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## Bill of Complaint.

Filed June 7, 1929.

### In Chancery of New Jersey.

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

The complainant, Herbert M. Ellend, Trustee in bankruptcy of Harry Marks and Mark M. Marks, Individually and trading as H. Marks & Son, respectfully shows that:

1. On February 25, 1927 Harry Marks and Mark M. Marks, trading as H. Marks & Son were duly adjudicated bankrupts.
2. That thereafter said Harry Marks and Mark M. Marks were discharged from bankruptcy on February 8, 1928 and said case was closed. 20
3. On January 28, 1929 the bankruptcy case of Harry Marks and Mark M. Marks trading as H. Marks & Son aforesaid was duly opened by order of the United States District Court and a new trustee, to wit, the complainant, appointed for the purpose of taking proceedings to collect certain assets alleged to belong to the estate. 30
4. That in the year 1922 the Millburn Building & Loan Association, a corporation of the State of New Jersey, duly issued a certain certificate of stock in said Building & Loan Association, No. 2507 to H. Marks & Son; that thereafter, at various times, said Building & Loan Association issued other certificates, to wit Nos. 2700, 3208, 3425, 3747 and 3838 to one Hannah Marks, who was the wife of Harry Marks and the mother of Mark M. Marks. 40

*Bill of Complaint.*

5. The aggregate of said Building & Loan shares represented by said certificates, is 55 shares, all of which are in the Millburn Building & Loan Association aforesaid.

6. That said Building & Loan shares were carried by the aforementioned bankrupts, Harry Marks and Mark M. Marks, Individually and trading as H. Marks & Son and were paid for from the time that they were purchased down to February 25, 1927 out of the bank account of said H. Marks & Son in the First National Bank of Millburn. Complainant charges that all of the money that went into the payment of the aforementioned Building & Loan shares down to February 25, 1927 was money of H. Marks & Son, the aforementioned bankrupt.

7. Complainant further says that certificate No. 2507 originally issued in the name of H. Marks & Son was endorsed in blank by H. Marks & Son and transferred and delivered to Hannah Marks before the said bankruptcy.

8. Complainant further says that the transfer of certificate 2507 and also the purchase of certificates Nos. 2700, 3208, 3425, 3747 and 3838 in the Millburn Building & Loan Association of Millburn, N. J. was voluntary and without the support of an adequate and valuable consideration and was fraudulent as to the creditors of said bankrupt and as to this complainant.

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

1. That Harry Marks and Mark M. Marks, Individually and trading as H. Marks & Son and

*Bill of Complaint.*

Hannah Marks, and Millburn Building & Loan Association, who are the defendants to this suit, may answer this Bill of Complaint and each statement therein made.

2. That the said defendants may make discovery of who has possessed said stock certificates mentioned in the Bill of Complaint and received the profits thereon. 10

3. That the said defendants or some of them, may be decreed to pay to complainant the full value of said stock certificates as of the date of February 25, 1927 together with interest thereon.

4. That the said transfer of certificate No. 2507 and the pretended transfer of certificates Nos. 2700, 3208, 3425, 3747 and 3838 of the Millburn Building & Loan Association stock by H. Marks & Son aforesaid to the defendant Hannah Marks may be set aside and held to be fraudulent and declared null and void and of no effect against the complainant as Trustee in bankruptcy of Harry Marks and Mark M. Marks, Individually and trading as H. Marks & Son. 20

5. That a writ of subpoena may issue, commanding said defendants to answer this Bill of Complaint and to abide by such decree as this court may make. 30

PALMER BRADNER,  
Solicitor for Complainant.

**Answer and Counterclaim of Defendants, Harry Marks and Mark M. Marks, individually, and trading as H. Marks & Son, and Hannah Marks.**

Filed Sept. 9, 1930.

IN CHANCERY OF NEW JERSEY.

10 Between  
HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,

Complainant,

and

20 HARRY MARKS and MARK M.  
MARKS, individually, and trad-  
ing as H. Marks & Son, and  
HANNAH MARKS, and FIRST  
NATIONAL BANK OF MILBURN,  
NEW JERSEY,

Defendants.

Answer and  
Counterclaim  
of Defendants,  
Harry Marks  
and Mark M.  
Marks, indi-  
vidually, and  
trading as H.  
Marks & Son,  
and Hannah  
Marks.

30 **ANSWER AND COUNTER-CLAIM.**

Defendants, Harry Marks and Mark M. Marks, individually and trading as H. Marks & Son, and Hannah Marks, by way of answer and counter-claim to the bill of complaint filed in the above matter by the complainant says:

1. Said defendants, Harry Marks and Mark M. Marks, individually, and trading as H. Marks & Son, and Hannah Marks, admit the allegations con-

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*Answer and Counterclaim of Defendants.*

tained in paragraphs one, two, three, four and five of the bill of complaint filed herein.

2. Said defendants deny the allegations contained in paragraphs six, seven and eight, of the said bill of complaint, and leave the complainant to its proofs.

3. The defendant, Hannah Marks, alleges that she was the owner of the certificates of stock alleged in the bill of complaint, for which she paid a lawful and valuable consideration, and denies that Harry Marks and Mark M. Marks, individually, and trading as H. Marks & Son, have had or are entitled to any money interest in any of the certificates of stock of the Milburn Building & Loan Association referred to in the said bill of complaint.

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## COUNTER-CLAIM.

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

Said Hannah Marks, by way of counter-claim, says:

1. On the date previous hereto, Hannah Marks, was indebted to the First National Bank of Milburn, New Jersey, and as collateral security for the loan, Hannah Marks, amongst other certificates of stock, pledged the certificate of stock of the Milburn Building and Loan Association, #2507.

30

2. By reason of mesne circumstances relating to bankruptcy of Harry Marks and Mark M. Marks, individually, and trading as H. Marks & Son, and without the consent of Hannah Marks, the First National Bank of Milburn, New Jersey, is about to, or has turned over, the said certificate

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*Answer and Counterclaim of Defendants.*

of stock to Herbert M. Ellend, trustee in bankruptcy of Harry Marks and Mark M. Marks, individually, and trading as H. Marks & Son.

3. Said Hannah Marks charges that Herbert M. Ellend, trustee in bankruptcy as aforesaid, and the First National Bank of Milburn, New Jersey, have deprived the said Hannah Marks from possession of said certificate of stock, and refuse to tender the same to her after demand for said certificate was made.

Said Hannah Marks is without adequate remedy in the Courts of Law, and therefore prays:

1. That the First National Bank of Milburn, New Jersey, and Herbert M. Ellend, trustee in bankruptcy of Harry Marks and Mark M. Marks, individually, and trading as H. Marks & Son, who are the defendants to this counter-claim herein, may answer the said counter-claim and each statement therein made.

2. That the said First National Bank of Milburn, New Jersey, may show by what authority or right it has divested itself of said certificate of stock, and is about to, or has, turned the same over to Herbert M. Ellend, trustee as aforesaid, and has refused, and still refuses, to deliver the said certificate of stock to the said Hannah M. Marks.

3. That a writ of subpoena may issue commanding the said defendants to this counter-claim, The First National Bank of Milburn, New Jersey, and Herbert M. Ellend, trustee in bankruptcy of Harry Marks and Mark M. Marks, individually, and trading as H. Marks & Son, to answer the said counter-claim, and to abide by such decree as this court

*Answer and Counterclaim of Defendants.*

may make, and the defendant Hannah Marks may have such further relief in the premises as this Honorable Court may deem meet.

HARRY S. NEIWIRTH,  
Solicitor for the Defendants, Harry Marks,  
and Mark M. Marks, individually, and  
trading as H. Marks & Son, and Hannah Marks. 10

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**Replication and Answer to Counterclaim.**

Filed Sept. 17, 1929.

IN CHANCERY OF NEW JERSEY.

10	Between HERBERT M. ELLEND, Trustee in Bankruptcy of Harry Marks and Mark M. Marks, individu- ally, and trading as H. Marks & Son,	Complainant,	} On Bill, etc. Replication and Answer to Counter- claim.
	and		
20	HARRY MARKS and MARK M. MARKS, individually, and trad- ing as H. Marks & Son, and HANNAH MARKS, and FIRST NATIONAL BANK OF MILBURN, NEW JERSEY,	Defendants.	

30 The complainant herein joins issue on the answer of the defendants, Harry Marks and Mark M. Marks, individually and trading as H. Marks and Son, and Hannah Marks.

**ANSWER TO COUNTERCLAIM.**

The complainant, by way of answer to the counterclaim of the defendant, Hannah Marks, says that:

He denies each and every allegation of said counterclaim.

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*Replication and Answer to Counterclaim.*

## FIRST DEFENSE.

The complainant says that said Building and Loan stock certificate #2507 mentioned in said counterclaim is not in the possession of the Trustee in Bankruptcy.

## SECOND DEFENSE.

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This complainant says that there is no equity in said counterclaim.

## THIRD DEFENSE.

This complainant says that said Hannah Marks is not the owner of said stock certificate.

PALMER BRADNER,  
Solicitor for Complainant. 20

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**Notice of Date Fixed for Hearing.**

Filed Jan. 18, 1930.

IN CHANCERY OF NEW JERSEY.

#73—442

Between  
 10 HERBERT M. ELLEND, Trustee in  
 Bankruptcy of Harry Marks  
 and Mark M. Marks, individu-  
 ally, and trading as H. Marks  
 & Son,

Complainant,

and

20 HARRY MARKS and MARK M.  
 MARKS, individually, and trad-  
 ing as H. Marks & Son, and  
 HANNAH MARKS, and MILL-  
 BURN BUILDING AND LOAN AS-  
 SOCIATION,

Defendants.

On Bill, etc.

Notice of  
 Date Fixed  
 for Hearing.

30 To HARRY S. NEIWIRTH, Solicitor for defendants,  
 Harry Marks, *et als*, and to HOBART L. BENE-  
 DICT, Solicitor for defendant, Millburn Build-  
 ing and Loan Association:

Please Take Notice that the Honorable Vice  
 Chancellor Alonzo Church has fixed Monday, Feb-

*Notice of Date Fixed for Hearing.*

ruary 3, 1930, at ten o'clock in the morning as the time and the Chancery Chambers, Newark, New Jersey, as the place of the hearing in the above entitled cause.

Respectfully yours,

PALMER BRADNER, 10  
Solicitor for Complainant.

Dated: January 13, 1930.

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**Testimony.**

IN CHANCERY OF NEW JERSEY.

Between  
 HERBERT M. ELLEND, Trustee in  
 10 Bankruptcy of Harry Marks  
 and Mark M. Marks, individu-  
 ally, and trading as H. Marks  
 & Son,

Complainant,

and

HARRY MARKS, MARK M. MARKS,  
 individually, and trading as H.  
 20 Marks & Son, and HANNAH  
 MARKS, and FIRST NATIONAL  
 BANK OF MILBURN,  
 Defendants.

February 3, 1930.

30 Transcript of shorthand notes of testimony taken  
 in the above entitled cause before his Honor, Alon-  
 zo Church, Vice-Chancellor, at the Chancery  
 Chambers, Newark, New Jersey, in the presence of:

PALMER BRADNER, ESQ. (By Herbert El-  
 len, Esq.), for the Complainant;

H. L. BENEDICT, ESQ., for Millburn Build-  
 ing and Loan Association;

HARRY NEIWIRTH, ESQ., for the Defend-  
 ants.

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(Counsel opened to Court).

*Robert F. Oliver, Jr.—Direct.*

ROBERT F. OLIVER, JR., called and sworn as a witness on behalf of the complainant, testified as follows:

*Direct-examination by Mr. Ellen:*

Q. Mr. Oliver, what is your present occupation?

A. I am in the real estate and general insurance business. 10

Q. Prior to that and fixing the date, if you will, please, with respect to the First National Bank of Dover, what was your occupation? A. Vice-President.

Q. Dating from what time? A. Well, the 1st of January, 1928.

Q. And prior to that, were you also connected with the bank? A. I was.

Q. And for how long? A. From March 16, 1909. 20

Q. Were you acquainted during the time you were in the bank with the account of H. Marks & Sons? A. I was.

Q. And what year was that account in the bank? A. I think it was 1922.

Mr. Neiwirth: Your Honor, I object to any question of thinking, unless we can fix the time with something definite. It is important that this man's testimony be fixed at certain—(interrupted). 30

The Court: I do not think it is important to know exactly when the account was opened. It was in 1922, and these transactions occurred?

Mr. Ellen: Some of them when the original transactions occurred, yes.

*Robert F. Oliver, Jr.—Direct.*

The Court: Well, then, of course, you must have proper evidence.

Q. In the year 1922, Mr. Oliver, was there an account in the bank in the name of H. Marks & Son?

A. There was.

10 Q. Did you ever receive any instructions from any member of the firm of H. Marks & Son relative to crediting the account for payment of Building & Loan shares? A. Not for crediting the account, but for charging the account, I received a request from Mr. Marks.

Q. Which Mr. Marks? A. Mr. Harry Marks:

Q. And what was the nature of that request? A. It came after a monthly payment had been neglected by him, in this respect: He came over to the  
20 Building & Loan meeting just about closing time, and, naturally, there was a line of customers there, and he decided he would go back and come back the next morning to pay it, and, naturally, being late, he was fined 10c. per share, or \$1. He protested against it, but I couldn't do anything for him. That was the rule of the Building & Loan. So the fine had to stand. But at that time I suggested to me that he would let me charge the ac-  
30 count each month, take care of his dues, and that he agreed to.

Q. At the time that request was made—oh, by the way, did you have any connection with the Milburn Building & Loan Association? A. Yes, I was a clerk.

Q. And at the time Mr. Marks made that request to charge his account with a payment, were the shares which he held in his name? A. They were.

40 Q. I show you a slip of paper, which is marked "Debit", and ask you if that is in your writing, or

*Robert F. Oliver, Jr.—Direct.*

was that made under your supervision, and what it signifies? A. That is not my writing, but I instructed the young lady to put the debit there. That represented the Building & Loan payment of February, 1927.

Q. What is the amount of that? A. \$55.

Mr. Ellen: I offer that.

10

Mr. Neiwirth: No objection.

(Paper marked Exhibit C-1).

Q. I show you these various sheets of paper and ask you whether or not those are original entries of the bank? A. They are.

Q. Were those under your supervision? A. They were.

Q. Can you tell from those what period of time in the extreme, that is, the earliest and the latest those sheets cover? A. The first entry is February 9, 1922, up to and including February 28, 1927.

20

Q. And whose account do those sheets represent? A. H. Marks & Son of Millburn.

Mr. Ellen: I offer these.

Mr. Neiwirth: No objection.

(Papers marked Exhibit C-2).

Q. Now, have you prepared from these bank statements an analysis— A. I have.

30

Q. —of the payments made to the Building & Loan Association? A. I did.

Q. I show you that sheet and ask you if that represents your analysis of those bank statements? A. It does.

Mr. Ellen: I offer this.

Mr. Neiwirth: Let me see it, please.

(Paper marked Exhibit C-3).

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*Robert F. Oliver, Jr.—Direct.*

Q. From that analysis which you have there, will you tell the Court, please, just what charges have been made over the period of time?

Mr. Neiwirth: Will you fix the date, please?

Mr. Ellen: That date is—

10 The Witness: You mean—

The Court: The total.

The Witness: The total?

Q. Yes. A. \$2115.83.

The Court: Twenty one hundred—

The Witness: \$2115.83.

The Court: Those were—you charged the account of this corporation—

20 The Witness: Yes.

The Court: —with payments on account of building and loan shares?

The Witness: Yes, sir.

Q. What years are covered by that analysis? A. 1922, 1923, 1924, 1925, 1926 and two months of '27.

Q. Now, the first item charged there is under what date, and what amount? A. February 10, 30 1922, \$10.25.

Q. Now, looking at that analysis, can you tell ultimately what the increase was in the charges to the account, the increase in each month? A. Yes. It was increased from ten to fifteen, in September of 1922; from fifteen to twenty-five, in November, 1923; from twenty-five to thirty-five, in April of '24; from thirty-five to forty-five, in September, 1924; from forty-five to fifty-five, in May, '25, until 40 February, '27.

*Robert F. Oliver, Jr.—Direct.*

Q. So that, eventually, there were fifty-five shares which were held? A. Yes.

Q. Now, can you tell from that statement whether or not the fifty-five dollars was paid as against shares which were held by the firm or by some one else? A. No, could not.

Q. When you were authorized to debit this account with the various amounts which from time to time you did withdraw, were you told for whose benefit those payments were being made? A. No. 10

Mr. Ellen: That is all. Cross-examine.

Mr. Neiwirth: No questions.

