shall receive it as though there had been no change of title to the property.

Yours truly,

William M. Muschert."

30 Q. Did you have any further interview with Mr. Muschert after that, or communicate with him?

A. I had numerous talks with Mr. Muschert after that.

Q. What was the purport of the conversation?

A. I went to Mr. Muschert to ask him to put that in the condition that it was before. He told me that my interests

Walter H. Rickey—Direct.

were all safe in every way. After that, I understood from outside talk, that remarks had been made that I was entirely out of my interests in this tri-party agreement.

Q. Well, then what took place; did you write Mr. Muschert?

A. Not after this.

MR. SATTERTHWAITE: I call for the production of the letter of November 17, 1916. 10

MR. DAWES: I have the letter of November 17.

Q. I hand you a letter dated November 19, 1915, and ask you if you received that from Mr. Muschert?

A. Yes, sir.

Q. That purports to be an answer to one of yours of November 17?

A. This refers to the letter I sent to him to sign, to show that my interests were perfectly secure. 20

Q. Is that the letter that you wrote?

A. I wrote this letter, yes, sir.

Q. To which the one of November 19 is a reply?

A. I presume this is an answer to this one.

MR. SATTERTHWAITE: I offer the two letters in evidence.

Said letters are marked "Exhibits C 5," and "C 6." 30

MR. SATTERTHWAITE: The letters are as follows:

Walter H. Rickey—Direct—Exhibit C-5.

C-5

“Trenton, N. J. Nov. 17th, '15.

Mr. William Muschert,
No. 118 Greenwood Ave.,
City.

Dear Will:

10

As I have not had the courtesy of a reply to my last communication am I to understand that you do not care to do as I requested? I sincerely trust that this is not the case for my desire has been and still is, to protect yours as well as my own interests; however, if I do not hear favorably from you by Friday P. M., the 19th, I shall feel compelled to request my Attorneys to proceed in the matter. Hoping I may not be compelled to do this, I am

Fraternally and sincerely yours,

20

Walter H. Rickey.”

The letter from William M. Muschert, 800 Edgewood Avenue, is as follows

“Trenton, N. J., Nov. 19, 1915.

Mr. Walter H. Rickey,
23 West State Street,
Trenton, N. J.

30

Dear Walter:

Your letter of the 17th just received, in reference to your letter of the 5th. I have tried to reach you on the telephone but have been unable to do so. A double moving has made it almost impossible

Walter H. Rickey—Direct—Exhibits.

to write before. If you look up our contract or agreement of April 16, 1914, you will find that I was to furnish an amount to cover all expenses owing on that date, said sum not exceeding \$5,000, and I have performed my part of the contract and paid the money over to Mr. Conard.

As for the statement sent to me for my signature, I cannot sign it, as the statements are not true. 10
The deed and title of the property are purely a matter between Mr. and Moon and the Moon Clay and Kaolin Co.

Yours truly,

William M. Muschert."

Q. Here is one dated November 22nd, written by you to Mr. Muschert; is that right?

A. Yes, sir, that is my signature.

Q. Will you read that? 20

A. "November '22, 1915.

Mr. William M. Muschert,
800 Edgewood Ave.,
City.

My dear Will:

I have yours of the 19th and note what you say. I must admit that I am at a loss to understand the matter, owing to the different explanations made by you, and still having your best interests at heart with my own, I am going to suggest that you meet me at my attorney's (Mr. Malcolm Buchanan) office over The Trenton Trust and Safe Deposit Co. this coming Wednesday at 4.00 P. M., at 30

Walter H. Rickey—Direct—Exhibit C-8.

which time I will be there. Mr. Buchanan is one of us, and we can talk on the square.

Trusting you will be able to so arrange, I am,
Sincerely yours,

Walter H. Rickey."

10

MR. SATTERTHWAITE: I offer that letter in evidence.

Said letter is marked "Exhibit C 7."

MR. SATTERTHWAITE: I call for a copy of the statement which Mr. Muschert refused to sign.

MR. DAWES: Here it is (producing statement).

20

MR. SATTERTHWAITE: I offer that in evidence.

Said statement is marked "Exhibit C 8."

MR. SATTERTHWAITE: The statement is as follows:

30

"I hereby acknowledge that I hold the property conveyed to me by John J. Moon and wife by deed dated _____ and recorded in Book _____ Mercer County Clerk's office, in trust for the benefit of Walter H. Rickey, J. Lefferts Conard and myself, subject to liens on the same in my favor for the repayment to me of moneys advanced by me amounting to———."

Walter H. Rickey—Direct.

Q. That was the enclosure in that letter of November 17?

A. Yes, sir.

Q. This enclosure was in the letter of November 17th from you to Mr. Muschert?

A. Yes, sir.

Q. Was there any further correspondence after that?

A. Not to my knowledge, sir. 10

Q. Something has been said about subsequent agreement for commission; I hand you a paper and ask you what that is?

A. That was an agreement by Mr. Moon to pay 10 per cent. of the amount that he should receive, the \$6,000 an acre, or 20 per cent. if the condemnation—

Q. It that a paper given to you by Mr. Moon?

A. Yes, sir.

Q. Read it.

A. "I agree to pay to W. H. Rickey and others ten per cent. on amount received in settlement satisfactory to me, twenty per cent. on condemnation under our contract, John J. Moon." It is not dated. I believe it was signed in April, 1914. 20

Q. This is what time?

A. This is not dated.

A. Who procured that?

A. I did.

Q. How came you to do it?

A. I asked Mr. Conard if there was a possibility of securing a loan for some money; Mr. Conard said, "If you will have a paper signed by Mr. Moon, which will show definitely that there is to be some proceeds from this matter, I will take the matter to a friend of mine, Mr. Gray, of the 30

Walter H. Rickey—Direct.

Pennington Bank. You can let me have your note. I will do that if you have that paper signed."

Q. You already had this agreement of April 16, hadn't you?

A. Yes, sir; he said that Mr. Gray might not be able to decide any specific amount that would be derived from that sale; that will show to Mr. Gray that there will be positive-
10 ly some amount received.

Q. Why would it show positively more than the original agreement?

A. That I don't know; he said that would secure the loan.

Q. The original agreement was that you were to have these lands at a certain price per acre?

A. Yes.

Q. If you got above that price, you would not get anything?

20 A. No, sir.

Q. This was an agreement to pay a commission whatever might be accepted

A. Yes, sir.

Q. Was this intended to take the place of that?

MR. DAWES: That is objected to.

THE COURT: Objection overruled.

30 A. No, sir, this was simply to secure that loan.

MR. DAWES: I move to strike that out.

Walter H. Rickey—Direct.

THE COURT: Motion denied.

A. I would never have had this signed to offset that other.

Q. It was additional?

A. Yes, sir.

Q. Was that before you learned of the conveyance of the land by Mr. Moon to Mr. Muschert?

A. Yes, sir. 10

Q. Now, after the time of this correspondence which has been introduced here, Mr. Rickey, have you done anything more since that last correspondence towards getting an arrangement with these people?

A. I had several conversations with Mr. Muschert.

Q. What was the purport of them?

A. I went to Mr. Muschert to advise him to be careful, as Mr. Moon told me, that owing to the way they had treated him, he was going to do both he and Conard bodily harm; he threatened to get a gun and shoot them; I went to Mr. Muschert about the conversation and advised him if he had made any arrangements with Mr. Moon to be very careful, as Mr. Moon had made these threats, and I was very much afraid he would carry them out; and at that time Mr. Muschert at his office gave me to understand that my interests were perfectly secure. 20

Q. Was that after he had repudiated the agreement?

A. Yes.

Q. What did he say?

A. That my interests were perfectly secure the same as they were under the tri-party agreement. 30

Q. Was there anything said about signing any more papers?

A. Yes, sir.

Q. Did you have any conversation after that time?

Walter H. Rickey—Direct

- A. No, sir.
- Q. When was this, about?
- A. This was about six months—oh, no, longer than that, during the fore part of the year.
- Q. Of the year 1917?
- A. Yes, sir.
- Q. You had no further conversation?
- 10 A. No, sir.
- Q. Have you made any further efforts to secure what you claim to be your rights in this matter?
- A. Only through counsel.
- Q. Before filing this bill?
- A. No, sir.
- Q. Did you send any notice?
- A. Only the letters I wrote Mr. Muschert.
- Q. In one of these letters you make a proposition to meet at Mr. Buchanan's office; did you meet there?
- 20 A. No, sir.
- Q. Was he representing you at the time?
- A. I consulted Mr. Buchanan at that time relative to the matter.
- Q. Did you make any efforts to find out what the condition of the Moon Clay and Kaolin Company was?
- A. Yes, sir.
- Q. What efforts did you make?
- A. Through counsel to have a statement from them owing to the condition of the company.
- 30 Q. Through what counsel?
- A. Through Colonel Van Cleef; Mr. Moon had conveyed to me one share of stock of the Moon Clay and Kaolin Company for the purpose of finding out the condition of the company.
- Q. What did you do?

Walter H. Rickey—Direct.

A. I requested them for a statement.

Q. Requested whom?

A. The Moon Clay and Kaolin Company.

Q. Did you get it?

A. No, sir.

Q. You had an assignment from Mr. Moon of one certificate of stock?

A. Yes, sir. 10

Q. Did you get it transferred on the books of the company?

A. They refused to transfer it.

Q. You made application for that?

A. Yes.

Q. Did you make application for permission to look at the books?

A. Yes, sir.

Q. To whom?

A. Through Colonel Van Cleef to the Moon Clay and Kaolin Company, or the officers. 20

Q. You have not learned anything about the condition?

A. No, sir, they refused.

Q. Do you know what is being done there?

A. I believe they are mining the clay very extensively; I have been out there and seen it.

Q. Are they selling clay?

A. They were removing it from the beds.

Q. In considerable quantities?

A. I believe so, sir, from what I could see. 30

Q. Did you have a conference between Mr. Edward Katzenbach, Judge Marshall and yourself and Colonel Van Cleef?

A. Yes, sir.

Q. When was that?

Walter H. Rickey—Direct.

- A. That was—
- Q. Did Mr. Moon state how many shares had been issued to him?
- A. Yes, sir.
- Q. How many?
- A. Two.
- Q. Did he say whether any other had been issued, to you?
- 10 A. He said he had only received the two shares.
- Q. Did he say anything to you about investigating conditions?
- A. Yes, he wanted an investigation made, sir.
- Q. What became of that stock?
- A. He asked for the return of it.
- Q. And did you return it?
- A. Yes, sir.
- Q. Without having procured any information?
- A. Yes, sir.
- 20 Q. Do you know whether or not the railroad company's project for a road across this land still is in contemplation?

MR. DAWES: I object to the question.

THE COURT: Objection overruled.

- A. I understand so.
- Q. Is it still alive?
- A. I understand so.
- 30 Q. Have you yourself seen any evidences of the survey made by them?
- A. Yes, I went over the surveys, sir.
- Q. What shows the surveys?
- A. The stakes.

Walter H. Rickey—Direct—Cross.

Q. Did anybody tell you who had driven those stakes there?

MR. DAWES: That is objected to.

THE COURT: Objection overruled.

A. Mr. Moon told me, yes, sir. 10

Q. Who told you?

A. Mr. Moon.

Q. Have you ever relinquished any rights you had in that by reason of this option or subsequent agreement?

A. Not to my knowledge.

Q. Had you any knowledge of these various conveyances before they were made?

A. I had not, sir.

Q. Did you in any way, directly or indirectly, give your consent to them? 20

A. I did not, sir.

Q. Have you ever ratified them since?

A. No, sir.

Q. You still claim your rights?

A. I do, sir.

Cross Examination by Mr. Dawes:

Q. Mr. Rickey, you had been in business relations with Mr. Moon for several years before 1913, had you not? 30

A. I had been assisting him.

Q. And advising with him as to his affairs?

A. Mr. Moon would consult me about his affairs.

Q. And after the condemnation proceedings in the Victor

Walter H. Rickey—Cross.

Humbrecht case, did Mr. Moon come and consult you about the possibility of the railroad going over the clay lands?

A. Yes.

Q. What did you advise him to do in that matter?

A. I didn't advise him.

Q. Well, what did you tell him to do?

A. I didn't tell him to do anything.

10 Q. How did you come to get the option from him?

A. Mr. Moon was telling me that the Pennsylvania Railroad Company contemplated going over his land; that he was an old man and didn't feel that he could fight a corporation going over his property. I said, "Then, why don't you have someone to take the matter up for you?" He said, "I'll take a certain amount for the land, and if you will take and fight it and stand all expenses, I will take \$6,000 an acre for the best clay land, and \$1,000 an acre for the other land."

Q. What was your understanding that you were to get—

20 A. Any amount I could derive over the amount stipulated in the option.

Q. At that time when you made this arrangement, were you insolvent?

A. Yes, sir.

Q. Judgments had been recovered against you?

A. I believe so.

Q. And those judgments are still outstanding?

A. I believe so.

30 Q. So that at that time you had no hope or expectation of purchasing these lands for yourself?

A. Not for myself.

Q. Simply to stand and fight the matter for Mr. Moon against the railroad company?

Walter H. Rickey—Cross.

A. Yes, sir.

Q. That was the entire object of this option?

A. Yes.

Q. No money passed between you and Mr. Moon for this deal?

A. Only one dollar.

Q. Was that paid?

A. Yes, sir. 10

Q. To Mr. Moon?

A. Yes,

Q. And what was paid for the extension?

A. There was nothing paid for the extension.

Q. Your relations with Mr. Moon had been friendly for a number of years, had they not?

A. They had.

Q. And where did you go to have this option agreement drawn up?

A. Mr. Conard drew it up. 20

Q. At whose request or suggestion did you go to Mr. Conard?

A. No one's, Mr. Conard represented the Rickey-Swann Company.

Q. Then this option was drawn up between you and Mr. Moon?

A. Yes.

Q. Mr. Moon is a married man?

A. He is.

Q. Did you ever have any talk with Mrs. Moon relative to signing the papers? 30

A. No.

Q. You never met her?

A. Yes, I have.

Walter H. Rickey—Cross.

Q. You never talked with her about relinquishing any interest she had in these lands?

A. No.

Q. Were you present when anybody else talked with her?

A. No.

10 Q. And there was no conversation that you had with her with a view of her signing any papers relinquishing any interest she might have in these lands?

A. If I recall correctly, I think Mr. Conard and I went one time to Mr. Moon's or Mrs. Moon's, just what date that is, I can't say; I had consulted Mr. Conard in the matter before the option was drawn.

Q. Then this so-called option agreement, was signed in the presence of Mr. Conard?

A. I believe so.

Q. Did you assign the option agreement to anyone before you assigned it to Mr. Muschert?

20 A. I did not.

Q. Did you give anyone else an interest in it?

A. Mr. Watson is the only one I assigned any interest to.

Q. You called personally on Mr. Muschert to secure a loan, did you not?

A. I did.

Q. Did you tell Mr. Moon or Mr. Conard that you were going to do that?

A. Mr. Conard.

30 Q. Not Mr. Moon?

A. No.

Q. You went to Mr. Muschert and what do you say Mr. Muschert told you about the loan?

A. That he would secure the loan.

Q. Did he tell you through whom?

Walter H. Rickey—Cross

- A. Yes.
- Q. And did you receive that money in cash or in a check?
- A. Check.
- Q. Whose check?
- A. Mr. Watson's, I believe.
- Q. And you signed the papers then set up in your bill?
- A. Yes. 10
- Q. That was before this three-party agreement was entered into?
- A. I can't say as to that date; the papers will show.
- Q. Then at the time you entered into this three-party agreement, had you or not discussed with Mr. Muschert or Mr. Conard the desirability of getting a commission agreement on the sale of these lands?
- A. Absolutely no.
- Q. The agreement itself speaks about a commission agreement? 20
- A. What agreement?
- Q. The three-party agreement.
- A. Whereabouts?
- Q. Was there any discussion about getting a commission agreement at the time the three-party agreement was entered into?
- A. No.
- Q. Then the discussion took place within a day or two after it was signed?
- A. About what? 30
- Q. About the commission agreement.
- A. That was never discussed by anybody but Mr. Conard and myself.
- Q. It took place within a day or two afterwards?

Walter H. Rickey—Cross.

A. I cant say.

Q. But the agreement was following shortly the three-party agreement?

A. That I can't say.

Q. You have said it was given to you on or about April 19, 1914, haven't you?

A. The answer will show that.

10 Q. Didn't you so state?

A. I probably said I judged it was about that time. I didn't say any specific date.

Q. Who were present when that agreement was signed?

A. Mr. Moon and I were the only ones there.

Q. You say that was an additional agreement between Mr. Moon and yourself for the benefit of Mr. Muschert and Mr. Conard, don't you?

A. I did not.

Q. Didn't you say that was an additional agreement?

20 A. I probably did.

Q. Who are the parties intended to be embraced in the words "Walter H. Rickey and others?"

A. No one was intended in that; Mr. Conard drew that wording.

Q. What did Mr. Moon understand when he signed that paper from what you told him who were to participate in this ten per cent. agreement?

A. Mr. Moon didn't mention any others.

Q. Did you show that agreement to anybody?

30 A. Mr. Conard.

Q. Did Mr. Conard have that in his possession?

A. Yes, sir.

Q. You understood that when you got that agreement, that if this land was conveyed to the railroad company you

Walter H. Rickey—Cross.

could claim and would claim ten per cent. of what he got for it, didn't you?

A. Mr. Moon very graciously said he would give that.

Q. And you wanted that put in writing?

A. It was in writing.

Q. You wanted that to enable you to obtain a loan on the strength of that paper, didn't you?

A. Mr. Conard was to obtain the loan. 10

Q. For whose benefit?

A. My benefit, sir.

Q. For what purpose did you put this paper in the custody of Mr. Conard?

A. Mr. Conard was to show that paper if I was to secure this money.

Q. That paper was to be shown to Mr. Gray; was it to be pledged to Mr. Gray for security?

A. Not to my knowledge, sir.

Q. You have kept that paper ever since, have you not? 20

A. There were two papers signed, one Mr. Conard took and one I retained.

Q. Copies of each other?

A. Exact copies.

Q. And where were those papers prepared?

A. I prepared the paper; Mr. Conard told me how to prepare it.

Q. Where were they signed?

A. At the clay pits, by Mr. Moon.

Q. Did he sign them willingly? 30

A. He did.

Q. Did you tell him for what purpose you wanted them?

A. No.

Q. He signed it unquestioningly, didn't he?

A. He did.

Walter H. Rickey—Cross.

Q. After that, did you procure from Mr. Muschert copies of any agreements or papers?

A. Yes.

Q. What paper did you procure from him?

A. A copy of the conditional deed.

Q. When did you procure that?

A. I can't say what date that was.

10 Q. Did you procure any other copies from him?

A. Not to my knowledge.

Q. From the time that you secured this ten per cent. agreement, 10 per cent. in the event that this property was conveyed by private sale to the railroad company, or 20 per cent. in the event that condemnation proceedings took place, were you frequently in consultation or conference with Mr. Conard or Mr. Muschert regarding this deal?

A. I had seen them after that.

Q. Won't you answer the question?

20

(Stenographer repeats the question.)

A. Yes, but not particularly this agreement.

Q. Concerning the clay matter?

A. Yes.

Q. And the sale.

A. Yes.

Q. And also Mr. Moon was constantly at your office, wasn't he?

30 A. He was.

Q. Talking about this matter?

A. He was.

Q. Did you borrow some money from Mr. Moon?

A. I did not.

Q. Did Mr. Moon endorse a note for you?

A. He has endorsed.

Walter H. Rickey—Cross.

Q. Did Mr. Moon, after you got this comission agreement from him, endorse a note for you in the amount of \$1,300?

A. He endorsed a note for the Rickey-Swann Company.

Q. For what amount?

A. I think it was for \$1500.00, if I remember correctly.

Q. And who advanced the money on Mr. Moon's note?

A. The Bank. 10

Q. Didn't you, after you got that loan, communicate to Mr. Moon prior to February 15, 1915, the fact that the bank required that note to be paid?

A. I did not.

Q. Didn't you know that Mr. Moon was obliged, if you didn't communicate with him and didn't Mr. Moon tell you that he was compelled to take that note up?

A. He did not.

Q. Did you not know from Mr. Moon that when this deed from John J. Moon to Mr. Muschert was given to Mr. Muschert, it was given for the very purpose of raising the money to pay the note of this Swann Company which you had him to endorse for you? 20

A. I did not; I would like to make a statement.

Q. Didn't Mr. Moon tell you that he was obliged, that he would be obliged to raise that money by selling or giving some lien on this clay land?

A. He did not.

Q. Didn't Mr. Muschert pay in your office on February 15, 1915, the note which Mr. Moon had endorsed for this Swann Company? 30

A. He did not.

Q. This Swann Company that you got Mr. Moon to endorse for, was in the hands of a receiver?

A. It was not at that time, sir.

Walter H. Rickey—Cross.

Q. Was it in bankruptcy?

A. Not at the time.

Q. It was a bankrupt concern at that time, though, in fact, wasn't it?

A. It was not.

Q. When did this company go into bankruptcy?

A. I don't recall the date.

10 Q. Wasn't it before the time you had the first deal with Mr. Moon on this option?

A. I can't say as to the date..

Q. You can say whether it was before or not?

A. I don't recall the date of the bankruptcy proceedings.

BY THE COURT:

Q. Didn't you say it was 1912?

A. I think it was 1912, but I can't remember.

20 Q. Didn't you know from Mr. Moon that that deed was given to Mr. Muschert as security for Mr. Moon for money he, Mr. Muschert, was advancing?

A. I did not.

Q. And didn't Mr. Moon so state to you?

A. He did not.

Q. And didn't he so advise with you on the matter?

A. He did not.

30 Q. Did you know that at the time that that deed was executed by Mr. Moon to Mr. Muschert, or have you subsequently found out, that there was a declaration of trust made by Mr. Muschert to Mr. Moon concerning those lands?

A. I understood from the records that he had re-conveyed the land to Mr. Moon.

Q. The land in question?

Walter H. Rickey—Cross.

A. Yes.

Q. When did you obtain knowledge of that fact?

A. The date I can't say.

Q. How long ago?

A. I can't say.

Q. Where, under what circumstances?

A. Through the records in the Court.

Q. Who told you? 10

A. My cousin told me.

Q. My question is this, Mr. Rickey: my question is, when you first heard that Mr. Muschert had executed a declaration of trust to Mr. Moon describing or setting forth the terms under which he held the title to the Moon clay tract of land which had been conveyed to him—

THE COURT: I think there is some mix-up between counsel and the witness, don't you, Mr. Dawes? 20

MR. DAWES: Probably there is.

BY THE COURT:

Q. Did you hear of a declaration of trust made by Mr. Muschert to Mr. Moon?

A. No, sir, all I heard was a re-conveyance of the property back.

Q. Did you ever know that at the time that that deed was delivered to Mr. Muschert by Mr. Moon, that Mr. Muschert had executed a paper to Mr. Moon stating that he held that simply to secure him against moneys which he was advancing? 30

A. I did not.

Walter H. Rickey—Cross.

- Q. You never heard of that paper?
 A. I did not.
 Q. Mr. Moon never told you about it?
 A. No.
 Q. Mr. Moon never showed it to you?
 A. No.
 Q. Did Mr. Moon show you papers which he executed
 10 or received at any time from Mr. Muschert, or from the
 Moon Clay and Kaolin Company?
 A. Mr. Moon told me about those papers, sir.
 Q. Did he ever show them to you?
 A. No.
 Q. Did you ever see any of the agreements between Mr.
 Moon and the Moon Clay and Kaolin Company?
 A. I have seen copies of them.
 Q. Who showed you copies?
 A. Mr. Risdon.
 20 Q. What Risdon?
 A. Edward Risdon.
 Q. Did Mr. Moon ever show them to you?
 A. Not to my knowledge.
 Q. Did you know where Mr. Risdon got the copies
 from?
 A. I did not.
 Q. Do you know whether or not Mr. Risdon had access
 to Mr. Moon's books in the Broad Street Bank?
 A. I believe he had.
 30 Q. Did he tell you he had copied those papers from
 there?
 A. He told me they were copies.
 Q. Did Mr. Risdon show you or give you a copy of the
 trust agreement entered into by Mr. Muschert about Feb-

Walter H. Rickey—Cross.

ruary 15, 1915, setting forth how he held the land under the first deed from Moon to Muschert?

A. I believe he did.

Q. When did Mr. Risdon give you those copies?

A. I don't remember the date.

Q. How long ago?

A. I don't remember.

Q. Give me the best idea; tell me approximately when 10 you got those copies from Mr. Risdon?

A. Why, I can't state.

BY THE COURT:

Q. About when?

A. I suppose three or four months ago.

Q. Not longer than that?

A. Not to my knowledge.

Q. Did you put those copies in the hands of Colonel 20 Van Cleef?

A. I did.

Q. When did you consult Colonel Van Cleef first about this matter?

A. I don't recall the date when I first consulted him.

BY THE COURT:

Q. About?

A. Several months ago.

Q. What counsel did you have before you had Colonel 30 Van Cleef?

A. I had no counsel in this matter, sir.

Q. Was Mr. Blackman your counsel?

A. He represented me in some other matters.

Walter H. Rickey—Cross.

Q. Did you not take up with Mr. Blackman this matter, the matter of your claims to the clay property?

A. I talked it over.

Q. Didn't you confer with Mr. Moon's counsel about it, you and Mr. Blackman?

A. Yes.

10 Q. Didn't you at that time have copies of those papers which I have just mentioned, the trust agreement and the other contracts between Mr. Moon and the Moon Clay and Kaolin Company?

A. I don't recall, sir.

Q. Will you say that you didn't place those papers in the possession and custody of Mr. Blackman?

A. I would not say so.

Q. Well, you know whether you did or not, if you only got them three or four months ago?

20 A. I don't recall that I ever placed those in Mr. Blackman's hands.

Q. You recall now, clearly, that you received those papers about three or four months ago, don't you?

A. I can't state what date it was.

Q. You won't state at all?

A. I can't state.

Q. Mr. Blackman was your counsel more than a year ago, wasn't he?

A. He represented me in numerous matters.

30 Q. Mr. Blackman was your counsel who represented you over a year ago?

A. I talked the matter over with him, I can't say how long ago.

Q. Wasn't it more than a year ago since you talked this matter over with Mr. Blackman?

A. Possibly it would be.

Walter H. Rickey—Cross.

Q. Don't you know on this witness stand now, that it was over a year ago?

A. Possibly it was.

Q. Sixteen months ago, wasn't it?

A. Possibly it was.

Q. Will you state now whether or not you placed copies of that agreement with Mr. Muschert and Mr. Moon, bearing date about February 15, 1915, setting forth the conditions under which Mr. Muschert held the Moon property, whether you didn't place those papers in the hands of Mr. Blackman? 10

A. I don't recall it.

Q. Didn't you know when you received those letters from Mr. Muschert that this agreement between Mr. Moon and Mr. Muschert, setting forth the terms under which Mr. Muschert held those lands was in existence; didn't you know?

A. What? 20

Q. Didn't you know at the time you received those letters from Mr. Muschert, that Mr. Muschert had given to Mr. Moon a statement in writing of the purposes and objects of his holding title to those lands?

A. I didn't give that any thought.

Q. I ask you the question, sir.

A. I can't say that I recall that.

Q. Will you state now that when you wrote those letters to Mr. Muschert, you hadn't seen the agreement between Mr. Muschert and Mr. Moon? 30

A. I may, but I will not state positively that I have.

Q. I will go one step further, and ask you whether or not in Mr. Muschert's office, Mr. Muschert himself hadn't shown you the original?

A. I don't recall that.

Walter H. Rickey—Cross.

Q. Will you say that he didn't show you the original agreement?

A. I don't recall his showing me any papers.

Q. Will you state that Mr. Muschert did not tell you in his office, before these letters were written in 1915, why he held those lands?

A. I don't recall any such conversation, sir.

10 Q. And will you state now that you did not have any knowledge whatever of that conveyance to Mr. Muschert, except from the records?

A. I positively state that, sir.

Q. And that you knew nothing of that agreement of 1915 at the time that you wrote those letters to Mr. Muschert?

A. I don't recall.

Q. Do you recall that John J. Moon brought you those papers and showed them to you?

A. I don't.

20 Q. In 1915?

A. I don't recall.

Q. Will you say that he did not?

A. Not to my knowledge.

Q. In this letter of Mr. Muschert's to you he states that the question of title to these lands was between Mr. Moon and the Moon Clay and Kaolin Company?

A. He did.

Q. You understood what that meant, didn't you?

A. I did not.

30 Q. Did you ask him?

A. I did not.

Q. Did you ask Mr. Moon?

A. I did not.

Q. Mr. Moon was in your office at that time, was he not?

Walter H. Rickey—Cross.