The Court: That is all. (

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Mr. Ellen: Mr. Neiwirth consents, at this time, to offer in evidence this transcript for the purpose of allowing the testimony of Mr. Bunnell, who is President of the First National Bank of Millburn, and the Treasurer of the Millburn Building & Loan Association, who was present, in evidence. Is that correct? 20

Mr. Neiwirth: Why, there is no objection to any statement contained in this pertaining to his duties there. I have no objection to that. But, if there is any testimony in this, and I have not seen it, that has any bearing on the defense, where I will have no opportunity to cross-examine, I will object to that phase of the testimony, at this time. 30

Mr. Ellen: I might say, this Mr. Bunnell's testimony relates merely to the fact that he discovered these building and loan certificates at the time that the loan was being paid off by the defendant, for the first time, and at the hearing before Referee Porter the defendant was represented by counsel, 40

*Robert F. Oliver, Jr.—Direct.*

who is present in this court, Mr. Silverstein, and an opportunity was given for cross-examination.

The Court: You cannot use the testimony here without the Counsel's consent.

Mr. Ellèn: I appreciate that.

10 Mr. Neiwirth: As to that phase of it, as to his duties, I have no objection, your Honor, and I think that it would be entirely unfair to my client to—  
(interrupted).

The Court: Where is Mr. Bunnel?

Mr. Ellen: He is in Florida, sir. He will be away for one month.

20 The Court: Well, the only thing to do is, I suppose, to adjourn the case until he comes back. I am sorry. If Mr. Neiwirth does not want to admit the testimony given at that time, then we will have to have the man come here and testify, because he is entitled to cross-examine him, not only before the Referee, but before this Court.

Mr. Ellen: I appreciate that.

The Court: Very well. Then we will adjourn it until Mr. Bunnel comes back.

Mr. Ellen: Will your Honor allow me at that time to make application to make a new date?

30 Mr. Neiwirth: In order to expedite it, if you will refer me to the question and answer, perhaps I will permit it to go in.

The Court: I will take a recess, and you can read it.

(Short recess).

The Court: Are you willing to admit it?

40 Mr. Neiwirth: I am willing to admit it, your Honor, excepting I want to refer specifically for the purpose of the record, to the fact that there were five other certificates, which is referred to in

*Colloquy.*

this bill of complaint, admitted to be in the name of Hannah Marks and not the partnership, according to the testimony, I want it specifically admitted.

The Court: Well, the testimony will show that that is admitted.

Mr. Neiwirth: Yes, sir.

10

The Court: All right.

(Paper handed to stenographer marked Exhibit C-4).

Mr. Ellen: That is the complainant's case, your Honor.

Mr. Neiwirth: May I address the Court, at this time?

The Court: Surely.

Mr. Neiwirth: As I understand it, on a question of this nature, I believe it is intended by the complaint to establish fraud on the part of the defendant, and from the testimony here adduced there is not anything before the Court to show that that is so.

20

The Court: Well, you know, if you make a motion to dismiss the bill, without putting in your testimony, and I deny it, you are precluded from putting in any testimony.

30

Mr. Neiwirth: Quite right. I merely make this suggestion, your Honor: In the face of what has been presented, you feel that we should proceed, I am satisfied.

The Court: I am not advising you to proceed or not. I am asking you if you are going to make a motion to dismiss.

Mr. Neiwirth: No, I won't make the motion, your Honor.

The Court: All right. Proceed.

40

*Colloquy.*

10 Mr. Ellen: May I be heard on one point, for the purpose of the record, rather? This is not an action in which the complainant alleges, as in the ordinary suit for fraudulent conveyance, that a fraud has been practiced in the sense that some one has transferred from the defendant when he was insolvent. We do say that payments were made surreptitiously by a bankrupt on account of shares in some one else's name, and those shares which stand in some one else's name are really the property of the defendant.

Mr. Neiwirth: What is this gentleman's name?  
Mr. Oliver.

The Court: Are you making this man your own witness now?

20 Mr. Neiwirth: Just for the purpose of one question.

*Direct-examination by Mr. Neiwirth:*

Q. I believe I have a recollection that you said you did not know on what shares these payments were being made, at the time you made the debits and credits on the account? A. Only on the first one.

30 Q. Did you know to what account the other shares were charged to, what names? A. No.

Q. You did not know whose names the shares were in, did you? A. No, sir.

Mr. Neiwirth: That is all.

Mr. Ellen: Just a minute, Mr. Oliver, at this time.

*Cross-examination by Mr. Ellen:*

40 Q. These debits were made, however—charged,

*Robert F. Oliver, Jr.—Cross.*

rather, to the firm of H. Marks & Son, were they not? A. Yes.

Q. You do know they were made on account of the building and loan shares, do you not? A. Yes, sir.

The Court: All right.

Mr. Neiwirth: Mr. Marks.

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HARRY MARKS, sworn as a witness on behalf of the defendants, testified as follows:

*Direct-examination by Mr. Neiwirth:*

Q. Mr. Marks, in the year 1922, did you have any shares of stock in—was it the Millburn Building & Loan? A. Yes, sir.

20

Q. You were in partnership with your son at that time; is that it? A. Yes, sir.

Q. Under what name was the shares of stock? A. In Harry Marks & Son.

Q. The firm's name? A. Yes, sir.

The Court: Harry Marks, or Harry Marks & Son?

Q. And son. Did you transfer these shares of stock? Did you? A. Yes, sir.

30

Q. To whom? A. To Hannah Marks, my wife.

Q. And why?

The Court: When?

The Witness: In 1922, sir, I wanted to enlarge my business, and I wanted to get some money—way back in 1900 and—

The Court: No. Just confine yourself to when you transferred them and why.

The Witness: Because I had borrowed 40

*Harry Marks—Direct.*

some money from my wife and I gave her those; I transferred those shares of building and loan to her to help to pay her back the money which I had promised to give her any time she wanted it.

10 Q. When did you borrow the money? A. In 1922.

Q. And when did you assign the shares to her, after that? A. Yes, sir.

Q. Now, how much money did you borrow? A. Two thousand dollars.

Q. Did you continue the payments on these shares— A. Yes, sir.

Q. —after that date? A. Yes, sir.

Q. On the ten shares? A. Yes, sir.

20 Q. And how did that come about? A. That I continued to pay for the shares?

Q. Yes. A. Because I had promised my wife, at the time I took the loan, that I would give her those shares of stock that we had taken out previously and continue to pay on those shares, which would pay her back her money.

Q. Well, have you her testimony here concerning 45 additional shares? A. Yes, sir.

30 Q. Did you take those shares out, and, if so, for whom? A. For Hannah Marks.

Q. And how did that come about? A. Why, my wife wanted to buy five shares of building and loan and asked me to do it for her, which I did.

Q. Where did you get the money from to take them out? A. My wife gave it to me, sir.

40 Q. Now, referring to five shares in 1922, ten shares in '23, ten shares in '24, and an additional ten shares in '24, and ten shares in '25, all in the name of Hannah Marks, were these shares taken

*Harry Marks—Direct.*

out the same way; if not, how were they taken out? A. Just the same way. My wife simply gave me the money to pay for the building and loan shares, as they came due she gave me the money.

Q. How was it, Mr. Marks, that these shares were paid for out of the account of the partnership?

A. Well, when you went over to the building and loan to pay your loan, there was usually a great big string of people that would take half an hour and sometimes three-quarters. I went over there one night to pay my building and loan, there was such a crowd there I couldn't wait, I had to come back and take care of my store. The next morning when I went there to pay the building and loan, I found that they had charged me a dollar for a fine, and I kicked about it. The gentleman, Mr. Oliver, that just was here, he suggested to me that I should do the same as a lot of others were doing, to have it taken from my bank account, and that would save me from having to be fined, and I wouldn't have to wait in line a half an hour or so, and I agreed to that. 10 20

Q. Did your wife give you all of the money that went towards the payment of these shares each month? A. Yes, sir.

Q. Did she pay you each month for the original ten shares, or was that handled separately? A. No. The ten shares, sir, we paid for ourselves. That was my arrangement that we pay for those ten shares ourselves, but the money for her building and loan she used to give me, and it was deposited in the bank in the same way as I made my other deposits, and it was deducted from the amount of balance that we had every month. 30

Q. Did you have any other bank account with the bank? A. No, sir. 40

*Harry Marks—Cross.*

Q. Did you have a personal bank account in your name? A. No, sir.

Q. Did your wife have one? A. No, sir.

Mr. Neiwirth: That is all.

*Cross-examination by Mr. Ellen:*

10

Q. When these shares were transferred to your wife, what value did they have? A. \$350.

Q. So that when she loaned you \$2000, in reality, all that you owed her was \$1700—or \$1650, is that right? A. Yes, sir.

Q. At the time you were bankrupt, how much money did you owe your wife? A. I think it was \$500.

20

Q. Is that listed in your schedule? A. No, sir.

Q. It is not? A. No, sir.

Q. Do you know whether or not your wife borrowed any money from the Building & Loan Association? A. Yes, sir.

Q. Do you recall the amount? A. It was \$1010.

Q. The maximum amount that you paid for your wife on account of these building and loan shares is \$55; is that correct? A. No, sir; I didn't paid that amount. I paid \$10, but my wife paid the  
30 other money.

Q. I mean, the amount that you paid, or which was debited to your account was \$55; that was the maximum, was it not? A. Yes, sir.

Q. Never paid any more to the Building & Loan Association, did you? A. Not at that time.

Q. Not at any time, did you ever pay more than \$55 at a single month? A. You mean for building and loan shares?

40

Q. Yes. A. No, sir, never paid any more than \$55 a month for building and loan shares.

*Harry Marks—Cross.*

Q. Did you pay any other amounts to building and loans other than \$55? A. Do you mean, after the loan was made, or previous to the loan being made?

Q. At any time, did you ever pay? A. After the loan was made, there was more money paid.

Q. That was debited to the firm account? A. 10  
Correct.

Q. And what was the maximum amount of that? A. The maximum amount was around, I think it was around \$85 or \$90 a month. I cannot recollect exactly, between \$85 and \$90.

Q. And when did those payments of \$85 first commence? A. After my wife bought her home.

Q. What date was that? Have you any idea? A. It was in 1925. 20

Q. Now, was the bank authorized to charge your account with \$85? A. Was the bank authorized? No.

Q. On account of the building and loan? A. They put—\$55 was spent, but they had the overage, and \$30 was all that was placed to it.

Q. You mean, debited to your account? A. \$85, exactly.

Q. So your account was debited with \$85? A. And some—\$85 and I think there was some interest money. 30

Q. Was the \$30 extra which the account was debited, on account of principal for this loan, or principal and interest? A. It was principal.

Q. All principal? A. The \$30 was principal. It started all the way from \$5, I think it was, and went down to 15c.

Q. At the time you were adjudicated a bankrupt, do you know the amount which your wife owed the Building & Loan Association on account 40

*Harry Marks—Cross.*

of the loan? A. You mean on account of the \$1010 that she borrowed?

Q. Yes. A. I think she owed them in the neighborhood of about—it must have been about—about \$300.

Q. About \$300? A. (Witness nods yes).

10 Mr. Ellen: That is all.  
The Court: That is all, sir.  
Mr. Neiwirth: Mrs. Marks.

---

HANNAH MARKS, sworn on behalf of the defendants, testified as follows:

*Direct-examination by Mr. Neiwirth:*

20 Q. Mrs. Marks, you are the wife of Mr. Marks, Harry Marks? A. Yes.

Q. Speak a little louder, please. You live in Millburn? A. Yes, sir.

Q. How many members are there in your family? A. Seven.

The Court: I cannot hear you.

The Witness: Seven.

30 Q. How many persons or members of your family were there at home in 1922? A. The youngest one.

Q. What is his name? A. Ralph.

Q. Ralph? A. (Witness nods yes).

Q. Was Sidney Marks at home? A. Oh, I didn't know what you asked me, I thought you—(interrupted).

Q. How many members lived with you? A. They were all home.

40 Q. And what income did you have in your home

*Hannah Marks—Direct.*

from the various members of your family? A. I have a young woman that is staying with me for the last fourteen years. In the beginning, the first few years, she gave me ten dollars a week. Later on, why, when things got dearer, she paid me \$12 a week, and, with the children working, why, I got all that was—that I had to have. 10

Q. Did your sons contribute to your home each week? A. Yes, sir.

Q. Did your husband contribute each week? A. Yes, sir.

Q. Did you loan your husband and your son some money in 1922? A. Yes, sir.

Q. How much was it? A. I loaned them \$2000.

Q. Was it all cash money? A. No. I had—my husband gave me a camp up in Unity, New Hampshire, and he also gave me some Liberty bonds and war stamps, and, when I came to Millburn, I gave my husband the stamps and bonds to put in safe keeping, because I had nowhere to keep them, and in 1922, he said to me, "Hannah, I would like to enlarge my business, but I have no money." So I said, "Well, I have got some and I will let you have it." He said, "How are you going to do it?" I said, "I will sell my camp and I will cash in the stamps and bonds," and I cashed it in, and I gave him the \$2000. 20 30

Q. You are speaking now of the place in Unity which was a cottage? A. Yes, sir.

Q. In New Hampshire? A. Yes, sir.

Q. When did you acquire this property? A. In 1920. My husband gave it to me.

Q. And in 1922 you sold it? A. Yes, sir; a little while before. I don't know exactly which it was.

Q. You are certain that it was before you made the loan to your husband? A. Oh, of course. 40

*Hannah Marks—Direct.*

Mr. Neiwirth: I offer for identification three copies of deeds concerning this parcel out in New Hampshire. It shows transactions from Barney Levitt to Harry Marks, November 24, 1913.

10 The next one, from Harry Marks to Hannah Marks, March 22, 1920.

And the third one from Hannah Marks to Bertha Steinfeld, June 6, 1922. No objection?

Mr. Ellen: No.

The Court: Have you any objection to their being marked in evidence?

Mr. Ellen: No.

20 The Court: They may be marked in evidence.

(Three papers marked Exhibits D-1, D-2 and D-3).

Q. Mrs. Marks, will you please explain to the Court what agreement you had with your husband, if any, about this money which you loaned him?

30 A. Well, when I agreed to loan him this money, I asked him how he was going to pay it back to me, so he said that he had ten shares of building and loan, and that he would let me have that in payment, so every month he paid until it would be paid up, and then I will get what is coming to me.

Q. Now, you have heard some testimony concerning 45 additional shares of stock, which appear in your name. Did you purchase these shares of stock from the building and loan? A. Yes, sir.

40 Q. And how did that take place? A. In 1922, I took out five shares, and in '23 I took out ten shares, and in '24 I took out ten and ten, different

*Hannah Marks—Direct.*

issues, and in '25 I took out ten shares, so that made 45 shares.

Q. Now, who went to the Building & Loan to get these shares? Did you go? A. Never.

Q. Well, who did? A. I gave the money to my husband and he went. I was never in that building ever since I am there. 10

Q. Did you ask your husband to take these shares out for you? A. I told him to take them, and I gave him the money to take them with.

Q. How did you pay for these shares every month? A. Well, as I said, I have this girl at the present time, and her money I took every week and put on one side, and with what the children gave me, I had more than to pay for them.

Q. Did you know anything about what fashion your husband paid these shares in, whether he went there personally, or paid them by check, or any other way? A. I don't know. 20

Mr. Ellen: I object to that, if the Court please—just a moment—hearsay.

The Court: I will sustain the objection. Well, no, I won't, either. She said she didn't know. That is all right, surely.

Q. Did you ever borrow any money on these shares of stock, Mrs. Marks? A. Yes, sir. 30

Q. Do you remember when that was? A. Yes, sir.

Q. When was it? A. In 1925.

Q. How much did you borrow? A. \$1010.

Q. Did you buy some real estate at that time?

A. I did.

Q. What was it? A. Just a home for myself.

Q. Do you still have the home? A. Yes, sir. 40

*Hannah Marks—Direct.*

Q. Did you recently have your attorney institute a suit against the Millburn Building & Loan Association to recover these 45 shares of stock? A. Yes, sir.

Q. Did you get them back? A. The 45 shares?

Q. Yes. A. The 45 I got back.

10 Q. And did you again make another loan on them? A. I did.

Q. In what amount? A. \$2200.

Q. What did you use this money for? A. Which money?

Q. That you got the last time on this loan? A. The last loan?

Q. The last loan that you got? A. To pay off some of my mortgage.

20 Q. On this real estate that you acquired? A. Yes, sir.

Q. Do you remember how much money you paid each month to the Building & Loan after you borrowed some money there? A. The first loan, you mean?

Q. Yes. A. Yes.

30 Q. How much did you pay? A. I paid \$45 a month. My husband gave me ten for the ten shares that he has given me, and \$30 a month on the payment and interest.

Q. Did you pay an additional \$30 each month? A. Yes, sir.

Q. After you acquired this money from the Building & Loan? Did you give that money to your husband? A. I gave this money to my husband.

Mr. Neiwirth: That is all.

*Cross-examination by Mr. Ellen:*

40 Q. How much is due? Just a moment, please.

*Hannah Marks—Direct.*

How much is due on this subsequent amount, this last amount which you borrowed from the Building & Loan Association? A. On which?