- A. Not to my knowledge.
- Q. About that time?
- A. Mr. Moon was in my office most every day.
- Q. And you were in Mr. Conard's office very frequently during that period, were you not?
- A. I was.
- Q. Were you with him, talking with him, on these clay lands in 1915, were you? **10**
- A. Yes.
- Q. At the time these letters were written, and afterwards, after these letters were written, after November 15, 1915, Mr. Moon was frequently in your office?
- A. He was.
- Q. And you were frequently in Mr. Conard's office?
- A. I believe I was in his office after that date.
- Q. Frequently?
- A. I can't say frequently.
- Q. Were you calling him up on the 'phone? **20**
- A. I certainly did call him on the 'phone.
- Q. You were in Mr. Muschert's office after that, were you not?
- A. I have stated so, yes, sir.
- Q. And did you read that statement in that letter?
- A. I did.
- Q. And do you state that you did not ask either Mr. Moon or Mr. Conard or Mr. Muschert what was meant by that?
- A. I did not. **30**
- Q. Can you give any reason why you didn't ask what was meant by that statement, if you were in their office consulting with them on this very matter?
- A. When I was in Mr. Conard's office the latter part of

Walter H. Rickey—Cross.

our dealings, it was to request the return of two notes that I had given Mr. Conard on which he was going to secure the loan.

Q. But when you received the letter, stating that the matter of the title was between Mr. Moon and the Moon Clay and Kaolin Company, you made no effort to find out what was meant by that statement, did you?

10 A. Unless that letter of mine to Mr. Muschert took up the matter.

Q. Did you know of the formation of the Moon Clay and Kaolin Company?

A. Not until after it was formed.

Q. Did Mr. Moon talk to you about it?

A. Not until after it was formed.

Q. Did he advise with you about it?

A. Not at all, sir.

Q. At any time?

20 A. Not at all.

Q. You saw it in the papers?

A. I learned then it was formed.

Q. You knew who the stockholders were?

A. It was stated in the papers.

Q. You knew that before this letter from Mr. Muschert to you was received, didn't you?

A. If that was the date.

Q. Did you ever talk with Mr. Muschert concerning this transfer?

30 A. I did.

Q. Can you fix the time?

A. The date I can't, the place I can.

Q. Where was the place?

Walter H. Rickey—Cross.

A. In front of the Trenton Trust and Safe Deposit Company.

Q. Did you go from there to anywhere?

A. Back to my office, and he went in the bank.

Q. Do you recall any conversation with Mr. Muschert on Stockton Street at the Reeves-Muschert Company's place?

A. Yes, sir.

Q. Will you fix the date of that? 10

A. I can't fix the date, sir.

Q. It was after you received Mr. Muschert's letter?

A. Possibly it was, I can't say.

Q. When did you first learn of the transfer to the Moon Clay and Kaolin Company?

A. The date I can't give; I learned it from my cousin, who was going over the records.

Q. You learned both facts from this cousin?

A. Yes. The Moon Clay and Kaolin Company's notice was in the paper, and he gave me the records shown on the 20 books in the court house.

Q. Did you at that time ask Mr. Muschert—I am speaking about your meeting on Stockton Street; do you recall going there?

A. I do.

Q. Do you recall where you met Mr. Muschert?

A. I certainly do, sir.

Q. And you walked with him to Stockton Street?

A. We were on Stockton Street when we were conversing; it was in his office, and from there we went in his 30 automobile to my office.

Q. Was that shortly after you learned of the transfer to the Moon Clay and Kaolin Company?

A. I can't tell just what date that was.

Walter H. Rickey—Cross.

Q. Did you at that time ask him to settle up with you what was due?

A. I did not.

Q. Did you do any figuring with him at that time as to what was due?

A. I offered to sell him my interest.

10 Q. Did you figure up what was due to you at that time on a 10 per cent. basis?

A. Not to my knowledge.

Q. You were there?

A. Yes, I certainly was there.

Q. Then I ask you again whether at that time and at that place you figured up what was coming to you under the 10 per cent. basis?

A. I did not, sir.

Q. Did you at any other time?

A. I did not.

20 Q. When did you first learn from Mr. Moon that he had transferred these lands to the Moon Clay and Kaolin Company?

A. I don't know that Mr. Moon ever told me he had conveyed them.

Q. Did you ever advise with him about it?

A. I talked with him about it in his counsel's office.

Q. Did you talk with him outside that office?

A. We frequently talked about the matter.

30 Q. Did you advise Mr. Moon to collect the money which was due to him from these gentlemen?

A. I did not.

Q. Did you advise him to get counsel?

A. He already had counsel.

Q. Did you advise him to go to counsel and get him to

Walter H. Rickey—Cross.

take action to collect the money which was due to him from the company or from Mr. Muschert or Mr. Conard?

A. I don't recall such suggestion.

Q. To be more specific, did you go with Mr. Moon more than a year ago to Judge Marshall's office in this city?

A. Yes, numerous times.

Q. And was the object of your going there to get Judge Marshall to collect from Mr. Conard and Mr. Muschert the amount due to Mr. Moon for the transfer of that property? **10**

A. I didn't go there for that purpose—

Q. Did you not state to Judge Marshall in his office more than a year ago, that you wanted Mr. Moon to get the cash which was due to him for the stock in that company from Mr. Muschert and Mr. Conard?

A. I did not.

Q. Did you not, in Judge Marshall's office, urge Mr. Moon, in the presence of Judge Marshall, to collect the money which was due on the stock for these very lands? **20**

A. I did not.

Q. Did you urge Mr. Moon to take action against these men?

A. I certainly did.

Q. You told Judge Marshall at that time that you were and had been the adviser of Mr. Moon?

A. I said Mr. Moon had consulted with me on the matter.

Q. And didn't you say to Judge Marshall, that you wanted Mr. Moon to get his money, and that was your purpose for going there, and that you were willing to do anything in your power so that Mr. Moon should get his money for the transfer of this property? **30**

A. The Moon Clay and Kaolin Company?

Walter H. Rickey—Cross.

Q. Yes.

A. I did not.

Q. You knew at that time what the agreements were between Mr. Moon and Mr. Muschert and Mr. Conard, did you not?

A. We had talked that over in Mr. Marshall's office.

Q. You had seen the papers?

10 A. Yes, sir.

Q. You saw all the papers?

A. I can't say that.

Q. Didn't Mr. Moon show them to you?

A. Not that I recall.

Q. Didn't he show them to you right after the deed was made to the Moon Clay and Kaolin Company?

A. Not to my recollection.

Q. You have no recollection on the subject whatever, have you?

20 A. Not that he brought the papers to me and showed them to me.

Q. You have no recollection as to when you had knowledge of this second transfer?

A. The organization of the Moon Clay and Kaolin Company?

Q. Yes.

Q. Not until it was in the paper.

Q. Did you talk to Mr. Moon about it?

A. After that.

30 Q. Now, Mr. Moon wanted to get the money for his stock, didn't he?

A. Not to my knowledge, no; he never said that to me.

Q. Didn't you go and confer with Judge Marshall as Mr. Moon's adviser and friend to give what information

Walter H. Rickey—Cross.

and knowledge you had, so that Mr. Moon could collect the money which was due to him on this stock?

A. No.

Q. Didn't you so state to Judge Marshall in his office more than a year ago, that that was your object and purpose, to go with Mr. Moon?

A. What was the object and purpose?

Q. Of getting Mr. Moon's money for the stock which he held in the Moon Clay and Kaolin Company? **10**

A. I did not.

Q. Judge Marshall was not your counsel?

A. He was not.

Q. Your counsel at that time was William E. Blackman?

A. Mr. Blackman represented me.

Q. He was your counsel?

A. In other matters.

Q. Didn't you ask Judge Marshall to confer with your counsel, William E. Blackman? **20**

A. I believe Mr. Blackman asked me to confer with him.

Q. Didn't you?

A. No, I don't know that I ever asked Mr. Marshall to confer with him.

Q. Do you know where Mr. Moon got the money from to pay the note which he indorsed at your request?

A. I understood afterwards, that Mr. Muschert had advanced the money.

Q. Do you know H. C. Stanford? **30**

A. I do.

Q. Who is he?

A. A friend of mine.

Q. Where does he live?

A. In Philadelphia, or a suburb of Philadelphia.

Walter H. Rickey—Cross.

- Q. Was he connected with this bankrupt company?
 A. He was not.
 Q. You never borrowed any money from Mr. Muschert save the \$3,000 loan, did you?
 A. No, sir.
 Q. Did Mr. Muschert ever pay you any money?
 A. Mr. Muschert paid me some money for Mr. Moon.
 10 Q. Part of this loan?
 A. It was not.
 Q. What did Stanford have to do with it?
 A. With what?
 Q. With the money he paid for Mr. Moon.
 A. Yes.
 Q. What?
 A. Mr. Moon borrowed some money from me. I secured the money from Mr. Stanford.
 Q. How much did you borrow?
 20 A. \$500.00.
 Q. Was that paid to you?
 A. The check was handed to me.
 Q. Do you recall where?
 A. Yes, sir.
 Q. Where?
 A. At my office.
 Q. By whom?
 A. By Mr. Muschert, I believe.
 Q. Did not Mr. Moon tell you that he was getting this
 30 money to pay off that loan from Mr. Muschert?
 A. He told me he was getting this money to pay this loan.
 Q. And didn't he tell you that he had given the deed to Mr. Muschert for the lands to secure him for that sum he was advanced?

Walter H. Rickey—Cross—Re-Direct.

A. He did not.

Q. This check, you have seen this check before?

A. Yes, sir.

Q. Is this the check which—

A. That was for a loan I secured for Mr. Moon of \$500.00.

Q. Paid to you?

A. Yes. 10

Q. It bears date February 15, 1915?

A. Yes, sir.

Q. Didn't Mr. Muschert, in your office, at the time this check was delivered to you, discuss with you the transfer of this property to him?

A. He did not.

Q. And the fact that he was loaning this money on the strength of that transfer?

A. He did not. 20

M. DAWES: I offer the check for identification.

Said check, No. 987, dated February 15, 1915, payable at the Mercer Trust Company, and drawn to the order of H. C. Stauffer for \$500.00, made by William M. Muschert, and indorsed "H. C. Stauffer, W. H. Rickey, Agent," is marked "Exhibit D 1 for identification."

Re-Direct Examination by Mr. Satterthwaite: 30

Q. Mr. Rickey, I understood you to say on cross-examination, that you got copies of certain papers which you turned

Walter H. Rickey—Re-Direct.

over to Col. Van Cleef, your counsel; what were they copies of?

A. Copy of a bond that Mr. Muschert gave Mr. Moon, I believe, when he bought that property from the Moon Clay and Kaolin Company, or from Mr. Muschert.

Q. Do you mean you handed to Col. Van Cleef a copy of any declaration of trust?

10 A. What the paper was, I don't know.

Q. Do you mean to say you handed to Col. Van Cleef a copy of any declaration of trust?

A. I don't know.

Q. Whatever papers you got, did you hand them over to him?

A. I gave him all my papers.

Q. You testified to getting certain copies of certain papers from Mr. Muschert; did you hand them over, whatever they were, to Col. Van Cleef?

20 A. I believe they were in the papers I handed to him.

Q. Did you hand them to him?

A. I believe so.

Q. Are you sure?

A. If they were in the papers, they were in the papers.

Q. I want to know if you handed him the copies of the papers you got?

A. I believe I did.

Q. All of them?

A. Yes, sir.

30 Q. You were questioned about a declaration of trust; what did you understand by a declaration of trust?

A. I didn't know anything about a declaration of trust.

Q. Counsel asked you if you had a copy of a declaration of trust; what did you understand by that?

Walter H. Rickey—Re-Direct.

A. I don't know that I can define it, unless it is something signed over to one to hold for one for their interest.

Q. Did you get a copy of anything like that to hand over to Col. Van Cleef?

A. I can't tell what they were.

Q. During the period those letters were being written, in November, 1915, were you at that time in the intervals calling at Mr. Muschert's office on him or Mr. Conard? **10**

A. No, there was some feeling existing.

Q. How soon after the writing of those letters, ending November 22nd, how soon after that were you in Mr. Muschert's office?

A. Several months ago.

Q. Not until then?

A. No, I don't think it was until that time.

Q. Then there was an interval of more than a year?

A. Yes, sir.

Q. Where had you met him? **20**

A. On the street.

Q. Did you have any talk about this clay matter?

A. No, the conversations I had with Mr. Muschert at those different times were to see if there would be any chance of his purchasing my interest, or making an advancement on account of my holdings.

Q. Your one-third interest in this matter?

A. Yes.

Q. Did you say anything about a 10 per cent. basis?

A. That was never brought up in conversations; that was entirely between Mr. Conard and me. **30**

Q. Did you make an estimate of what your interest would be worth?

A. Not on a 10 per cent. basis.

Q. On any basis?

Walter H. Rickey—Re-Direct.

A. In conversations with Mr. Muschert on Stockton Street the question of what the price would be for the sale of the property and what amount we would receive—

Q. Would receive in what?

A. Over and above the amount we were to pay for the property.

Q. That was discussed?

10 A. Yes, sir.

Q. And that amount you were to pay was what?

A. \$6,000 per acre for the best clay lands, and \$1,000 an acre for the outlying lands where the clay was not as heavy.

Q. When you had your conversation with Mr. Moon about this clay land, and didn't ask him what was meant in that letter of November 19, what was that conversation?

A. I had seen Mr. Moon numerous times; Mr. Moon made my office his headquarters, and the transfer was not mentioned at all to Mr. Moon; it wasn't talked over at that
20 time. I have asked Mr. Moon how it was he transferred the property after he deeded it to me.

Q. What did he say?

A. He said he was in need of money and they agreed to give him so much money. I asked him how he could do it; he said he didn't know, he just done it. They were to pay him \$55,000 in a year and \$10,000 cash, because \$5,000 of that was to go to Mr. Conard, and they were to pay \$45,000 in one year's time. They took his business and ran his business; he had nothing to live on; and then in my office he
30 came in with these threats that he was going to do bodily harm, and then I went to Mr. Muschert to advise him to be careful, as Mr. Moon had made these threats owing to the fact that they had taken his livelihood.

Q. He told you he was to get \$45,000 more?

A. Yes, sir.

Walter H. Rickey—Re-Direct.

Q. Do you know whether the bond you speak of—

A. He spoke about the bond; I have seen the bond in Mr. Marshall's office.

Q. What was your purpose in going to Judge Marshall's office with him?

A. To talk over the matter and to see that Mr. Moon got the \$6,000 an acre, and was not euchered out of what he really should get. 10

Q. These visits were after the episode of these letters?

A. Oh, yes, we were in Mr. Marshall's office numerous times after that. I tried to protect Mr. Moon's interests as well as my own.

Q. You say you were in Mr. Conard's office in reference to securing two notes?

A. Yes.

Q. When was that with reference to these letters?

A. I think it was sometime in 1915.

Q. Those letters were in November, 1915; there wasn't 20
much of the year left after that?

A. The notes had nothing to do with these letters.

Q. About how long after the time of those letters was it?

A. I can't say.

Q. Was it considerable time?

A. I think so.

Q. Was it in December, 1915, or—

A. I think it was somewhere about that time.

Q. Did you get your notes?

A. They were not discounted. 30

Q. Did you get them?

A. I finally got them; Mr. Conard gave me his check, which was not honored, and I asked for the notes.

Q. You said you had a conversation after the Moon Clay and Kaolin Company had been formed, and that you knew

Walter H. Rickey—Re-Direct.

of it from Mr. Muschert in front of the Trenton Trust Company; what was that?

A. I asked him how it was that they were manipulating the affairs which belong to three of us in the manner in which they were, and why they broke the agreement, that certainly they had broken their agreement, and the holdings should revert to me.

10 Q. What did he say?

A. He said they simply done that because they thought it would be better in his name than in my name.

Q. You said that was said when they were talking of the conveyance of the property, as I understand you?

A. Up in his office he gave me to understand that my interests would be cared for, that I would receive my one-third interest.

Q. That was after the corporation had been organized?

A. Yes.

20 Q. Did he say in what way you would receive it?

A. No.

Q. This was after those letters had been written?

A. Yes, sir.

Q. How long after?

A. This was a few months ago.

Q. How long before the filing of this bill?

A. I think this was possibly in June or July.

Q. You say he assured you then your interests would be taken care of?

30 A. Yes, sir.

Q. What did you say to him?

A. I told him I was very glad to know they would be.

Q. Did you go away satisfied that they would be?

A. At that moment I felt that he was telling the truth.

Q. When did you change your mind?

Walter H. Rickey—Re-Direct—Re-Cross.

A. Well, I heard remarks that he had made; I was told of some remarks—

Q. Was it because of things you heard?

A. Yes, sir.

Q. You placed the matter in Col. Van Cleef's hands?

A. Yes, sir.

Q. This check to Mr. Stauffer, that was February 15, 1915, that was prior to these letters then?

10

A. Yes, that was purely an outside matter, didn't pertain in any way to this; it was a loan Mr. Moon wanted of \$500.00, and I got it for him; it has no bearing whatsoever on this matter; I had loaned Mr. Moon moneys right along in different amounts.

Q. Did you learn at any time anything about the terms or conditions on which Mr. Moon conveyed these lands to Mr. Muschert, except what you say he told you?

A. We talked these matters over in Mr. Marshall's office.

20

Q. Did you learn anything except what Mr. Moon told you?

A. From the copies that Mr. Risdon gave me.

Q. What did you learn additional from them?

A. It only verified it.

Q. Did you learn anything different from what you say Mr. Moon told you?

A. No, sir.

Re-Cross Examination by Mr. Dawes:

30

Q. Mr. Rickey, you say you were satisfied from what Mr. Muschert told you in his office in July of 1917?

A. I didn't say I was satisfied; I felt easier of mind.

Q. Did you ever have any further conversation with him?

Walter H. Rickey—Re-Cross.

- A. Not to my knowledge.
- Q. Did your counsel ever write to Mr. Muschert or Mr. Conard about this matter, so far is you know?
- A. I believe my counsel saw Mr. Muschert.
- Q. After you were in Mr. Muschert's office?
- A. Yes, sir.
- Q. No, how long before you went to Judge Marshall's
- 10** office in the first place was it that you had received these copies from Mr. Risdon?
- A. I can't say.
- Q. Some time before?
- A. I can't say.
- Q. Where are these copies now?
- A. What copies I received I turned over to my counsel.
- Q. As Mr. Risdon gave them to you?
- A. Yes.
- Q. You are a real estate agent, aren't you?
- 20** A. No, sir.
- Q. You draw mortgages and chattel mortgages, don't you?
- A. No; I have dealt in real estate, but—
- Q. Don't you advertise yourself on your letterheads as a real estate agent; don't you advertise real estate on your letterheads?
- A. I do.
- Q. Are you a dealer?
- A. No.
- 30** Q. You do draw bonds and mortgages and wills?
- A. No; counsel does that.
- Q. Don't you draw chattel mortgages for your clients?

MR. SATTERTHWAITTE: That is objected to as irrelevant.

Walter H. Rickey—Re-Cross.
William M. Muschert—Direct.

THE COURT: Objection overruled.

A. No, sir

WILLIAM M. MUSCHERT, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

10

Direct Examination by Mr. Satterthwaite:

Q. Mr. Muschert, have you got the minute book and other books of the Moon Clay and Kaolin Company with you?

A. I believe I have all but the minute book.

Q. Where are they?

A. The minutes were not kept in a book, they were kept under individual wrappers.

20

Q. Where are those minutes?

A. The majority of the minutes disappeared at the time of the, I think, removal of our office from the Commonwealth Building to the Broad Street Bank Building.

Q. You kept no records of the minutes of the company and have not preserved any record?

A. In spite of our attempt to keep them, they seem to have disappeared.

Q. Did you ever put them in a book?

A. No.

30

Q. Who was secretary?

A. I was.

Q. You kept them on loose paper?

A. We made typewritten copies of the minutes.

Q. It is alleged in the bill that there was a conveyance to the Moon Clay and Kaolin Company of these lands in

William M. Muschert—Direct.

consideration of \$206,000. You have no minutes showing—

- A. We cannot produce the minutes.
- A. As a matter of fact, was that the consideration paid for the transfer of that property?
- A. \$206,000 worth of stock was transferred.
- Q. Was that stock issued to Mr. Moon for that?
- A. Yes, sir.
- 10 Q. Did your books show that?
- A. Yes.
- Q. Will you produce them, please?
- A. (Witness produces books).
- Q. This is your stock certificate book?
- A. Yes, sir.
- Q. Did you keep any other transfer book other than this?
- A. No, sir.
- Q. This shows the issuing of certificate No. 1 to John J. Moon for two shares?
- 20 A. For two shares.
- Q. And No. 2 to William M. Muschert for four shares?
- A. Four shares.
- Q. And No. 3 to J. Lefferts Conard for four shares?
- A. Four shares.
- Q. No. 4 to J. Lefferts Conard for 430 shares?
- A. I believe that is the correct amount.
- Q. No. 5 to J. Lefferts Conard for 215 shares?
- A. Yes, sir.
- 30 Q. No. 6 to Muschert for 215 shares?
- A. Yes.
- Q. And No. 7 to John J. Moon for 2059 shares?
- A. Yes, sir.
- Q. No. 8 to John J. Moon, 8031 shares?
- A. Yes.

William M. Muschert—Direct.

- Q. No. 9 to J. Lefferts Conard for 614 shares?
 A. Yes.
 Q. No. 10 to William M. Muschert for 614 shares?
 A. Yes, sir.
 Q. No. 11 to William M. Muschert for 416 shares?
 And No. 12 to J. Lefferts Conard for 416 shares?
 A. Yes, sir.
 Q. And that is the extent of the issue? **10**
 A. Yes.

BY THE COURT:

- Q. Were they all original issues?
 A. No, sir, transfers.
- Q. Nos. 1, 2, 3 and 4, and 5 and 6, are all dated December 9, 1914; what do they figure up?
 A. Yes, I think they are.
 Q. On May 20, is the issue No. 7 of 2059 shares to John J. Moon, and on the same day No. 8 of 831 shares, what were they issued for? **20**
 A. The 2059 shares were issued to John J. Moon in purchase of the clay lands owned by him at that time.
 Q. What is the par value of those shares?
 A. \$100.00.
 Q. That would be \$205,900.00?
 A. Yes, sir.
 Q. On the same day—
 A. You will find that was transferred. **30**
 Q. These 614 shares issued to Mr. Conard and 416 shares, were they transferred by Mr. Moon to you?
 A. Exactly.

William M. Muschert—Direct.

BY THE COURT:

Q. What is the authorized capital?

A. \$250,000.

Q. What was the issued capital?

A. \$250,000.

10 Q. Mr. Moon was not paid in cash for this property, simply the issuing of these shares?

A. That's all.

Q. And when the transfer was made, was he paid for the stock transferred?

A. Yes, sir.

Q. How was he paid for that?

A. In cash, and in bond.

Q. And his holding now is two shares, isn't it?

A. Yes, sir.

20 Q. And what he has got out of that property has been what he got for the shares of stock he transferred to you and Mr. Conard?

A. Yes, sir.

Q. And that amounts to how much?

A. \$55,000, I think.

Q. And this bond that has been spoken of, that is a bond guaranteeing him the payment of the balance of \$55,000?

A. Yes, sir.

Q. Can you say whether or not a resolution was passed in the Board of Directors showing the purchase?

30 A. Yes.

Q. Can you give us the terms of that resolution?

A. It was resolved that the Moon Clay and Kaolin Company purchase the clay lands of John J. Moon for 2059 shares of stock; that is my recollection of the minutes.

Q. Was there anything in there about the directors hav-

William M. Muschert—Direct—Cross.

ing found the value of the property anything like that in the resolution, do you remember?

A. I don't remember.

BY THE COURT:

Q. How did you arrive at the \$55,000 figures?

A. That was arrived at afterwards, between Mr. Moon and Mr. Conard.

10

Q. How was the amount arrived at?

A. I can't state how; Mr. Conard had that.

Q. In the purchase from Moon, you valued it at \$206,000?

A. Yes, sir.

Q. And for this \$206,000 worth of stock you gave him but fifty-five, and those things occurred within a few days of each other?

A. Oh, no; the issue of stock for the purchase of the clay lands was six months or more.

20

Q. But the arrangement to buy this \$206,000 worth of shares at fifty-five, was made at the same time that the stock was issued, wasn't it?

A. No, I think it was afterwards.

Q. Do you say it was an after-thought that you were to buy Mr. Moon's stock?

A. Largely.

Q. Did the property depreciate from the higher to the lower figure between the time that Mr. Moon sold and the time that you bought his stock?

30

A. No, sir.

Cross Examination by Mr. Dawes:

Q. You have some of the minutes of the company?

William M. Muschert—Cross.

John T. Van Cleef—Direct.

A. We have the minutes of the incorporation and the purchase of the East Trenton Heights; I think that is the last minutes we have.

Q. Have you those with you?

A. Yes, sir.

Q. Are they in this envelope?

10 A. Yes, sir.

Q. The Moon Clay and Kaolin Company took over first what lands?

A. They first took over the East Trenton Heights.

JOHN T. VAN CLEEF, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct Examination by Mr. Satterthwaite:

20 Q. Col. Van Cleef, were you consulted by Mr. Rickey, the complainant, about bringing this action, or about this matter?

A. Yes, sir.

Q. When?

A. Well, it was some time before the filing of the bill, not very long before.

Q. Did he hand you papers which purported to be copies of some papers secured by Mr. Risdon?

A. No, I never knew of papers purporting to come from
30 Mr. Risdon.

Q. He handed you papers?

A. Yes, the conditional bill of sale.

Q. What conditional bill of sale?

A. Between him and Moon and the tri-party agreement, and a copy of the bond that was given by the Moon Clay and Kaolin Company, or Mr. Muschert, to John J. Moon, for \$5,000.

John T. Van Cleaf—Direct—Cross.

Q. Have you any copy of any declaration of trust?

A. No, sir, I never heard of it; he never told me there was any such paper in existence.

Cross Examination by Mr. Dawes:

Q. I show you a subpoena duces tecum, and ask you if that is your name? **10**

A. Yes.

Q. Is that your signature?

A. Yes, sir.

Q. What paper did you want us to produce, described as follows: "Agreement between John J. Moon"—

THE COURT: Why don't you get at it in another way, Mr. Dawes?

Q. When had you first heard of the existence of the supposed trust agreement dated February 15, 1915? **20**

A. Trust agreement?

Q. I mean between Mr. Moon and Mr. Muschert, dated February 15, 1915, relative to the transfer of the clay lands from—

A. I don't remember that at all, Mr. Dawes.

Q. The question is, whether you ever saw that?

A. I don't think I ever did.

Q. Was Mr. Rickey present when it was prepared?

A. No, I got it out of my own head. **30**

COMPLAINANT RESTS.

RECESS UNTIL 2 P. M.

Dorothy F. Pine—Direct.

AFTER RECESS.

DOROTHY F. PINE, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Dawes:

- 10 Q. Miss Pine, you are at Baltimore in the Johns Hopkins Hospital?
 A. Yes, sir.
 Q. Engaged there as a nurse?
 A. Yes, sir.
 Q. In 1915, were you employed in the City of Trenton?
 A. Yes, sir.
 Q. By whom?
 A. By Mr. Conard, the Moon Clay and Kaolin Company.
- 20 Q. Where were the office of Mr. Conard and the Moon Clay and Kaolin Company?
 A. 305 Commonwealth Building.
 Q. Was there a sign up there of the Moon Clay and Kaolin Company?
 A. There was.
 Q. Did they have extra rooms in the suite or rooms in connection with Mr. Conard's office?
 A. They did.
 Q. How long were you engaged for the Moon Clay and
- 30 Kaolin Company?
 A. From August, 1915, until February, 1916.
 Q. And during that period of time, did you ever see the complainant, Mr. Rickey?
 A. I did, yes sir.
 Q. Where did you see Mr. Rickey?

Dorothy F. Pine—Direct.

- A. In the office of the Moon Clay and Kaolin Company.
- Q. With whom was he in conversation or conference?
- A. With Mr. Conard and Mr. Muschert at times.
- Q. How frequently was Mr. Rickey in the offices?
- A. Well, quite frequently, I should say; sometimes twice a week and sometimes oftener.
- Q. Would he ever call up on the 'phone?
- A. Yes. 10
- Q. Whom would he ask for?
- A. Mr. Conard.
- Q. Would Mr. Moon sometimes be in the room?
- A. Very often in the office.
- Q. From the time that you were employed by the company from August, 1915, to February, 1916, who kept the minutes of the company?
- A. I kept them, wrote them.
- Q. In what form or shape?
- A. On regular legal paper, typewritten. 20
- Q. Were they kept apart from the other papers?
- A. Yes.
- Q. And when you left in 1916, in February, where were those minutes?
- A. The last I saw them they were in a red envelope, in the file cabinet in Mr. Conard's office.
- Q. Do you remember any minute regarding the purchase of the Moon Clay and Kaolin Company; or do you remember any particular transaction you recorded; do you recall any transaction?
- A. No, I don't recall any particular ones. 30

Dorothy F. Pine—Cross.

Cross Examination by Mr. Satterthwaite:

- Q. Did you hear any conversation between Mr. Rickey and Mr. Conard, or Mr. Rickey and Mr. Muschert?
- A. I never did.
- Q. You never had any idea what his errand was?
- A. No.
- 10 Q. Do you know between what periods of time it was he called there?
- A. I went there in August, 1915, and it was around the first few months more so than the last.
- Q. After November, 1915, you don't remember seeing him there so much?
- A. No, Mr. Conard was away then.
- Q. So these things would be in the months preceding 1916?
- A. Yes, sir.
- 20 Q. Now, these minutes were kept on the loose sheet form on papers?
- A. Yes.
- Q. And never put in a book?
- A. No.
- Q. Do you know why they were not put in a book?
- A. No.
- Q. Were you ever told to put them in a book?
- A. No.
- Q. Or not to put them in a book?
- 30 A. No.
- Q. How came it to be put on these loose sheets of paper; was it your own suggestion?
- A. I don't know that it was; they were handed to me and I did it that way.
- Q. What did you copy them from?

Dorothy F. Pine—Cross—Re-Direct.

- A. They were dictated to me.
- Q. By whom?
- A. Mostly always by Mr. Muschert.
- Q. Were they signed by anybody?
- A. Yes.
- Q. By whom?
- A. By the directors, Mr. Conard, Mr. Muschert and
Mr. Moon. 10
- Q. Those three did sign the minutes?
- A. Yes.
- Q. Each time?
- A. I think so, I couldn't remember.
- Q. Was Mr. Moon there every time they had a meeting?
- A. Yes, sir.
- Q. Do you know about how many meetings were held?
- A. No, I don't.
- Q. Were there a number?
- A. Yes, sir, there were; there were, I think, three or 20
four.
- Q. And Mr. Moon was present each time?
- A. I think he was.

Re-Direct Examination by Mr. Dawes:

- Q. You said Mr. Conard was away part of the time; did
he return before February, 1916?
- A. Yes, sir, he did.
- Q. What have you to say about Mr. Rickey coming 30
there after Mr. Conard's return?
- A. He was in there several times, not as frequently.
- Q. Can you fix the time when Mr. Conard did return?

Dorothy F. Pine—Re-Direct—Re-Cross.

A. Mr. Conard returned, I think, in November and around Christmas time.

Q. Christmas time of 1915?

BY THE COURT:

Q. He left in November?

10

A. He left in October, I think; he was back once, I know.

Q. Was he there about the time you left in February, 1916?

A. He was there until some time in January, and then went away, and then he came back again, I think, around March, some time in March.

Q. And during what time in the year 1916, or the latter part of the year 1915 was it that you saw Mr. Rickey there, during those periods did you see him there how frequently?

20

A. Not so frequently as before.

Q. He was there?

A. Yes, sir.

Q. How many times a week would you say?

A. I don't know, probably only once.

Re-Cross Examination by Mr. Satterthwaite:

Q. Are you sure that Mr. Rickey came more than once after Mr. Conard returned?

30

A. No, I am not sure.

J. LEFFERTS CONARD, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

*J. Lefferts Conard—Direct.**Direct Examination by Mr. Dawes:*

Q. Mr. Conard, you are acquainted with the complainant, Mr. Rickey?

A. Yes, sir.

Q. In 1913, were you acquainted with him?

A. Yes. 10

Q. And during that year 1913, at any time, did Mr. Rickey and Mr. Moon come to your office in Trenton?

A. Yes, sir.

Q. For what purpose?

A. They wanted this option drawn.

Q. Did you draw this option bearing date in 1913?

A. Yes.

Q. And how often after that did you come in contact with Mr. Rickey and Mr. Moon?

A. Well, they were in there a number of times, frequently. 20

Q. Were you advised or consulted with concerning the loan of money which Mr. Watson made?

A. Yes, sir.

Q. What do you know about the loan of the money?

A. Rickey telephoned over to me from Watson's office, and I went over there; that's the first I knew anything about that loan.

Q. The loan was made by—what do you know about the money? 30

A. Rickey and Watson and Muschert and Satterthwaite were there, and—

Q. What Satterthwaite?

A. Mr. Satterthwaite. Rickey told me he was negotiating a loan and making an assignment of this option; and I

J. Lefferts Conard—Direct.

was there when Satterthwaite dictated the option, and it was drawn and signed; then I left there.

Q. And when did you next see Mr. Rickey?

A., About an hour afterwards, I think, or an hour and a half.

Q. Did anything take place in respect to the clay lands?

A. No, nothing with respect to the clay lands. He came
10 in after he left Watson's office, to see me; I asked him to, and he came over and we had a conversation there.

Q. What was that conversation?

A. Well, it was in reference to this. After this option was taken, Rickey had talked with me about representing him in this railroad deal, acting as counsel, and he had said to me he would give me half-interest in any profits he made out of it for my services, and had given me a little memorandum in writing to that effect; and so when I went over to
20 Watson's office, I asked him what he meant by assigning or selling it, or pledging this option, when he had assigned one-half of it to me for my services; I asked him where I came out in that transaction. So we finally agreed to settle. He gave me \$300.00 for what I had already done up to date, and closed the transaction so far as we were concerned. That was satisfactory to me and satisfactory to him; he wrote out a check.

Q. When did you next see Mr. Rickey in respect to this deal?

A. He was up to see me right along, and frequently
30 stopped me going by his office about this railroad deal, and told me I had an entire misconception of it; it was a good thing; he still wanted me to take the same position I had in the matter, but I declined for a while.

Q. What was the next paper you recall being drawn?

J. Lefferts Conard—Direct.

A. The next paper—I told Rickey I wouldn't go any further with the matter without some money; he would have to pay me in cash. Subsequently, an arrangement was made by which Muschert furnished the money for me, and then the tri-party agreement was drawn by me. We were all there together; it was read over and finally signed, and the terms of it show what it was.

Q. After this agreement was drawn up, which bears date April 16, 1914, was anything said at that time, or shortly afterwards, about commissions? **10**

A. Yes; Mr. Moon used to drop in the office once in a while; I got acquainted with him through Mr. Rickey, and I would sometimes see him on the street. It was one of those visits at the office in which we were discussing this clay land and the probabilities, he said to me when I spoke of this option—

MR. SATTERTHWAITE: I object to this if Mr. Rickey was not present. **20**

A. Rickey was not present.

THE COURT: Objection sustained.

Q. You had a conversation with Mr. Moon?

A. Yes.

Q. Did you afterwards see Mr. Rickey?

A. Yes. **30**

Q. State what you said to Mr. Rickey.

A. I told Walter what Moon had claimed to me about this option; I told him he had said to me that this option was not an option in the strict sense of the word, it was obtained with the understanding that it was merely to be a sort of representation to the railroad company of what they con-

J. Lefferts Conard—Direct.

sidered the land worth, and I told him he had said to me that that was all; and that is how he got him, Moon, to sign it, in which case, in my opinion, that option was no good, and before I went any further I wanted that matter straightened out. I told him what Mr. Moon had told me—

Q. Well, what was said and done by you?

A. Then that was discussed between Rickey and I in two
 10 or three different interviews as to what to do about it. I made the suggestion that the better thing was to get down to a business basis, and I asked him whether he could get from Mr. Moon a regular straight brokerage contract with Mr. Moon, that is, a commission, instead of this intangible option. He said he could get that, and wanted to know what sort of form I wanted it in, and I told him. I am not so sure that I didn't scribble off something to that effect; I don't know whether I told him or not. I wanted a straight commission agreement on a percentage basis, and he came back with
 20 that signed.

Q. And did he show it to you?

A. Yes.

Q. Did you have it afterwards?

A. Yes, I told him "You have a certain sum you will obtain for commissions, and that is business."

Q. What then happened?

A. Then he wanted to get some money, and he said,
 30 "Now, your opinion is that there will be surely some money coming; can you raise me some money, can you loan me some?" Well, I just had, and I told him "No." He said, "Can you get a note through for me in the bank," and suggested himself the bank, the Pennington Bank. I said "Oliver Gray is a friend of mine; I'll send for him and ask him about it;" but that note wasn't discounted.

Q. Did you ever have this commission agreement?

J. Lefferts Conard—Direct.

A. The one that he had signed, I don't recollect that I did; I saw it, I knew it was signed. In fact, Mr. Moon—

Q. Then after that what was done in reference to this matter?

A. Then we were talking after we got it shaped up in a business way; we talked about the matter in its different phases, and it was suggested about the formation of this company; and then we were talking about the formation of that company, and that was the subject of conversation after conversation, sometimes all together and sometimes just Rickey and I were talking about it. I talked with Muschert about it and talked with Moon about it. 10

Q. What did you do?

A. Rickey suggested that that would be a good plan, but seemed to think that there was a large amount of money, larger than we seemed to appreciate in these lands to be sold to the railroad company, that we were going to get a fabulous sum for them; and he was urging us all the time, that if properly taking care of, the whole proposition would result in Moon getting a large profit and us getting correspondingly large commissions; he was a little more optimistic about it than any of the rest of us, I think. 20

Q. Then you were discussing the formation of the Moon Clay Company before the deed of February 15, 1915, was made out?

A. Oh, yes; you'll find that the original company was formed along in June; it was formed on a cash basis by Mr. Moon, Mr. Muschert and myself; Mr. Moon took a couple of shares, I took four shares, and Mr. Muschert took four shares, and we had a very indefinite idea of what that would lead to. We were talking about the formation, but nothing definite; so the first organization was to that effect. It was later that fall, I think you will find, that the deal was 30

J. Lefferts Conard—Direct.

made by which the East Trenton Heights, which had been purchased in parts by me from Humbrecht—that was taken over by the Moon Clay and Kaolin Company because we were not arriving at anything definite. I talked with Rickey about it and he talked with Mr. Moon, and his report would be that Mr. Moon was interested, and sometimes that he was not. It dragged along; and in the meantime we took over

10 the East Trenton Heights at a valuation we decided on ourselves.

Q. And issued stock for that?

A. Yes.

Q. And the stock you held in the company was given to you for that purpose, except the four shares?

A. Yes, sir, that was issued for the East Trenton Heights.

Q. Now, go on.

A. We were still all the time talking about the formation of the Clay Company to develop these clay lands. Mr. 20 Moon seemed inclined to like the idea, but he had nothing definite, and that dragged along for quite a while until finally—Mr. Moon was at that time running a little behind, I think, financially; he had indorsed a note for Rickey, and I think one of two notes, and then he had quite a number of debts that were pressing pretty hard. Mr. Rickey was collecting for him, I think, and trying to keep him in some sort of shape, but he finally came to a point where he wanted to borrow some money. Mr. Rickey came to me and said, “Mr. Moon will have to have some money.” I said, “What 30 have you got to suggest?” Well, he talked about one thing and another, and he said, “Why not get Mr. Muschert?” and I think before he had talked with me he had talked with Muschert; “How about Mr. Muschert advancing him some money, and he can take the clay lands and hold them as security;” and that ended up by that being done, and Mr.

J. Lefferts Conard—Direct.

Rickey called my attention to the fact that there was another note. There was some mystery about that note. He said it was held by a friend, but he wouldn't disclose the name of that friend, for some reason. It finally culminated in the making of the deed to Mr. Muschert, and he making a declaration of trust to Mr. Moon, and then Mr. Muschert loaned him the money to pay his debts and cleaned him up; and I went down to Rickey's office to see Walter about the note that there was some mystery about, and I couldn't understand; he was very indefinite with me, and I said, "I'll tell you what you better do; Mr. Muschert better attend to this himself." I didn't like his attitude in the thing; and Mr. Muschert came down to Rickey's office, and the check was made out by Mr. Muschert in Mr. Rickey's office, and they concluded the arrangement and fixed it up. 10

Q. I show you a paper bearing date the 15th day of February, 1915, and ask you if that is the declaration of trust we have been talking about? 20

A. Yes, this is the one Mr. Rickey had an idea changed the deal.

Q. Who drew that paper up, Mr. Conard?

A. I think this is mine; I think I drew it; I knew about it.

Q. And did you ever show Mr. Rickey that paper; did you ever tell Mr. Rickey or show him that paper?

A. Yes, Mr. Rickey told me; he said that I gave Mr. Moon some paper which changed this commission agreement we had with him, and I said I had not. I had given him simply a straight declaration of trust showing why Mr. Muschert—showing how he held this deed, that it was for the security of the moneys advanced for Moon's benefit. I told him Moon had the original of this; that I would get it and show it to him. He came up to the office, and I read it 30

J. Lefferts Conard—Direct.

over to him. I said "How does that change what he has done? Nothing in this that changes the attitude."

Q. Who is "he"?

A. Mr. Rickey.

Q. Then, what was the next subject of conversation among you, Rickey and Muschert?

10 A. Well, after that was over, we still continued on talking about that company arrangement that had always been in our minds about forming a company, one which would be satisfactory to all interests, when everybody could be satisfied. We wanted to form one if everybody could be satisfied. Mr. Rickey told me, he said he had friends in the railroad company, and that if this company was organized it would have the effect of increasing the value of the lands and increasing the prospect of a sale, that is, increasing the amount received from the sale of the land. I quite agreed with him, not to the extent he went, but I thought it was a
20 good thing myself from a business standpoint.

Q. Well, who negotiated with Mr. Moon for this land?

A. Well, Rickey and I talked about the amount of stock that Moon ought to be allowed, in comparison to the amount of stock that had already been issued for the Heights. We discussed that situation, but the best Rickey would allow, I think he said, was around \$200,000, and he said he would get for these lands at least that sum from the railroad company alone, and it was easily worth that to take him in the company; and finally I consented to that; that would be al-
30 lowing four shares of stock for the clay lands as against one for the East Trenton Heights, and the valuation had been fixed at about \$43,000. So I finally consented to fix the figure at \$206,000.

J. Lefferts Conard—Direct.

BY THE COURT:

Q. What was the \$43,000?

A. That was for stock issued for the East Trenton Heights, issued prior to that time; so when we got down to that figure, I don't know whether Rickey and him got together, or how it was, but it was decided on by Moon, and I thought that would be the valuation after talking with Mr. Muschert; then we held a formal meeting, a joint meeting of stockholders and directors, and we had a waiver of notice of meeting drawn at the time, which we all three signed, and I think we all three signed the minutes; then the stock was issued. 10

Q. How soon after this meeting of the company was held was it that a deed was made by Mr. Moon?

A. A good while; that deed never was forthcoming, and it was delayed for a good while; just the exact time I can't be certain about now. It hung fire until I was rather decided that we were never going to get it; at least, I began to think so. Then I was approached by Mr. Rickey in his office one day, and he said, was there any possibility of some money changing hands at the time of this deal, and I said "No," the stock was to cover it, and Moon would have to come along and help us in this thing. He was the only clay man in the company at that time. He said "Can it be so arranged that there would be some money in the transaction, so Moon would get some money?" I told him I didn't see how it could be, and then later he said, "How about you buying this stock out for cash?" I said "Well, what will he take for it;" and then started the negotiations for the sale of that stock to us. I, in the meantime— 30

J. Lefferts Conard—Direct.

BY MR. SATTERTHWAITE:

Q. Are you testifying to a conversation with Mr. Rickey?

A. Yes, sir. I, in the meantime, because of Mr. Rickey's influence with Moon—that deed he never delivered, and the deal was never concluded, and I told Mr. Rickey I didn't
 10 like that proposition, he either ought to throw the deal down completely or come through with that deed; I wanted the deed so as to conclude the other deed; then I would talk about stock. Rickey afterwards came to me and told me the matter could be better arranged by buying that stock, the way the situation was, "You can deal with Moon." I said, "What does he want for that stock?" he said, "I don't know what he will take, but I'll find out for you;" and I don't think it was very long after that, that Mr. Moon came to
 20 me without Rickey, he was alone that time. I was in Hildebeecht's old restaurant on Hanover street, getting lunch, and he said, "Now, do you think you can interest Mr. Muschert in buying that stock of mine and settling for the whole thing in cash? I said, "I don't know, John.

MR. SATTERTHWAITE: That is objected to.
 THE COURT: Objection overruled.

A. He gave me a figure.

30 MR. SATTERTHWAITE: Objected to.
 THE COURT: Objection overruled.

Q. Give the history of that.

A. I had two or three conversations with Moon; then Rickey called me up on the telephone, and I went down there to his office, and he says, "How are you making out with

J. Lefferts Conard—Direct.

that deal with Moon?" I said, "Well, I had agreed to give him on an installment sort of contract \$55,000;" and he asked me how much in that installment method of dealing with him I was to pay down. I told him \$10,000. He said, "Now, that's all right if you can make that twenty instead of ten;" and then I had a talk with Mr. Muschert. I told Rickey there was no way to make it twenty, there was no way to accomplish that twenty unless it was done later; and Moon came up to see me afterwards, and we talked there a little while. I was several days about the thing, and finally the deal was made by which we could pay by the installment plan. 10

Q. Then was the deed delivered?

A. Then he never came through with the deed then; he signed a contract to deliver a deed; we paid him the first installment, and he delivered possession, however, this time of the land, and we commenced operations. This was along about the first of August, 1915, and we were operating right along there; and the delay in the deed at this time, as Mr. Rickey told me, that the delay was in making some satisfactory arrangement with Mrs. Moon about her signature to the deed, and that dragged along until after I went away in another business in October; I went away with Mr. Moses; and when I came back along about Christmas time, the deed had not yet been delivered. Then I was compelled to go away again on the gas business, and I then arrived back here in February. I was gone a few weeks and was back here in February, and took up the question of the delivery of that deed with Mr. Moon, and he said they were still unable to get Mrs. Moon to join in that deed. "Well," I said, "We would accept the deed without her joining, for the present, and then we could fix up that matter with her later, when we were to close the whole transaction; so he delivered the deed to me; and that is all with reference to her. 20 30

J. Lefferts Conard—Direct.

Q. That deed was delivered to you along in February, 1916?

A. Yes, sir.

Q. He made that delivery to you?

A. Well, I think that deed was signed in Judge Marshall's office.

10 Q. From August, 1915, to February, 1916, did you see Mr. Rickey?

A. Oh, yes.

Q. When he was coming to your office during that period of time, what were you discussing with him?

A. Why, this railroad deal, we talked about that; this clay business is the only business I had with Mr. Rickey at that time.

Q. Were you discussing anything about Mr. Moon?

20 A. The question of getting that deed was the principal thing in my point of the conversation, but there were a great many conversations that there was no particular point to them.

Q. After February, 1916, did you see Mr. Rickey?

A. Yes.

Q. At your office or elsewhere?

A. Well, I was in and out; after October, 1916 or 1915, I was away a good deal; I would be away and then back again.

Q. Did you see Mr. Rickey?

A. I saw him at different times.

30 Q. Did you have any conversation with him respecting these matters?

A. Yes, I did; that was right after the deed was delivered; I remember talking with him in his office, or at the time the deed was delivered.

J. Lefferts Conard—Direct.

Q. What were you talking about then; did you ever have any talk with him about the subject of what his relations were with this corporation, or what his rights were?

A. Oh, yes, we threshed that out at the time the amount of stock was fixed; he wanted to hold that number of shares up; he insisted on keeping that up, because he had, I believe, said to John Moon time and again, we would get \$200,000 for it, and I thought that was problematical. I said so to him; I said, "You are in the air on this thing; you are away above what was reasonable;" and when we finally did arrive at it, he said "How does this leave us?" I said, "You got a right to figure your commissions;" he said, "I know, but suppose the railroad company should afterwards give \$500,000 for it." I said, "If it does, we won't have any objection to give you commissions on the extra." He slapped me on the back and said, "All right, old fellow; it will bring more than you think for." **10**

Q. What moneys had Mr. Rickey received from you and Mr. Muschert on the commissions? **20**

A. I don't know of him receiving anything from Mr. Muschert except what he borrowed from Watson, and what he had got from me, \$1750.00; he had \$1750.00 from me, and I think \$3,000 he got from Watson.

Q. And had Mr. Muschert advanced you any moneys in accordance with the three-party agreement?

A. Oh, yes, he paid me the money; everything was closed according to agreement.

Q. Did Mr. Rickey ever say anything more to you about commissions? **30**

A. Yes, sir.

J. Lefferts Conard—Direct.

BY THE COURT:

Q. On what basis were the commissions figured?

10 A. On 10 per cent. of \$206,000, would leave Rickey something coming to him after considering what he owed me, a small amount would be coming to him; but he had agreed with me that I should be paid out of anything that was coming to him.

Q. During all these various times you were meeting Mr. Rickey, did he ever make any objection to the transfer of the title to the Moon Clay and Kaolin Company?

A. Oh, no.

Q. Did you ever after that discuss commissions or compensation with him, or loaning him money, or anything of that kind?

20 A. He wanted to borrow money about every time I saw him.

Q. He said this morning, Mr. Conard, about your not delivering to him certain notes; do you know what that referred to?

A. At the time we took the business, as I explained to him, it was indefinite in its terms; the proposition was indefinite; it was so indefinite, just exactly what it was I would not as a lawyer want to describe it.

Q. You were talking about what?

30 A. The option; then we substituted for that commission arrangement, I said, "You get something definite now, and when a sale does take place, certainly, you are entitled to a commission, and we are entitled to a commission; under this contract we each have commissions; we are protecting the moneys which are paid to him." He said, "How does that figure?" and I explained to him that it would be figured, of

J. Lefferts Conard—Direct.

course, in accordance with the agreement of the three; and then it was that he said to me, "You think there would be something coming to me?" I said, "Yes;" he said, "Well, do you suppose you can get your friend Oliver Gray, at the Pennington Bank, to put a note through for me;" "Well," I said, "I'll see;" and I sent for Oliver and asked him if he would discount a note.

10

THE COURT: I don't understand this; this is the same thing you spoke of before? Well, go on.

A. Oliver said he would discount it and took the note, and Rickey and Mr. Gray and I were in the office. I handed the note to Mr. Gray, and he said he would discount it and put it through on Monday. This was the latter part of the week. He said he would put it through on Monday, and I gave Rickey a check for the proceeds; and on Monday I got a letter from Gray saying they couldn't put that note through, the bank wouldn't discount it.

20

Q. Well, what became of the note then?

A. I had it in the safe for a long time, and he wanted the note for a long time and I wanted the check, and finally he delivered the check to Blackman, and I went to Blackman and got the check and gave him the note. Blackman was Rickey's counsel.

Q. Since the Moon Clay and Kaolin Company have been in possession of these lands, what have they been doing?

A. We have been trying to build the company up.

30

Q. Have you expended any money?

A. Yes, we put an expert on there and we have had him on ever since, I think a couple of months after the company started to operate; we have had him building up the trade and teaching our superintendent the selection of trade; and

J. Lefferts Conard—Direct—Cross.

we have built up the business and bought apparatus, and we could be spending more money to put it in better shape, but it is in good shape now. We have spent a lot of money. We have never taken any money out of the Moon Clay and Kaolin Company; all the money it is earning and the business of the selling end, what that has made has all gone back in the company. The only reason we stopped putting more

10 money in—we built the business up, and now the question is, getting apparatus in to get the clay out; but this apparatus, to put it in, would be very expensive; and every once in a while we hear a rumor that the railroad company is coming through; and we were afraid that we would get smashed and never get reimbursed.

Q. Mr. Conard, the various deeds and contracts which you and Mr. Moon have made, have they been kept from the knowledge of Mr. Rickey, the complainant?

A. No, Mr. Rickey and Mr. Moon and Mr. Muschert

20 and myself; I don't know what has become of some of the papers; they lay on the desk and he had entre to our office all the time, and so did Mr. Moon; and Mr. Moon kept some private papers there.

Cross Examination by Mr. Satterthwaite:

Q. Mr. Conard, you drew up this original option for deed between Mr. Moon and Mr. Rickey?

A. Yes.

30 Q. And at that time didn't you understand that you and Mr. Muschert had any interest in it, or was it all Mr. Rickey's?

A. All Mr. Rickey's.

Q. Who was present when it was done?

A. Mr. Moon, Mr. Rickey and myself.

J. Lefferts Conard—Cross.

Q. Did they give you instructions when they came there about drawing it, and tell you what agreement they had come to?

A. Well, yes, it was drawn at their request; I knew nothing about this matter.

Q. Who gave you the instructions?

A. Mr. Rickey.

Q. Mr. Moon was there? 10

A. Yes, sir.

Q. Did Mr. Moon have anything to say about it at all?

A. I don't think he gave me any instructions whatever.

Q. Nothing was said whatever about this being a mere camouflage to blind the railroad company; nothing said about it then?

A. Nothing I recall at that time.

Q. You understood it was a genuine option on the part of Mr. Moon with Mr. Rickey, that if he could negotiate a sale or deal by which he would get anything above that price, Mr. Moon would accept it? 20

A. That was my understanding from Mr. Rickey.

Q. Mr. Moon was present?

A. Yes.

Q. Subsequently to that you had a call from Mr. Rickey from Mr. Watson's office?

A. Yes.

Q. Did he ask you to come over there?

A. Yes.

Q. Did he tell you what he wanted you for? 30

A. Not until I got there.

Q. When you got there?

A. Yes.

Q. What did he say?

A. He said he was borrowing money from Watson through Muschert on this railroad deal.

J. Lefferts Conard—Cross.

- Q. Yes; go on.
 A. That's all he said to me.
 Q. Do you say he said "railroad deal" or "on that option?"
 A. I think he said "railroad deal."
 Q. You understood it referred to this option?
 A. Yes.
- 10 Q. Why did he say he had called you over?
 A. They had sent for Mr. Harvey Satterthwaite in the meantime, and he got there before I did, and Mr. Rickey called me out in the back office and said, "I am borrowing some money from Watson on that railroad deal; and I want you to draw this agreement to assign the option to secure the money;" and Harvey dictated it while I was there; I don't think I made any change in it.
 Q. Was Mr. Muschert present?
 A. In the front office, yes.
- 20 Q. Did Mr. Rickey say he wanted you to come there to assure them that this option was of a binding character?
 A. No.
 Q. You were not asked about that?
 A. No.
 Q. So far as you know, you were only called over to draw up the assignment?
 A. I assumed that.
 Q. You learned nothing else?
 A. No; I was there a very short time.
- 30 Q. Shortly after that, an extension of the option was secured, wasn't there?
 A. I don't remember the getting of that extension of the option, but I think it was—

J. Lefferts Conard—Cross.

Q. Now, then, in April, 1914, when did Mr. Rickey first speak to you about representing him in this matter and giving you one-half?

A. After Mr. Moon went that day, I drew that option for him.

Q. How soon after?

A. Right away.

Q. What did he say? 10

A. He said he had spoken to Mr. Moon and he wanted me to go in with him on the thing; he said, "I'll give you one-half of the profits of the thing; it was very general.

Q. What were you to do?

A. I was then practicing law, and Mr. Rickey told me at that time that the railroad company was liable to come through right away, and if a price couldn't be agreed upon, they would condemn, and in the condemnation proceedings I was to have charge of that.

Q. Mr. Rickey had agreed with Mr. Moon to assume 20
any burden there might be?

A. I don't know that he did at that time, but he was interesting me in the thing, and interesting him, and I don't know that very much was said.

Q. Wasn't he by that proposition engaging you, as you understood, to represent him or Mr. Moon nominally, of course, in any litigation that might occur, inasmuch as Mr. Rickey had undertook to take the burden of it?

A. I don't know that he went that far. 30

BY THE COURT:

Q. Wasn't that the understanding?

A. Yes, something of that nature; I was to be the lawyer for the proposition.

J. Lefferts Conard—Cross.

Q. And you were to have one-half interest in that option for that?

A. Yes, sir.

Q. Now, you say when you went back from Mr. Watson's office, you reproached him for having made an assignment of this option?

A. Yes.

10 Q. That assignment was merely as collateral for the loan of \$3,000, and was not an assignment absolute, was it?

A. I understood Rickey—

Q. It was security merely for the loan of \$3,000?

A. Mr. Rickey I understood—

Q. When you went back from there, or shortly afterwards, you reproached Mr. Rickey for making that assignment?

A. Yes.

Q. How soon after?

20 A. About an hour or an hour and a half.

Q. When you went over there you made no objection to it?

A. No.

Q. Why not?

A. I didn't thoroughly understand just exactly what the deal was, except what Rickey told me; he simply said he was borrowing some money on that railroad deal, and he wanted me to draw that assignment; and Harvey had begun to draw it, and I said, "Well, what is he doing?" He said,

30 "Well, it's an assignment of his right in the railroad deal to secure Watson for the money."