Q. Of the amount which you recently borrowed from the Building & Loan Association, the last one. You paid back some of the money which you borrowed to pay off the mortgage on your house, didn't you? A. Yes, sir. 10

Q. And how much is now due the Building & Loan? A. I don't just remember. My son takes care of all my business, because I am not good at figures.

Q. The amount which you originally borrowed is not the amount now due, is it? A. No, sir.

Q. Did you give your husband every month the amount necessary to pay on account of the principal of the \$1010 loan? A. Yes, sir. 20

Q. Do you know whether or not he took that down to the Building & Loan, or paid it by check? A. I don't know.

Q. How did you derive your income from which you gave your husband these moneys every month?

A. From the young lady that is staying with me, and my children.

Q. And your children contributed to your support? A. Yes, sir. 30

Q. All of your children? A. All of them.

Q. All of them have incomes which they earn? A. Yes, sir.

Q. How much did your son, Sidney, contribute?

A. All according to his earnings.

Q. Have you any idea what they were in 1925?

A. No, I have not.

Q. Did he have any income in 1925? A. Yes, sir. 40

*Hannah Marks—Cross.*

Q. Do you know where he was employed at that time? A. No.

Q. Was he employed? A. He was.

Q. All day? A. All day.

The Court: Do you know where he was employed?

10

The Witness: In Newark.

The Court: By whom?

The Witness: By Harry Silverstein.

Q. As a matter of fact, he was serving a clerkship in a law office, was he not, Mrs. Marks? A. Well, he was doing that, and odd work around the town.

Mr. Ellen: That is all.

20

The Court: That is all, Madam.

---

MILTON MARKS, sworn as a witness on behalf of the defendant, testified as follows:

*Direct-examination by Mr. Neiwirth:*

Q. Milton, were you in partnership with your dad at the time of this controversy? A. Yes, sir.

30

Q. What kind of a business was it? A. General dry goods.

Q. I see. Did you know that the partnership account was being charged with the monthly payment of the building and loans? A. Yes, sir.

Q. How did you know it? A. Well, I was a partner, and, naturally, I was consulted in most of the money matters.

40

Q. And how did it come to your attention? A. First of all, we needed a loan to increase our business. Mother made that loan, and father promised

*Milton Marks—Direct.*

to pay her back immediately, and we had previously taken out a few shares of building and loan, and we figured that would be a safe and sure way of paying back the money.

Q. Now, regarding these additional 45 shares of stock which you have heard here this morning, did you know that these items were being paid out of the account of the partnership? A. Certainly. 10

Q. How did that come to your knowledge? A. I was living at home at the time. Naturally, I knew mother gave father money to pay for the shares. He deposited that money which he gave her (she gave him) in the general banking fund, and, naturally, withdrew it through the building and loan.

Q. Did you make the checks out, or did your dad make the checks out? A. Father made out the checks. 20

Q. What signatures were necessary on the checks? A. Only his.

Q. Did you have anything to do with the books? A. Very little.

Mr. Neiwirth: Take the witness.

*Cross-examination by Mr. Ellen:*

Q. Do you know in what manner the \$30, which was paid on account of the principal of the \$1010 loan, was paid by your firm? A. What was that, please? 30

Q. (Question read as follows): "Do you know in what manner the \$30, which was paid on account of the principal of the \$1010 loan, was paid by your firm?" A. This money was given by my mother to take care of it, I believe. 40

*Milton Marks—Cross.*

Q. Was the bank authorized to debit the account with \$30 in addition to the \$55 every month? A. That I couldn't say.

Q. Did your father make out a separate check for that? A. Well, just withdrawn from his bank balance each month.

10 Q. Without making out separate checks? A. That is the way I believe the situation was.

Q. Well, do you know whether or not that was the situation? A. I do not, no.

Q. And you don't know very much about the bank account of H. Marks & Son? A. I didn't handle the books.

Q. Did you ever see any checks made out for \$30 every month? A. I can't say that I saw many of the checks, anyway.

20

Mr. Ellen: That is all.

---

HARRY SILVERSTEIN, sworn as a witness in behalf of the defendants, testified as follows:

*Direct-examination by Mr. Neiwirth:*

Q. Mr. Silverstein, did you represent any party in interest in the bankruptcy proceedings? A. I did.

30

Q. Whom did you represent? A. I represented the bankrupts..

Mr. Neiwirth: We are admitting, for the purpose of the record, that Mr. Silverstein is an attorney in this State.

Q. Did you institute a replevin suit against the Millburn Building & Loan Association? A. No.

40

*Harry Silverstein—Direct.*

Q. Or the bank? A. I instituted a replevin suit against the First National Bank of Millburn, in the latter part of April, 1928.

Q. And what was the purpose of the suit? A. To secure possession of five building and loan certificates, and, between the time the papers left my office and got to the sheriff's office, four of the certificates were turned over to me by the treasurer of the Building & Loan, who was the president of the bank, and the one certificate was retained by them. I then proceeded. They filed an answer in that replevin proceeding, and I immediately served them with a notice to strike the answer, which they filed, on the ground it was sham, which it was, and, thereafter, these proceedings were instituted. There was a restraining order, restraining the action on the replevin, pending the outcome of this suit. 10 20

Q. Did you make a demand for these certificates of stock before you instituted the suit? A. I did.

Q. And why were they refused? A. Apparently, the only reason given—

The Court: No, what does it say?

The Witness: "On advice of counsel."

The Court: All right.

The Witness: As a matter of fact, what was said was this, that on the advice of counsel, he was turning over to me the four certificates, and the fifth certificate he would turn over to me in a few days, and the few days resulted in this proceeding. 30

Q. Was that as far as you went with that cause of action? A. Well, after I was enjoined by the Court, that is as far as I could go.

Q. And what was the reason for that restraint? 40

*Robert F. Oliver, Jr.—Rebuttal—Direct.*

The Court: No.

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

The Court: No.

Mr. Neiwirth: That is all.

The Court: Any cross?

10

Mr. Ellen: No cross.

The Court: That is all.

Mr. Neiwirth: That is our case, your Honor.

Mr. Ellen: Will your Honor permit me to ask Mr. Oliver one question in rebuttal?

The Court: All right.

Mr. Ellen: Take the stand, please.

20

ROBERT F. OLIVER, JR., recalled in rebuttal.

*Direct-examination by Mr. Ellen:*

Q. Mr. Oliver, I ask you if you will please to refer to your analysis sheet. Does it appear anywhere between the years of the accounts credited, these payments of building and loan shares, that the amount ever exceeded \$55? A. No, it does not.

30

Q. Was \$85 at any time ever debited that account? A. No.

Mr. Ellen: That is all.

The Court: That is all, sir.

Does it appear on the record when these people went into bankruptcy, and when they were discharged?

Mr. Ellen: Yes, sir. Those facts are admitted in the answer. They are pleaded in the bill that on February 25, 1927, the de-

40

*Robert F. Oliver, Jr.—Rebuttal—Direct.*

defendants were adjudicated bankrupt; that on February 8, 1928, the defendants were discharged; that on January 28, 1929, the bankruptcy proceedings were duly opened by order of the United States District Court.

The Court: Now, you want to submit memorandums? 10

Mr. Ellen: If the Court so desires us to submit, I am perfectly willing.

The Court: All right. You will submit memorandums on the testimony. You will have to have the testimony written out.

How long do you want after the testimony is written out?

Mr. Ellen: Say—

The Court: Ten days?

Mr. Ellen: About ten days would do, I think. 20

The Court: All right.

30

40

**Exhibit D-1.**

Know all Men by these Presents, that I, Barney Levitt, of Hartford, in the County of Windsor, and State of Vermont, for and in consideration of the sum of Two Hundred and sixty-five Dollars to me in hand before the delivery hereof, well and truly paid by Harry Marks of Hartford in said County and State, the receipt whereof I do hereby acknowl-  
 10 edge, have granted, bargained, and sold, and by these Presents do give, grant, bargain, sell, alien, enfeoff, convey and confirm unto the said Harry Marks and his heirs and assigns forever.

A certain tract or parcel of land with buildings thereon situated in Acworth in the County of Sullivan and State of New Hampshire and bounded and described as follows, viz:

20 Beginning at a spotted maple tree on the north side of the Crescent Lake Road so called, thence running along the north side of said road westerly about 50 feet to land of Captain L. Sarsons, thence northerly on the east line of said Sarson's land to Crescent Lake, formerly called, Cold Pond; thence along the south shore of said Crescent Lake about sixty-five feet to a spotted white birch tree; thence southerly to the bound begun at. Being a part of the Glidden lot so called.

30 Said land was conveyed to me by deed of Prosper Simano and Mary Simano on the 7th day of November 1913, and recorded in Book 185, Page 518 of Sullivan County Land Records, to which reference is had for more particular description.

To Have and to Hold the said granted premises, with all the privileges and appurtenances to the same belonging to him the said Harry Marks and his heirs and assigns to him and their only proper use and benefit forever. And I the said Barney  
 40 Levitt and my heirs, executors and administrators,

*Exhibit D-1.*

do hereby covenant, grant and agree, to and with the said Harry Marks and his heirs and assigns, that until the delivery hereof I am the lawful owner of said premises, and am seized and possessed thereof in my own right in fee-simple; and have full power and lawful authority to grant and convey the same in manner aforesaid; that the premises are free and clear from all and every encumbrance whatsoever; and that I and my heirs, executors and administrators, shall and will warrant and defend the same to the said Harry Marks and his heirs and assigns, against the lawful claims and demands of any person or persons whomsoever. 10

And I, \_\_\_\_\_ wife of the said \_\_\_\_\_ in consideration aforesaid, do hereby relinquish my right of dower \_\_\_\_\_ in the before mentioned premises. 20

In Witness Whereof, I have hereunto set my hand and seal this 22 day of November in the year of our Lord 1913,

BARNEY LEVETT L.S.

Signed, sealed and delivered  
in the presence of us:

Gertrude G. Pingree  
David A. Pingree

30

State of Vermont, Hartford, ss. Nov. 22, A. D. 1913.

Personally appeared the above named Barney Levitt and acknowledged the foregoing instrument to be his voluntary act and deed.

Before me, David A. Pingree, Notary Public.  
(Notarial Seal)

ENDORSED:

Copy: (Homestead) Warranty Deed—Barney 40

*Exhibit D-2.*

Levett to Harry Marks—Sullivan County, N. H. Records—Received Nov. 24th, 1913.—Recorded in Col. 185, Page 529—A true copy, Attest: Chas. W. Rounsevel, Register.

10

**Exhibit D-2.**

Know All Men by These Presents, that I, Harry Marks, of New York, in the County of New York, and State of New York for and in consideration of the sum of one dollar and other valuable consideration to me in hand before the delivery hereto, well and truly paid by Hannah Marks of New York, in said County and State, the receipt whereof I do hereby acknowledge, have granted, bargained, and sold, and by these Presents do give, grant, bargain, sell, alien, enfeoff, convey and confirm unto the said Hannah Marks and her heirs and assigns forever.

A certain tract or parcel of land with buildings thereon situated in Acworth in the County of Sullivan and State of New Hampshire, and bounded and described as follows, viz: Beginning at a spotted maple tree on the north side of the Crescent Lake Road so-called, thence running along the north side of said road westerly about 50 feet to land of Captain L. Sarsons, thence northerly on the east line of said Sarson's land to Crescent Lake, formerly called Cold Pond; thence along the south shore of said Crescent Lake about sixty-five feet to a spotted white birch tree; thence southerly to the bound begun at. Being a part of the Glidden Lot so called. Said land was conveyed to me by deed of Prosper R. Simano and Mary Simano on the 7th day of November 1913, and recorded in

*Exhibit D-2.*

Book 185, Page 518 of Sullivan County Land Records, to which reference is had for more particular description.

To Have and to Hold the said granted premises, with all the privileges and appurtenances to the same belonging to her the said Hannah Marks and her heirs and assigns to her and their only proper use and benefit forever. And I the said Harry Marks and my heirs, executors and administrators, do hereby covenant, grant and agree, to and with the said Hannah Marks and her heirs and assigns, that until the delivery hereof I am the lawful owner of the said premises, and am seized and possessed thereof in my own right in fee-simple; and have full power and lawful authority to grant and convey the same in manner aforesaid; that the premises are free and clear from all and every encumbrance whatsoever; and that I and my heirs, executors and administrators, shall and will warrant and defend the same to the said Hannah Marks and her heirs and assigns, against the lawful claims and demands of any person or persons whomsoever. 10 20

In Witness Whereof, I have hereunto set my hand and seal this 18th day of March, 1920.

HARRY MARKS L.S. 30

Signed, sealed and delivered  
in presence of us:

Louis Jaykowsky.

State of New York, County of New York, City of  
New York, ss.

On this 18th day of March, before me, personally appeared Harry Marks, to me known and known to me to be the individual described in who execut- 40

*Exhibit D-2.*

ed the foregoing instrument and he duly acknowledged to me that he executed the same.

LOUIS JADKOWSKY,  
Commissioner of Deeds,  
N. Y. N. Y.

10 Com. Expires Sept. 23, 1921.  
N. Y. Co. No. 53.  
(Com. of Deeds)

## ENDORSED:

Copy: (Homestead) Warranty Deed—Harry Marks to Hannah Marks—Sullivan County, N. H., Records—Received March 22nd, 1920—Recorded in Vol. 200, Page 231—A true copy, Attest: Chas. W. Rounsevel, Register.

20

Form 3.  
State of New York, County of New York, City of  
New York, ss. No. 15236

Series B I, William F. Schneider, Clerk of  
the County of New York, and also Clerk of the  
Supreme Court in and for said county.

30 Do Hereby Certify, That said Court is a Court  
of Record, having by law a seal; That Louis Jay-  
kowsky, whose name is subscribed to the certifi-  
cate or proof of acknowledgment of the annexed in-  
strument, was at the time of taking the same, a  
Commissioner of Deeds in and for said city and  
County, duly commissioned and sworn, and quali-  
fied to act as such; that as such Commissioner of  
Deeds he was duly authorized by the laws of the  
State of New York to administer oaths and affir-  
40 mations, to take affidavits and certify the acknowl-  
edgment and proof of deeds and other written in-  
struments to be read in evidence or recorded in

*Exhibit D-3.*

this State; and further that I am well acquainted with the handwriting of such Commissioner of Deeds and verily believe that his signature to such proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 19, 10  
day of March 1920.

W. F. SCHNEIDER,  
Clerk.

(Court Seal)

**Exhibit D-3.**

Know All Men by These Presents, that I, Hannah Marks, wife of Harry Marks, and the said Harry Marks, of the Township of Millburn in the County of Essex and State of New Jersey, for and in consideration of the sum of One dollar and other good and valuable consideration to us in hand before the delivery hereof, well and truly paid by Bertha Steinfield, widow, of Claremont, in the State of New Hampshire, the receipt whereof I do hereby acknowledge, have granted, bargained, and sold, and by these Presents do give, grant, bargain, sell, alien, enfeoff, convey and confirm unto the said Bertha Steinfield, and her heirs and assigns forever. 20 30

A certain tract or parcel of land with buildings thereon, situated in Acworth in the County of Sullivan and State of New Hampshire, and bounded and described as follows: viz:

Beginning at a spotted maple tree on the north side of Crescent Lake Road, so-called, thence running along the north side of said road westerly 40

*Exhibit D-3.*

about 50 feet to land of Captain L. Sarson, thence northerly on the east side of said Sarson's land to Crescent Lake, formerly called Cold Pond; thence along the south shore of said Crescent Lake about sixty five feet to a spotted white birch tree; thence southerly to the bound begun at.

10 Being a part of the Glidden Lot so-called. Said land was conveyed to the said Hannah Marks by deed of Harry Marks on the 18th day of March 1920 and recorded in Volume 200, Page 231 of Sullivan County, New Hampshire, Land Records.

To Have and to Hold the said granted premises, with all the privileges and appurtenances to the same belonging to her the said Bertha Steinfield and her heirs and assigns to her and their only proper use and benefit forever. And I the said  
 20 Hannah Marks and my heirs, executors and administrators, do hereby covenant, grant and agree, to and with the said Bertha Steinfield and her heirs and assigns, that until the delivery hereof I am the lawful owner of the said premises, seized and possessed thereof in my own right in fee-simple; and have full power and lawful authority to grant and convey the same in manner aforesaid; that the premises are free and clear from all and every en-  
 30 cumbrance whatsoever; and that I and my heirs, executors and administrators, shall and will warrant and defend the same to the said Bertha Steinfield and her heirs and assigns, against the lawful claims and demands of any person or persons whomsoever.

In Witness Whereof, we have hereunto set our

*Exhibit D-3.*

hands and seals this nineteenth day of July, nineteen hundred and twenty-one.

HANNAH MARKS L.S.  
HARRY MARKS L.S.

Signed, sealed and delivered  
in the presence of:  
Wm . E. Summers.

10

State of New Jersey, County of Essex, ss. On this nineteenth day of July, one thousand nine hundred and twenty-one, before me personally appeared Hannah Marks and Harry Marks, her husband, to me known and known to me to be the individuals described in the foregoing instrument and acknowledged the foregoing instrument to be their voluntary act and deed.

20

WM. E. SUMMERS,  
Commissioner of Deeds of and  
for the State of New Jersey.

(Commissioners Seal)  
ENDORSED:

Copy: (Homestead) Warranty Deed—Hannah Marks, to Bertha Steinfield—Sullivan County, N. H., Records—Received June 6th, 1922—Recorded in Vol. 209, Page 84—A true copy, Attest: Chas. W. Rounsevel, Register.

30

**Stipulation.**NEW JERSEY COURT OF ERRORS AND  
APPEALS.

HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,  
10 Complainant-Appellee,

vs.

HARRY MARKS and MARK M.  
MARKS, individually, and trad-  
ing as H. Marks & Son, and  
HANNAH MARKS, and MILL-  
BURN BUILDING AND LOAN AS-  
SOCIATION,  
20 Defendants-Appellants.

On Appeal.

Stipulation.

Whereas certain exhibits were offered in evi-  
dence by the complainant-appellee, when the above  
entitled matter was contested in the Court of Chan-  
cery of New Jersey, which exhibits consisted of  
bank ledger sheets, bank statements, debit slips and  
miscellaneous papers,

30 And whereas the defendants-appellants are de-  
sirous of including in their State of the Case on  
Appeal, the matters and things in the said exhibits  
contained,

And whereas the expense involved in including  
the exhibits in the State of the Case may be obvi-  
ated by a stipulation by and between counsel cov-  
ering the information in said exhibits contained,

40 NOW THEREFORE, it is stipulated by and between  
counsel for the defendants-appellants and the com-  
plainant-appellee, that the following is a true  
statement of the contents of the said exhibits which

*Stipulation.*

may be considered by the Court of Errors and Appeals of New Jersey, in lieu of the said exhibits.

Statement of monies charged against the bank account of H. Marks & Son, with the First National Bank of Millburn, N. J. for the payment of monthly dues in the Millburn Building and Loan Association, for stock shares held in the name of H. Marks & Son and Hannah Marks:

10

Date	Charges	
1922		
Feb. 10	\$10.25	
Mar. 9	10.00	
Apr. 13	10.00	
June 15	21.00 (two months dues and \$1. fine)	
July 14	10.00	
Aug. 9	10.00	
Sept. 14	15.00	20
Oct. 10	15.00	
Nov. 9	15.00	
Dec. 14	15.00	
1923		
Jan. 11	15.00	
Feb. 15	15.00	
Mar. 15	15.00	
Apr. 12	15.00	
May 10	15.00	
June 14	15.00	30
July 11	19.58	
Aug. 9	15.00	
Sept. 13	15.00	
Oct. 11	15.00	
Nov. 14	25.00	
Dec. 13	25.00	
1924		
Jan. 9	25.00	
Feb. 15	25.00	
Mar. 13	25.00	
April 10	35.00	40
May 15	35.00	
June 10	35.00	
July 10	35.00	

*Stipulation.*

	Aug. 14	35.00
	Sept. 11	55.25
	Oct. 8	45.00
	Nov. 14	45.00
	Dec. 10	45.00
	1925	
10	Jan. 15	45.00
	Feb. 13	45.00
	Mar. 12	45.00
	Apr. 9	45.00
	May 14	55.00
	June 9	55.00
	July 6	55.00
	Aug. 12	55.00
	Sept. 10	55.00
	Oct. 15	55.00
	Nov. 9	55.00
	Dec. 7	55.00
	1926	
20	Jan. 11	55.00
	Feb. 8	55.00
	Mar. 9	55.00
	Apr. 13	55.00
	May 11	55.00
	June 8	55.00
	July 12	55.00
	Aug. 12	55.00
	Sept. 8	55.00
	Oct. 14	55.00
30	Nov. 9	55.00
	Dec. 6	55.00
	1927	
	Jan. 11	55.00
	Feb. 9	55.00

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\$2146.08 Total Charges.  
30.25 Fines & pass book

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\$2115.83 Net Charges.

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PALMER BRADNER,  
Solicitor for Complainant-Appellee.

HARRY B. NEIWIRTH,  
Solicitor for Defendants-Appellants.



*Memorandum of Complainant.*

10 & Son, were duly adjudicated bankrupts and were discharged therefrom on February 8, 1928. On January 28, 1929, the said bankruptcy was reopened upon sufficient proof, by order of the United States District Court, and the complainant, Herbert M. Ellend, duly appointed as Trustee for the purpose of collecting the assets belonging to the estate as aforesaid.

20 In 1922, the Millburn Building and Loan Association, a New Jersey corporation, issued stock certificates #2507, in the said Association to the defendant H. Marks & Son, and at various times thereafter, said Association issued other stock certificates, #2700, 3208, 3435, 3747 and 3838 to the defendant Hannah Marks, who is the wife of Harry Marks and the mother of Mark M. Marks, both of whom are defendants herein. Said Building and Loan certificates represented 55 shares of stock in the said Building and Loan Association, and were carried and paid for by the defendants Harry Marks and Mark M. Marks, Individually and trading as H. Marks & Son, from the date that the said certificates were purchased down to February 25, 1927. Said payments were made out of the bank account of the defendants which bank account 30 was maintained in the First National Bank of Millburn, New Jersey.

40 The complainant charges that the moneys paid in on account of the certificates as aforesaid, were the property of the defendant bankrupts and that certificate #2507, originally issued in the name of the bankrupt firm, was endorsed, transferred and delivered to the defendant Hannah Marks before the said bankruptcy, for the avowed purpose of defrauding creditors.

*Memorandum of Complainant.*

The testimony adduced at the trial of the issue between the parties, reveals that Robert F. Oliver, Jr. a former officer of the First National Bank of Millburn, and a clerk in the Millburn Building and Loan Association, was requested by Harry Marks, one of the defendants, some time in February, 1922, to debit the account of H. Marks & Son monthly with an amount sufficient to carry and pay for the building and loan shares outstanding in the name of H. Marks & Son. (Page 3) Upon the debiting of the account, the Bank would pay over the amount so charged to the Building and Loan Association, in which Association, payment on account of stock certificates would be credited. From February 1922 to February 28, 1927, the account of the bankrupt was debited as aforesaid. with the exception that the amount of the debit increased as new certificates were issued, until the aggregate amount finally totaled \$55.00 per month. In all, the sum of \$2,115.83 was so deducted from the account of the defendant H. Marks & Son, and credited on account of the Building and Loan certificates as aforesaid. (Page 7)

John B. Bonnell, President of the First National Bank of Millburn, and Treasurer of the Millburn Building and Loan Association (whose testimony at a former hearing was admitted in evidence in toto, Exhibit C-4) testified that the defendant Hannah Marks, borrowed some money from the Millburn Building and Loan Association on her own note, and posted as collateral security for the said note, the stock certificates in the Building and Loan Association, which are the subject of controversy in this cause. Some time in May or June of 1928, Hannah Marks applied to pay off

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*Memorandum of Complainant.*

10 the balance due on said loan and demanded the return of the collateral posted as security, at which time, Mr. Bonnell first became apprised of the fact that the said Hannah Marks was in possession of the Building and Loan certificates, which, after an examination of the ledger of the First National Bank of Millburn, disclosed that the said certificates were paid for from 1922 until 1927, in their entirety, by the bankrupt H. Marks & Son, which firm was indebted to the First National Bank of Millburn, one of the creditors in bankruptcy, in a sum approximating \$9,000. Thereafter, proceedings were immediately instituted to reopen the said bankruptcy for the purpose of claiming as a part of the estate of the bankrupt, the Building and Loan certificates as aforesaid.

20 The defendant Harry Marks testified (Page 14) that he was one of the partners of the firm of H. Marks & Son, and the owner of a certificate for 10 shares of stock in the Millburn Building and Loan Association. In 1922, he desired to enlarge his business, and borrowed \$2,000. from his wife, and in payment thereof, transferred the Building and Loan certificate to her, and continued the monthly payment thereof in the fashion heretofore outlined,  
30 for the purpose of further continuing the payment of the alleged debt to his wife. (Page 15) Thereafter, he took out 45 additional shares of stock of the Building and Loan Association, in the name of Hannah Marks, at various times, and paid for them out of the account of the firm, which subsequently went bankrupt, and was reimbursed therefor by his wife. (Page 16)

40 The value of the original 10 shares transferred to the defendant Hannah Marks, in repayment of the \$2,000. loan to the bankrupts, was \$350., which,

*Memorandum of Complainant.*

Harry Marks testified, made the amount due and owing to his wife \$1650. At the time of the adjudication of bankruptcy, the amount then due and owing was \$500. *The witness further testified that the amount which was due and owing to his wife at the date of the bankruptcy was not listed in the schedule of the bankrupts.*

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This clearly indicates that the testimony is false or the acts of the bankrupt and his wife collusive for the purpose of defrauding the creditors.

Harry Marks further testified that the maximum amount debited to the account of the bankrupt firm, for the purpose of paying the monthly dues on 55 shares of stock of the Building and Loan Association, was \$55. plus an additional \$30. per month on account of a loan by the Building and Loan Association, to the defendant Hannah Marks, making a total of \$85. per month. (Page 20) This amount, \$85. was debited from 1925 to the date of adjudication of bankruptcy, according to the testimony of Harry Marks.

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Robert F. Oliver, Jr. recalled in rebuttal (Page 37) testified that by reference to the analysis sheet of the First National Bank of Millburn (Exhibit C-3) and the ledger of the said bank (Exhibit C-2) *the amount debited to the account of the firm never exceeded \$55., nor was \$85. ever debited to the account.*

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Again, mute evidence of the falsity of the testimony in behalf of the defendants.

The defendant Hannah Marks, testified that she is the wife of Harry Marks and lived at home, together with seven members of the family and a young woman, who was a boarder, all of whom contributed toward the support and maintenance of the household. She further testified that she loan-

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*Memorandum of Complainant.*

ed her husband \$2,000. in 1922, which moneys she derived from the sale of a camp in Unity, New Hampshire, and Liberty Bonds and War Stamps, *all of which were given to her by her husband, Harry Marks.* (Page 23)

10 Hannah Marks further testified (Page 26) that out of the contributions of the members of the household, who lived at home, together with the boarder, she was able to give her husband, Harry Marks, sufficient moneys to pay the 45 shares of stock which were taken out in her name. On Page 28, she testified that the \$30. per month which was paid on account of the stock loan which she received from the Building and Loan Association, *was paid by her husband, Harry Marks, out of the firm account,* while on page 17, Harry Marks, husband  
20 of Hannah Marks, testified that *she gave him all of the money* which went toward the payment of these shares each month.

On cross examination, Mrs. Marks testified that she did not know how much was due the Building and Loan Association on account of the stock loan which she received in 1925, stating the reason therefor that her son took care of all of her business because she was not good at figures. However, in  
30 all other matters pertaining to the moneys paid to her husband every month, the amount of money which she loaned to him, the camp in New Hampshire, War Savings Stamps and Liberty Bonds which were transferred to her by her husband in 1920, she has a very distinct recollection, notwithstanding that the transaction involving the transfer to her of certain assets of her husband took place in 1920, about which she testified she had a  
40 complete knowledge, and the amount of the money due the Building and Loan Association on the

*Memorandum of Complainant.*

stock loan which took place in 1925, of a much more recent date, and about which she knew nothing.

On page 29, Hannah Marks contradicts herself and her previous testimony by saying that the \$30. per month paid on account of the principal of a loan, was given to her husband Harry Marks, by her, whereas, on page 28, she testified that he gave her the money. Hannah Marks testified on cross examination (Page 30) that she derived her income from the moneys given to her by the young lady and her children, including one son, Sidney Marks, who was serving a clerkship in a law office in 1925, besides doing "odd work" around the Town. The Court may judicially notice that a candidate for the bar examination of New Jersey, serving a clerkship in the office of a Counsellor-at-law, of this State, must spend at least five hours per day, pursuing his vocation of law clerk, and the further fact that the remuneration of a law clerk is nominal, so that obviously, Sidney Marks, notwithstanding his mother's testimony, was not in a position to contribute toward her support.

The defendant Milton Marks testified (Page 31) that he is a son of Harry Marks and one of the partners of the firm of H. Marks & Son. He testified on direct examination, that he knew that his firm account was being charged with payments on account of Building and Loan shares, because he was consulted in most of the money matters. He testified further, on page 32 and 33, that he had very little to do with the books. On cross examination (Page 33) Milton Marks testified that he believed that his mother gave to his father \$30. a month necessary for the repayment of the loan from the Building and Loan Association, and then

*Memorandum of Complainant.*

testified, notwithstanding his direct examination, that *he did not know whether or not the bank was authorized to debit the account (the firm's account) with the \$30. on account of principal of a loan, in addition to the stock payment of \$55. per month.*

10 On page 33, he testified that he did not know whether separate checks were drawn on the firm account for the Building and Loan payments, or whether the bank simply debited the firm's account. On page 34, he testified that he did not handle the books of the firm, and the obvious conclusion from his testimony, is that he knew nothing whatever about any transactions which, as a member of a firm, he should have known, *and the presumption may very well be, that his reason for not knowing*  
 20 *of them, was that the arrangement which allegedly existed between his mother and the firm, in point of fact, never existed at all.*

## SUMMARY.

The account of H. Marks & Son was charged from June 1922 to 1927 with the payment of all of the Building and Loan shares which are the subject matter of this litigation, and no corroborative proof is offered by the defendants to sustain the conten-  
 30 tion that the payments were accomodation for which the firm was reimbursed, nor does it appear anywhere, either by books of account or statements of any kind, other than the testimony of materially interested parties, that Hannah Marks ever loaned any money to the firm of H. Marks & Son, or ever reimbursed the firm for moneys advanced on account of the payment of Building and Loan shares in her name.

40 It is a singular coincidence that the firm of H.

*Memorandum of Complainant.*

Marks & Son, after making all of these payments for a period of years, filed a petition in bankruptcy, which in no way affected the status of the Building and Loan shares, because they were in the name of the defendant Hannah Marks, and further that the bankrupt firm still owed Hannah Marks \$500. and yet never listed such a liability in their schedules. 10

The defendant Hannah Marks alleges that her source of income was derived from her children and a boarder who lived with her and paid rent, but nowhere does it appear, what amounts were given to her, nor do the defendants take the obvious course of corroborating such statements by producing the children and the boarder, all of whom certainly must have been available, particularly to testify in behalf of their mother and father. 20

Harry Marks and Hannah Marks are effusive in their contradictions of each other, and from a perusal of their testimony, it becomes apparent that their stories are a conglomeration of patent lies.

The complainant respectfully submits that a Decree in accordance with the prayer of the Bill, be entered in his favor.

PALMER BRADNER, 30  
Solicitor for Complainant.

**Memorandum of Defendants.**

Filed March 20, 1930.

IN CHANCERY OF NEW JERSEY.

	Between HERBERT M. ELLEND, Trustee in 10 Bankruptcy of Harry Marks and Mark M. Marks, individu- ally, and trading as H. Marks & Son, <div style="text-align: right; margin-right: 20px;">Complainants,</div> <div style="text-align: center; margin: 5px 0;">and</div> HARRY MARKS, MARK M. MARKS, 20 individually, and trading as H. Marks & Son, and HANNAH MARKS, and FIRST NATIONAL BANK OF MILBURN, <div style="text-align: right; margin-right: 20px;">Defendants.</div>	Memorandum of Defend- ants.
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30 There is but one question before the Court for determination—whether the payments made on account of the shares of stock in a building and loan association were moneys belonging to the partnership, or whether the moneys so advanced were the moneys of Mrs. Marks.