Q. Well, you understood what it was then.

A. And Rickey told me, "You come over to the office; I'll be there.

Q. You understood then what it was?

J. Lefferts Conard—Cross.

A. Yes.

Q. Why didn't you object to it then?

A. I don't know; I was rather new in the proposition at that time, and I was not enthusiastic about it.

Q. You realized fully then that Mr. Rickey was making an assignment to Mr. Watson to secure \$3,000?

A. Yes.

Q. Did Mr. Rickey come over to your office?

10

A. Yes.

Q. He came?

A. Yes, sir.

Q. And what conversation took place?

A. I asked him what it was; he told me. I said "You assigned this whole option over to him to secure him for this money, and I am half-owner in it; where do I get off?" He said, "I'll take care of you." I said, "I think you better do that right now;" and he did, he gave me \$300.00.

20

BY THE COURT:

Q. Up to that time you hadn't done any work?

A. Very little.

Q. Was that \$300.00 in settlement of the arrangement he had made before?

A. Yes, I was through.

Q. You didn't borrow the \$300.00 of him?

A. He subsequently, about a year or so afterwards, he claimed that, but I didn't.

30

Q. Now, shortly after that, did you draw up an agreement or an assignment to Mr. Muschert at the same time this was done, for giving Mr. Muschert 10 per cent. on what Mr. Rickey might make out of this option?

J. Lefferts Conard—Cross.

A. No, I think that was done before, or after I got in the office.

Q. You didn't have anything to do with preparing that paper?

A. I don't recollect that at all.

Q. This paper of April 16, 1914, was executed by the three of you; you drew that?

10 A. Yes, I drew that paper.

Q. So that, whatever your relations with Mr. Rickey were before that, you came in with that agreement?

A. Yes.

Q. And you were to receive \$5,000 then in advance for services?

A. Yes; I was to act as counsel for the three of us, and have charge of the deal.

Q. And you got the \$5,000?

20 A. Yes, I got the \$5,000, and if anything should happen to me, I should get other counsel to take my place and go on with it.

BY THE COURT:

Q. You got \$5,000 retaining fee for something you didn't know was going to happen?

A. Yes; we knew we would have to get experts.

Q. You were not sure that the railroad company was going to take it?

30 A. Mr. Rickey said he had inside information that they were going to take it, and we would have to get ready.

Q. When was it you told Mr. Rickey you would not go any further without some cash?

A. Some time before that.

J. Lefferts Conard—Cross.

Q. Before this assignment to Mr. Watson?

A. No, sometime before the tri-party agreement.

Q. How long?

A. Some little time.

Q. Now, then, that was in between the time of this assignment to Watson and April 16, 1914?

A. Yes.

Q. If Mr. Rickey settled up with you by paying you \$300.00, why did you tell him you wouldn't go any further without some cash? **10**

A. It looked like a peculiar deal to me, that Watson business.

Q. What had you to do with it further?

A. He was up to see me right along trying to interest me to take the thing up, that is, in going on with the thing.

Q. If I understand you, the arrangement at the beginning was, you should do this work when this railroad should seek to enter upon this land; there wasn't anything for you to do before that; is that it? **20**

A. Yes; he told me he had inside information, and that they could go along. I didn't want to do anything. I said "That's all right; well, that will all be all right."

Q. What do you mean?

A. Well, we ought to have some idea what we have there, some idea of the value of it, the marketability of it, so that it could be shown to the railroad company, and then, if they were not inclined to pay what we thought it was worth, they could condemn on the proof, and that would be the same proof we prepared for the friendly negotiations. **30**

Q. He wanted you to do some surveying of the land, didn't he?

A. No, he got the land surveyed.

J. Lefferts Conard—Cross.

Q. Then what was there for you to do, as to legal services?

A. Well, legal services in the nature of the preparation of a case.

Q. You were originally promised half for that when the time should arrive, and when this assignment was made you were paid \$300.00, and then you were done with it?

10 A. Yes, we closed there.

Q. Then you told him you were not going on any further without some money shortly after that; what interest did you have in it then?

A. No interest whatever in it.

Q. You were not any longer retained, were you?

A. No, I was out of it.

Q. You said "You can't have some money," and he said you could get it from Mr. Muschert?

A. Yes.

20 Q. And that led to the drawing up of this three-party agreement?

A. Yes.

A. And as a result of drawing that agreement you got \$5,000 and Mr. Rickey didn't get anything?

A. No, sir.

Q. You got the \$5,000?

A. Yes, sir.

Q. That agreement referred to this loan of \$3,000?

A. Yes.

30 Q. And provided that should be refunded to Mr. Muschert?

A. Yes, sir.

Q. Then there was nothing more to be done until the railroad company wanted to get the land, so far as you understood?

J. Lefferts Conard—Cross.

A. Nothing special.

Q. Now, how soon was it after that that you told Mr. Rickey that Mr. Moon had told you that this agreement was a mere pretence, this option?

A. That was the occasion right after the tri-party agreement was drawn that Mr. Moon heard about it, and came in the office and got talking to me about it as to what the nature of it was, and it was explained to him, and then it was that he told me about this option, that it was not given for the purpose of an option—

10

Q. I am asking when you told Mr. Rickey this?

A. That was after the conversation of Mr. Moon with me.

Q. What did Mr. Rickey say?

A. Mr. Rickey asked me what I wanted; I said "Walter, you better get this down to a business basis, get a broverage contract out of Moon to pay so much commissions for the sale of the land, and then—

20

Q. Did Mr. Rickey at that time say to you that he would like to raise some more money on the strength of this thing?

A. Almost immediately after he got the new contract signed, and did put it as I told him, on a business basis, right after that is when he told me to get some money.

Q. At the time you told Mr. Rickey of this conversation, at that time did Mr. Rickey say to you he would like to raise some money?

A. No.

30

Q. Did you suggest to him, or say to him, if you recall, that as it stood now, as the agreement stood, there was no certainty that any of you was to get anything—

A. I said the terms of the option were very uncertain.

J. Lefferts Conard—Cross.

Q. Did Mr. Moon agree to dispose of the land for \$6,000 and \$1,000, in other words, an option to let it go at that price, and to show you that you had something there, to borrow money—

A. The borrowing of money wasn't at that time.

10 Q. What I am trying to get at, Mr. Conard, is, before you got this 10 per cent. agreement from Mr. Moon, wasn't the suggestion made by you, that in order to get security on the strength of this agreement, you must show you could get some money in any event?

A. No.

Q. What was it? That is, wasn't the reason then so as to borrow money?

A. No.

Q. Immediately after getting that agreement you did make an application for a loan?

A. He did to me.

20 Q. You made it for him?

A. He did to me, and I sent for Mr. Gray, yes.

Q. You gave your check for the proceeds of the note which you anticipated would be discounted?

A. Yes, sir.

Q. That check was not paid?

A. No.

Q. Mr. Rickey didn't get the money?

A. No.

30 Q. Now, when was it Mr. Rickey talked about the formation of the company?

A. At different times.

Q. When did you first talk of it?

A. The first that was mentioned, that would be a pretty hard thing to fix a date.

J. Lefferts Conard—Cross.

Q. How soon after getting this 10 per cent. agreement, for instance?

A. Do you mean within a season? It would be pretty hard to say the first time we talked about that, but it was talked of quite a while before it was consummated.

BY THE COURT:

Q. After the 10 per cent. agreement? **10**

A. Yes, sir.

Q. How long after?

A. I think it started about that time, I think.

Q. Who first suggested the idea of forming the company?

A. Mr. Rickey?

Q. For what purpose?

A. With the idea of carrying out the object of the association of all of us, to increase the valuation of this land, to keep it up. **20**

Q. Was it to carry out the purpose of this three-party agreement that he suggested that?

A. First started to assist the proposition generally, without any definite manner of organization.

Q. The three-party agreement was still in existence?

A. Yes.

Q. And that was understood by you?

A. Yes.

Q. What did Mr. Rickey say about organizing a company? **30**

A. He suggested we could form and take up this proposition and battle with the railroad company; it could be handled better.

Q. How many times did you have a conversation with him about that, and how far did he go in suggesting the scheme?

J. Lefferts Conard—Cross.

- A. We talked at different times; it's hard to say.
- Q. You understand when he spoke about forming a company, that he was to be in it?
- A. No.
- Q. Then why was he interested?
- A. He thought we would get more money for the land.
- Q. What interest would that be for Rickey?
- 10 A. He would get a bigger commission; his idea was that we could form a company and take over these lands and promote it, and build this business up, that if we could do that, we could get a large sum of money for it.
- Q. Rickey's interest then was, simply a purchase of the lands which you and he and Muschert had a contract together, and it was to get commissions?
- A. That's the only interest I knew that Rickey had in it.
- Q. At the formation of the company he was not present, was he?
- 20 A. I don't think he was there that day.
- Q. He had nothing to do with it when it came to the final—
- A. He knew of the original formation of the company but whether he was there the day we had the first meeting of the incorporators I don't know.
- Q. Did he know it had been definitely decided to incorporate?
- A. Oh, yes.
- Q. How?
- 30 A. From our talks.
- Q. You got the idea from him?
- A. Yes, he was the head and front of the matter from the start to the finish.
- Q. He was the genius of the whole—
- A. He was the genius.

J. Lefferts Conard—Cross.

Q. Now, when was it you say that Rickey was collecting for Mr. Moon and came to you and said that he wanted to get some money for Mr. Moon, to raise some money for Mr. Moon; he said Moon would have to have some money.

A. Between the—right after—some time after May, 1915.

Q. Was that after the corporation had been formed?

A. Yes, sir, after the stock had been issued to Moon for the lands before the deed was given. **10**

Q. And he suggested that you get the money from Muschert and have the property signed over to Muschert as security, didn't he?

A. Oh, I was referring to getting the cash for the stock when I answered the previous question; that matter of taking care of Moon was just before he was actually taken care of by that transfer to Muschert.

Q. That was before the incorporation was made, wasn't it? **20**

A. I don't think so.

Q. Didn't Mr. Moon convey to Muschert before the company was incorporated?

A. I don't think so; I think that was between—

Q. When was the company incorporated?

A. June, 1914.

Q. I mean the deed to Muschert as security was before the incorporation?

A. Oh, no, that was after the incorporation quite a while. **30**

Q. Why did it appear to you that Mr. Rickey was so interested in getting money for Moon?

A. Well, Mr. Rickey always acted for Mr. Moon; they acted jointly together; whether Mr. Rickey was adviser or not—they were about like attorney and client.

J. Lefferts Conard—Cross.

Q. He was looking after Mr. Moon's interest?

A. Yes, sir.

Q. You say you went down to Mr. Rickey's office to see about that note; what mystery was there about that note, the \$500.00 note?

10 A. Why, he wouldn't say where this note—I asked him, I said, "What note is this?" We had cleaned up all his other debts. He said, "Now, there's still a note for \$500.00;" and I went down there, and he wouldn't tell me who had that note, or what it was given for. I said, "You had better do business right with Mr. Muschert, and talk to Muschert," and I telephoned to Muschert, and they came down and they talked it over, and the check was drawn for the note, and I think it was indorsed by Moon; it was cleaned up so that Moon would be taken care of.

Q. Was that the time this declaration of trust was drawn?

20 A. Yes.

Q. You say you showed that to Mr. Rickey?

30 A. Not that day, I don't think he saw it; it wasn't until Mr. Rickey accused me, he said "What paper did you give Mr. Moon?" I said "We gave him a paper showing how Mr. Muschert held these lands, how he come to hold the lands; a declaration of trust to show he held them for Moon, after these indebtednesses were paid off;" he said, "Did you give him any paper which changed our position?" I said, "No;" he claimed I had. I said, "You come up to the office; Mr. Moon has it and I'll show it to you;" and he came to the office, and I got it from Mr. Moon and showed it to him, and explained that it didn't alter our situation.

J. Lefferts Conard—Cross.

Q. He asked if the situation had been changed for paying commissions?

A. Yes.

Q. He didn't specify that 10 per cent. basis?

A. No.

Q. You understood up to that time, that the three-party agreement and the original option were in force?

A. We didn't consider the original option after we got that agreement. 10

Q. You didn't?

A. No.

Q. Did you consider the three-party agreement superseded it?

A. No, I thought that was made stronger.

Q. There is nothing in the declaration of trust which takes in Mr. Rickey?

BY THE COURT:

20

Q. Which was first?

A. The three-party agreement was made first, and then the 10 per cent. agreement afterwards.

Q. Now, then, how long after the organization of the corporation was it that Mr. Rickey was there suggesting the amount of stock to be issued for these lands?

A. We didn't talk of the amount of stock at all until about six weeks before the deal was made, a month or six weeks before the deal was finally consummated.

30

Q. You say his interest in keeping up the amount of stock is, that that would fix the commissions?

A. No, he wanted to know about this East Trenton Heights, and it was the comparison between the clay lands and the stock issued for the East Trenton Heights.

J. Lefferts Conard—Cross.

Q. After he had no interest in the Moon Company at all, except in the purchase of the Moon land and his commission—if he had no interest other than that, why was he interested at all in the East Trenton Heights proposition; what difference would it make to him whether there was a ten of a thousand shares?

10 A. Because it would alter the value of the stock Moon got for the clay lands.

Q. That would not affect Mr. Rickey?

A. It would affect Moon, and what affected Moon would affect Rickey.

Q. Why was Rickey's interest in that part?

A. Well, he said he had told Moon that he would get him \$200,000 for that, and I would have to make the stock that, and I said that would be four to one, that the value of the clay lands would be estimated at practically four to one. I spoke to him about the value of the Moon lands;
20 Rickey and I argued about that pro and con; his point was that the railroad company would never give less than \$200,000 for it; that if it was developed it would be \$200,000, and it was only fair if it made four to one against the East Trenton Heights, it was only fair to issue what we knew it would probably bring, and he said "It's cheap at that."

Q. You say Rickey told you that he had promised Moon to get him \$200,000 for the land?

A. Yes.

30 Q. That he had assured him he would realize that much?

A. Yes.

Q. That was the entire tract rather than what the railroad—

A. From the railroad company he was talking about.

J. Lefferts Conard—Cross.

Q. When was it that Rickey made a proposition about buying Moon's stock from him?

A. When I went to see him several times about why we couldn't get that deed, and Rickey suggested then, "Why don't you get somebody to buy the stock?"

Q. When?

A. Between the time of the making of the deal and the final giving of the deed. 10

Q. And what interest had he in your buying Mr. Moon's stock that had been issued to him for the land?

A. Well, that's just what he suggested, but it was not discussed, it was a question of whether we could accomplish that.

Q. You say that Mr. Rickey has got part of his commission; do you concede that Mr. Rickey is entitled to one-third of the commission on the sale of that land?

A. Yes.

Q. From whom? 20

A. He was entitled to one-third, which ought to be paid by the company, but it was rather indefinite, and I think fairly Rickey would be entitled to it from us.

Q. Why?

A. Because here is a sale to the company; we were interested in the company, Rickey is not; he is entitled to his commissions the same as if we had sold it to John Jones or any outsider.

Q. Your agreement for commissions with the agreement that Mr. Moon would pay 10 per cent. from the price he got, the price Mr. Moon got from the company, was \$205,900.00, and didn't Mr. Moon then owe to you three 10 per cent. of that, according to that agreement? 30

A. No, he wasn't to be charged anything, as I told Rickey we were standing those commissions, his one-third;

J. Lefferts Conard—Cross.

he was in doubt about it, and afterwards he asked me about it, and I explained that he was to be taken care of, and I told him at that time I was ready to figure it up with him at that time.

Q. Mr. Rickey was representing Mr. Moon in that deal by which the land was—

10 A. I didn't think it was a legal representation or anything else; he was talking more in favor of Mr. Moon than us.

Q. Then, did you and Mr. Muschert, dealing with Mr. Rickey, who was there representing Mr. Moon, agree with Mr. Rickey that if Mr. Moon would transfer this property to the company for \$206,000 worth of stock, that you and Mr. Muschert, or the company which was controlled by you, would assume this 10 per cent. commission?

A. We would pay Mr. Rickey his share of the commission.

20 Q. You agreed to that?

A. We agreed to that, yes, sir.

Q. How had Mr. Rickey been paid his share of that commission, or any part of it?

A. He has only been paid by the amounts he has been advanced; it has never been settled.

Q. It is not settled?

A. No.

Q. You mean, that if the commissions were 10 per cent. on \$206,000, that would be \$20,600, wouldn't it?

30 A. Yes.

Q. Now, Mr. Muschert had advanced under the three-party agreement, \$5,000 to you?

A. Yes.

Q. And \$3,000 was coming to Mr. Rickey?

A. Well, yes, three thousand some hundred dollars.

J. Lefferts Conard—Cross.

Q. And if that agreement took the place of the original agreement as to profits on the land, then Mr. Muschert was to be reimbursed what he had advanced before there was any division of the profits?

A. First, he got out of it the money that Mr. Muschert advanced to me, \$5,000.

Q. Then, do I understand you, that that agreement you were still operating under, or were you not? 10

A. Oh, yes.

Q. What do you say was Mr. Rickey's share of that 10 per cent.

A. I figure it \$400.00 after he settled up with Muschert and Watson.

Q. Well, he didn't get anything from Muschert, did he?

A. Well he owed Muschert for getting a loan from Watson, and he was to pay first Watson, then Muschert for procuring the loan; after that it would be his.

Q. What do you mean, the \$3,000 loan? 20

A. Yes.

Q. Well, the agreement of April 16 supplanted the agreement by which he was to pay Muschert for securing that loan?

A. That is provided in that agreement.

Q. One-third of that commission would be \$6,888.00, wouldn't it?

A. No.

Q. Now, then, do I understand you, that Mr. Rickey made a contract finally by which it was agreed to pay Mr. Moon \$55,000 for his holdings? 30

A. Yes, sir.

Q. Do you know of any interest Mr. Rickey had in that?

J. Lefferts Conard—Cross.

A. I never knew, no, why he wanted that made a cash deal instead of stock.

Q. Mr. Conard, Mr. Rickey, you say, tried to induce you to make a \$20,000 payment instead of a \$10,000 payment when you had a conversation when the stock was transferred?

A. Yes.

10 Q. Did he indicate why he was interested in that?

A. No, he never said why.

Q. Apparently he was looking out for Mr. Moon?

A. So far as I know.

Q. You say you gave Mr. Rickey \$1750.00; how did you give that?

A. How?

Q. You testified that you paid Mr. Rickey \$1750.00; when was that paid?

A. I loaned him that much.

20 Q. When?

A. I have got the dates of it.

Q. Give them to us.

A. (Looking at book) It was right after the tri-party agreement was made, and before the commission agreement he got that money from me.

Q. Right after the three-party agreement was made?

A. Yes, I think so.

Q. And before what?

A. And I think before or right after the commission agreement was secured.

30 Q. If it was after the three-party agreement and before the commission agreement, then the commission agreement came after the three-party agreement?

A. It did.

Q. It came after?

J. Lefferts Conard—Cross.

A. On April 18, that's right, after the tri-party agreement.

Q. What year?

A. 1914.

Q. How much did you let him have then?

A. \$1,000.

Q. \$1,000?

A. Yes, and the month afterwards—

10

Q. The months afterwards, how much then?

A. May, 19, \$750.00.

Q. And that was loaned to him?

A. Yes, sir.

Q. How came you to loan it to him?

A. I loaned it.

Q. Was that money ever paid back?

A. No, sir.

Q. Now, do you claim, if I understand you, that—do you claim, in accordance with the letter of Mr. Muschert of November 19, 1915, that Mr. Rickey had no further interest in this matter, or do you say he had further interest?

20

A. What letter do you refer to?

MR. DAWES: I object to the question.

THE COURT: The objection is overruled.

Q. (Stenographer repeats the question).

A. Do I understand that you mean, do I think he has a further interest?

30

Q. Does he have an interest?

A. Rickey has an interest until this commission matter is cleared up.

J. Lefferts Conard—Cross.

BY THE COURT:

Q. What?

A. On the 10 per cent. agreement; the last time I talked with him about it, it was to be left until the railroad went through.

Q. Has he still an interest under the option agreement and the three-party agreement?

10

A. Well, he has had an interest under the three-party agreement.

Q. And the option agreement?

A. I never have considered the option agreement.

Q. Then, when Rickey patted you on the back and said it was all right, wasn't that with reference to the option agreement if the railroad came through and you got more than \$200,000?

20

A. He may have reference to that. The way I considered it, Vice-Chancellor, was from my own point of view and our talk was to substitute the commission agreement for the option, on account of the indefiniteness of the option; and in fact, the selection of the clay lands would be largely up to Mr. Moon, and the uncertainty in the thing, and we wanted to substitute the brokerage agreement.

Q. Had Mr. Rickey any interest in the \$5,000 you got out of the ten?

30

A. He got nothing out of that.

Q. What was that \$5,000 for?

A. Just exactly as it was nominated in the agreement itself; I was to have that cash advanced to me.

Q. You were to have that \$5,000 for getting \$10,000 cash?

J. Lefferts Conard—Cross—Re-Direct.

THE COURT: The sale to the corporation had not been effected then.

Q. What was that \$5,000 for?

A. The sale of that stock was arranged on an installment basis, and every time we made a payment we were to have a discount. If we paid the cash instead of the installment plan, as that bond provided for, any time that I raised the cash to pay him, the real net price of that stock to us would have been \$40,000 cash; if there was a delay in these payments and we kept him out of the money until the time nominated in the contract, he was to get it all, otherwise, we were to get a discount and \$5,000 of the balance. 10

BY THE COURT:

Q. Mr. Muschert put up \$10,000, didn't he?

A. We put that up together. 20

Re-Direct Examination by Mr. Dawes:

Q. You spoke about two loans of money to Mr. Rickey in April, 1914, and May, 1914, amounting to \$1750.00?

A. Yes.

Q. Have you got the checks whereby you loaned that money to Mr. Rickey?

A. Yes, sir, I have the checks; I want to say this in addition to that, at that time—

BY THE COURT:

Q. Have you the checks? 30

A. Yes, sir.

Q. Produce those checks.

A. (Witness produces checks).

Erwin E. Marshall—Direct.

MR. DAWES: I offer the checks in evidence.

10 Said checks, the first payable at the First National Bank of Pennington, New Jersey, dated May 19, 1914, to Walter H. Rickey, made by J. Lefferts Conard for \$750.00, and endorsed "W. H. Rickey, Agent;" and the other payable at the Broad Street National Bank, Trenton, New Jersey, to the order of W. H. Rickey, Agent, made by J. Lefferts Conard, Attorney, for \$1,000, dated April 18, 1914, and indorsed "W. H. Rickey, Agent," are marked "Exhibits D 2" and "D 3," respectively.

ERWIN E. MARSHALL, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Dawes:

20

Q. How long have you been counsel for Mr. Moon?

A. Off and on, I suppose, for fifteen or twenty years.

Q. And were you consulted by Mr. Moon in respect to any transaction or dealings with Mr. Conard, Mr. Muschert and the Moon Clay and Kaolin Company?

A. I was consulted by Mr. Moon about the summer of 1915, I think.

Q. 1915 or '16?

A. Perhaps it was 1916.

30

Q. Perhaps it was, did you say?

A. Perhaps it was; at the time of the transfer of the stock proposition.

Q. And who came with Mr. Moon to your office?

A. In the first place?

Q. Yes.

A. Mr. Conard.

Erwin E. Marshall—Direct.

Q. And were you at that time shown a certain bond and contract between Mr. Conard and the Kaolin Company and Mr. Moon?

A. I was.

Q. You saw that?

A. It was at that time a blank not signed by anyone.

Q. They brought it to you what for?

A. For me to examine for Mr. Moon. 10

Q. And was the bond finally signed?

A. It was signed, against my advice, however.

Q. And certain additions and corrections made?

A. There were certain additions made, but not the additions which I suggested.

Q. Later on, did Mr. Moon come to your office then again?

A. Later on he did, yes.

Q. How long after that time?

A. Oh, perhaps a year; well, he came in my office from 20 that time probably on an average of two or three times a week for the next two or three weeks.

Q. Who came with him?

A. He usually came alone then.

Q. What was the object of his coming at that time?

A. Discussing the execution of this paper.

Q. Had the paper at that time been executed, or was it about to be executed?

A. It had not.

Q. Why? 30

A. Mr. Moon was holding off because I had advised against his accepting it.

Q. You had so advised?

A. Yes.

Q. Was the paper finally accepted?

Erwin E. Marshall—Direct.

A. It finally was, yes. Mr. Moon came to my office and told me they had talked with Mr. Conard, and they had come to an understanding, and he had decided to accept the bond.

Q. Did he come to your office after that?

A. Yes.

Q. Often?

10 A. Quite frequently; before he came in with Mr. Conard I probably had not seen Mr. Moon as a client for two years, during the time these negotiations were pending I didn't see Mr. Moon and he didn't consult with me.

Q. After this bond was signed and delivered by the company, and Messrs. Conard and Muschert, he came again to the office?

A. Quite frequently from that time on.

Q. What did he come for at that time?

A. Well, for—there was once, I think, a question about
20 deeding this property; the deed had not been delivered at that time to the Moon Clay and Kaolin Company, and I think on one occasion I went out, at his request, to see Mrs. Moon about joining in that deed; nothing came of that, however.

Q. She did not join?

A. She did not.

Q. Was the deed finally signed?

A. I understand it was; and I had nothing to do with the drawing of the deed or preparing it; my stenographer hap-
30 pened to take the acknowledgment for Mr. Conard, but—

Q. Speaking of the time when these visits were made, I think I misled you in suggesting 1916; do you recall the time?

A. I think it was sometime in July or August of 1915 when this matter was first brought to my attention.

Erwin E. Marshall—Direct.

Q. When you say first brought to your attention, that occupied what period of time?

A. A matter of two or three weeks from the time I was first shown this first draft of a bond, until the time Mr. Moon finally told me he had decided to accept it.

Q. And from that time on, how long was it before this deed was delivered?

A. I couldn't say; it may have been several weeks; it may have been longer than that. I had nothing to do with the delivery of that deed, but judging from my recollection of the date of that deed, it was some time after; I have since seen the deed and know it was— 10

Q. Subsequently to the delivery of this deed, did Mr. Moon come to your office?

A. Yes, he continued to come.

Q. What subject did he discuss with you?

A. The subject of his getting some money from the Moon Clay and Kaolin Company on account of this agreement. 20

BY THE COURT:

Q. The bond?

A. Yes, sir, the bond or verbal agreement that they had between themselves, rather.

Q. Can you fix the time of his coming for this second purpose or object?

A. Oh, that may have been—my recollection is, that the money was to be paid, that he was to have the money paid to him periodically during a term of years, or something like that, and it may be two or three or four months before he came to see about money. 30

Q. Did he come alone?

Erwin E. Marshall—Direct.

A. Sometimes he came alone and sometimes, I think once or twice, Mr. Conard was with him.

Q. And was that matter finally arranged?

A. No, it was never definitely arranged; some advances were made to Mr. Moon from time to time, in no very large amounts, however.

Q. Did Mr. Moon continue to come to your office?

10 A. Yes.

Q. And later on, after Mr. Conard had been there, did Mr. Rickey ever come?

A. Mr. Rickey came in with him some months after the execution of that bond, and Mr. Rickey and Mr. Moon came into my office one morning, I think it was, it might have been in the afternoon—

Q. Can you fix the time with any degree of definiteness?

A. I would say it was along in the early part of 1916, perhaps in the month of March, or something like that.

20 Q. And was that the time when Mr. Rickey came with him?

A. Yes, sir.

Q. What was the conversation at that time with you by Mr. Rickey and Mr. Moon?

30 A. Mr. Moon brought Mr. Rickey into my office, and Mr. Moon said to me, he said, "I have brought Mr. Rickey in here because I found Mr. Rickey is a good friend of mine; Mr. Rickey and I have been estranged for some time, but I think now Mr. Rickey is all right and that he means to help me;" and then we discussed—then the question of the payment from the Moon Clay and Kaolin Company of the balance of the purchase price due under that bond, and Mr. Rickey, as I recall it, at that time said he wanted to help Mr. Moon to get his money; he thought he had not been fairly dealt with and he wanted to do all he could to help

Erwin E. Marshall—Direct.

Mr. Moon get his money. I think on that occasion we got the bond out; it was in my office; I went over it and discussed different phases of getting money; I think Mr. Rickey said to me that he also had a claim against Conard and the Moon Clay and Kaolin Company, but he would forego his claim at that time to help Mr. Moon to collect his money.

Q. The money Mr. Moon was seeking to collect was how much? 10

A. A balance of \$45,000, less some payments which had already been made.

Q. The collecting on that bond was the subject of how many visits to your office by Mr. Rickey?

A. Perhaps three or four, or maybe more; a number of times he came in.

Q. And each time the subject under discussion was the collection of this \$45,000?

A. In his early visits, yes.

Q. Later on did Mr. Rickey bring you any papers? 20

A. Later on, at the time he first came in there I had no knowledge of the existence of any of these agreements or options between Mr. Rickey and Mr. Moon; I had no knowledge that such agreements existed; they were never brought to my attention, and the subject was brought up about the existence of those agreements, and I remarked to Mr. Rickey that I had never seen them, and I said I would like to see them. He said, "I can furnish you with copies of them, and I will send them down to you. There had been some discussion about my meeting Mr. Blackman, who represented Mr. Rickey, and subsequently, Mr. Rickey did send me down a letter; I think sometime in April, 1916, a letter enclosing copies of three or four different papers or agreements; I can refer to the letter and give you the exact date 30

Erwin E. Marshall—Direct.

when that came to me. (After looking at paper.) I am wrong as to the date; it is November, the 11th of November, 1916.

Q. What papers were enclosed?

A. The papers enclosed, I have them here; the earliest one is the so-called option agreement or conditional deed; another one was a copy of an agreement between Walter H. Rickey and William M. Muschert, bearing date the 26th day of February, 1914. Another paper that he brought me was that so-called extension agreement with Mr. Moon. A third copy of an agreement he brought was one that bears no date, but what has been called the 10 per cent agreement, signed by Mr. Moon.

Q. And did you have a conference with Mr. Blackman, representing Mr. Rickey?

A. Yes, I did; Mr. Rickey asked me to have a conference with Mr. Blackman, and Mr. Blackman came into my office. I am not quite sure, but I think Mr. Rickey was there at that time, and the suggestion had been made by Mr. Rickey a short time ago, that he thought he and Mr. Moon could combine together and file some sort of a bill in the Court of Chancery which would produce a settlement for Mr. Moon and for Mr. Rickey, which he claimed was due him from the Moon Clay and Kaolin Company.

Q. Anything else?

A. Later on, Mr. Blackman and I did discuss this matter, and the conclusion that Mr. Blackman reached at that time was, that a bill at this time by Mr. Rickey would be premature, as his idea was that this commission would not be payable until a sale had been made to the railroad company.

Q. Did you have any further interview with either Mr. Rickey or Mr. Blackman?

Erwin E. Marshall—Direct.

A. Then at a little later time I think it was, Mr. Moon and Mr. Rickey again came into my office, and Mr. Moon asked me to get from my safe a certificate for two shares of the capital stock of the Moon Clay and Kaolin Company; he said he wanted to transfer one share of that stock to Mr. Rickey, so that Mr. Rickey, being a stockholder of the Moon Clay and Kaolin Company, might be entitled to have access to the books, so that Mr. Rickey could help Mr. Moon find out what the Moon Clay and Kaolin Company was doing; and it was stated also specifically at that time, that no title should pass to Mr. Rickey, but that after he had accomplished his purpose, it would re-transferred to Mr. Moon. An assignment was made of one share of that stock, and I believe it was turned over to Mr. Blackman. I was informed that Mr. Blackman wrote to the Moon Clay and Kaolin Company, demanding access to the books, but it was refused. 10

Q. In your office did Mr. Rickey see this proposed agreement between Mr. Moon and Mr. Muschert and Mr. Conard? 20

A. What proposed agreement?

Q. The agreement for the payment of \$45,000?

A. The bond?

Q. Yes.

A. He didn't see the proposed agreement; he saw the bond itself after it had been executed and delivered.

Q. You say he saw the bond; who showed him the bond?

A. I had the bond out there in my office; on one occasion he was out there, and I think Mr. Rickey already had a copy of it. 30

Q. At that time, did Mr. Rickey state to you that this deed, or either one of these deeds, had been made out without his knowledge?

Erwin E. Marshall—Direct.

A. He made no complaint to me about that.

Q. Earlier in these proceedings, did Mr. Moon consult you before the first or so-called option agreement was made out?

A. Yes, he did consult me about the propriety of making such an agreement.

10 Q. Did he state you at that time—what did he state to you at that time about the proposed option agreement?

A. That was probably in 1912 or 1913. Mr. Moon told me Mr. Rickey wanted me to give him an agreement or option on this property for a large amount of money; I don't think the amount was mentioned in my hearing at that time; he said that his idea was that if that agreement was made and put upon record it would be of considerable force when it came to fixing the value when the railroad company had the condemnation proceedings. I said "I think it wouldn't make any difference;" I advised him against making
20 it. I never heard from Mr. Moon from that time on until the time I related, and I had no knowledge that such an agreement had ever been made.

MR. SATTERTHWAITE: No questions.

Adjourned until Friday morning, November 23, 1917,
at 10:30 A. M.

Ellwood W. Watson—Direct.

Docket 43-576

IN CHANCERY OF NEW JERSEY

<i>Between</i>	Walter H. Rickey,	}	On Bill, &c.	10
	<i>Complainant,</i>			
<i>and</i>	The Moon Clay and Kaolin Company, et al.,	}	Testimony.	
	<i>Defendants.</i>			

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Friday, the twenty-third day of November, 1917, at 10.30 A. M.,

Before HON. JOHN H. BACKES, Vice-Chancellor.

20

Appearances as heretofore noted.

ELLWOOD W. WATSON, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Dawes:

Q. Mr. Watson, you hold a note given by Mr. Rickey to you?

A. I do.

30

Q. Have you got the first or original note given?

A. I have.

Q. Will you produce it?

A. (Witness produces note).

Q. Have you the assignment?

Ellwood W. Watson—Direct—Cross

- A. I have.
 Q. Have there been any payments made on that note?
 A. No, sir.
 Q. Is the amount and interest due?
 A. It is.
 Q. Who advanced the money on that note?
 A. I did.
 10 Q. Your own money?
 A. Absolutely.

Cross Examination by Mr. Satterthwaite:

- Q. At whose request did you advance the money on that note?
 A. Mr. Muschert's.
 Q. The note has been renewed from time to time?
 A. It has.
 20 Q. At whose request has it been renewed?
 A. Mr. Rickey's.
 Q. Has interest been paid on it?
 A. It has not.
 Q. Since the first year has interest been paid on it?
 A. No, sir.
 Q. Was interest added in the principal amount of the note?
 A. No.
 Q. The interest wasn't taken care of at all?
 30 A. No, sir.
 Q. Was it understood the interest would be paid when this deal should go through?
 A. I don't know.
 Q. Were you looking to Mr. Muschert to see that the interest was paid?

Ellwood W. Watson—Cross—Re-Direct.

A. Absolutely.

Q. And to see that the principal was paid?

A. Absolutely.

Q. Then, in advancing this money, you did that really as an accommodation for Mr. Muschert?

A. Partially so; as an investment also.

Q. It was not a loan to Mr. Rickey in the ordinary strict sense? 10

A. It was a loan to Mr. Rickey, that is, procured on Mr. Muschert's personal guarantee to me.

Q. Mr. Rickey didn't make any request for a loan?

A. No; Mr. Muschert asked me if I would loan to Mr. Rickey \$3,000; I said I would want some collateral, and Mr. Muschert said he would guarantee the loan; I said under those conditions I would do it.

Q. You thought it would redound to the benefit of Mr. Muschert if you made the loan?

A. I don't know. 20

Re-Direct Examination by Mr. Dawes:

Q. The money was loaned by check?

A. Yes, sir.

MR. DAWES: I offer these papers in evidence.

Said note, payable in four months with 6 per cent. interest, dated February 26, 1914, for \$3,000 to Ell- 30
wood W. Watson by Walter H. Rickey and Carl
Rickey, is marked "Exhibit D 4."

William M. Muschert—Direct.

Said assignment made by Walter H. Rickey to Ellwood W. Watson, and dated the same date, is marked "Exhibit D 5."

WILLIAM M. MUSCHERT, being recalled by the defendants, testified as follows:

10 *Direct Examination by Mr. Dawes:*

Q. Mr. Muschert, when did you first become acquainted with Mr. Conard?

A. I first knew Mr. Conard at the time of the marriage of his sister to Mr. Reeves.

Q. When did you first become associated with him in business?

A. Shortly before the signing of the tri-party agreement.

Q. How long had you known Mr. Rickey?

20 A. I had known him for ten or fifteen years, I should say.

Q. You received a deed for the property from Mr. Moon and you gave back also the declaration of trust which has been offered in evidence in this case; did you ever have any conversation with Mr. Rickey with respect to that transaction?

A. I had a conversation with Mr. Rickey on the day that that trust agreement was signed in his office.

Q. Just state what the conversation was.

30 A. It seems that there was a note transaction between Mr. Moon and Mr. Rickey, whereby Mr. Moon was either liable or asked to pay for the note, and as part of the plan to settle up with Mr. Moon, I went to Mr. Rickey's office to pay off this note of \$500.00, and I told Mr. Rickey at the time that I had received the deed to the property and was

William M. Muschert—Direct.

cleaning Mr. Moon up. It was on that occasion that Mr. Rickey thoroughly understood why I was doing it.

Q. What did you tell him about the conditions?

A. That I had a trust agreement with Mr. Moon.

Q. Did you tell him what the terms of the trust agreement were?

A. Oh, yes, that 10 per cent. agreement?

Q. Yes.

10

A. Yes.

Q. What did you tell him?

A. Well, I don't remember the words, but in effect that we had this 10 per cent. agreement with Mr. Moon to take the place of the option, and on the strength of that we were setting Mr. Moon right with the world at large, paying off his debts.

Q. Did you see Mr. Rickey often about this time?

A. Every few days.

Q. Who first spoke to you about the delivery of that deed; do you recall? 20

A. Why, I think Mr. Conard spoke to me about that first.

Q. When you told Mr. Rickey that you received the deed, etc., what did he say?

A. I can't remember that he made any comment on it.

Q. How long did you continue to be in frequent communication with Mr. Rickey; how often did you see him?

A. Oh, I saw him, I should say, on an average of once—well, we will say once in two weeks, for a matter of a couple of years. 30

Q. Do you recall the formation of the Moon Clay and Kaolin Company?

A. Yes.

William M. Muschert—Direct.

Q. Did you ever have any talk with Mr. Rickey on that subject?

A. The topic came up between Mr. Rickey shortly after our tri-party agreement; we were discussing as to the advantages that would accrue to our profits out of the sale of the property if the negotiations should be handled by a corporation rather than individuals, and we all said that
 10 it would be of great value to us to have a company to fight the railroad.

Q. That was said about what time after the formation of the company?

A. I can't say whether it was before or after the actual incorporation, but it was about that time.

Q. And who took up the negotiations for the transfer of the title of the Moon lands to the company?

A. So far as I know, Mr. Conard.

Q. With whom?

A. Mr. Rickey.
 20

Q. Were you present at any of those interviews?

A. No, sir, I was not present.

Q. Were you present at any of the interviews between Mr. Moon and Mr. Conard?

A. Yes.

Q. When that was the subject of the conversation?

A. Yes.

Q. When was the bargain made for the lands with reference to the transfer of the title to the company; do you
 30 know?

A. Why, you mean when was the—

Q. When was the bargain made by Mr. Moon to transfer the title?

A. Why, it was made, I think, somewhere around May, June or July of 1915.

William M. Muschert—Direct.

Q. Did you take part in those negotiations?

A. The final negotiations, yes.

Q. What were those final negotiations; with whom were they had?

A. They were between Mr. Conard, Mr. Moon and myself; that is, the actual signing of the agreement.

Q. The signing of the agreement for the transfer of the title to the company? 10

A. Yes, sir, the agreement to take stock.

Q. Was the agreement for the transfer of the title to the company by word of mouth; was it verbal or was it a written agreement?

A. It was a written agreement whereby Mr. Moon agreed to take so many shares of stock of the Moon Company and the transfer of title to the Moon Company.

Q. And where is that agreement?

A. I think I have that agreement here; this is it (producing a paper). 20

MR. DAWES: I offer the paper in evidence.

Said agreement, being an assignment by John J. Moon to the Moon Clay and Kaolin Company, all his right, title and interest in clay pits, etc.; also the good will and trade name thereof; also assigning to William M. Muschert and J. Lefferts Conard, Certificate of Stock No. 8 of the company, and to purchase two certain shares of the capital stock of the company, and declaring null and void the declaration of trust, etc., said paper being dated August 5, 1915, is marked "Exhibit D 6." 30

Q. Then, how soon after that agreement was made was it before the title was actually transferred to the company?

William M. Muschert—Direct.

A. What is that?

A. How soon after that agreement was entered into was it that the title was actually transferred to the company?

A. About five months.

Q. During that time were there negotiations going on between Mr. Moon and the company?

A. Yes, sir.

10 Q. How often during this period of time was it, that you saw Mr. Rickey?

A. I continued to see Mr. Rickey until—well, I think somewhere around the first of the year, that is, the first of the year 1916.

Q. And what was the subject of the discussion at that time when you saw Mr. Rickey?

MR. SATTERTHWAITE: That is objected to.

20 THE COURT: Objection overruled.

A. There were usually two topics discussed at our meetings with quite some regularity; first, as to the possibility of Walter Rickey borrowing money either from me or from other people, and the other topic was, that from confidential sources that he had, he was able to assure us that the railroad was about to move in the matter, and a general discussion of our strength before the railroad, etc.

30 Q. During this period of time, was he discussing with you anything about the relations with Mr. Moon?

A. I can't answer; I can't remember.

Q. The title had not yet been transferred?

A. No.

Q. Was that subject—

A. That subject was broached.

William M. Muschert—Direct.

Q. Do you recall anything that was said at that time by Mr. Rickey, or you to him?

A. No.

Q. You do not?

A. No, I don't recall any of the exact conversation.

Q. Did Mr. Rickey know that this contract had been made?

A. Yes. 10

Q. How did he know it?

A. I don't know.

Q. How do you know he knew it?

A. From our conversations; there was allusion made to it.

Q. And the title was finally transferred you say, in February, 1916?

A. Yes.

Q. And at the time the title was transferred, you executed a bond? 20

A. Yes.

Q. To Mr. Moon?

A. Yes.

Q. Now, then, was that subject brought up with Mr. Rickey during these periods that you were talking with him?

A. No, no.

Q. And the company went into possession of this land at what time?

A. It went into possession of the land, I think it was, August 5, 1915. 30

Q. And what sort of possession did they have at that time; what did they do out there?

A. We started to mine clay on a very indefinite possession.

Q. You were in full possession?

William M. Muschert—Direct.

- A. We were in full possession.
- Q. Operating the mines?
- A. Operating the clay pits.
- Q. And you continued to operate the pits until the present time?
- A. Yes.
- 10 Q. And who has advanced the money for the operation of those pits since?
- A. I have.
- Q. And you have sold the clay?
- A. Yes, sir.
- Q. And are building up the business?
- A. Yes, sir, the business has gone away ahead of us.
- Q. Did you ever have a conversation with Mr. Rickey wherein you told him that you furnished the money and not Mr. Watson?
- A. No, sir. You mean in regard to the Watson note?
- 20 Q. Yes.
- A. No, sir.
- Q. Did you have any conversation with him after this deed was transferred?
- A. The final transfer to the company?
- Q. Yes.
- A. Yes, sir.
- Q. On what subject?
- A. He came to my office in the Broad Street Bank Building, that is, the office of the Moon Clay and Kaolin Company.
- 30 Q. When was that?
- A. That was early, well, I should say about March of this year, 1917, March or April, somewhere around there.
- Q. Any discussion of this matter?
- A. Well, he stopped in merely to tell me that he again had assurances from Philadelphia from his confidential friend

William M. Muschert—Direct.

that the railroad company was ready to move right away, and for us to get ready to meet them; and at the same time he also warned me to be very careful of Mr. Moon, as Mr. Moon was carrying a gun and was going to shoot me on sight.

Q. Have you had any other conversation with him since?

A. No.

Q. You had a conversation with him at your partnership office on Stockton Street?

10

A. Yes, sir.

Q. Do you recall when that was?

A. Only indistinctly as the latter part of 1916.

Q. That was then before the deed was delivered?

A. Oh, yes, the final deed?

Q. Yes. State what took place in that conversation.

A. Mr. Rickey wanted to first borrow some money; I was unable to lend it to him; then he wanted me to arrange to buy his share in the commissions, and I told him that I might; I was figuring all along that there was about—

20

Q. What did you tell him?

A. I told him that I would figure up with him what was coming to him, and then if we could agree on a figure, I would simply cash him up. That conversation took place at the corner of Montgomery and East State, and I was in a hurry to come over to Muschert, Reeves and Company at the time, and I told him if he would come over with me, we would figure up and see where we stood. We walked over to Stockton Street to Muschert, Reeves and Company, and in the office we sat down at the long table and started to figure—

30

Q. How did you figure?

A. I had done my figuring and he did his figuring.

Q. What were his figures?

William M. Muschert—Direct.

A. I am unable to state just how he did his figuring; I followed him to a certain extent.

Q. What was he figuring on?

A. On the \$206,000 on the 10 per cent. basis, and then he went on from that in some way to figure in the option, and it was at that point where we couldn't come in, rather, I couldn't follow his figures at that time and have not been
10 able to since.

Q. These letters offered in evidence, dated in the month of October, 1915, and running through the month of November of that same year, can you fix the conversation which you have just detailed with reference to those letters, whether the conversation was before or after those letters?

A. I think the conversation was after those letters; I can't say for sure on that point.

Q. In this letter of November 2nd, 1915, you say "If there should be any money due you from your share in the
20 option;" what did you mean by that statement; you say, "If there should be any money due you from your share in the option after my claim and the principal and interest of the Watson note are paid, you shall receive it as though there had been no change of title;" what did you mean by that phrase "the option?"

A. We had always referred to all these negotiations under the general head of option, the original bill of sale and the 10 per cent. agreement and the tri-party agreement, all being together, we referred to as the option; the option to
30 sell in some form or other, a sort of a general term.

Q. And in your letter of November 19, 1915, you say: "As for the statement sent to me for my signature, I cannot sign it, as the statements are not true. The deed and title of the property are purely a matter between Mr. Moon and

William M. Muschert—Direct—Cross.

the Moon Clay and Kaolin Company.” What did you mean by this phrase in your letter?

A. Why, Mr. Rickey wanted me to sign a statement to the effect that I held the property in trust for Mr. Rickey and Mr. Conard and myself, that he might show it to some friend of his, I believe to borrow money on. I refused to do that, because the trust that I held that property under was given to Mr. Moon.

10

Q. What did you mean to convey to him “That the title of the property is purely a question between Moon and the Moon Clay and Kaolin Company?”

A. Why, the Moon Clay and Kaolin Company was—I didn’t want to go on record as writing a letter that would give Mr. Rickey a chance to borrow money under false conditions; I didn’t want to make myself liable for something that wasn’t so.

Cross Examination by Mr. Satterthwaite:

20

Q. I hand you this paper; is that the statement which Mr. Rickey asked you to sign in November 17th?

A. Yes, sir.

Q. What was there in that that was untrue, that you objected to signing it?

A. As this statement read, “I hereby acknowledge that I hold the property conveyed to me by John J. Moon and wife, by deed dated _____ and recorded in Book

_____ page _____ in the Mercer County Clerk’s Office, in trust for the benefit of Walter H. Rickey, J. Lef-ferts Conard and myself, subject to a lien on the same in my favor, for the repayment to me of moneys advanced by me, amounting to _____ . Now, my trust agreement

30

that I had with Mr. Moon was, that I was holding the title

William M. Muschert—Cross.

to that property in trust for Mr. Moon, not for Mr. Rickey, nor Mr. Conard, nor myself.

Q. Did Mr. Rickey at this time—had Mr. Rickey seen that trust agreement?

A. I presume he did.

Q. Had he?

A. I don't know.

10 Q. Didn't you understand that Mr. Rickey meant by this acknowledgment by you, that you held whatever interest you had here over and above your obligations to Mr. Moon with regard to this property; that you held that interest in trust for yourself, Mr. Conard and Mr. Rickey; didn't you understand that that is what he meant by this?

A. No, sir, I didn't.

Q. Did you understand that you did hold it in trust for Mr. Rickey, Mr. Conard and yourself, and above your primary obligations to Mr. Moon?

20 A. No, sir.

Q. You didn't recognize as being then in existence the three-party contract of April 16, 1914?

A. Yes.

Q. Why, then, if that was in existence, wasn't Mr. Rickey interested in one-third in whatever profits you, Mr. Conard and he might make out of that property after paying Mr. Moon what was to be paid to him?

A. He was entitled to one-third of the 10 per cent.

30 Q. If your objection to this enclosure was as to the form of it, why didn't you sign a form which would be equivalent, but in the proper form, or, why didn't you in your letter to him, make an acknowledgment according to the actual fact?

A. Because I believed he was trying to get a statement from me that would bolster his credit so he could borrow money on what was not so.

William M. Muschert—Cross.

Q. There was nothing in his letter of November 17 about that, was there?

A. I don't know what his letter of November 17th was; I can't say that he wrote me in regard to that.

Q. The letter that enclosed this paper I refer to, he didn't state to you in any way that he wanted this signed for the purpose you speak of, did he?

A. For the purpose of borrowing money? 10

Q. Yes.

A. In one of his previous letters I think he did; not necessarily this particular draft.

Q. In this letter of yours of November 19, did you intend that letter as a repudiation of any right or interest that Mr. Rickey had in the whole matter? To put the record straight. Mr. Dawes calls my attention to the fact that that statement was in the letter of November 5, not in that of November 17, and in that letter he does state that the letter of November 2nd was not quite full enough to satisfy the parties. 20

Q. Mr. Muschert, then, did you or did you not mean by that letter of November 19 which I have just shown you, to repudiate Mr. Rickey's having any further interest in the matter?

A. No, sir.

Q. You still recognized that he was entitled to one-third interest in whatever profits might be made?

A. Why, yes.

BY THE COURT:

30

Q. And you do now?

A. One-third of the commissions, yes, sir.

Q. What do you mean?

A. The commissions on the sale of the property.

William M. Muschert—Cross.

Q. Which sale of the property?

A. Well, in case it was sold to the Pennsylvania Railroad, or the sale to the Moon Company, if he wants to consider that as a sale.

Q. Mr. Moon was to pay that commission, wasn't he?

A. Mr. Moon originally was.

10 Q. How is the Moon Company obligated by anything that you or it has done?

A. I don't know whether the Moon Company is obligated legally, but the idea was, that when the Moon Company took title to the property from Mr. Moon, that this was to be substituted in the payment of the 10 per cent. commission.

Q. Do you mean this 10 per cent. is to be estimated on the price which the company paid Mr. Moon?

20 A. Yes.

Q. Did Mr. Rickey make his choice?

A. I didn't hear him.

Q. Just explain to us your understanding of Mr. Rickey's present standing in the matter.

30 A. My understanding of Mr. Rickey's present standing is, that he will wait until the sale to the Pennsylvania Railroad, and in case the purchase price paid by the railroad, is greater than the purchase price that was paid by the company to Mr. Moon, then he will get one-third of the 10 per cent. commission, figured on the price paid by the Pennsylvania Railroad; if, however, the price paid by the Pennsylvania Railroad is less than that paid by the Moon Company, then the 10 per cent. is to be based on the \$206,000 which has been paid by the Moon Company to Mr. Moon.

William M. Muschert—Cross.

BY THE COURT:

Q. Then you didn't recognize as existing the first option agreement?

A. The conditional bill of sale?

Q. Whatever you call it.

A. No, that was substituted by the 10 per cent. agreement.

10

Q. The land that the Pennsylvania Railroad Company would take, if they should come there, would not be all the land, would it?

A. No, sir.

Q. If the railroad company should take the lands which would pay the Moon Clay and Kaolin Company, the present owner, as much, or nearly as much, or more than they paid for the whole land, it would still leave the Clay Company the owner of the land?

A. Yes.

20

Q. What would be Mr. Rickey's interest there?

A. I don't think Mr. Rickey ever had any interest in the lands that were not to be taken by the Pennsylvania Railroad Company.

Q. This land, as a matter of fact, is valuable clay land, isn't it?

A. Very valuable.

Q. Do you know whether or not it has been estimated that Mr. Moon was getting out of it in his limited sales, at the rate of about \$24,000 an acre?

30

A. I never heard Mr. Moon figure that.

Q. You never understood that?

A. No.

Q. You considered the land worth more than \$206,000 for development as clay land, didn't you?

William M. Muschert—Cross.

A. Yes, sir.

Q. And anything which would be made out of it either by selling to the railroad or as clay lands, would be part of the profits growing out of the deal?

A. No, sir.

Q. Why not?

A. The profits growing out of the deal were simply in
10 the sale to the Pennsylvania Railroad Company.

Q. Where would Mr. Rickey have any interest in the sale to the Clay Company, then?

A. That was a sale of the land that gave him the choice whether he would consider that a sale in the sense of a sale to the railroad company or not.

Q. What did he say?

A. You will have to ask Mr. Conard about that; I didn't have the conversation with him.

Q. You say you told Mr. Rickey the day that declaration
20 of trust was signed, you received a deed for the property?

A. Yes, sir.

Q. That very day?

A. Yes.

Q. How came you to tell him?

A. Because I was paying a debt of Mr. Moon's.

Q. How came you to advance the money for that?

A. That Mr. Moon might be financially cleared of debt, and prevent the possibility of creditors of Mr. Moon suing him or putting him in an unenviable position before the Penn-
30 sylvania Railroad.

Q. You were interested, then, in financing Mr. Moon in order to keep this land from any obligation?

A. Rumor, yes.

William M. Muschert—Cross.

Q. What would Mr. Rickey have to do with Moon's debt?

A. I don't know; he seemed to be very much interested in—

BY THE COURT:

Q. What debt were you paying at the time?

A. A note of Mr. Moon's, that was held by a friend of Mr. Rickey's. 10

Q. Mr. Rickey was handling that debt?

A. Mr. Rickey was handling that debt.

Q. You say Mr. Rickey made no comment when you told him you received the deed?

A. I don't remember any comment.

Q. He didn't ask you where he came in, or anything of that sort?

A. No. 20

Q. Did you have a conversation with him on the street in which he spoke about this conveyance to you or to the corporation?

A. Yes, sir.

Q. In front of the Trust Company?

A. Yes.

Q. Was that before or after this?

A. That was after this.

Q. Did he ask you then about where he came in?

A. Yes.

Q. What was the first thing he said in that conversation? 30

A. He said to me, he said, "The property having been transferred to you, where does that leave me, where does that leave my interest?"

William M. Muschert—Cross.

BY THE COURT:

Q. Did he mean you personally, or the Moon Company?

A. Me.

Q. What did you say?

10 A. That that would make no difference whatever in his rights.

Q. Under the option?

A. Under our agreement.

Q. You refer to which agreement?

A. To the tri-party agreement.

Q. And did he seem satisfied?

A. He made no further comment on it.

Q. When he first opened the conversation, did he express surprise that the property had been conveyed to you?

A. No, sir.

20 Q. But the day before, when you told him, he didn't ask about his interest?

A. He acted as if he was thoroughly familiar with the matter.

Q. But you had just told him?

A. He didn't take it as if it was news.

Q. That was the same day you got the deed?

A. Yes.

Q. He couldn't be familiar with it; you had not told him, and when you told him he didn't ask you a word?

30 A. No.

Q. How many days afterwards was it that he met you in front of the Trust Company when he asked you how the deed left him?

A. I don't know; it might have been one month or six months; I have no way of placing that date.

William M. Muschert—Cross.

Q. After that, did you have a conversation with him about the conveyance to the company?

A. The conversation was before that.

Q. Well—

A. Oh, no, I don't remember any such conversation.

Q. You say that you were meeting him quite frequently during the year 1915, I think it was?

A. Yes, sir. 10

Q. Didn't you ever have any conversation with him about the transfer of the property to this corporation?

A. Yes, but I can't give the conversation, but I don't remember what it was.

Q. Did he make any complaint about it as to the matter of affecting his interest?

A. No, sir.

Q. Didn't ask you what his rights would be?

A. No, sir, not since that conversation in front of the Trust Company. 20

Q. When was this matter of forming the corporation first brought up?

A. Very shortly after the signing of the tri-party agreement.

Q. Who first suggested it?

A. The first to suggest it to me was Mr. Conard.

Q. Did you ever hear Mr. Rickey suggest it?

A. I heard him conversing upon it.

Q. Before it was formed?

A. I can't say whether it was before or after. 30

Q. To the best of your recollection, you never heard him speak about it before the corporation was actually formed?

A. I can't say whether it was before or after.

William M. Muschert—Cross.

Q. Now, after this corporation was formed, did Mr. Rickey tell you that he had heard information that the Pennsylvania Railroad Company was soon to proceed to take some of this land?

A. Yes, sir.

Q. And did he then say anything about what his share would be?

10 A. No, sir.

Q. Who determined the account of capitalization of the corporation?

A. Mr. Conard, as far as I know.

Q. Did Mr. Rickey have anything to do with that?

A. Not with me.

Q. Did Mr. Rickey have anything to do with the arrangement of the number of shares to be issued to Mr. Moon for the land finally?