40 The testimony in the case as introduced by the complainant shows just one element of fact, and that is, that certain sums of money were paid to the Milburn Building & Loan Association by deduction from the accounts of H. Marks & Son, a partnership, and that only ten shares of the fifty-five shares of stock were transferred to the defendant, Hannah Marks. Complainant's own witness testified that at his recommendation and sugges-

*Memorandum of Defendants.*

tion to Mr. Marks, the deductions were made from the account of H. Marks & Son, on account of the building and loan shares, in order to avoid payment of fines in the event of the failure to pay on a regular pay night. Beyond this, the testimony is barren as to any facts that may tend to indicate that Mr. Marks with Mrs. Marks acted in collusion against the interest of the creditors of H. Marks & Son, or as a fraud against the said creditors. 10

It is my humble opinion that the complainant must go much further than he has in order to trace property or money in the hands of third parties for the purpose of impressing a trust on said property or funds, in support of which I beg to submit the following cases:

I beg to submit the case decided by your Honor, in 141 Atl. Reporter, page 804, Conway vs. Raphael. 20

In the above cited case, a bill was filed by trustee in bankruptcy to set aside a conveyance made by the husband, to the wife as being fraudulent for want of fair consideration, in which case your Honor held:

“Complainant seeking to set aside conveyance in fraud of creditors has a burden of proof to show conveyance rendered the grantor insolvent; lack of evidence that conveyance rendered debtor insolvent is a ground for dismissal in a bill of discovery to set aside conveyance as in fraud of creditors.” 30

In the case of Vail vs. Diamond, 135 Atl. Rep. page 791, decided by Vice Chancellor Backes, the essence of which is as follows:

“On a creditor’s bill to set aside voluntary 40

*Memorandum of Defendants.*

conveyance for fraud, fraud must be *proved*; fraud as to creditors in voluntary conveyance cannot be presumed as a matter of law."

In the case of Milkman vs. Arthe, 223 Federal, page 507, April 13, 1915 (New York), the husband gave the wife money from time to time for household expenses, from which money she purchased some stock, which incidentally is analagous to the case at bar, and the Court in that case held:

"Property bought by a wife of a bankrupt with money saved by her from sums given her by her husband from time to time for household expenses when he was not indebted, and for which he asked no accounting, cannot be recovered by his trustee for the benefit of subsequent creditors."

It would appear from these cases, and in view of the testimony introduced by the complainant and defendants in this case, the burden of proof has not been overcome by the complainant, taking into consideration the testimony of the defendants which stands wholly uncontradicted, that Mrs. Marks loaned to the partnership business the sum of \$2000.00, and at the time this money was passed to the partnership, a certificate of ten shares of stock was transferred to her name from the partnership, which had a value of \$350.00, and that the agreement to re-pay was to continue the payments on the said ten shares of stock until maturity or when the sum amounted to \$2000.00 on the books of the building and loan association. As to the other forty-five shares of stock, the testimony also is wholly uncontradicted; that Mr. Marks, acting as the agent of Mrs. Marks, and who, incidentally negotiated all of Mrs. Marks' transactions with the

*Memorandum of Defendants.*

building and loan association, as the record will disclose, took out for Mrs. Marks forty-five additional shares from time to time, and that the moneys for the payment of the said forty-five shares of stock were given to Mr. Marks each month, by Mrs. Marks. Mr. Marks, having no other bank account other than that of the partnership, inadvertently deposited the moneys in the accounts of the partnership, and had deductions made from the said account for fifty-five shares, which was the property of Mrs. Marks. 10

The testimony introduced by Mrs. Marks readily shows an income each week in her household, of a sufficient amount to permit a surplus sufficient to pay for forty-five shares each month, which testimony also stands entirely uncontradicted; there being an income from a boarder, plus the income from her sons, as well as a weekly allowance from her husband. 20

It further appears from the testimony that there was a good and valuable consideration passed between Mrs. Marks and the partnership, and stands uncontradicted, the reasonableness of which was substantiated by the evidence of the fact that Mrs. Marks sold a piece of real estate from which she acquired \$1000 in cash, and that in addition thereto, had \$1000.00 from the sale of liberty bonds and war savings stamps, which testimony, in its present form, in my opinion, eliminates any question concerning the position of the complainant as to his rights to any consideration in the moneys so deducted from the account of the partnership, which testimony also establishes, and it appears uncontradicted, as a true, proper and valuable consideration for the assignment of the shares, as well 30 40

*Memorandum of Defendants.*

as this defendant's, Hannah Marks, rights and interest in said assignment.

10 The record further discloses that between the time of the assignment and the date of the bankruptcy, the sum of \$2115.83 was paid through the partnership accounts and on account of the building and loan shares, which if, conceded for the purpose of argument, was not moneys which were advanced to the partnership by Mrs. Marks, the partnership, nevertheless, was indebted to Hannah Marks to the sum of \$2000 for and on account of the loan made to the said partnership by her, and which obviously stands out as being an indebtedness due from the partnership to Mrs. Marks, in the amount of \$2000.00, which appears in the testimony and uncontradicted.

20 In support of this contention, the case of Cole vs. Lee's Executors, Court of Errors and Appeals, December 12, 1889, 18 Atl. Rep. page 854, distinctly holds:

30 "When the fact that the husband received his wife's money was established by proof, there was established a liability on his part to account in equity to her for at least the principal sum received, which liability would afford a consideration sufficient to support a mortgage."

which has been held in this case, amongst other things as to the rights of creditors.

I respectfully submit that the complainant's brief does not cite any circumstance or facts establishing a principal of law from the testimony, nor is any law offered in support of the same, but instead, has submitted conclusions without logic or  
40 proper inference from the testimony, also (prob-

*Memorandum of Defendants.*

ably by inadvertence) misstated the fact that the deductions from the bank account of the partnership was made at the suggestion of Mr. Marks, whereas the testimony at the end of the first paragraph, page four, discloses that Mr. Oliver, complainant's witness, recommended the deductions to be made from the bank account, and then "But at that time I suggested to me that he would let me charge the account each month, take care of his dues, and that he agreed to". 10

The suggestion by counsel of the variance in some of the testimony of the witnesses, in my humble opinion, rather establishes the truth of the testimony of the several witnesses, instead of a reflection as to its correctness, since the court is very familiar with not only the testimony as introduced by a witness, but the witness' conduct while testifying, and the testimony of the several witnesses was entirely truthful, and the facts disclosed were given to the court as they actually are, and nowhere in the testimony does it show that the witnesses at any time changed their testimony. 20

The defendants respectfully submit that a decree be entered in their favor, dismissing the bill of complaint, with costs for the defendants.

HARRY S. NEIWIRTH, 30  
Sol'r. for Defendants.

**Memorandum by the Court.**

IN CHANCERY OF NEW JERSEY.

10	Between HERBERT M. ELLEND, Trustee in Bankruptcy of Harry Marks, <i>et als,</i> <div style="text-align: right; margin-right: 20px;">Complainant,</div> and HARRY MARKS and MARK M. MARKS, <i>et als,</i> <div style="text-align: right; margin-right: 20px;">Defendants.</div>	} Memorandum. (Not for print)
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*This memorandum is not to be published in the official or unofficial reports.*

20                    Mr. PALMER BRADNER, for complainant.  
                       Mr. HARRY S. NEIWIRTH, for defendants.  
 CHURCH, V. C.

This suit is instituted by a trustee in bankruptcy to recover certain assets which allegedly belong to the bankrupt's estate and which were assigned in defraud of creditors.

30                    The bill sets forth that on February 25, 1927, the defendants, Harry Marks and Mark M. Marks, trading as H. Marks & Son, were duly adjudicated bankrupts and were discharged therefrom on February 8, 1928. On January 28, 1929, the bankruptcy was reopened by order of the United States District Court, and the complainant, Herbert M. Ellend, was appointed as trustee for the purpose of collecting the assets belonging to the estate.

40                    In 1922, the Millburn Building and Loan Association issued stock certificate #2507 to the defendants, H. Marks & Son, and at various times

*Memorandum by the Court.*

thereafter said association issued other stock certificates, No. 2700, No. 3208, No. 3435, No. 3747 and No. 3838, to the defendant, Hannah Marks, who is the wife of Harry Marks and the mother of Mark M. Marks. These building and loan certificates represented 55 shares of stock and were carried and paid for by the defendants, Harry Marks and Mark M. Marks, individually and trading as H. Marks & Son, from the date that the said certificates were purchased down to February 25, 1927. The payments were made out of the bank account of the defendants, which was maintained in the First National Bank of Millburn. 10

The testimony shows that Robert F. Oliver, Jr., a former officer of the First National Bank of Millburn, and a clerk in the Millburn Building and Loan Association, was requested by Harry Marks, in February, 1922, to debit the account of H. Marks & Son monthly with an amount sufficient to carry and pay for the building and loan shares outstanding in the name of H. Marks & Son. On the debiting of the account the Bank would pay over the amount so charged to the building and loan association. From February, 1922, to February 28, 1927, the account of the bankrupt was debited as aforesaid with the exception that the amount of the debit increased as new certificates were issued, until the aggregate amount finally totaled \$55. a month. The total sum so deducted was \$2,115.83, and this was from the account of the defendants, H. Marks & Son. 20 30

The testimony also shows that Hannah Marks borrowed money from the Millburn Building and Loan Association on her own note, and posted as collateral security for the note the stock certifi- 40

*Memorandum by the Court.*

10 cates which are the subject of this controversy. In May or June of 1928, Hannah Marks applied to pay off the balance due on her note and demanded the return of the collateral. Then for the first time it was disclosed that the certificates were paid for from 1922 until 1927 by the bankrupt, H. Marks & Son. Harry Marks testified that he was one of the partners of the firm of H. Marks & Son, and the owner of a certificate for 10 shares of stock in the Millburn Building and Loan Association; that he desired in 1922 to enlarge his business and borrowed \$2,000. from his wife and transferred the building and loan certificate to her, and continued the monthly payment as heretofore outlined.

20 The value of the 10 shares transferred to Hannah Marks, in repayment of the \$2,000. loan was \$350., which Harry Marks testified made the amount due his wife \$1,650. At the time of the adjudication of bankruptcy, the amount due and owing was \$500. This amount was not listed in the schedule of the bankrupts.

30 Hannah Marks testified that she lived at home, together with seven members of the family and a boarder. She testified that she lent her husband \$2,000., which she derived from the sale of a camp in Unity, New Hampshire, and liberty bonds and war stamps, all of which were given to her by her husband.

Without analyzing the testimony further, it appears that the account of H. Marks & Son was charged with the payment of all the building and loan shares which are the subject of this litigation. There is no proof to sustain the contention that

*Memorandum by the Court.*

the payments were accomodation for which the firm was reimbursed. Nor does it appear that Hannah Marks ever lent any money to the firm of H. Marks & Son, or ever reimbursed the firm for moneys advanced on account of the building and loan shares.

The testimony of the Marks is contradictory.

It seems clear to me that the amount advanced for these building and loan shares should be paid to the trustee for the purpose of the bankruptcy suit. I will advise a decree accordingly.

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**Final Decree.**

Filed April 29, 1930.

IN CHANCERY OF NEW JERSEY.

73—442

	Between	
10	HERBERT M. ELLEND, Trustee in Bankruptcy of Harry Marks and Mark M. Marks, individu- ally, and trading as H. Marks & Son,	} On Bill, etc. Final Decree.
	Complainant,	
	and	
20	HARRY MARKS and MARK M. MARKS, individually, and trad- ing as H. Marks & Son, and HANNAH MARKS, and MILL- BURN BUILDING AND LOAN AS- SOCIATION,	
	Defendants.	

30 This cause coming on to be heard in the presence  
of Herbert M. Ellend, of the office of Palmer Brad-  
ner, solicitor of complainant and Harry Neiwirth,  
Solicitor of defendants, Harry Marks and Mark M.  
Marks, individually and trading as H. Marks and  
Son, and Hannah Marks, and the Court having ex-  
amined the pleadings and taken proofs orally and  
in open court, and having heard and considered the  
arguments of counsel thereon;

40 And the court being satisfied that the transfer  
of a certificate for ten shares of stock in the Mill-

*Final Decree.*

burn Building and Loan Association, a corporation of New Jersey, which certificate bears the number 2507, by the defendants, Harry Marks and Mark M. Marks, individually and trading as H. Marks and Son, to Hannah Marks was a voluntary conveyance made without consideration, and with the actual intent on the part of the said Harry Marks and Mark H. Marks, Individually and trading as H. Marks and Son, by means of said transfer, and by continued monthly payments on account of said certificate of stock, which payments were continued until February 25, 1927, at which time Harry Marks and Mark M. Marks, individually and trading as H. Marks and Son, were duly adjudicated bankrupts, to delay or hinder the creditors of the said bankrupts, all having lawful claims or debts against the said bankrupts, from applying the value of the said certificate towards the liquidation of the debts aforesaid;

And the court being further satisfied that the certificates Nos. 2700, 3208, 3435, 3747 and 3838 aggregating 45 shares of stock in the said Millburn Building and Loan Association, issued originally to the defendant Hannah Marks, are the property of and were maintained and paid for by the defendants, Harry Marks and Mark M. Marks, individually and trading as H. Marks and Son, up to the date of their adjudication as bankrupts, as aforesaid, for the purpose of delaying or hindering the creditors of the said bankrupts, all having lawful claims or debts against the said bankruptcy, from applying the value of the said certificates toward the liquidation of the debts aforesaid, it is on this 29th day of April, 1930,

ORDERED, ADJUDGED AND DECREED that the said transfer by the defendants, Harry Marks and Mark

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*Final Decree.*

M. Marks, Individually and trading as H. Marks and Son, of certificate 2507 for ten shares of stock in the Millburn Building and Loan Association to the defendant, Hannah Marks, be and the same is hereby set aside and held to be fraudulent and declared null and void and of no effect as against the trustee and creditors in bankruptcy of the said

10 Harry Marks and Mark M. Marks, Individually and trading as H. Marks and Son, and it is further

ORDERED, ADJUDGED AND DECREED that the certificates Nos. 2700, 3208, 3435, 3747 and 3838 aggregating forty-five shares of stock in the said Millburn Building and Loan Association, registered in the name of the defendant, Hannah Marks, be and the same are hereby declared to be the property of the defendants, Harry Marks and Mark M. Marks,

20 Individually and trading as H. Marks and Son, for the benefit of the Trustee and creditors in bankruptcy of the said defendants, Harry Marks and Mark M. Marks, Individually and trading as H. Marks and Son, and it is further

ORDERED, ADJUDGED AND DECREED that the Millburn Building and Loan Association, a corporation of New Jersey, pay over to the complainant, Herbert M. Ellend, as Trustee in Bankruptcy of the defendants, Harry Marks and Mark M. Marks,

30 Individually and trading as H. Marks and Son, the value of certificates 2507, 2700, 3208, 3435, 3747 and 3838, together with the accrued profits thereon, up to and including the date of the adjudication of bankruptcy of Harry Marks and Mark M. Marks, Individually and trading as H. Marks and Son, that is to say, February 25, 1927, It is further

ORDERED that the defendants, Harry Marks and Mark M. Marks, Individually and trading as H.

*Final Decree.*

Marks and Son, and Hannah Marks pay to the complainant, the costs of this suit to be taxed, including a counsel fee of \$100. which is hereby allowed to said complainant. It is further

ORDERED that unless the said defendants, Harry Marks and Mark M. Marks, Individually and trading as H. Marks and Son and Hannah Marks, shall within ten days after service upon them of a true but uncertified copy of this decree and taxed bill of costs, (which may be so marked by the Solicitor of the complainant) pay to the complainant the amount due to him as and for his counsel fee, together with the taxed costs, that a writ of execution issue for said amounts against the goods and chattels, lands, tenements, hereditaments, and real estate of the said defendants, according to the practice of this court, which Writ may be directed to the Sheriff of Essex County for the purpose of satisfying the complainant's allowance of a counsel fee and taxed bill of costs.

E. R. WALKER,  
C.

Respectfully advised,  
ALONZO CHURCH,  
V. C.

30

40

**Notice of Appeal.**

Filed May 7, 1930.

## IN CHANCERY OF NEW JERSEY.

10	Between		
		HERBERT M. ELLEND, Trustee in Bankruptcy of Harry Marks and Mark M. Marks, individu- ally, and trading as H. Marks & Son,	
		Complainant,	} On Bill, etc. Notice of Appeal.
	and		
20		HARRY MARKS and MARK M. MARKS, individually, and trad- ing as H. Marks & Son, and HANNAH MARKS, and MILL- BURN BUILDING AND LOAN AS- SOCIATION,	
		Defendants.	

30 The defendant Hannah Marks does hereby ap-  
peal from the Final Decree made in the above en-  
titled cause, on the 29th day of April, 1930, and  
from the whole and every part thereof, to the

*Notice of Appeal.*

Court of Errors and Appeals in the Last Resort in  
All Causes.

Dated: May 6th, 1930.

HARRY S. NEIWIRTH,  
Solicitor for and of Counsel     10  
with defendant Hannah Marks.

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

HARRY S. NEIWIRTH,  
Of Counsel with Defendant  
Hannah Marks.

20

30

40

**Petition of Appeal.**

Filed May 7, 1930.

**NEW JERSEY COURT OF ERRORS AND  
APPEALS.**

Between

10 HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,

Complainant-Appellee,

and

20 HARRY MARKS and MARK M.  
MARKS, individually, and trad-  
ing as H. Marks & Son, and  
HANNAH MARKS, and MILL-  
BURN BUILDING AND LOAN AS-  
SOCIATION,

Defendants-Appellants.

On Appeal  
from the  
Court of  
Chancery.

Petition of  
Appeal.

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

30

The petition of Hannah Marks, the Appellant in  
the above entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by a final  
decree made in the Court of Chancery, by his Hon-  
or, Edwin Robert Walker, Chancellor of the State  
of New Jersey, bearing date, April 29th, 1930, in  
a certain cause in said Court of Chancery wherein  
the said Herbert M. Ellend, Trustee in Bankrupt-  
40 cy of Harry Marks and Mark M. Marks, individual-

*Petition of Appeal.*

ly and trading as H. Marks & Son, was complainant, and the said Hannah Marks was a defendant, in this respect, to wit, that the said decree adjudges that a certain transfer of stock from Harry Marks and Mark M. Marks, individually and trading as H. Marks & Son, of ten (10) shares of stock in the Milburn Building & Loan Association, to the defendant Hannah Marks, was declared and held to be fraudulent, and null and void and of no effect as against the Trustee in Bankruptcy and creditors in bankruptcy of the said Harry Marks and Mark M. Marks, aforesaid; and further that certain certificates Nos. 2700, 3208, 3435, 3747 and 3838, aggregating 45 shares of stock in the said Milburn Building & Loan Association and registered in the name of the defendant Hannah Marks, was declared to be the property of the defendants Harry Marks and Mark M. Marks, and further that the Milburn Building & Loan Association was directed by the said decree to pay over to the complainant, the value of the said certificates of stock hereinbefore referred to, together with accrued profits thereon; and further said decree provided, that in the event of default in payment, that the said defendants Harry Marks and Mark M. Marks, who were adjudicated bankrupts, and Hannah Marks, the defendant, do pay costs and counsel fee, and in the event of failure of payment, that execution be issued.

And petitioner appeals from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that the evidence produced at the trial, on behalf of the complainant, was not sufficient to sustain or maintain the bill of complaint, and further that the court erroneously made the findings aforesaid, and fur-

*Petition of Appeal.*

ther that the court should have found for the defendant Hannah Marks, and dismissed the bill of complaint; and further that from the testimony the court could not, and should not have found that the transfer of certificate No. 2507 to the Millburn Building & Loan Association, was a voluntary conveyance and made without consideration and made with the intent to delay or hinder the creditors, or by continued monthly payments on account of said certificate, intend to delay or hinder the creditors; and further that from the testimony the court should not have found that certificates No. 2700, 3208, 3435, 3747 and 3838, aggregating 45 shares of stock in the Millburn Building & Loan Association, were property of or were ever maintained and paid for by the defendants Harry Marks and Mark M. Marks; and further that there is no testimony whatsoever to sustain the finding of the transfer of certificate No. 2507 was made in fraud of creditors and that from the testimony, it clearly appears that the court should have found for the defendant Hannah Marks and against the complainant, and the Millburn Building & Loan Association.

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

HARRY S. NEIWIRTH,  
Solicitor for and of Counsel  
with Appellant.

## Answer to Petition of Appeal.

Filed May 16, 1930.

### NEW JERSEY COURT OF ERRORS AND APPEALS.

HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,

Complainant-Appellee,

vs.

HARRY MARKS and MARK M.  
MARKS, individually, and trad-  
ing as H. Marks & Son, and  
HANNAH MARKS, and MILL-  
BURN BUILDING AND LOAN AS-  
SOCIATION,

Defendants-Appellants.

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On Appeal  
from the  
Court of  
Chancery.

Answer to  
Petition of  
Appeal.

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The answer of Herbert M. Ellend, Trustee in  
Bankruptcy of Harry Marks, and Mark M. Marks, 30  
individually and trading as H. Marks and Son, the  
above named appellee, to the petition of appeal of  
Hannah Marks, the above named appellant, respect-  
fully shows that:

1. This appellee, not admitting the truth of all  
or any of the matters in said petition of appeal  
contained, for answer thereto nevertheless admits  
that a decree was on the 30th day of April, 1930,  
made and entered in the Court of Chancery of New 40

*Answer to Petition of Appeal.*

Jersey in the above entitled cause for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said decree this appellee begs leave to refer thereto when the same shall be produced.

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

PALMER BRADNER,  
Solicitor for and of Counsel  
with Appellee.

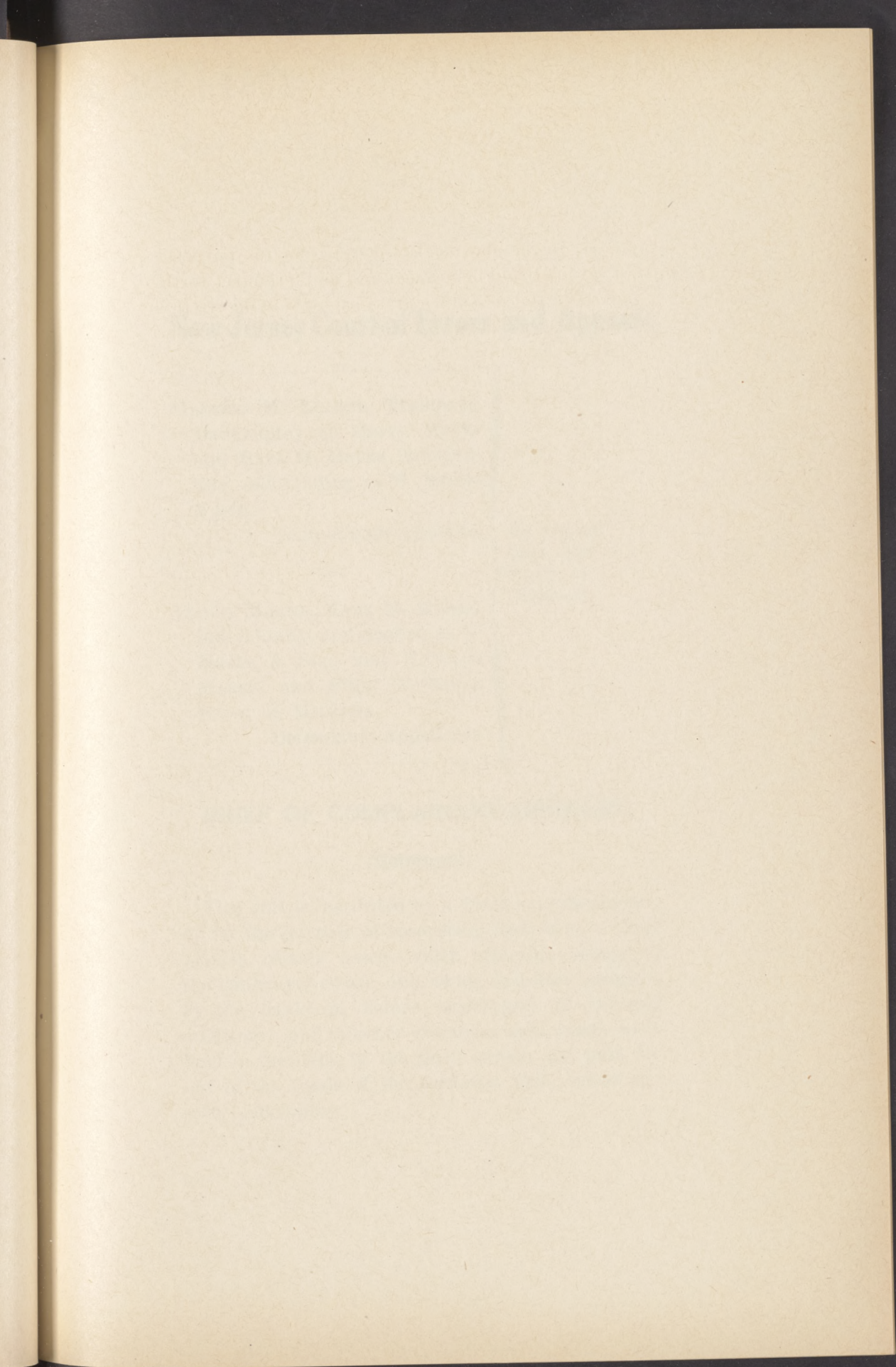
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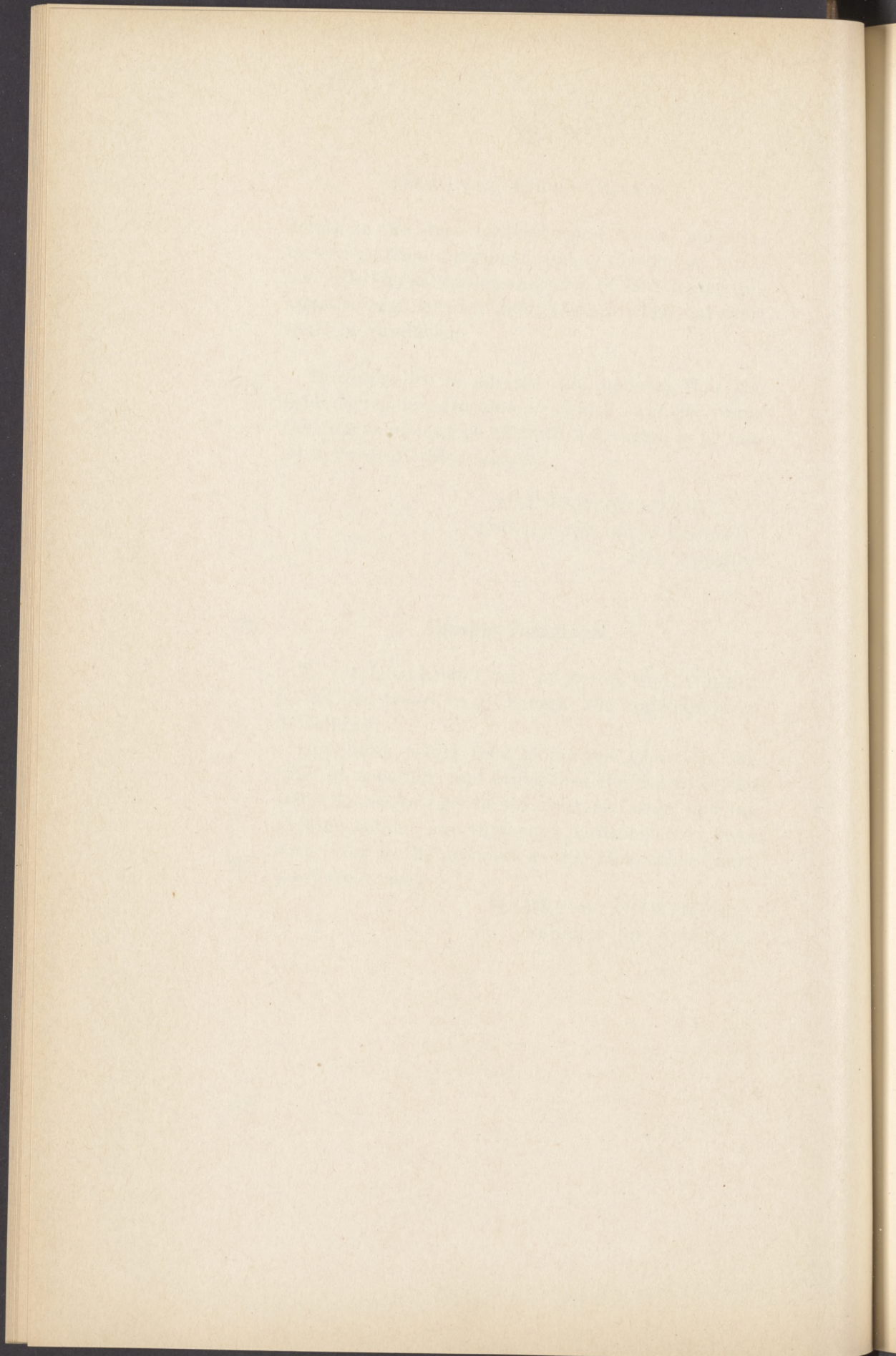
20 **Closing Paragraph.**

To the Honorable Court of Errors and Appeals, in the last resort in all causes; the appellant says as follows:

Appellant refers this Honorable Court to the brief of appellant and prays that the decree of the said Chancellor may be reversed, set aside, and for nothing holden, and that your petitioner may have  
30 such relief in the premises as this Honorable Court shall seem meet.

HARRY S. NEIWIRTH,  
Solicitor for Appellant.





## New Jersey Court of Errors and Appeals

HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,

Complainant-Appellee,

vs.

HARRY MARKS, MARK M. MARKS,  
individually, and trading as H.  
Marks & Son, and HANNAH  
MARKS, and FIRST NATIONAL  
BANK OF MILBURN,  
Defendants-Appellants.

On Appeal  
from the  
Court of  
Chancery.

### BRIEF OF COMPLAINANT-APPELLEE.

#### Statement.

This suit is instituted by a Trustee in Bankruptcy for the purpose of recovering back from a third person, certain assets which allegedly belong to the bankrupts estate, and which had been assigned by the bankrupt before bankruptcy to defraud creditors; and in other instances said assets were held in the name of the third person and paid for out of the funds of the bankrupt firm, before the said bankruptcy.

### Facts.

The Bill filed in the cause, sets forth *inter alia* that on February 25, 1927, the defendants Harry Marks and Mark M. Marks, trading as H. Marks & Son, were duly adjudicated bankrupts and were discharged therefrom on February 8, 1928. On January 28, 1929, the said bankruptcy was reopened upon sufficient proof, by order of the United States District Court, and the complainant, Herbert M. Ellend, duly appointed as Trustee for the purpose of collecting the assets belonging to the estate as aforesaid.

In 1922, the Millburn Building and Loan Association, a New Jersey corporation, issued stock certificates #2507 in the said Association to the defendant H. Marks & Son, and at various times thereafter, said Association issued other stock certificates, #2700, 3208, 3435, 3747 and 3838 to the defendant Hannah Marks, who is the wife of Harry Marks and the mother of Mark M. Marks, both of whom are defendants herein. Said Building and Loan certificates represented 55 shares of stock in the said Building and Loan Association, and were carried and paid for by the defendants Harry Marks and Mark M. Marks, Individually and trading as H. Marks & Son, from the date that the said certificates were purchased down to February 25, 1927. Said payments were made out of the bank account of the defendants which bank account was maintained in the First National Bank of Millburn, New Jersey.

The complainant charges that the moneys paid in on account of the certificates as aforesaid, were the property of the defendant bankrupts and that certificate #2507, originally issued in the name of the bankrupt firm, was endorsed, transferred

and delivered to the defendant Hannah Marks before the said bankruptcy, for the avowed purpose of defrauding creditors.

### Argument.

The testimony adduced at the trial of the issue between the parties, reveals that Robert F. Oliver, Jr. a former officer of the First National Bank of Millburn (The designation of the witness p. 13, l. 14 of the State of Case as an officer of the First National Bank of Dover is a stenographic error which should read First National Bank of Millburn.) and a clerk in the Millburn Building and Loan Association, was requested by Harry Marks, one of the defendants, some time in February, 1922, to debit the bank account of H. Marks & Son monthly with an amount sufficient to carry and pay for the building and loan shares outstanding in the name of H. Marks & Son. (P. 14, l. 6-30) Upon the debiting of the account, the Bank would pay over the amount so charged to the Building and Loan Association, in which Association, payment on account of stock certificates would be credited. From February 1922 to February 28, 1927, the account of the bankrupt was debited as aforesaid, with the exception that the amount of the debit increased as new certificates were issued, until the aggregate amount finally totaled \$55.00 per month. In all, the sum of \$2,115.83 was so deducted from the account of the defendant H. Marks & Son, and credited on account of the Building and Loan certificates as aforesaid. (P. 15, l. 13-23, p. 16, l. 3-14, p. 16, l. 31-39, p. 17, l. 3-4).

John B. Bonnell, President of the First National Bank of Millburn, and Treasurer of the Millburn

Building and Loan Association (whose testimony at a former hearing was admitted in evidence in toto, Addenda to State of Case, pages 1-6 inclusive) testified that the defendant Hannah Marks, borrowed some money from the Millburn Building and Loan Association on her own note, and posted as collateral security for the said note, the stock certificates in the Building and Loan Association, which are the subject of controversy in this cause. Some time in May or June of 1928, Hannah Marks applied to pay off the balance due on said loan and demanded the return of the collateral posted as security, at which time, Mr. Bonnell first became apprised of the fact that the said Hannah Marks was in possession of the Building and Loan certificates, which, after an examination of the ledger of the First National Bank of Millburn, disclosed that the said certificates were paid for from 1922 until 1927, in their entirety, by the bankrupt H. Marks & Son, which firm was indebted to the First National Bank of Millburn, one of the creditors in bankruptcy, in a sum approximating \$9,000. Thereafter, proceedings were immediately instituted to reopen the said bankruptcy for the purpose of claiming as a part of the estate of the bankrupt, the Building and Loan certificates as aforesaid.