A. I know nothing about that.

20 Q. You never heard that?

A. No.

Q. So far as you know, he had nothing to do with it?

A. Only from hearsay; I never heard him say anything about it.

Q. So far as you know, he had nothing to do with it?

A. I guess not.

Q. Did you say it was in March or April last that he came in the office of the Broad Street Bank Building, that he had news of the company's early action?

30 A. It must have been in May.

Q. What further conversation did you have then about any distribution of profits?

A. None.

Q. Did you recognize then he would be entitled to his share?

William M. Muschert—Cross.

A. Yes, sir, if the amount brought by the Railroad Company was greater than \$206,000.

Q. He agreed to that?

A. Yes, sir.

Q. What did he say?

A. That wasn't mentioned at that time.

Q. When you had this interview with him on Stockton Street and went to your office in the Muschert-Reeves Building, just what did Mr. Rickey say about his commissions, and the basis for them? 10

A. Well—the whole conversation leading up to that figuring?

Q. Yes.

A. Well, he had to have money; I got that right straight along.

Q. I understand that. Tell us what his idea of his rights was.

A. He asked me if I would cash him out. 20

Q. Did you understand that he would be willing to sell for a little less than you might think it was worth?

A. I could only follow Mr. Rickey's figuring so far; beyond that I was lost.

Q. I ask you whether Mr. Rickey, as an inducement to you to buy him out, would sell for less than he was entitled to?

A. There was nothing said about how much I should pay him; that was left to the figuring out of Mr. Rickey's share, and then what price would be agreed upon as making it worth while for me to take it over. 30

Q. You didn't get the amount of his share figured out?

A. No.

Q. You don't know just upon what basis he did figure?

William M. Muschert—Cross.

A. No, sir, he told me at the end of the conversation that he expected to get \$3,000, and when I figured it out I made it about \$400.00 coming to him, as I recollect.

Q. You recognized as still in force the agreement of April 16, 1914, as to essential conditions?

A. What agreement is that?

Q. The three-party agreement?

10 A. Yes.

Q. But you say that the agreement of 10 per cent. with Mr. Moon was by common consent substituted in place of that part of the option referred to in the three-party agreement, which provided that you should have all above \$6,000, or \$1,000 an acre, respectively?

A. My understanding was, that the 10 per cent. was to substitute the original bill of sale absolutely.

Q. But this three-party agreement stood, then, if you incorporate the 10 per cent. agreement in it the place of the option?

A. Yes.

Q. The \$3,000 loaned by Mr. Watson to Mr. Rickey, was that advanced by Mr. Watson at your request?

A. On my recommendation.

Q. And you agreed to stand good for it?

A. Mr. Watson asked my opinion of it.

Q. Answer the question.

A. Yes.

Q. In this three-party agreement, you agreed, did you not, that that \$3,000 should be considered part of the expenses of the transaction, and would be deducted before—

30 A. That had nothing to do with the expenses, that was a personal liability of Mr. Rickey's.

William M. Muschert—Cross.

John J. Moon—Direct.

Q. By that agreement, you were to advance \$5,000 to Mr. Conard?

A. Yes, sir.

Q. And the agreement recited that there had been \$3,000 advanced to Mr. Rickey through Mr. Watson?

A. Yes.

Q. And it also provided that there should be an additional \$2,000. advanced, but only on the consent of all three of the parties? 10

A. No, sir.

Q. Was that other \$2,000 ever advanced?

A. No, sir.

Q. So that only the \$8,000 was advanced?

A. There was only \$5,000 advanced for the promotion of this agreement.

BY THE COURT:

20

Q. That was expenses?

A. That was expenses.

Q. Wasn't it agreed that the \$3,000 which was advanced by Mr. Watson to Mr. Rickey, and on which you became liable, together with \$5,000 advanced to Mr. Conard, were to be regarded as expenses in this enterprise, and be deducted and reimbursed—

A. It was not.

JOHN J. MOON, a witness produced on behalf of the defendants, being duly sworn, testified as follows: 30

Direct Examination by Mr. Dawes:

Q. Mr. Moon, how long have you known Mr. Rickey?

A. 15 of 20 years, I believe.

John J. Moon—Direct.

Q. And in the year 1913, what position or relation did he sustain towards you?

A. Well, he was my confidential friend; he done a little business.

Q. Did he see you or you see him about the prospective condemnation of your clay lands?

A. Certainly did.

10 Q. Just tell the circumstances under which you saw him and this deal was made.

A. In the Victor Humbrecht case against the railroad company I was a witness for him, and I thought he got rather a raw deal, and they condemned my land, so I went and seen Mr. Rickey and we talked the matter over, and Mr. Rickey advised me it would be a good thing if we should place a value on the land by giving him an option.

Q. For what purpose?

A. For placing a value of the amount.

20 Q. How did you come to fix on the price which you did for the land?

A. Well, by fixing those prices we thought that would enable us to handle the law suit better.

Q. And then this agreement was drawn at Mr. Conard's office?

A. Yes, sir.

Q. Did you receive anything for the signing of that agreement?

A. No, sir.

30 Q. Mr. Rickey says he paid you one dollar?

A. He did not.

Q. And after that, you extended the time of this agreement?

A. Yes, sir.

John J. Moon—Direct.

Q. Later on a deed was made by you to Mr. Muschert, which deed I think is dated February 15, 1915, and Mr. Muschert gave to you a writing setting forth the terms of the trust—did you have any talks or conversation with Mr. Rickey on that matter?

A. I did.

Q. When did you have those conversations?

A. I couldn't just give the dates.

10

BY THE COURT:

Q. With reference to the time you got the trust deed?

A. I done really nothing in the case without his advice; he was adviser.

Q. Did Mr. Rickey know before that this deed was to be delivered?

A. Yes, sir.

20

THE COURT: The deed to Mr. Muschert?

MR. DAWES: Yes, sir.

BY THE COURT:

Q. Did he know that was to be done?

A. Yes, sir.

Q. Will you state how you came to sign an agreement for 10 per cent.; how did you come to sign the 10 per cent. agreement? 30

A. The thing was talked over together with us.

Q. Who talked it over?

John J. Moon—Direct.

A. Conard, Rickey, Muschert and myself; but it was talked to Rickey first, that it would be an excellent thing to put this thing on a percentage basis, and after we talked on it it was agreed, or I agreed that I would give 10 per cent., that they was to pay all the law fees, and the 10 per cent. was to be divided up into three parts.

10 Q. That agreement is the one that has been offered in evidence?

A. Yes, sir.

Q. Now, after this deed to Muschert was delivered, were moneys advanced to you?

A. Yes, sir.

Q. Did any of those moneys advanced to you have any relation to Mr. Rickey?

A. Yes.

Q. What?

20 A. I paid Rickey's note in the bank, a \$1500.00 note, but it was got down at that time to \$780.00; and another note I paid there, that we were both jointly on. It was a \$300.00 note, and had been \$50.00 paid on it; that's charged up to me in the bank and taken out of my account.

Q. Had these matters been the subject of conversation between Rickey and you?

A. Yes, sir.

Q. Before or after the deed was delivered?

A. Before.

30 Q. Later on, Mr. Moon, you formed, or were one of the incorporators of the Moon Clay and Kaolin Company?

A. Yes.

Q. What part, if any, did Mr. Rickey play in the formation of that company?

A. Well, it was formed really at his suggestion; we had private talks, then we met in Mr. Conard's office.

John J. Moon—Direct.

Q. And later on was there any talk about taking over your clay lands?

A. Yes, sir.

Q. And did you deal directly with the Moon Clay Company for the sale of those lands?

A. Not first, secondly.

BY THE COURT:

10

Q. Who at first?

A. Mr. Rickey.

Q. And then afterwards you dealt with the Clay Company?

A. Yes.

Q. And you agreed, along in August, 1915, to convey those lands to the Moon Clay Company?

A. Yes, sir, about that time.

Q. For certain stock in the company?

20

A. Yes, sir.

Q. Was that stock delivered to you?

A. Yes.

Q. And afterwards transferred to Mr. Muschert?

A. Yes, sir.

Q. And Mr. Conard?

A. Yes, sir.

Q. And then finally a deed was delivered?

A. Yes.

Q. What were your relations with Mr. Rickey during— 30

A. That deed wasn't delivered for some time after.

Q. During the time between the delivery of the deed and the formation of the company were there any conferences with Mr. Rickey?

A. Yes, sir.

Q. How often did you see him during that period?

John J. Moon—Direct.

A. Oh, every few days.

Q. Where would you meet him?

A. On the streets, and sometimes at his office.

Q. What were you talking about those times you saw him?

A. A clay proposition.

10 Q. Later on you transferred a share of stock, did you not?

A. Yes, sir.

Q. To Mr. Rickey?

A. Yes.

Q. Do you recall going to Judge Marshall in the summer of 1916?

A. Yes, I couldn't give you the dates; I never put anything down.

Q. Who went with you?

A. Mr. Rickey.

20 Q. For what purpose did you go to Judge Marshall's?

A. For the purpose of getting this share of stock, as he said he didn't care anything about his own affairs, but he wanted to see me get my money.

Q. How much money was due you at that time?

A. He claimed that the whole thing was due.

BY THE COURT:

Q. How much?

A. At that time \$5,000, I think.

30 Q. Did you come there for the purpose of getting the \$5,000 of the whole forty-five—

A. No, for the purpose really of getting the whole \$40,000; he directed the whole thing.

John J. Moon—Direct.

Q. Did you talk up the matter with Judge Marshall with that end in view?

A. Yes.

Q. And how many times did you see Mr. Rickey on that subject during the whole summer of 1916?

A. I don't know; I couldn't count the times; numerous times.

Q. What was he advising you to do? 10

A. To go on with this suit.

Q. The suit what for?

A. To get the money.

Q. For the sale of the lands?

A. No.

Q. For the stock?

A. For the cash.

Q. For the stock?

A. Yes.

20

BY THE COURT:

Q. You mean the money under your \$55,000 bond?

A. Yes, the money under my regular bond.

Q. At how many times did you go with him to Judge Marshall's office, that you can remember?

A. I wouldn't say whether it was three or four times, three times anyway.

Q. And that was the object of your going there? 30

A. Yes.

Q. Did Mr. Rickey talk to Judge Marshall on the subject?

A. Yes.

John J. Moon—Direct—Cross.

Q. What did he say to Judge Marshall about bringing suit to collect the money on the bond, or for Judge Marshall to get the money on the bond; what did Mr. Rickey say if you can recall now?

A. I don't just remember, but he said that he wasn't after his own interests; that he went for my express purpose to have access to the books.

10

BY THE COURT:

Q. Did Mr. Rickey know that you were about to sell your land to this company for \$205,000?

A. Yes, sir.

Q. Had you talked that over with him?

A. Yes, sir; he got it really from two sources, but what I knew Ed. Risdon has, and they were very intimate and working together all the time.

Q. Who is he?

20

A. He is a machinist; he used to keep a restaurant in front of the Pennsylvania depot.

Cross Examination by Mr. Satterthwaite:

Q. Did you speak to Mr. Rickey yourself, Mr. Moon, about selling the land to the company?

A. Individually, yes.

Q. Before you sold it?

A. Yes, sir.

30 Q. This note you speak of that was reduced down to \$780.00 you indorsed for Mr. Rickey?

A. It was in trust for the Rickey-Swann Company.

Q. At his request?

A. Yes, sir, I looked to him for payment.

Q. Was he the one who reduced it to \$780.00?

A. I think it was changed over to him.

John J Moon—Cross.

- Q. Who cut it down?
- A. He cut it down.
- Q. He assumed the note?
- A. Yes, sir.
- Q. Your land there is valuable clay land, is it not?
- A. Yes.
- Q. And you have placed a valuation on it as high as \$24,000 an acre? **10**
- A. I don't just remember what I have done.
- Q. In a letter to the President of the Mechanics National Bank; do you recall that?
- A. Yes, sir.
- Q. Do you remember placing a valuation on the land there and what you were getting out of it?
- A. Yes.
- Q. Do you remember whether you showed that it netted you about \$24,000 an acre?
- A. I didn't say all of it, only a portion of it. **20**
- Q. There is considerable of it that is valuable clay land, is there not?
- A. Well, of course, I made the deal because I seen the railroad company was going to take it all, and I was really discouraged, and I didn't want to fight the company myself; I saw the raw deal Humbrecht got, and I didn't want to be up against what he was up against.
- Q. You mean they were going to take all the most valuable part?
- A. Yes. **30**
- Q. Do you think that the price named in the option was excessive, \$6,000 for the best clay land, and \$1,000 for the rest; do you think that was more than the land was worth?
- A. Well, you can hardly judge; clay lands are difficult to judge because you really got to prospect every ten feet to

John J Moon—Cross.

know. From my viewpoint, I think that is a good, fair value.

Q. Mr. Rickey was not to get anything out of it unless he got more than for it, was he?

A. Out of the land?

Q. Yes, according to the option.

A. He was to get his the way I had in mind when the
10 deal was made, he was to get his one-third of 10 per cent. out of the amount of land that the railroad company took; of course, I expected to go on with my operations at that time after the deal had been made.

Q. There was nothing said in that option about 10 per cent.; you agreed in that option to let him have it for \$6,000 and \$1,000; now, did you think that that was more than the land was worth to you?

A. I think it was a good, round price.

Q. Did you think it possible for Mr. Rickey to get more
20 than that for it?

A. No.

BY THE COURT:

Q. Where was Mr. Rickey's profits to come from?

A. In the 10 per cent.

Q. 10 per cent. hadn't been spoken of at that time?

A. Oh, in the option I give him?

30 Q. Yes.

A. This option was given to place a value on the ground.

Q. Wasn't he to make sale of the lands under that option if he could?

John J Moon—Cross.

A. No, if was taken to the company afterwards.

Q. No, but at the time it was signed?

A. No.

BY THE COURT:

Q. How would that fix a price for the company?

A. It wouldn't fix what they were going to give,
but it would naturally look good.

10

Q. How look good to the railroad company?

A. That the land was valuable.

Q. How did you expect it to look good?

A. I mean, it looked good—

Q. It looked good on paper?

A. Yes, sir.

Q. I just show you this letter, Mr. Moon, a letter you wrote to Governor Stokes; I show that to you to refresh your memory.

20

A. Well, that was all done at the suggestion of that fellow (Mr. Rickey).

Q. Was it true what you said in that statement?

A. Of course, there's a little guess work about it.

Q. Here you state this: "I am able to dig 40 pits per acre, each pit to date averaging 800 tons, making 32,000 tons per acre, which, at a profit of 75c. per ton, nets \$24,000.00 per acre. Not only am I making this amount per acre, but I have rejected an offer of 40c. per ton royalty and have now an offer of 25c. per ton on all clay dug without touching it myself which means \$8,000.00 per acre royalties."

30

Was that statement true?

A. I wouldn't like to say it was perfectly true. It was done to get that man's notes through the bank.

Q. Whose notes?

A. Rickey's.

John J. Moon—Cross.
Walter H. Rickey—Direct.

- Q. Was it three-quarters true?
 A. I presume three-quarters of it is true.
 Q. What note was going through the bank then?
 A. That \$500.00 note.

10 WALTER H. RICKEY, the above-named complainant, being recalled, testified in rebuttal, as follows:

Direct Examination by Mr. Satterthwaite:

- Q. Mr. Rickey, did Mr. Conard loan you \$1750, as was testified here yesterday?
 A. No, sir, that was to come to me out of the amount Mr. Muschert paid.
 Q. Well, he gave you \$1750.00?
 A. Yes.
 20 Q. He testified that you paid him \$300.00 from the \$3,000 from Mr. Watson?
 A. I did, sir.
 Q. Did you pay it to him?
 A. I loaned it to him.
 Q. You loaned it to him?
 A. Yes.
 Q. Did you have a settlement with him by which he was paid off for his interest for services in regard to that option?
 A. I did not, sir.
 30 Q. Did you suggest the incorporation of the Moon Clay and Kaolin Company?
 A. I emphatically did not, sir.
 Q. Did Mr. Muschert, on the day that the \$500.00 note was paid off, did he tell you that he had taken a deed from Mr. Moon at that time?

Walter H. Rickey—Direct.

A. No, he did not.

Q. Did you negotiate the sale of Mr. Moon's stock to the company?

A. I did not, sir; I knew nothing of him.

Q. Did you agree with Mr. Conard or Mr. Muschert, to substitute the 10 per cent. agreement for the option?

A. I did not, sir.

10

MR. DAWES: No questions.

I offer in evidence this assignment.

Said assignment of one-tenth of the profits made by Walter H. Rickey and Carl Rickey to William M. Muschert, and dated February 26, 1914, is marked "Exhibit D 7."

Adjourned to Wednesday, November 28, 1917.

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J. Lefferts Conard—Direct.

Docket 43-576.

IN CHANCERY OF NEW JERSEY

	<i>Between</i>		}	
	Walter H. Rickey,	<i>Complainant,</i>		On Bill, &c.
10	<i>and</i>		}	
	The Moon Clay and Kaolin			Testimony.
	Company, et al.,	<i>Defendants.</i>		

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Wednesday, the twenty-eighth day of November, 1917, at 4 p. m.,

Before HON. JOHN H. BACKES, Vice-Chancellor.

20

Same appearances as before noted.

J. LEFFERTS CONARD, being recalled on behalf of the defendants, testified as follows:

Direct Examination by Mr. Dawes:

Q. Mr. Conard, at the time these two checks were given to you by Mr. Rickey, what was said?

30 A. I had been counsel for Rickey, and Carl, and I had put the company through bankruptcy, that is, this Rickey-Swann Company; Rickey was having some difficulty with two or three special creditors; one of them was a Professor Rich, of the Lawrenceville Schools, and another by the name of Wirtschafter here in town; and his concern, that is, the

J. Lefferts Conard—Direct.

Steamship concern as I understood it. He first borrowed from me the \$1,000, with the understanding that he would need right at that time about \$1200, he thought it would figure up, to fix up his accounts with the Steamship Company. I let him have \$1,000, and he came back and said it would amount to more than two and felt very anxious to fix that thing up and get it straightened out, and he asked me whether I couldn't get a note discounted. He mentioned Mr. 10
 Gray, and I sent for Mr. Gray and asked him to come down and see me. Mr. Gray was then President of the Pennington Bank; he thought he could get a note discounted; so Rickey made a note out for \$2500.00; I indorsed it, and Mr. Gray took it and he thought he would get it discounted; that he couldn't do, so we couldn't get the money that way, and this same day the auditor of the Steamship Company was in Mr. Rickey's office, he told me, and that the matter would have to be adjusted or there would be trouble about it; so I gave him on the day he made out the note and Mr. 20
 Gray took it, I gave him a check for the proceeds of the note, so he could show the auditor when he went back to the office that he would have the money by, I think, Monday, and Mr. Gray said the money would be put on; then we got word he wouldn't put that note on, and then for several days, I think you will find, possibly a week or so, he was trying to get the money wherever he could get it; he was unsuccessful. This was running right along at the same time as the main deal; I told him, I said "You get that commission agreement signed to substitute for the option, and I'll help 30
 you; I'll give you what I can spare; and he did in the meantime get this commission agreement signed; and then he wanted me to let him have another \$1,000, and I couldn't spare it. I offered to let him have \$500.00 out of my own account, and finally I did send to him that \$750.00 he figured he would have to have at that time to adjust the matter with the company. Then I wrote a check for \$750.00 and gave

J. Lefferts Conard—Direct.

that to him, and he was to bring the other check for the proceeds of the note back later; it was handed to me by Mr. Blackman, his lawyer.

Q. What was said at the time this money was given, about how it was to be paid?

A. It was understood between us that I should get the money from Will—

10 Q. Who is Will?

A. Muschert.

Q. Go on.

A. Get the money from Will out of any money that was due him.

Q. Have you those checks with you?

A. Yes, sir (producing them).

Q. What is this?

A. This is the check I gave him for the proceeds of the note, and I afterwards give him this check on the Pennington Bank; this is that first \$1,000.

20 Q. I call your attention to the check dated April 18, 1914, "Exhibit D 3," and ask you why the payee of that check was "Rickey, Agent?"

A. He wanted to deposit this in his company's account, and that was made that way at his request, "W. H. Rickey, Agent."

Q. I show you the second check, and you say that this money was loaned at about the time that you were to get the money from Mr. Gray, if you could?

30 A. When the note failed to be discounted, I helped him out with all I could spare.

Q. You helped him out?

A. Yes.

Q. As a fact, Mr. Conard, was there any agreement between you and Rickey; was there any agreement or under-

J. Lefferts Conard—Direct—Cross.

standing between you and Rickey that this \$1750.00 was a gift?

A. No.

Q. Was there any understanding or secret agreement between you and him, that this \$1750.00 was to be something coming to him out of the \$5,000, his share of the \$5,000?

A. No.

10

Q. Was anything ever said between you and him about this being a gift?

A. No, no such language was ever used.

Cross Examination by Mr. Satterthwaite:

Q. Mr. Conard, how did Mr. Muschert pay you the \$5,000, at one time or at different times?

A. \$2,000 the day the contract was signed.

Q. How does that \$2,000 correspond in date with the date of the \$1,000 check you paid Mr. Rickey, do you know? 20

A. Very soon after, I gave Rickey the check for \$1,000 right after the deal was made.

BY THE COURT:

Q. Right after you got the \$2,000 from Muschert?

A. Yes, sir.

Q. What was the next payment Mr. Muschert made, you say that \$1500? 30

A. Mr. Muschert could tell you better than I could; I don't remember how those payments were made exactly.

J. Lefferts Conard—Cross.

BY THE COURT:

Q. Were they made in cash or by checks?

A. Checks, I think, all of them.

Q. Wasn't it \$1500 or something?

A. I think the second payment was another \$1,000.

Q. How soon after that was the next one, \$500.00?

10 A. No, I think all those checks were \$1,000 checks, except the last, and then Mr. Muschert and I were dealing with some property in East Trenton Heights; it's about that time.

Q. How soon after Mr. Muschert made the second or third payments was it that you gave the check for \$750.00 to Mr. Rickey?

A. I don't remember that.

Q. Was it shortly after?

20 A. The next money I gave Rickey was after I couldn't get the note through, and it was after the commission agreement had been brought in and signed; I know I didn't let him have any money until he brought it in.

Q. You testified the other day, that after Mr. Rickey got this option, there was an understanding between you and him that you would help him through and go one-half on any profits?

A. That was prior to the time he signed it over to Watson.

Q. It was before that?

A. Yes, that was in writing.

30 Q. You say it was in writing?

A. Yes, a memorandum in writing that he gave me.

Q. Have you got the writing?

A. No, that was destroyed at the time we settled; he finally gave me \$300.00 and settled up.

J. Lefferts Conard—Cross.

Q. You also testified, as I recall, that subsequently you said to him, that if you were to go on with this, you wanted more money advanced, or you would not go on with it, and then it was that this scheme was devised of trying to get some money from Mr. Muschert upon the assigning to him of the one-third interest?

A. Yes, sir.

Q. Did you and Mr. Rickey talk over how much you wanted to raise from Mr. Muschert, if he would advance something, in addition to the \$3,000 he had advanced to Mr. Watson for the assignment of one-third of the profits? 10

A. No.

Q. Wasn't there some talk between you and Mr. Rickey, that if this arrangement was made with Mr. Muschert, that he should be urged, if he could be induced to raise \$5,000, and that each of you would have one-half of that between you?

A. No, nothing of that kind. 20

Q. You drew the agreement yourself?

A. Yes, sir.

Q. Do you know how the second check came to be exactly \$750.00?

A. He said it would take \$1,000, and I wanted to let him have \$500.00 of it. We talked there for an hour and a half, and he tried hard to get me to make that \$1,000, and I said "You will have to some part of it yourself, Rickey; I can't take it all;" and then I finally gave him \$750.00, and then he subsequently got the difference from another man to square up the company's account. 30

Q. You took no note or any obligation this time at all?

A. The only note I had was that one I tried to get discounted.

Q. You took no note for this money?

J. Lefferts Conard—Cross—Re-Direct.

A. No; it was understood I would get the money from Will out of any money he had; that was the only chance; I knew all his private circumstances.

Q. You took no memorandum?

A. No, I had the check.

BY THE COURT:

10

Q. You took nothing in writing to show that these two sums were loaned to you by Rickey and were not a gift?

A. No.

Q. Why didn't you?

A. I was his counsel, and our relations were so friendly.

Q. Why didn't you take it?

A. It didn't occur to me; I was trying my best to get him straightened out; I had no idea he would dispute it.

20

Q. When did you try to get the \$500.00 from Mr. Gray that you spoke of the other day?

A. \$2500.00.

Re-Direct Examination by Mr. Dawes:

Q. Was this the only Ollie Gray transaction there was?

A. Yes, sir, the note was returned to Rickey; that will show \$2500.00.

30

BY THE COURT:

Q. As I recall the testimony, you spoke of a \$500.00 note transaction with Oliver Gray? If \$500.00 was mentioned as being the amount,

J. Lefferts Conard—Re-Direct—Re-Cross.

it was a mistake and was intended to be \$2500.00,
represented by the check before you?

A. Yes, that was the only transaction we had.

Q. You say there was an agreement in writing for one-half apportionment; when was that agreement made?

A. After the option was drawn by me for Rickey and Moon. 10

Q. When was it destroyed?

A. The day he borrowed the money from Watson.

BY THE COURT:

Q. And paid you the \$300.00?

A. Yes.

Re-Cross Examination by Mr. Satterthwaite:

Q. You had two different meetings with Col. Van Cleef, 20
representing Mr. Rickey, to endeavor to see whether this
matter might be adjusted, sometime in October last?

A. Yes.

Q. At that time you talked over the various phases of this
transaction, you talked over pro and con the various phases
of this transaction?

A. I talked with the both of them in Van Cleef's office.

Q. During that time did you say anything to Col. Van
Cleef or Mr. Rickey, about having loaned any money to Mr.
Rickey? 30

A. I used the term that he had had the money, that he
had been paid possibly.

Q. Did you say anything about having loaned him the
money?

J. Lefferts Conard—Re-Cross—Re-Direct.

A. I don't think the word "loan" was mentioned that I know of, I don't recall that it was.

Q. Did you say anything to him about having advanced money to Mr. Rickey, that you had and wanted the Colonel to give you credit for, or wanted Rickey to give you credit for?

10 A. No, he had not—
Q. Was it spoken of?

A. No.

Q. You were met there for the purpose of seeing whether or not you could agree on an amount to settle this case?

A. No.

Q. Didn't Col. Van Cleef talk to you about that?

A. Later we did, but that was not the object of the meeting.

20 Q. When you got there, you discussed that question whether there could be an amount arrived at that would settle the case?

A. Yes, as I was leaving.

Q. Did you say anything to Colonel or Mr. Rickey about having loaned or advanced \$1750.00, which should be credited?

A. No.

Re-Direct Examination by Mr. Dawes:

Q. Did you go over any figures at that time?

30 A. Yes. Rickey figured up the amount of commissions; Colonel went in the other room and said, "I'll leave you two together;" and Rickey figured up there the commissions, and then he wanted to figure in the option; there's what the dispute was about.

J. Lefferts Conard—Re-Direct.

Walter H. Rickey—Direct.

Q Were the creditors on the commissions given; did you go over the items of the credits?

A. He figured up himself there at the desk on a slip of paper.

Q. What was the amount then figured up?

A. \$420.00, besides his rights in the option, and that he computed might be as high as \$40,000. Then I said "I'm through;" then I told Colonel "If you can settle this case for \$1,000, I'll pay it myself;" that was all that was said about settling. 10

Q. The answer filed in this case covering the \$1750.00?

A. Yes.

Q. The answer says he has had his full commissions and this \$1750.00 was what formed part of the basis of that matter?

A. Yes.

Q. Who figured \$400.00 balance? 20

A. Rickey.

WALTER H. RICKEY, the above-named complainant, being recalled, testified as follows:

Direct Examination by Mr. Satterthwaite:

Q. Mr. Rickey, did you at a meeting with Mr. Conard, figure out the amount of commissions at \$400.00, or any such sum? 30

A. I did not, sir.

Q. Mr. Rickey, at the time that this \$1,000 check was given to you by Mr. Conard, was anything said by you to Mr. Conard, or by him to you, in regard to paying some particular creditors of yours?

A. No, sir.

Walter H. Rickey—Direct.

Q. What, if anything, had that payment to do with the attempt to get the note discounted at the Pennington Bank by Mr. Gray?

A. None whatever.

Q. You did ask him to get a note discounted?

A. I did, sir.

Q. Was that before or after you got this \$1,000?

10 A. If I remember, it was before.

Q. Now, did the payment of the \$750.00 have anything to do with that?

A. It did not, sir.

Q. How came those two sums to be paid to you?

A. As per the agreement between Mr. Conard and I for the division of the \$5,000.00 which was to be received from Mr. Muschert. There was an understanding between Mr. Conard and I that the \$5,000.00 was to be divided between us. The first of the \$5,000.00 was paid on receipt by Mr. 20 Conard of Mr. Muschert's check, \$2,000.00. Mr. Conard then advised he had received \$1,500.00 from Mr. Muschert, and the \$750.00 was part of that. The \$1,750.00 was part of the \$2,500.00 which I was to receive of the \$5,000.00.

Q. Did you ever ask for any more?

A. I did.

Q. How much more did you ask for?

A. For the balance, sir.

Q. When did you do that?

30 A. I asked him sometime after that if Mr. Muschert had paid the balance and he advised me that he had not. He always led me to understand that he had not until I had been advised by Mr. Muschert that he had paid the full amount. Mr. Conard led me to understand that the other balance had not been paid.

Walter H. Rickey—Direct—Cross.

Q. In one of the letters offered in evidence the other day you asked Mr. Muschert to kindly inform you how much he had advanced to Mr. Conard?

A. Yes, sir.

Q. What had that reference to?

A. I asked him that to see if he had really advanced the money to Mr. Conard.

Q. What did you refer to? 10

A. To the \$5,000.00.

Q. What interest had you in knowing whether he had advanced it?

A. The balance of the \$5,000.00 part of which was to come to me.

Q. And you met with your counsel Colonel Van Cleef with Mr. Conard in different conferences?

A. Yes, sir.

Q. Did he say anything then?

A. What about? 20

Q. Was anything said there at all about this \$1750.00?

A. No, sir.

Q. Was it mentioned?

A. In no manner was it mentioned; never had been mentioned, sir.

Cross Examination by Mr. Dawes:

Q. Was the \$5,000.00 mentioned?

A. Not to my knowledge. 30

Q. The \$3,000.00?

A. Not to my knowledge.

Q. Was the ten per cent. on the agreement mentioned?

A. Mr. Conard was claiming that the ten per cent. substituted the original tri-party agreement.

Walter H. Rickey—Cross.

Q. The items which went to make up the amount of the payments claimed by Mr. Conard were not specified in this conference?

A. They were not.

Q. And you say, as per the agreement, the \$5,000.00 was to be divided between you. What agreement are you speaking of?

10 A. A mutual agreement.

Q. Verbal or what?

A. Verbal.

Q. Made when?

A. At the time when the tri-party agreement was arranged for.

Q. Was that a secret agreement between you and Mr. Conard?

A. I didn't consider it a secret agreement.

20 BY THE COURT:

Q. You were dividing up with Mr. Muschert?

A. No, I was supplying the deal. Mr. Muschert was to advance that in coming into the deal and to share with us the profits. In other words, buying an interest in it. That's the way I looked upon it.

Q. Was Mr. Muschert informed of that?

A. Not to my knowledge.

30 Q. Why, if that was the understanding between you and Mr. Conard, and everything was open and above board, why wasn't Mr. Muschert informed where his \$5,000.00 was to go?

A. I didn't consider that entered into it. He was simply to pay \$5,000.00 for coming into it.

Walter H. Rickey—Cross.

Q. You said the other day this was a gift—

A. No, I did not.

Q. Listen to my question. You said the other day this was a gift—those two checks, didn't you?

A. I didn't mean to imply it was a gift. It was \$1,750.00 of the \$2500.00 of the \$5,000.00. He naturally wouldn't give me \$1,750.00 off hand.

Q. You say you didn't borrow this money to pay any special debt with it? 10

A. I did not.

Q. At that time were you owing this company that amount of money and they were pressing you for the money—the Steamship Company?

A. No, sir.

Q. Why did you request the check to be written "Walter Rickey, Agent."

A. Owing to the failure of the Rickey-Swan Company I changed my bank account from W. H. Rickey to W. H. Rickey, Agent. All my money was kept in the bank for all the different lines and everything in my deposit as W. H. Rickey, Agent. 20

Q. Is there any difference between Walter H. Rickey, Agent, and Walter H. Rickey?

A. Mr. Conard advised—

Q. In your way of doing business is there any difference between W. H. Rickey and W. H. Rickey, Agent?

A. Not that I know of, no.

Q. W. H. Rickey could take what moneys he pleased out of W. H. Rickey, Agent? 30

A. I could check on that, yes sir.

Q. Who was the principal of W. H. Rickey, Agent?

Walter H. Rickey—Cross.

BY THE COURT:

Q. Agent for yourself?

A. No, I was agent for all the different steamship lines, and Mr. Conard advised that it would be well to turn my account from W. H. Rickey to Agent, after the failure of the Rickey-Swan Company.

10

Q. This money went into the Steamship Company account?

A. It went into my account; that was the only account I had.

Q. Were you under any written contract to deposit these moneys to W. H. Rickey, Agent?

A. I was not.

Q. And on the failure, you ceased to do business as W. H. Rickey?

20 A. And on the suggestion of Mr. Conard I made the deposit that way.

Q. And didn't you borrow money from Robert Messler of this city for the same reason that you borrowed this money off Mr. Conard?

MR. SATTERTHWAITE: Objected to.

A. I did not.

30 Q. Well, didn't you get Mr. Messler to indorse a note for you for the very purpose of making up the very balance which you told Mr. Conard was due to this steamship transaction?

A. I did not, sir.

John T. Van Cleef—Direct—Cross.

JOHN T. VAN CLEEF, being re-called on behalf of the complainant, testifies as follows:

Direct Examination by Mr. Satterthwaite:

Q. Colonel, did you, as counsel for Mr. Rickey, meet with Mr. Conard with regard to an effort to settle this matter? 10

A. Yes, October 3 I think it was at my office in the Commonwealth Building, at that time.

Q. At that time was there any figuring on commissions as such, at all?

A. No, Mr. Conard said he would be willing to settle it—

BY THE COURT:

Q. Was there any calculations on a ten per cent. basis, by which it was ascertained that there was a balance of \$500.00 coming to Mr. Rickey? 20

A. There were no calculations made whatever. Just a lump sum offered by Mr. Conard without any figuring.

Q. To settle it?

A. To stop the noise.

Q. Was there anything said about this \$1,750.00?

A. No, sir. 30

Cross Examination by Mr. Dawes:

Q. Didn't you leave Mr. Rickey and Mr. Conard together and you went in your back office?

A. Yes, for a short time.

John T. Van Cleaf—Cross—Re-Direct.

Q. Didn't you request Mr. Conard to meet Mr. Rickey at your office?

A. I believe I did; yes, sir.

Q. With a view of settling this case?

A. Either Mr. Conard suggested it or I did.

Q. Didn't you request Mr. Conard to come to your office to see if this matter could not be settled?

10 A. No, he requested me.

Q. Where was that request made?

A. I think on the street.

Re-Direct Examination by Mr. Satterthwaite:

Q. There was another meeting between you and Mr. Conard?

A. Yes, sir; in my office in the American Mechanics' Building.

20 Q. That was a later one?

A. Yes, sir, not long ago.

Q. Your present office?

A. Yes.

Q. Was there anything then talked about as to specific figures on commissions or anything of that kind?

A. None whatever. There wasn't anything figured on at all except the bare offer.

Q. Was there anything said then about the \$1,750.00?

A. Not a word.

30

MR. DAWES: No questions.

I move to strike out the testimony as to what was said at either of those conferences.

William M. Muschert—Re-Called.

THE COURT: The motion is made too late.

WILLIAM M. MUSCHERT, being re-called by the Court, testifies as follows:

BY THE COURT:

Q. Mr. Muschert where are the checks or the return vouchers you gave to Mr. Conard for payment of that \$5,000.00 under the three-party agreement 10

A. They are in my desk at home.

Q. Bring them here on Friday morning at half-past ten, will you?

A. Yes, sir.

Adjourned to Friday, Nov. 30, 1917, at 10.30 A. M.

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30

William M. Muschert—Direct.

Docket 43-576.

IN CHANCERY OF NEW JERSEY

10	<i>Between</i> Walter H. Rickey, <i>and</i> The Moon Clay and Kaolin Company, et al.,	Complainant, Defendants.	} } } } } }	On Bill, &c. Testimony.
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Testimony taken in the above entitled cause, at the State House, Trenton, New Jersey, on Friday, the thirtieth day of November, 1917, at 10.30 A. M.

20 Before HON. JOHN H. BACKES, Vice-Chancellor.

APPEARANCES, as heretofore noted.

WILLIAM M. MUSCHERT, being recalled on behalf of the defendants, testifies as follows:

Direct Examination by Mr. Dawes:

30 Q. Mr. Muschert, have you produced this morning the checks showing the payments of money to Mr. Conard on the \$5,000.00 mentioned in the tri-party agreement

A. I have them here (producing them).

Q. After this tripartite agreement was made, did Mr. Rickey ever, or not, ask you as to the payments of money to Mr. Conard?

William M. Muschert—Direct.

A. He never asked me, no, except in a letter he wrote to me.

MR. DAWES: I offer them in evidence.

The first of said checks, dated April 17, 1914, No. 845, payable at the Mercer Trust Company, to the order of J. Lefferts Conard, and made by William M. Muschert for \$2,000.00, indorsed "J. Lefferts Conard, For Deposit, L. Lefferts Conard, Attorney," is marked Exhibit D-8. 10

The second check, No. 850, dated April 30, 1914, payable at the Mercer Trust Company to the order of J. Lefferts Conard, and made by William M. Muschert for \$1,500.00, indorsed "J. Lefferts Conard, J. Lefferts Conard, Attorney," it marked Exhibit D-9. 20

The third check, No. 858, dated May 15, 1914, drawn to the order of J. Lefferts Conard by William M. Muschert, for \$1,000.00, payable at the Mercer Trust Company, endorsed "For Deposit, J. Lefferts Conard, Attorney," is marked Exhibit D-10.

The fourth check, No. 870, dated July 1, 1914, drawn to the order of J. Lefferts Conard by William M. Muschert, for \$158.50, payable at the Mercer Trust Company, indorsed "J. Lefferts Conard," is marked Exhibit D-11. 30

William M. Muschert—Direct.

Oliver B. Gray—Direct.

Q. The first of these checks April 17, 1914, is for \$2,000.00; the second for \$1500.00, April 30, 1914; the next for \$1,000.00 dated May 15, and July 1, \$158.50.

A. Yes, sir. The balance was made in a cash settlement, and a voucher—

10 BY THE COURT:

Q. And these checks amount to how much

A. \$4,658.50.

Q. And the difference you paid in cash?

A. And the difference I paid in cash.

OLIVER B. GRAY, a witness produced on behalf of the complainant, being duly sworn, testifies as follows:

20 *Direct Examination by Mr. Van Cleef:*

Q. Mr. Gray, you are a resident of Pennington?

A. Yes, sir.

Q. In 1915 were you a director in the Pennington National Bank?

A. President at that time, and a director.

Q. Had you presented to you for discount any notes made by Walter H. Rickey?

A. I don't remember that.

30 Q. Were there any notes of Mr. Rickey presented to the Pennington Bank by Mr. Conard for discount?

A. Not that I remember.

Q. You would remember it, I suppose?

A. He might have spoken to me in his office about discounting one, but it was never presented to the bank. I think there was a little talk once of a note of, I think,

Oliver B. Gray—Direct.

\$2500.00, whether the bank would discount it. I couldn't tell what they would do.

Q. You did not refuse to discount it?

A. No, it never came to the bank that I can remember.

Q. I show you a letter and ask you if that is your signature annexed to the letter?

A. That is my name.

Q. And your signature? 10

A. Yes, sir.

MR. VAN CLEEF: I offer the letter in evidence.

Said letter on the letter-head of Walter H. Rickey, and signed by him, to Oliver B. Gray, President First National Bank, Pennington, N. J., dated July 28, 1915, and the answer thereto by Mr. Gray to Mr. Rickey, dated July 29, 1915, and written underneath said letter, are marked Exhibit C-9. 20

MR. VAN CLEEF: The letter to Oliver B. Gray:

Trenton, N. J., July 28, 1915.

Mr. Oliver B. Gray, Pres.,

First National Bank,

Pennington, N. J.

My Dear Mr. Gray:

Referring to my letter of May 6th., copy herewith attached, your notation thereon, may I ask if you will please advise if the said note was presented to you by Mr. Conard for discounting at your bank or any other, and if Mr. Conard in any manner took this up with you at or about that time? May I 30

Oliver B. Gray—Cross.

ask that you will treat this confidentially until I can see you personally.

Regretting that I did not see you at the bank or your home this A. M., I beg to remain, awaiting yours,

Yours very truly,

(Signed) W. H. Rickey."

10

The answer, which is written at the bottom of the sheet, is as follows:

"July 29, 1915.

Mr. W. H. Rickey.

Dear sir:

I do not remember that Mr. J. L. Conard presented the note for \$2500.00.

20

Yours,

O. B. Gray."

Cross Examination by Mr. Dawes:

Q. Did Mr. Rickey ever discuss with you in Mr. Conard's office the discounting of a note?

A. I think they were both together once, Mr. Conard and Mr. Rickey, and had something to say about it.

Q. Was the note actually presented to you?

30

A. I don't remember, but I don't think it was ever presented. It was only a little talk about it, I think, and I got that letter, but don't know whether it was presented.

Q. And in that letter you say you don't remember?

A. No.

Oliver B. Gray—Cross.

Q. And that is substantially your answer today?

A. Yes, sir.

Q. That letter dears date—

A. July 28, 1915.

MR. DAWES: I offer in evidence the declaration of trust and the papers I offered for identification.

10

Said Declaration of Trust and Agreement between John J. Moon and William M. Muschert, dated February 15, 1915, is marked Exhibit D-12.

The check heretofore marked Exhibit D-1 for identification, being for \$500.00 from Muschert to Stauffer, is marked Exhibit D-1.

BOTH SIDES REST.

20

30

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In 1913 the complainant Rickey obtained from the defendant Moon what has been termed an option agreement, whereby Moon agreed to sell to Rickey his clay lands in Hamilton township, at any time within two years, for \$6,000 per acre for the best clay lands, and \$1,000 per acre for the balance. In February of the following year, Moon extended the option for a further term of two years, or "until the deal now pending is closed." The deal was Rickey's negotiations with the Pennsylvania Railroad for a strip of land for its new freight line across New Jersey, between Philadelphia and New York. Rickey then interested the defendant Muschert and persuaded him to secure a loan of \$3,000 from his friend Watson upon a promise to pay Muschert one-tenth part of the profits on the option agreement. Rickey assigned the option to Watson as collateral security and reduced to writing the ten per cent. agreement with Muschert. He then got from Moon a commission agreement, wherein Moon agreed to pay ten per cent. commission upon all sales of his lands and twenty per cent. upon all receipts from condemnation proceedings. Thereupon the complainant and Muschert and J. Lefferts Conard, the latter then an attorney-at-law of this state, entered into what has been called the three party agreement, wherein it was stipulated that Muschert was to hold the Moon-Rickey agreements (I do not recall whether the commission agreement was specially mentioned) for the benefit of the three, subject to the lien of the Watson loan, and that to promote "the operation" Muschert was to advance to Conard \$5,000 to cover expenditures to date, and a further sum not exceeding \$2,000 for future promotion. The complainant and Conard were to give their attention and efforts, Conard his professional skill, in advancing the enterprise, which was understood to be defending the condemnation proceedings. Out of the profits Muschert was first to retain \$10,000, made up of the \$3,000 borrowed from Watson, the \$5,000

Opinion

paid to Conard, and the \$2,000 to be then later advanced. The agreement then provided that all of the profits should be divided among the three, share and share alike "after the deduction of the said sum of \$10,000 hereinbefore mentioned, which said sum shall be regarded as expenses and first deducted out of said profits." The condemnation proceedings failed of realization, and then Muschert, Conard and Moon formed the Moon Clay and Kaolin Company, and took over the clay lands for \$206,000 of the capital stock of the company, under arrangement with Moon that he was to sell his holdings to Muschert and Conard for some \$50,000. The clay company is now owned by Muschert and Conard and is operating the clay-pits. The complainant was not permitted to participate. He was practically frozen out. He then filed this bill to impress the trust of the three-party agreement, and for an accounting. In their answer the defendants Muschert and Conard set up Rickey's ten per cent. commission agreement, and claimed that they were operating under it in connection with the three-party agreement, and on the witness-stand they both expressed themselves as willing to assume Moon's obligation to pay the commission on a sales price of \$206,000, to be divided according to the terms of the three-party agreement. Upon the court's suggestion, the complainant asked leave to amend, which was granted.

THE VICE-CHANCELLOR (after argument):

When the pleadings are amended as directed, this will be a bill for an accounting for profits in a joint venture. The admitted profits are ten per cent. on \$206,000, viz.: \$20,600, and these are to be divided equally between the complainant and Conard and Muschert, after Mr. Muschert deducts \$8,000, viz.: the \$3,000 due to Watson, and the \$5,000 he advanced to Conard. The terms of the agreement were that he was to deduct

Opinion

10 \$10,000, but this included the \$2,000 which he was to later advance, but did not. The three-party agreement shows clearly the final arrangement of the parties, and this was that all over and above \$10,000 (now \$8,000) was to be divided share and share alike. It was urged during the course of the trial and on the argument that the loan from Watson to Rickey should be taken from Rickey's share, but this manifestly was not the bargain. The \$3,000 loan to Rickey, which Muschert secured, and the \$5,000 paid to Conard, and the other \$2,000 which Muschert promised, are treated by the three-party agreement as expenses of the enterprise, to be paid out of the profits. In ascertaining what is Rickey's due the total of these sums (\$8,000) is to be deducted and the balance divided. And so with Muschert's ten per cent. agreement for securing the loan from Watson. That is also merged in the three-party agreement and controlled by the terms of the division.

20 The claim made by Conard against Rickey that he loaned him \$1750 upon the understanding that it was an advance on account of Rickey's prospective profits and to be deducted upon final settlement, is not sustained by the proofs. The money was paid by Conard to Rickey shortly after the making of the three-party agreement and at a time when Rickey was known to be insolvent, and when the prospects of making a profit were none too bright and when Conard could have little hope of repayment if he were lending. The payment to Rickey is shown by two checks of Conard, one for \$1,000, the other for \$750, but Conard took nothing from Rickey to show that they were loans. The presumption is that the checks were given in payment and Rickey says that is why they were given. His testimony is that Conard and he agreed to divide equally

30

Opinion

the \$5,000 Muschert was to advance under the three-party agreement, and I believe him as against the denial and explanation of Conard, and his story is borne out, in a measure, by the fact that the first payment made by Muschert to Conard on the day after the three-party agreement was made was for \$2,000, and on the following day Conard gave Rickey his check for \$1000. On April 30th Muschert gave to Conard another \$1500, and twenty days later Conard gave Rickey his second check for \$750. There is still \$750 due Rickey from Conard, one-half of the balance collected from Muschert. 10

The decree will read that Muschert pay to Watson \$3,000; that the established gross profits are \$20,600, from which \$8,000 is to be deducted, and the balance divided into three parts. One-third will be adjudged to Rickey. 20

MR. DAWES: Is there any interest?

THE VICE-CHANCELLOR: As I interpret the three-party agreement, the profit to be divided was all in excess of \$10,000 net (8,000, as it has turned out). That was the stipulation of the parties. The language is plain and explicit. If the written document does not correctly disclose the agreement of the parties, a bill to reform should have been filed.

As to the interest on the Watson loan, Muschert was not to pay more of the loan than the \$3,000 principal. Whatever interest has accrued is Rickey's debt, and the decree may provide that this interest be paid out of Rickey's share. 30

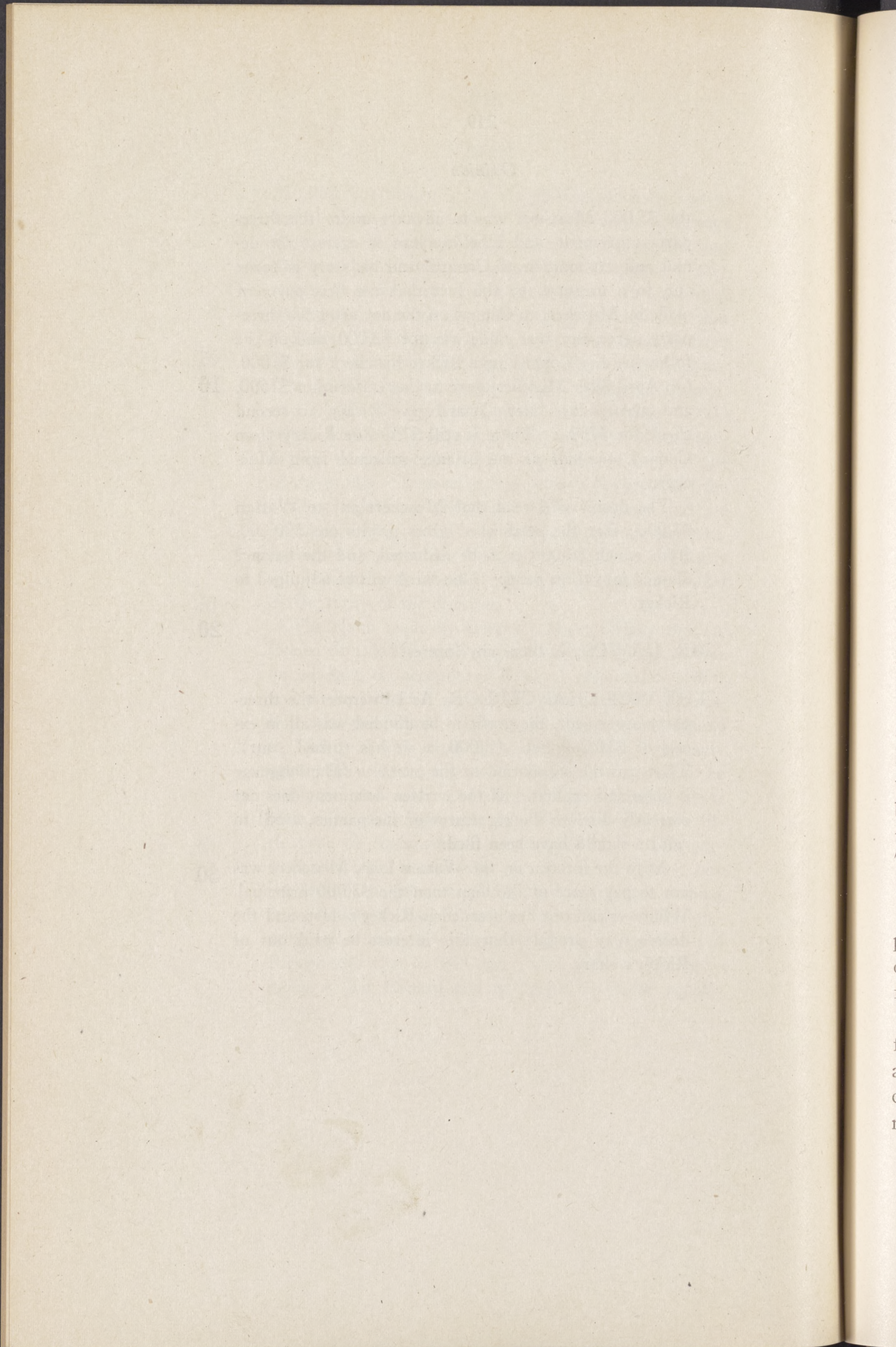


EXHIBIT C 3.

THIS AGREEMENT, made this sixteenth day of April, A. D. nineteen hundred and fourteen, by and between WILLIAM MUSCHERT, of the city of Trenton, in the county of Mercer and State of New Jersey, WALTER H. RICKEY, and J. LEFFERTS CONARD, of the same place, hereinafter known and designated as parties of the first, second and third part in the order first above named, who, each for himself, in consideration of the mutual covenants hereinafter contained, agrees as follows:

WHEREAS, heretofore, the said party of the second part has been the holder of a certain option on property located in the township of Hamilton, in the county of Mercer, designated by a certain map or plan of the same prepared by the Trenton Engineering Company, and now in possession of the party of the third part, known as the map and plans of property of John J. Moon, of Hamilton Township, Mercer County, New Jersey, pursuant to his said option, a deed for the said property has been duly executed and delivered by the said John J. Moon to the said party of the second part, and recorded in the Clerk's Office of the county of Mercer, and now in the possession of the said party of the first part, by virtue of an assignment thereof made by the said party of the second part to the said party of the first part to secure a personal loan in the sum of Three Thousand Dollars;

1. It is hereby agreed by the said party of the first part to hold the said assignment for the mutual benefit of all three parties to this agreement, subject to the following conditions:

First. The assignment above mentioned and heretofore made to be a first lien against any moneys received as profits from the said option, whether in the form of commissions or by whatsoever name they may be so derived.

Second. Any moneys advanced by the said party of the first part, pursuant to this agreement, shall be a lien and payable first out of the said profits after the lien first above mentioned.

2. The said party of the first part agrees to advance for the benefit of the promotion of the said option a sum of money not exceeding Five Thousand Dollars to the said party of the third part, covering expenditures and expenses to the date of this agreement, and a further sum not exceeding Two Thousand Dollars for the purpose of furthering the interests of the said option, which last said sum of money, however, shall be expended only by consent of all the parties to this agreement.

3. The said party of the first part agrees to pay on the execution of these presents to the said party of the third part the sum of Two Thousand Dollars, part and parcel of the said sum of Five Thousand Dollars first above mentioned, the balance to be paid at the convenience of the said party of the first part, or when the necessity of the delivery of the same shall appear.

1. The said party of the second part, on his part, hereby agrees that the option, contract, agreement and deed held by him by and with the said John J. Moon shall be and is hereby assigned to the said party of the first part absolutely, to be held by the said party of the first part, pursuant to these articles of agreement and for the mutual benefit of all three parties hereto.

2. The said party of the second part further agrees to give his time, skill and attention whatever occasion requires for the furtherance of the promotion of the option herein referred to and to do all in his power to promote the profits of this enterprise and render such assistance as he may be requested so to do by either of the other parties hereto.

3. The said party of the second part hereby and further agrees in the promotion of the execution of this

contract and declares there are no other assignments, liens or claims of any kind, manner or description against the option hereof and herein assigned other than the said lien of the said party of the first part heretofore made and herein repeated.

1. The said party of the third part, on his part, agrees to use his time, skill and understanding to the promotion of the best interests of the parties hereto jointly as attorney and counsel, unless disabled by the rule now **10** pending in the New Jersey Supreme Court, in which case he agrees, at his own proper costs and charges, to substitute other counsel, the expenses of whom to be charged against his share of the division of profits hereinafter referred to.

2. The said party of the third part further agrees that no expense or outlay of money shall be incurred in connection herewith, except by the consent of the other parties to this agreement, and he further agrees that said sum of Five Thousand Dollars first above mentioned shall be in full satisfaction of all obligations of **20** either of the other parties hereto to any party or parties of any kind, manner or description contracted by the said party of the third part.

And it is further agreed by and between all the parties hereto that all moneys from whatever source the same may be obtained paid to either of the parties to this contract, by virtue of the order of any Court or **08** voluntarily by the parties paying the same, shall be paid forthwith if in cash without depositing the same, and if by check or other negotiable paper by an immediate endorsement without deposit to the said party of the first part, who, for this purpose, shall act as treasurer of the within enterprise, and the consent of all the parties hereto is given to the said party of the first part to act, demand, sue for and collect any sums of money directly or indirectly received in the promotion of the

option herein referred to, and to be paid out only on the consent of all the parties hereto, with the exception of the sum of Ten Thousand Dollars, which, it is hereby agreed, the said party of the first part shall deduct from the moneys received for reimbursement of the said sum or sums so advanced or to be advanced in the furtherance of this agreement.

It is hereby further agreed by and between each of the parties hereto with the other that all the profits to
10 be derived from the sale of lands in said option described, whether by sale, division or condemnation proceedings, shall be divided among the three parties hereto, share and share alike, after the deduction of the said sum of ten thousand dollars hereinbefore mentioned, which said sum shall be regarded as expenses and first deducted out of the said profits; that the said division of profits may be made at such time after the same accrue as shall be agreed upon by all the
20 parties to this agreement, all being present at the distribution in person or by proxy, who shall act only with written authority.

And it is further agreed by and between the parties hereto that no sum or sums of money is to be accepted on behalf of the parties to this contract, or a sum fixed for the sale of the said lands or any part thereof on behalf of the parties to this contract by any of the parties hereto, except when such sum or sums have been agreed to previously by all the parties hereto, and the
30 written consent of each of the said parties fixing said sum filed with the said party of the first part.

And it is further agreed by and between the parties hereto that a violation of this contract by either of the parties shall work a complete forfeiture of all his interests therein, and he thereupon agrees that all writing, writings, papers, data and the paraphernalia of any kind in his possession shall be delivered to the remaining parties to this contract forthwith on demand.