The defendant Harry Marks testified (p. 21, l. 18-20) that he was one of the partners of the firm of H. Marks & Son, and the owner of a certificate for 10 shares of stock in the Millburn Building and Loan Association. In 1922, he desired to enlarge his business, and borrowed \$2,000. from his wife, and in payment thereof, transferred the Building and Loan certificate to her, and continued the monthly payment thereof in the fashion heretofore outlined, for the purpose of further continuing

the payment of the alleged debt to his wife. (P. 21, l. 40, p. 22, l. 3-27) Thereafter, he took out 45 additional shares of stock of the Building and Loan Association, in the name of Hannah Marks, at various times, and paid for them out of the account of the firm (which subsequently went bankrupt) and was reimbursed therefor by his wife. (P. 22, l. 28-40, p. 23, ll. 3-26)

The value of the original 10 shares transferred to the defendant Hannah Marks, in repayment of the \$2,000. loan to the bankrupts, was \$350., which, Harry Marks testified, made the amount due and owing to his wife \$1650. At the time of the adjudication of bankruptcy, the amount then due and owing was \$500. *The witness further testified that the amount which was due and owing to his wife at the date of the bankruptcy was not listed in the schedule of the bankrupts.* (P. 24, ll. 11-20).

This clearly indicates that the testimony is false or the acts of the bankrupt and his wife collusive for the purpose of defrauding the creditors.

Harry Marks further testified (P. 24, ll. 31-33, p. 25, ll. 3-31) that the maximum amount debited to the account of the bankrupt firm, for the purpose of paying the monthly dues on 55 shares of stock of the Building and Loan Association, was \$55. plus an additional \$30. per month on account of a loan by the Building and Loan Association, to the defendant Hannah Marks, making a total of \$85. per month. (P. 20) This amount, \$85. was debited from 1925 to the date of adjudication of bankruptcy, according to the testimony of Harry Marks.

Robert F. Oliver, Jr. recalled in rebuttal (P. 36, ll. 25-31) testified that by reference to the anal-

ysis sheet of the First National Bank of Millburn (See stipulation page 46 of State of Case) and the ledger of the said bank, *the amount debited to the account of the firm never exceeded \$55., nor was \$85., ever debited to the account.*

Again, mute evidence of the falsity of the testimony in behalf of the defendants.

The defendant Hannah Marks, testified that she is the wife of Harry Marks and lived at home, together with seven members of the family and a young woman, who was a boarder, all of whom contributed toward the support and maintenance of the household. (P. 26, ll. 20-40, p. 27, ll. 3-14) She further testified that she loaned her husband \$2,000. in 1922, which moneys she derived from the sale of a camp in Unity, New Hampshire, and Liberty Bonds and War Stamps, *all of which were given to her by her husband, Harry Marks.* (P. 27, ll. 14-31)

Hannah Marks further testified (P. 29, ll. 14-18) out of the contributions of the members of the household, who lived at home, together with the boarder, she was able to give her husband, Harry Marks, sufficient moneys to pay the 45 shares of stock which were taken out in her name. On page 30, lines 21-30, she testified that the \$30. per month which was paid on account of the stock loan which she received from the Building and Loan Association, *was paid by her husband, Harry Marks, out of the firm account,* while on page 23, lines 25-27, Harry Marks, husband of Hannah Marks, testified that *she gave him all of the money* which went toward the payment of these shares each month.

On cross-examination, Mrs. Marks testified (P. 34, ll. 11-14) she did not know how much was due the Building and Loan Association on account of

the stock loan which she received in 1925, stating the reason therefor, that here son took care of all of her business because she was not good at figures. However, in all other matters pertaining to the moneys paid to her husband every month, the amount of money which she loaned to him, the camp in New Hampshire, War Savings Stamps and Liberty Bonds which were transferred to her by her husband in 1920, she has a very distinct recollection, notwithstanding that the transaction involving the transfer to her of certain assets of her husband took place in 1920, about which she testified she had a complete knowledge, and the amount of the money due to the Building and Loan Association on the stock loan which took place in 1925, of a much more recent date, and about which she knew nothing.

On page 31, lines 17-19, Hannah Marks contradicts herself and her previous testimony by saying that the \$30. per month paid on account of the principal of a loan, was given to her ~~by her~~ husband Harry Marks, by her, whereas, on page 30, lines 25-28, she testified that he gave her the money. Hannah Marks testified on cross-examination (P. 31, ll. 23-24 and p. 32, ll. 3-15) that she derived her income from the moneys given to her by the young lady and her children, including one son, Sidney Marks, who was serving a clerkship in a law office in 1925, besides doing "odd work" around the Town. The Court may judicially notice that a candidate for the bar examination of New Jersey, serving a clerkship in the office of a Counselor-at-law, of this State, must spend at least five hours per day, pursuing his vocation of law clerk, and the further fact that the remuneration of a law clerk is nominal, so that obviously, Sidney Marks, notwithstanding his mother's testimony,

was not in a position to contribute toward her support.

The defendant Milton Marks testified (P. 32, ll. 26-35) that he is a son of Harry Marks and one of the partners of the firm of H. Marks & Son. He testified on direct examination, that he knew that his firm account was being charged with payments on account of Building and Loan shares, because he was consulted in most of the money matters. He testified further, on page 34, lines 11-15, that he had very little to do with the books. On cross-examination, (P. 33, ll. 29-40) Milton Marks testified that he believed that his mother gave to his father \$30. a month necessary for the repayment of the loan from the Building and Loan Association, and then testified, (P. 34, ll. 3-5) notwithstanding his direct examination, that *he did not know whether or not the bank was authorized to debit the account (the firm's account) with the \$30. on account of principal of a loan, in addition to the stock payment of \$55. per month.*

On page 34, lines 6-10, he testified that he did not know whether separate checks were drawn on the firm account for the Building and Loan payments, or whether the bank simply debited the firm's account. On page 34, lines 13-15, he testified that he did not handle the books of the firm, and the obvious conclusion from his testimony is that he knew nothing whatever about any transactions which, as a member of a firm, he should have known, *and the presumption may very well be, that his reason for not knowing of them, was that the arrangement which allegedly existed between his mother and the firm, in point of fact, never existed at all.*

### Summary.

The account of H. Marks & Son was charged from June 1922 to 1927 with the payment of all of the Building and Loan shares which are the subject matter of this litigation, and no corroborative proof is offered by the defendants to sustain the contention that the payments were accomodation for which the firm was reimbursed, nor does it appear anywhere, either by books of account or statements of any kind, other than the testimony of materially interested parties, that Hannah Marks ever loaned any money to the firm of H. Marks & Son, or ever reimbursed the firm for moneys advanced on account of the payment of Building and Loan shares in her name.

It is a singular coincidence that the firm of H. Marks & Son, after making all of these payments for a period of years, filed a petition in bankruptcy, which in no way affected the status of the Building and Loan shares, because they were in the name of the defendant Hannah Marks, and further that the bankrupt firm still owed Hannah Marks \$500. and yet never listed such a liability in their schedules.

The defendant Hannah Marks alleges that her source of income was derived from her children and a boarder who lived with her and paid rent, but nowhere does it appear, what amounts were given to her, nor do the defendants take the obvious course of corroborating such statements by producing the children and the boarder, all of whom certainly must have been available, particularly to testify in behalf of their mother and father.

Harry Marks and Hannah Marks are effusive in

their contradictions of each other, and from a perusal of their testimony, it becomes apparent that their stories are a conglomeration of patent lies.

**Complainant-Appellee prays that the Decree of the Court of Chancery below, be affirmed.**

Respectfully submitted,

PALMER BRADNER,  
Solicitor for and of counsel  
with Complainant-Appellee.

HERBERT M. ELLEND,  
On the Brief.

## New Jersey Court of Errors and Appeals

Between

HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,

Complainant-Appellee,  
and

HARRY MARKS, MARK M. MARKS,  
individually, and trading as H.  
Marks & Son, and HANNAH  
MARKS, and FIRST NATIONAL  
BANK OF MILBURN,  
Defendants-Appellants.

On Bill, etc. to  
impress a lien.

On Appeal  
from the  
Court of  
Chancery.

### ADDENDA TO BRIEF OF HANNAH MARKS.

Since the printing of the State of Case and the Brief as filed herein by the defendants-appellants, two cases have been handed down by the Court of Errors and Appeals. The case of The Kearny Plumbing Supply Co. vs. Gland, et al., on bill from the Court of Chancery and reported in 151 Atlantic Reporter, page 873, and in 8 Miscel., page 789, and the case of The Trust Company of Orange vs. Garfinkel, 151 Atlantic Reporter, page 858, and in 107 Equity, page 20. The Kearny Plumbing Supply Co. vs. Gland, et al., case was decided under the Fraudulent Conveyance Act, 1 Cum. Supp. to C. S. of N. J., 1911-1924, page 647, and the Trust Company of Orange case was decided under the

Uniform Transfer Act, 1 Gum. Supp. to C. S. of N. J. 1911-1924, sec. 47-150, etc. In *The Kearny Plumbing Supply Co. vs. Gland, et al.* case, the proposition is established that the complainant must sustain the burden of proving that the conveyance rendered the grantor insolvent and in the *Trust Company of Orange vs. Garfinkel* case, that the complainant must have had an interest in the stock when it was assigned.

The facts in the case are that in 1922 H. Marks & Son assigned to Hannah Marks some building and loan shares and that petition in bankruptcy was filed in behalf of H. Marks & Son, in 1927.

The evidence in the case shows that at the time of the assignment of shares of stock from H. Marks & Son to Hannah Marks the said shares of stock had a value of \$300.00 and at that time Hannah Marks loaned to H. Marks & Son the sum of \$2,000.00 upon agreement that the building and loan shares would be assigned to her and that H. Marks & Son would continue the payment on the said shares until maturity, which would amount to \$2,000.00. This defendant appeals from the decree of the Court below for the reason that the Court found "that the conveyance to Hannah Marks was a voluntary conveyance made without consideration and with the actual intent on the part of the said Harry Marks and Mark M. Marks, individually and trading as H. Marks & Son by means of said transfer, and by continued monthly payments on account of the said certificate of stock which payments were continued until February 25, 1927, at which time Harry Marks and Mark M. Marks, individually and trading as H. Marks & Son, were duly adjudicated bankrupts, to delay or hinder the creditors of the said bankrupts, all having lawful claims or debts against the said

bankrupts, from applying the value of the said certificate towards the liquidation of the debts aforesaid."

No evidence or testimony has been introduced by the trustee to in any wise establish that this assignment of the building and loan shares to Hannah Marks, rendered H. Marks & Son, the grantors, insolvent, nor was any evidence or testimony introduced to show that any creditor or creditors held any interest in the shares of stock assigned to Hannah Marks at the time of the assignment. It does not appear anywhere in the case that at the time of the assignment of the shares of stock to Hannah Marks, that H. Marks & Son were not sound financially, or is it even hinted that such might be the case.

I submit that the learned Vice Chancellor was in error and should have found for the defendant, Hannah Marks, for the reason that no such proof was submitted to the Court in order that it may have found for the trustee either under the Fraudulent Conveyance Act or the Uniform Transfer Act, nor was any proposition of law or case cited by the complainant or by the Court below to support the decree herein entered, for the complainant wholly failed to establish that the assignment of the shares of stock in the year 1922 hindered or delayed the interest of creditors in a bankruptcy proceedings in 1927, nor has the Court below indicated by any stretch of the imagination how such a transfer or assignment of stock in 1922 could have hindered or delayed creditors by a bankruptcy proceedings in 1927.

The effect of the decree is to permit the assertion of a lien or interest as to property which is in the class of negotiable paper and is against the person who is to become possessed of that paper for the

fair consideration without fraud and without knowledge of any lien or interest and without knowledge of a debt.

The Uniform Fraudulent Conveyance Act, 1 Cum. Supp. to C. S. of N. J. 1911-1924, page 647, provides:

"3. Fair consideration is given for property or obligation \* \* \* \* ."

"(b) When such property, or obligation is received in good faith to secure a present advance or *antecedent debt* in amount not disproportionately small as compared with the value of the property, or obligation-obtained."

Section 44-150 provides, page 648:

"1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser, *for fair consideration without knowledge of the fraud at the time of the purchase* \* \* have (The conveyance set aside, etc.)"

"2. A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, *may retain the property or obligation as security for repayment.*"

This act has been held by this court to completely supersede the Fraudulent Conveyance Act, 2 C. S. of N. J., page 2619, section 11, etc., and to make wholly inapplicable cases such as

Severs v. Dodson, 53 N. J. E., 633.

See Conover v. Raphel, in this court, 6 N. J. A. R. 812.

Morrisville Trust Co. v. Moon, Circuit Court of Appeals, for 3rd Circuit, 21 Federal (2nd) 716.

The subject matter of this litigation is stock and under the Uniform Transfer Act, 1 Cum. Supplement, to C. S. of J. J. 1911-1924, sec. 47-150, p. 690, it is provided:

“Title to a certificate and to the shares represented thereby can be transferred *only*

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.”

Under the act a certificate of stock is given the quality of negotiable paper. An interest in certificates of shares of stock can only be obtained in the manner specified by the statute.

Besson v. Stevens, 94 N. J. E. 549, at p. 563.

And see the remarks of this court at p. 569.

Although complainant did not obtain any interest in or lien upon the stock in the manner pointed out by the statute, the decree treats it as if it had.

When the Vice Chancellor found that this was a voluntary conveyance without consideration, with the actual intent to delay or hinder the creditors of H. Marks & Son, the bankrupts, and from applying the value of the certificate towards the liquidation of their debts, he wholly failed to take into

account that the assignment of the building and loan shares was made five years prior to the bankruptcy proceedings and that there is nothing before the Court at this time to show that H. Marks & Son was not financially sound at the time of the assignment or that there was an outstanding creditor who had an interest or a lien in the stock so transferred which the said complainant is obliged to establish under the Fraudulent Conveyance Act or the Uniform Transfer Act and in the matter pointed out by the Statute. The decree, however, treats it as if it had.

**It is respectfully submitted that the decree below be reversed.**

Respectfully submitted,

HARRY S. NEIWIRTH,  
Solicitor for and of Counsel  
with Appellant.

IN CHANCERY OF NEW JERSEY.

Between

HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,

10

Complainant-Appellee,

and

HARRY MARKS, MARK M. MARKS,  
individually, and trading as H.  
Marks & Son, and HANNAH  
MARKS, and FIRST NATIONAL  
BANK OF MILBURN,  
Defendants-Appellants.

On Bill, etc.

20

JOHN B. BUNNELL, sworn.

*Direct-examination by Mr. Bradner:*

Q. What is your connection with the First  
National Bank? A. President of the First  
National Bank of Milburn.

Q. And you're also connected with the Milburn  
Building & Loan Association? A. Treasurer of  
the Milburn Building & Loan. 30

Q. Do you recall a loan by Hannah Marks being  
paid off to the Milburn Building & Loan Associa-  
tion? A. I do.

Q. As treasurer you had the collateral in your  
possession? A. I was custodian of the collateral  
and the note.

Q. When the loan was paid off and you examin-  
ed the collateral, you discovered this certificate  
amongst them? A. Yes, sir. 40

*John B. Bunnell—Direct.*

Offered in evidence and marked Exhibit  
"P-5" of this date.

A. There are also five other stock certificates.

10 By Mr. Silverstein: We'll admit there  
were five other certificates and the numbers  
of the certificates were as follows: #2700,  
#3208, #3435, #3747, #3838.

*By Mr. Bradner:*

Q. In whose names were the other certificates  
issued? A. Hannah Marks.

Q. And the notes were signed by Hannah Marks  
also? A. Yes, sir.

20 Q. She borrowed the money from the Millburn  
Building & Loan Association on her own note; is  
that correct? A. Yes, sir.

Q. About when was it that you discovered these  
certificates? A. It was several weeks ago, when  
the secretary of our building & loan called for the  
notes which had been paid, that is the notes had  
been paid in full, then I discovered these certifi-  
cates.

30 Q. That was the first time it was brought to your  
attention, on this Exhibit "P-5"? A. When I sur-  
rendered that certificate I discovered the note and  
whose certificate it was.

*Cross-examination by Mr. Silverstein:*

Q. Is this the note that you returned to him? A.  
Yes; that's the note.

Offered in evidence.

No objection.

40 Marked Exhibit "R-1" of this date.

*John B. Bunnell—Cross.*

Q. You know the signature of H. Marks & Son, do you not? A. Yes, sir.

Q. Is this the signature of H. Marks & Son on the assignment on the back of Exhibit "P-5"? A. Yes, sir.

Q. At the time of the filing of the petition in bankruptcy, H. Marks & Son were indebted to your bank, were they not? A. Yes, sir. 10

Q. They were indebted for a considerable sum of money, in the neighborhood of \$9000.00; weren't they? A. Yes, sir.

Q. You filed a claim with the Referee, didn't you? A. We did.

Q. You received a dividend? A. Yes, sir.

Q. On or about the 26th day of March, 1928, did you receive communication from Sidney Marks, a member of the Bar of this State? A. Yes, sir. 20

Q. And as a result of that communication you finally saw Mr. Sidney Marks in your office at the bank? A. He came to see me; yes.