In witness whereof, the said parties have hereunto set their names and affixed their seals the sixteenth day of April, A. D. nineteen hundred and fourteen.

WILLIAM MUSCHERT, [L. S.]
 WALTER H. RICKEY, [L. S.]
 J. LEFFERTS CONARD. [L. S.]

Witness Present:

ANNA H. WOOD.

10

EXHIBIT D 5.

KNOW ALL MEN BY THESE PRESENTS, That I Walter H. Richey of the City of Trenton, County of Mercer State of New Jersey in consideration of the sum of Three Thousand Dollars lawful money of the United States to me in hand paid by Ellwood W. Watson of Langhorne, Pennsylvania, do hereby assign, transfer and set over to the said Ellwood W. Watson all my right title and interest of in and to a certain conditional sale of land made by John J. Moon of the City of Trenton to me dated the Fourteenth day of August, nineteen hundred and thirteen, and recorded in the Mercer County Clerk's Office in Book 360 of Deeds on pages 247 and so forth, together with the written extension dated February 25th, 1914. This assignment being made however as collateral security for a note of even date herewith for the payment of Three Thousand Dollars with interest to the said Ellwood W. Watson by the said Walter H. Richey and Carl Richey; and any and all renewals of said note.

20

30

WALTER H. RICKEY. [SEAL]

Signed, sealed and delivered this 26th day of February, 1914, in the presence of

HARVEY SATTERTHWAITE.

STATE OF NEW JERSEY }
 MERCER COUNTY } ss.

Be it known, That on the 26th day of February in the year of our Lord one thousand nine hundred and fourteen before the subscriber, a Master in Chancery of the State of New Jersey, personally appeared Walter H. Richey who I am satisfied is the party mentioned in the foregoing contract and Deed of Conveyance, and the contents thereof being by me first made known unto
 10 him he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, and for the uses and purposes therein expressed.

HARVEY SATTERTHWAITE,
 M. C. C. of N. J.

EXHIBIT D 7.

20

THIS ASSIGNMENT, Made this twenty-sixth day of February, nineteen hundred and fourteen, by WALTER H. RICKEY and CARL RICKEY, of the City of Trenton, County of Mercer and State of New Jersey, party of the first part, to WILLIAM M. MUSCHERT, of said City of Trenton, party of the second part, *witnesseth* that in consideration of services rendered by the party of the second part in procuring a loan of three thousand dollars cash
 30 to be made to the party of the first part, or an extension of credit secured by the surety to be procured by the party of the second part, that they the said party of the first part for themselves, their heirs, executors, administrators and assigns do hereby assign as brokerage or pay for procuring said loan to be made or credit to be extended, to the party of the second part, his heirs, executors, administrators and assigns, all the one-tenth of the profits due or to become due to the

party of the first part on account of all the right, title and interest of the said party of the first part in the contract or agreement which is annexed hereto. And the party of the first part further agrees to furnish a statement of said profits verified by affidavit, if so required, and to allow the party of the second part or a responsible accountant selected by him, to examine all the books, papers, and accounts of the party of the first part, relating to said contract, and to check up the statement of the party of the first part to be furnished as aforesaid. **10**

In witness whereof the party of the first part have hereunto set their hands and seals the day and year first above written.

WALTER H. RICKEY. [SEAL]

The name of Carl Rickey stricken out before signing.

Signed, sealed and delivered in the presence of
HARVEY V. SATTERTHWAITTE. **20**

EXHIBIT D 12.

THIS AGREEMENT made this fifteenth day of February, A. D. nineteen hundred and fifteen, between John J. Moon, of the City of Trenton, County of Mercer, and State of New Jersey, party of the first part, and hereinafter mentioned as such; and William M. Muschert, of the same place, party of the second part, and so hereinafter mentioned, **30**

Witnesseth, that whereas by deed of conveyance of even date hereof, the said party of the first part has conveyed certain lands and premises, in said deed more particularly described and set out, and

WHEREAS the said party of the second part is about to make loans, advances and disbursements for the

use and benefit of the said party of the first part, now then the said parties in consideration of the mutual covenants herein mentioned, by each of the said parties to be performed did agree in manner following, to wit:

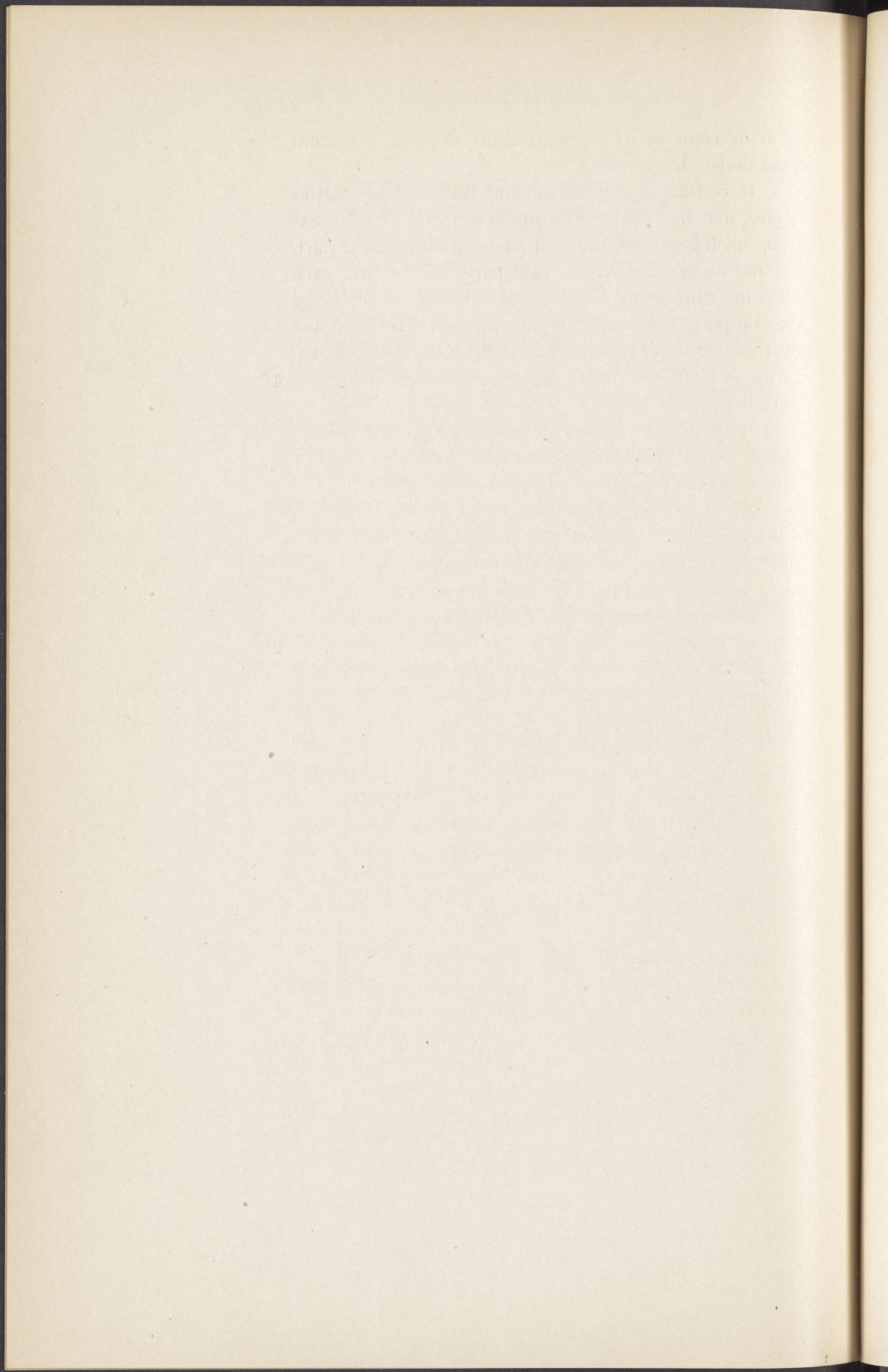
1. That the said party of the second part shall hold the title of the said lands, in trust for the fulfillment of the within contract, in its entirety, the said lands to be conveyed only upon completion of all the terms of the within contract, and the consent of both of the
10 parties hereto.

2. That upon a sale or upon the conveyance of the above mentioned lands, by reason of condemnation proceedings, or by voluntary agreement of both of the parties hereto, out of the proceeds of the said sale, shall be deducted a sum equal to the amount of moneys so advanced or disbursed by the said party of the second part, for the use and benefit of the party of the first part.

3. That in event of the sale of the said lands to
20 any party or parties or a corporation, there shall be additionally deducted from the proceeds thereof the sum of ten per cent. of the consideration for the sale of the said premises or of any part thereof.

4. That in case of condemnation proceedings, now contemplated by the Pennsylvania Railroad Company, the Philadelphia & Newark Railroad Company, or any other party or parties whatsoever, there shall be deducted from the purchase price of said sale or any part thereof that shall have been so condemned or taken,
30 a sum equal to twenty per cent. of the gross receipts therefrom.

5. That the said party of the first part does hereby constitute the said party of the second part, its true and lawful agent and Attorney, for him, but at his own profit and charges, to negotiate and sell said lands hereinbefore mentioned, at private sale, the price, however, for said lands to be acquiesced and consented to by the said party of the first part, before any contract, agree-



NEW JERSEY
Court of Errors and Appeals

BETWEEN

WALTER H. RICKEY,
Complainant-Respondent,

AND

THE MOON CLAY AND KAOLIN
COMPANY ET AL.,
Defendants-Appellants.

} On Appeal from
a Decree advised
by Vice-Chancel-
lor Backes.

Brief for Appellants.

STATEMENT OF FACTS.

The complainant filed his Bill against The Moon Clay and Kaolin Company, John J. Moon, William M. Muschert, J. Lefferts Conard and Elwood W. Watson, alleging that he held an option upon certain lands belonging to John G. Moon, and which the Pennsylvania Railroad Company or one of its subcompanies was contemplating condemning; that he desired to borrow some money and applied to the defendant William M. Muschert, whereupon the defendant Muschert borrowed \$3,000.00 from Elwood W. Watson, defendant, upon Muschert's guarantee of the payment, and the complainant assigned to Watson his interest in the

option as collateral security, and also assigned to the defendant Muschert one-tenth of the profits which might accrue from the said option.

That on the 16th day of April, 1914, the defendant Muschert, the complainant Rickey and the defendant Conard entered into an agreement whereby the option was assigned to the defendant Muschert, to hold the same for the mutual benefit of the three parties thereto, reciting that the assignment should be a first lien against any moneys received as profits in the form of commissions or otherwise, and that any moneys advanced by the defendant Muschert should be a lien and payable out of the said profits. It was further stipulated that Mr. Muschert should advance to Mr. Conard for the benefit of the enterprise a sum of \$5,000.00, covering expenditures and expenses, upon the agreement that Mr. Conard should use his time, skill and understanding for the promotion of the enterprise and conduct the legal proceedings if condemnation proceedings should be undertaken. The Bill then alleged that on the 15th day of February, 1915, without the knowledge, consent, understanding or acquiescence of Rickey, the defendant John J. Moon conveyed the premises covered by the option to the defendant Muschert for an express consideration of \$10,000.00, and that on the 5th day of February, 1916, Muschert conveyed the premises to the defendant John J. Moon, and that John J. Moon, on the 9th day of February, 1916, conveyed the premises for the express consideration of \$206,000.00 to The Moon Clay and Kaolin Company, which was a corporation formed by Messrs. Muschert, Conard and Moon, and that the Company was engaged in mining clay and reaping large profits therefrom.

The prayer of the Bill was that the conveyance of the premises by John J. Moon to the defendant Muschert, and by the defendant Muschert to Moon, and by Moon to The Moon Clay and Kaolin Company, may be declared null and void, and that the defendants may be declared to hold the title to the said premises in trust

for the mutual benefit of the defendant Muschert, the complainant, and the defendant Conard. (Subject to the terms of the agreements above mentioned.)

THE ANSWER OF THE DEFENDANTS.

The answers admitted the conveyance and set up that the complainant had full knowledge of the making of the conveyances, co-operated in promoting and advancing the negotiations for the respective conveyances, and THAT THERE WAS A COMMISSION AGREEMENT HELD BY THE COMPLAINANT FROM MR. MOON WHEREBY THE COMPLAINANT AND OTHERS (MEANING MESSRS. MUSCHERT AND CONARD SHOULD RECEIVE 10 PER CENT. COMMISSION ON THE SALE OF THE PROPERTY, IF SOLD WITHOUT CONDEMNATION PROCEEDINGS AND 20 PER CENT. IF THE LAND SHOULD BE CONDEMNED.

*Commission Agt
Mud R. 55
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THE TRIAL.

Vice-Chancellor Backes heard the matter, and on the issue made by the pleading the Vice-Chancellor, after the testimony was produced, which overwhelmingly refuted the claims of Rickey contained in his Bill, suggested to the complainant that he amend his Bill and claim only on the Commission agreement. The conclusion of the Vice-Chancellor was that the complainant had been "frozen out" by the defendants Muschert and Conard, and gave a decree based upon ten per cent. (10%) of the selling price, \$206,000, and deducted therefrom the \$3,000.00 advanced to Rickey by Watson under the terms of the three-party agreement, dated April 15th, 1914 (*Exhibit C-3*), and also the \$5,000.00 advanced to Mr. Conard, which left a balance of \$12,600.00, and made the decree in favor of Rickey for one-third of \$4,200.00, and ordered deducted from

Rickey's share of \$4,200.00 the interest on the Watson note from February 26, 1914, to the date of the decree. The defendants Muschert and Conard claimed there were certain offsets in their favor which the Vice-Chancellor should have allowed, and that in his disallowance of them he overlooked the force and effect of the cogent elements in the testimony and the circumstances detailed by the witnesses.

THE CLAIMS OF THE DEFENDANTS.

FIRST, *the claim of J. Lefferts Conard*: Mr. Conard claimed that on April 18th, 1914, he gave a check payable to the order of W. H. Rickey, Agt., for \$1,000.00 (*Exhibit D-3*); and on May 19th, 1914 (*Exhibit D-2*), he gave another check to Walter H. Rickey for \$750.00, which was endorsed "Walter H. Rickey, W. H. Rickey, Agt.," which the complainant borrowed from him on an understanding that these sums were to be repaid out of the profits of the enterprise. Mr. Conard, in his answer, set up the commission agreement, and claimed that Rickey had been paid, and at the trial testified (pages 117, 141, of State of Case) as to the money advanced to Rickey, and on page 191 he gives full details of Rickey's being "hard up" and of pressingly needing this money because the auditor of the Steamship Company had been in Rickey's office and the matter had to be adjusted promptly. One check of Mr. Conard's (*Ex. D-3*) was payable to W. H. Rickey, Agt., and the other check (*Ex. D-2*) was payable to Walter H. Rickey and was endorsed "Walter H. Rickey, W. H. Rickey, Agt.," showing that these moneys were deposited by Rickey to his agential account of the Steamship Company.

Rickey claimed that there was a verbal agreement that the \$5,000.00 which Mr. Conard had received under the Trust or three-party agreement, dated April 16, 1914, from Mr. Muschert, was to be divided equally with Rickey, and that these two checks were in part

payment. (See page 200 and 201 State of Case.) On page 202, line 10, Rickey testified that this division agreement was a verbal agreement, made AT THE TIME WHEN THE TRI-PARTY AGREEMENT WAS ARRANGED FOR, and that Mr. Muschert was not informed of it.

Mr. Conard and Mr. Rickey are sharply at issue on this point. Mr. Conard is now dead, and I ask a careful scrutiny of the testimony that the reproach of dealing unfairly may not attach to his memory unjustly.

All the known circumstances and the conduct of the parties manifest the truthfulness of Mr. Conard's testimony.

(a) Rickey's conduct: The three-party agreement created the relationship of trust among the three parties to it and Rickey's claim, if true, was a fraud upon the third party, Mr. Muschert. *Jackson v. Hooper*, 76 N. J. Eq., 185; *Braddock v. Hinchman*, 78 N. J. Eq., 270.

(b) The omission of this alleged understanding from the three-party agreement is a cogent circumstance to be considered. This understanding was contemporaneous with the three-party agreement. This three-party agreement shows that Rickey got \$3,000.00 from Mr. Watson on the strength of his ownership of the option, which was to be repaid out of the profits of the enterprise. Mr. Muschert paid \$5,000.00 for the legal services of Mr. Conard in the promotion of the enterprise and any agreement to divide the \$5,000.00 was antagonistic to the spirit of the three-party agreement and a fraud upon it and Mr. Muschert.

(c) Rickey never made any effort to collect the balance of the \$2,500.00. \$750.00 was due Rickey, if his statement was correct, and if Mr. Conard had agreed to divide the \$5,000.00, Rickey would have, naturally, tried to get the money from Mr. Conard. On page 200, line 25, Rickey was asked concerning the balance of his claim:

Q. Did you ever ask for any more?

A. I did.

Q. How much did you ask for?

A. For the balance.

Q. When did you do that?

A. I asked him if Mr. Muschert had paid the balance, and he advised me he had not. He always led me to understand that he had not until I had been advised by Mr. Muschert that he had paid the full amount. Mr. Conard led me to understand that the balance had not been paid.

And Rickey further testified, page 201, line 10, that "he had received this information from Mr. Muschert's letter that the full \$5,000.00 had been paid," which letter bore date November 19, 1915 (see page 52, line 30). This explanation of Rickey will not bear examination. Rickey testified earlier in the case that Mr. Muschert told him that the \$5,000.00 had been paid (page 47, line 33). Rickey testified on page 77, that after these letters had been written, that is, November, 1915, "*When I was in Mr. Conard's office, the latter part of our dealings, it was to request the return of the two notes that I had given Mr. Conard, on which he was going to secure a loan;*" and he reiterates on page 89, in re-direct examination, lines, 20, etc., that his purpose in being in Mr. Conard's office, the latter part of 1915, was to get the notes, but not a word about this \$750.00.

I submit, it is reasonable to believe that Rickey would not have demanded the balance of the money from Mr. Conard, as he had Mr. Buchanan for his lawyer at that time, as those letters show, and yet no mention of the \$750.00 was made by Rickey or any demand for the payment.

(d) Rickey's non-claim under the commission agreement for \$4,200.00 is significant. Here was a claim amounting to \$4,200.00 against the company, or Messrs. Moon, Conard and Muschert, yet no mention in the Bill of Complaint of this Commission agreement or

any claim under it, according to Rickey's testimony. The convincing evidence of Judge Marshall that Rickey brought the commission agreement to his office, that Rickey thought that he and Mr. Moon could combine and file a bill against the company for their respective claims; and by implication Judge Marshall's testimony shows that the commission agreement was discussed in his office with Rickey's counsel, Mr. Blackman. (Page 150, line 31) Judge Marshall says: that the conclusion of the conference with Mr. Blackman was that "his commission" would not be payable until a sale had been made to the Railroad Company. And on page 151, line 32, that Rickey made no complaint that these deeds had been made out, without his knowledge or consent. This conduct of Rickey's and his non-claim against Mr. Conard, shows clearly that Rickey was acting under the commission agreement and ~~his omission claim of Mr. Conard to this \$1,750.00; otherwise, just claim of Mr. Conard to this \$1,750.00; otherwise, he would have made claim under the commission agreement for \$4,200.00.~~

SECOND: The conduct of the defendants, Muschert and Conard, has been consistent with the existence of the Commission agreement. First, Mr. Muschert took the deed of February 15, 1915, under a Declaration of Trust which provided that the property, if sold, the proceeds thereof should be held subject to the 10 per cent. commission and 20 per cent. if it was condemned. Whereas, Rickey claimed that the Commission agreement was simply executed to secure a loan from Mr. Gray, through the Pennington Bank (page 56, line 30); that this was simply to secure that loan, and "I would never have had this signed to offset that other." On page 65, line 30, that "the commission agreement was never discussed by any one but Mr. Conard and myself." On page 66, line 22, that "no one was intended to be embraced in the words 'Walter H. Rickey and others.'"

Rickey's testimony is directly contrary to what he did in taking the Commission agreement to Judge Marshal's office, and is contrary to the testimony of Messrs. Conard, Muschert and Moon.

(e) Rickey claims that the deeds had been executed without his knowledge or consent. Judge Marshall says he made no such claim; that he came to his office with Mr. Moon for the purpose of collecting or helping Mr. Moon to collect the purchase money from the sale to the Moon Clay and Kaolin Co.; that he came as Mr. Moon's friend and made no claim that Mr. Moon had wronged him. Moon says and Rickey admits that he, Rickey, was his confidential advisor (page 178, lines 1, etc.)—"I done really nothing in the case without his advice; he was my advisor." That Moon and Rickey were together constantly during the period of these negotiations.

(f) Rickey's testimony is valueless under the rule laid down in *Clark v. Public Service Electric Company*, 86 N. J. L. 144.

Rickey testified that he knew nothing about the conveyance of February 15, 1914, by Moon to Mr. Muschert, and of the conveyance by Mr. Moon to the Moon Clay and Kaolin Company dated April 9, 1916. On p. 61, 11, 12, etc.: Q. "Had you any knowledge of these conveyances before they were made?" A. "I had not, sir." Q. "Did you in any way, directly or indirectly, give your consent to it?" A. "I did not." Q. "Have you ever ratified them since?" A. "No, sir." The testimony further shows that Rickey was the confidential adviser of Moon, and that Moon advised with him as to his making of these deeds. Mr. Moon says, p. 178, "He was my confidential friend. I really did nothing in this case without his advice." P. 179, l. 18. That Rickey knew that the deed of February 15, 1914, was to be delivered. P. 180, l. 32: Q. "What part did Mr. Rickey play in the formation of the company?" A. "It was formed at his suggestion." Q. "And did

you deal directly with the Moon Clay Company for the sale of those lands?" A. "Not first." Q. "Who at first?" A. "Mr. Rickey." Q. "During the time between delivery of the deed and the formation of the company, did you have any conferences with Rickey?" A. "Yes, sir." Q. "How often did you see him during that period." A. "Every few days—on the streets and in the office." Rickey testifies that Mr. Moon was in his office almost every day, p. 77; and that he, Rickey, was in Conard's office frequently during that period, and yet he had the effrontery to claim that he did not inquire of Mr. Moon about those conveyances. P. 77, l. 28. Rickey denied that he went to Judge Marshall's office with Mr. Moon for the purpose of getting Judge Marshall to take action for the recovery of the consideration to be paid by the Moon Clay and Kaolin Company. Q. "Did you advise Mr. Moon to collect the money which was due him from these gentlemen?" p. 80, l. 30. A. "I did not." Q. "Did you advise him to go to counsel, and get him to collect the money which was due to him from the company, or from Mr. Muschert or Mr. Conard?" A. "I don't recall such suggestion." P. 81, ll. 30, etc. Q. "Didn't you say to Judge Marshall that you wanted Mr. Moon to get his money, and that that was your purpose in going there, and that you were willing to do anything in your power so that Mr. Moon could get his money for the transfer of this property?" A. "I did not." Judge Marshall says, p. 148, l. 25: "Mr. Moon brought Rickey to my office . . . and Mr. Rickey, as I recall it, at that time said he wanted to help Mr. Moon to get his money?" Q. "At that time did Mr. Rickey state to you that this deed or either one of these deeds had been made out without his knowledge?" A. "He made no complaint to me about that." The Vice-Chancellor in his conclusions says, p. 217, ll. 15, etc., that Rickey was practically frozen out, whereas I claim that Rickey had full knowledge, and was in co-operation with the parties during

the entire period of deed-making. Assuming that the relationship between these parties was one of trust, the contract relations between themselves will be supported if the *cestui que* trust acted voluntarily and with intelligence and full knowledge of all the circumstances. *Swift v. Craighead*, 75 N. J. Equity 102.

If Rickey did not know whether or not the \$5,000.00 had been advanced to Mr. Conard, then his lack of interest in finding out from Muschert whether Mr. Conard had received it renders his claim to the balance most improbable.

Furthermore, the absence of moral indignation on Rickey's part against Mr. Conard in November, 1915, when he received Mr. Muchert's letter telling him that the entire \$5,000.00 had been advanced, I consider a potent circumstance in the case.

The testimony, therefore, shows clearly that Rickey's testimony at the trial, as to the execution of these deeds without his knowledge and consent, was untrue. That no reason existed why Mr. Moon would not advise with Rickey as to these various deeds, and that their daily meetings, discussing the sale of the clay lands, renders it most improbable that Rickey did not know that these lands were being sold. His testimony is untrue in so many particulars and in opposition to so many of the surrounding circumstances, as to render it valueless upon the disputed point in the case.

I therefore claim that Mr. Conard is entitled to be credited with \$1,750.00, with interest from the date of the loan until paid.

II. MR. MUSCHERT'S CLAIM.

On the 26th day of February, 1914, Rickey agreed with Mr. Muschert that for his services in procuring a loan to be made by Elwood W. Watson, one-tenth of the profits due or to become due to Rickey on the option should be paid to Mr. Muschert. Mr. Muschert's services were not only in procuring the loan, but in

giving his credit by guaranteeing Rickey's note to Mr. Watson (see Bill of Complaint, page 12, line 10). This agreement is set out in the Bill of Complaint and was recognized by the bill as a valid and outstanding agreement. The prayer of the bill, in the second paragraph, recognized it by asking relief that one of the defendants might be decreed to hold said lands for the mutual benefit, interest and profit of the three parties, subject to the terms of the AGREEMENTS AFORESAID. That Rickey recognized this as a part of the agreement is manifested by his omission to incorporate the commission agreement, which he claimed to be only between him and Mr. Conard, in his Bill of Complaint.

Mr. Muschert wrote Rickey on November 2, 1915, that this property was held to secure "my claim against you and the payment of the three thousand dollar note given to Mr. Watson." (P. 50, line 10.)

This agreement was also submitted to Judge Marshall (see page 150, line 7). The intent of the parties as to what a contract means must be the guide. The interpretation which the parties themselves placed on the agreement will practically control the court's construction. The construction which Rickey knew Muschert was placing upon this contract is also a significant circumstance.

Under the pleadings in this case this agreement stands as a valid and uncontested contract.

Courts will not construe one agreement to be abrogated by another and later agreement unless the two agreements can not stand together. No such incompatibility or repugnance appear between these documents in this case and the action of the complainant in setting this agreement up estops him from alleging, after the status of the affair changed that it was no longer a binding or controlling agreement.

(B) Rickey submitted this agreement to Judge Marshall (page 150, lines 9, etc.).

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see 10641*

(C) Mr. Muschert states in his letter to Rickey that he is holding the land to secure "my claim against you" and the payment of the \$3,000.00 note.

What a person means is best determined by his conduct and frequently by what he says. Rickey's claim that the three-party agreement contains the entire agreement, when he seeks to defeat the commission agreement of Mr. Muschert and that it does not contain the entire agreement when it operates to his disadvantage as to Mr. Conard's claim, is inconsistent.

In *Lorery v. Hawaii*, 206 U. S. 206, at page 222, it is said:

"There is no surer way to find out what the parties meant and to see what they have done. So obvious or patent a principle hardly needs the repetition it has received. And equally obvious is a resort to circumstances and conditions which preceded a contract. And this makes the value of contemporaneous construction. It is valuable to explain a statute when disinterested judgment is alone involved and invoked. It is of greater value to explain a contract where self-interest is quick to discern the extent of right or obligation, and never yields more than the written or spoken word required."

And in *Ryan v. Ohme*, 244 Fed. 31, at page 34, it is said:

"The rule is that greater regard is to be had to the clear intent of the parties than to any particular words they may have used in the expression of their intent. The language used must be interpreted in the sense in which the promisor knew, or had reason to know, that the promisee understood, and the rule is clearly established that in cases of doubt all the negotiations between the parties may be considered in arriving at the true intent of the parties."

STATEMENT OF THE ACCOUNT.

Commissions on \$206,000.00, \$20,600.00

Credits:

Watson note,\$3,000.00

Amount paid Mr. Conard, 5,000.00

With interest from February,

1914, to date of decree, 810.00

—————
\$8,810.00 8,810.00

—————
\$11,790.00

\$ 3,930.00

Rickey's share, one-third, from which is to be deducted interest on the Watson note

of February 26, 1914, to date of payment, \$765.00

Amount due Mr. Conard, 1,750.00

Interest from May 19, 1914, to date, 420.00

Commissions due Mr. Muschert, 1/10 of the profits, with interest, 2,060.00

Amount due defendants —————
\$4,995.00

III. The decree should be reformed. It should direct that the option agreement be delivered up to these defendants, and that the Clerk of the County of Mercer enter a discharge thereof upon his records. It should also state that the defendant Muschert should have a credit for the interest on the Watson note, which is to be deducted from Rickey's share of the commission. It should also provide that the \$5,000.00 advanced to Mr. Conard should bear interest.

Respectfully submitted,

AARON V. DAWES,

Counsel for Appellants.

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