Q. You had a conversation with him at that time; did you not? A. Yes, sir.

Q. That was after the note had been paid off to the Milburn Building & Loan Association, was it not? A. Yes; but I think we still retained the note, if I'm not mistaken, and the certificate. 30

Q. You received a communication from me after that, did you not? A. All the communications that I received from you with the exception of one I turned over to Mr. Bradner.

Q. But you did receive communication from me? A. Yes; I think I received several communications from you.

Q. As a result of my communications you wrote me under date of April 11th, did you not? A. Yes. 40

*John B. Bunnell—Cross.*

Q. Is that your signature on that letter? A. Yes, sir.

Q. On the stationery of the First National Bank of Milburn? A. Yes, sir.

Letter marked Exhibit "R-2" for identification.

10 Q. What was the conversation you had with Sidney Marks when he called at your bank? A. I can't remember just exactly what it was. He came and wanted to know what the trouble was. He evidently didn't know what the trouble was, and I told him what the trouble was. I told him I had referred it to our attorney, the whole matter in regard to this Building & Loan and the payment of it.

20 Q. Was that the only conversation you had with him? A. We talked about it. I told him what we had discovered. What we discovered he evidently didn't know but I think he must have known all about it.

Q. Referring to your conversation with him, I want to know what your conversation with him was? You spoke with him about these certificates of stock? A. Yes, sir.

30 Q. What was your conversation with him concerning these certificates of stock? A. I threatened him and told him that the attorney expected to see Judge Runyon and present the case to him and everything. I said to him under advice of counsel—

Q. What did you say to him?

Objected to by Mr. Bradner, as immaterial and irrelevant.

40 Objection sustained, exception allowed.

*John B. Bunnell—Cross.*

Q. When did you first find out that you had this certificate in your possession? A. I found it out when Mr. Willis, the secretary of the Milburn Building & Loan called for the note and the certificates.

Q. Do you remember the date? A. I can't remember the exact day. It's not long ago. 10

Q. In March? A. I think so.

Q. Don't your Building & Loan records show when the note was paid? A. I don't keep those records. The secretary would keep that. I just was custodian of the notes.

Q. Using the letter marked Exhibit "R-2" for identification will that refresh your recollection as to when you first learned about the note? A. No; it was previous to this time.

Q. About how long previous to this time? A. I think probably it was in March; about one month. 20

Q. Between March 11th, up until sometime in May, you made no effort to have this stock certificate turned over to the Court, did you? A. What I did was to consult our attorney, Mr. Bradner. I was absolutely under his jurisdiction.

Q. As a matter of fact, isn't the reason you didn't turn this stock certificate over to the Court or make any application to the Court is that you tried to collect the amount that was due by the bankrupts to the bank? 30

Objected to by Mr. Bradner.

Objection overruled, exception.

A. No.

Q. There was a replevin suit instituted, was there not by Hannah Marks, for the purpose of receiving possession of this certificate of stock? A. Yes, sir.

Q. And you were served in that proceeding? A. Yes, sir. 40

*John B. Bunnell—Cross.*

Q. In the bankruptcy proceedings the First National Bank of Milburn was represented by counsel, was it not? A. Yes, sir.

Q. Who was the attorney? A. Mr. Bradner.

Q. You don't mean Mr. Bradner represented you at that time? A. I'm not positive of that.

10 Q. As a matter of fact, wasn't Mr. Alexander T. Schenck your attorney at that time? A. I don't remember any such name as that.

Q. You don't know who represented you in the bankruptcy proceedings? A. No.

Q. But you do know you were represented by counsel, don't you? A. I am not sure of that. I know that we turned the matter over shortly afterwards to Mr. Bradner.

20 Q. Shortly after when? A. I think after the bankruptcy was closed. That is after we had received our first dividend. I can't tell the exact date. Mr. Bradner was in the bank every day or two and we talked it over.

Q. Who filed your proof of debt with the United States District Court in the bankruptcy proceedings? A. I think Mr. Binn, the cashier.

Sworn to before me this 4th  
day of June, 1928.

30 W. W. Porter,  
Referee in Bankruptcy.

92 MAY. 7 1931

## New Jersey Court of Errors and Appeals

HERBERT M. ELLEND, Trustee in  
Bankruptcy of Harry Marks  
and Mark M. Marks, individu-  
ally, and trading as H. Marks  
& Son,

Complainant-Appellee,

vs.

HARRY MARKS, MARK M. MARKS,  
individually, and trading as H.  
Marks & Son, and HANNAH  
MARKS, and FIRST NATIONAL  
BANK OF MILBURN,  
Defendants-Appellants.

On Appeal  
from the  
Court of  
Chancery.

### BRIEF OF DEFENDANTS-APPELLANTS.

There is but one question before the Court for determination—whether the payments made on account of the shares of stock in a building and loan association were moneys belonging to the partnership, or whether the moneys so advanced were the moneys of Mrs. Marks.

The testimony in the case as introduced by the complainant shows just one element of fact, and that is, that certain sums of money were paid to the Milburn Building & Loan Association by deduction from the accounts of H. Marks & Son, a partnership, and that only ten shares of the fifty-five shares of stock were transferred to the defendant, Hannah Marks. Complainant's own witness

testified that at his recommendation and suggestion to Mr. Marks, the deductions were made from the account of H. Marks & Son, on account of the building and loan shares, in order to avoid payment of fines in the event of the failure to pay on a regular pay night. Page 14, ll. 6-38 of testimony of Mr. Oliver.

"Q. In the year 1922, Mr. Oliver, was there an account in the bank in the name of H. Marks & Son?

"A. There was.

"Q. Did you ever receive any instructions from any member of the firm of H. Marks & Son relative to crediting the account for payment of Building & Loan shares?

"A. Not for crediting the account, but for charging the account, I received a request from Mr. Marks.

"Q. Which Mr. Marks?

"A. Mr. Harry Marks.

"Q. And what was the nature of that request?

"A. It came after a monthly payment had been neglected by him, in this respect: He came over to the Building & Loan meeting just about closing time, and, naturally, there was a line of customers there, and he decided he would go back and come back the next morning to pay it, and, naturally, being late, he was fined 10c. per share, or \$1. He protested against it, but I couldn't do anything for him. That was the rule of the Building & Loan. So the fine had to stand. But at that time I suggested to me that he would let me charge the account each month, take care of his dues, and that he agreed to.

"Q. At the time that request was made—oh, by the way, did you have any connection with the Millburn Building & Loan Association?

"A. Yes, I was a clerk.

"Q. And at the time Mr. Marks made that

request to charge his account with a payment, were the shares which he held in his name?

"A. They were."

Beyond this, the testimony is barren as to any facts that may tend to indicate that Mr. Marks with Mrs. Marks acted in collusion as against the interest of the creditors of H. Marks & Son, or as a fraud against the said creditors.

It is my humble opinion that the complainant must go much further than he has in order to trace property or money in the hands of third parties for the purpose of impressing a trust on said property or funds, in support of which I beg to submit the following cases:

I beg to submit the case decided by your Honor, in 141 Atl. Reporter, page 804, Conway vs. Raphel.

In the above cited case a bill was filed by trustee in bankruptcy to set aside a conveyance made by the husband, to the wife as being fraudulent for want of fair consideration, in which case the court held:

"Complainant seeking to set aside conveyance in fraud of creditors has a burden of proof to show conveyance rendered the grantor insolvent; lack of evidence that conveyance rendered debtor insolvent is a ground for dismissal in a bill of discovery to set aside conveyance as in fraud of creditors."

In the case of Vail vs. Diamond, 135 Atl. Rep. page 791, decided by Vice Chancellor Backes, the essence of which is as follows:

"On a creditor's bill to set aside voluntary conveyance for fraud, fraud must be *proved*; fraud as to creditors in voluntary conveyance cannot be presumed as a matter of law."

In the case of Milkman vs. Arthe, 223 Federal, page 507, April 13, 1915, (New York), the husband gave the wife money from time to time for her household expenses, from which money she purchased some stock, which incidentally is analogous to the case at bar, and the Court in that case held:

“Property bought by a wife of a bankrupt, with money saved by her from sums given her by her husband from time to time for household expenses when he was not indebted, and for which he asked no accounting, cannot be recovered by his trustee for the benefit of subsequent creditors.”

It would appear from these cases, and in view of the testimony introduced by the complainant and defendants in this case, the burden of proof has not been overcome by the complainant, taking into consideration the testimony of the defendants which stands wholly uncontradicted, pages 26 to 30 inclusive of Mrs. Marks, and pages 21 to 24 inclusive of Harry Marks:

HANNAH MARKS, sworn on behalf of the defendants, testified as follows:

“Direct-examination by Mr. Neiwirth:

“Q. Mrs. Marks, you are the wife of Mr. Marks, Harry Marks?

“A. Yes.

“Q. Speak a little louder, please. You live in Millburn?

“A. Yes, sir.

“Q. How many members are there in your family?

“A. Seven.

The Court: I cannot hear you.

The Witness: Seven.

“Q. How many persons or members of your family were there at home in 1922?

"A. The youngest one.

"Q. What is his name?

"A. Ralph.

"Q. Ralph?

"A. (Witness nods yes).

"Q. Was Sidney Marks at home?

"A. Oh, I didn't know what you asked me, I thought you—(interrupted).

"Q. How many members lived with you?

"A. They were all home.

"Q. And what income did you have in your home from the various members of your family?

"A. I have a young woman that is staying with me for the last fourteen years. In the beginning, the first few years, she gave me ten dollars a week. Later on, why, when things got dearer, she paid me \$12. a week, and, with the children working, why, I got all that was—that I had to have.

"Q. Did your sons contribute to your home each week?

"A. Yes, sir.

"Q. Did you loan your husband and your son some money in 1922?

"A. Yes, sir.

"Q. How much was it?

"A. I loaned them \$2000.

"Q. Was it all cash money?

"A. No. I had—my husband gave me a camp up in Unity, New Hampshire, and he also gave me some Liberty Bonds and War Stamps, and, when I came to Millburn, I gave my husband the stamps and bonds to put in safe keeping, because I had nowhere to keep them, and in 1922, he said to me, "Hannah, I would like to enlarge my business, but I have no money." So I said, "Well, I have got some and I will let you have it." He said, "How are you going to do it?" I said, "I will sell my camp and I will cash in the stamps and bonds" and I cashed it in, and I gave him the \$2000.

"Q. You are speaking now of the place in Unity which was a cottage?

"A. Yes, sir.

"Q. In New Hampshire?

"A. Yes, sir.

"Q. When did you acquire this property?

"A. In 1920. My husband gave it to me.

"Q. And in 1922 you sold it?

"A. Yes, sir; a little while before. I don't know exactly which it was.

"Q. You are certain that it was before you made the loan to your husband?

"A. Oh, of course.

Mr. Neiwirth: I offer for identification three copies of deeds concerning this parcel out in New Hampshire. It shows transactions from Barney Levitt to Harry Marks, November 24, 1913.

The next one from Harry Marks to Hannah Marks, March 22, 1920.

And the third one from Hannah Marks to Bertha Steinfeld, June 6, 1922. No objection?

Mr. Ellend: No.

The Court: Have you any objection to their being marked in evidence?

Mr. Ellend: No.

The Court: They may be marked in evidence.

(Three papers marked Exhibits D-1, D-2 and D-3).

"Q. Mrs. Marks, will you please explain to the Court what agreement you had with your husband, if any, about this money which you loaned him?

"A. Well, when I agreed to loan him this money, I asked him how he was going to pay it back to me, so he said that he had ten shares of building and loan, and that he would let me have that in payment, so every month he paid until it would be paid up, and then I will get what is coming to me.

"Q. Now you have heard some testimony concerning 45 additional shares of stock,

which appear in your name. Did you purchase these shares of stock from the building and loan?

"A. Yes, sir.

"Q. And how did that take place?

"A. In 1922, I took out five shares, and in '23 I took out ten shares, and in '24 I took out ten and ten, different issues, and in '25 I took out ten shares, so that made 45 shares.

"Q. Now, who went to the Building & Loan to get these shares? Did you go?

"A. Never.

"Q. Well, who did?

"A. I gave the money to my husband and he went. I was never in that building ever since I am there.

"Q. Did you ask your husband to take these shares out for you?

"A. I told him to take them, and I gave him the money to take them with.

"Q. How did you pay for these shares, every month?

"A. Well, as I said, I have this girl at the present time, and her money I took every week and put on one side, and with what the children gave me, I had more than to pay for them.

"Q. Did you know anything about what fashion your husband paid these shares in, whether he went there personally, or paid them by check, or any other way?

"A. I don't know.

Mr. Ellend: I object to that, if the Court please—just a moment—hearsay.

The Court: I will sustain the objection. Well, no, I won't either. She said she didn't know. That is all right, surely.

"Q. Did you ever borrow any money on these shares of stock, Mrs. Marks?

"A. Yes, sir.

"Q. Do you remember when that was?

"A. Yes, sir.

"Q. When was it?

"A. In 1925.

"Q. How much did you borrow?

"A. \$1,010.00.

"Q. Did you buy some real estate at that time?

"I did.

"Q. What was it?

"A. Just a home for myself.

"Q. Do you still have the home?

"A. Yes, sir.

"Q. Did you recently have your attorney institute a suit against the Millburn Building & Loan Association to recover these 45 shares of stock?

"A. Yes, sir.

"Q. Did you get them back?

"A. The 45 shares?

"Q. Yes.

"A. The 45 I got back.

"Q. And did you again make another loan on them?

"A. I did.

"Q. In what amount?

"A. \$2200.

"Q. What did you use this money for?

"A. Which money?

"Q. That you got the last time on this loan?

"A. The last loan?

"Q. The last loan that you got?

"A. To pay off some of my mortgage.

"Q. On this real estate that you acquired?

"A. Yes, sir.

"Q. Do you remember how much money you paid each month to the Building & Loan after you borrowed some money there?

"A. The first loan, you mean?

"Q. Yes.

"A. Yes.

"Q. How much did you pay?

"A. I paid \$45. a month. My husband gave me ten for the ten shares that he has given me, and \$30.00 a month on the payment and interest.

"Q. Did you pay an additional \$30 each month?

"A. Yes, sir.

"Q. After you acquired this money from the Building & Loan? Did you give that money to your husband?

"A. I gave this money to my husband.

Mr. Neiwirth: That is all."

HARRY MARKS, sworn as a witness on behalf of the defendants, testified as follows:

Direct-examination by Mr. Neiwirth:

"Q. Mr. Marks, in the year 1922, did you have any shares of stock in—was it the Millburn Building & Loan?

"A. Yes, sir.

"Q. You were in partnership with your son at that time; is that it?

"A. Yes, sir.

"Q. Under what name was the shares of stock?

"A. In Harry Marks & Son.

"Q. The firm's name?

"A. Yes, sir.

The Court: Harry Marks, or Harry Marks & Son?

"Q. And son. Did you transfer these shares of stock? Did you?

"A. Yes, sir.

"Q. To whom?

"A. To Hannah Marks, my wife.

"Q. And why?

The Court: When?

The Witness: In 1922, sir, I wanted to enlarge my business, and I wanted to get some money—way back in 1900 and—

The Court: No. Just confine yourself to when you transferred them and why.

The Witness: Because I had borrowed some money from my wife and I gave her those; I transferred those shares of building and loan to her to help to pay her back the money which I had promised to

give her any time she wanted it.

“Q. When did you borrow the money?”

“A. In 1922.

“Q. And when did you assign the shares to her, after that?”

“A. Yes, sir.

“Q. Now, how much money did you borrow?”

“A. Two thousand dollars.

“Q. Did you continue the payments on these shares—

“A. Yes, sir.

“Q. —after that date?”

“A. Yes, sir.

“Q. On the ten shares?”

“A. Yes, sir.

“Q. And how did that come about?”

“A. That I continued to pay for the shares?”

“Q. Yes.

“A. Because I had promised my wife, at the time I took the loan, that I would give her those shares of stock that we had taken out previously and continue to pay on those shares, which would pay her back her money.

“Q. Well, have you her testimony here concerning 45 additional shares?”

“A. Yes, sir.

“Q. Did you take those shares out, and, if so, for whom?”

“A. For Hannah Marks.

“Q. And how did that come about?”

“A. Why, my wife wanted to buy five shares of building and loan and asked me to do it for her, which I did.

“Q. Where did you get the money from to take them out?”

“A. My wife give it to me, sir.

“Q. Now, referring to five shares in 1922, ten shares in '23, ten shares in '24, and an additional ten shares in '24, and ten shares in '25, all in the name of Hannah Marks, were these shares taken out the same way; if not, how were they taken out?”

"A. Just the same way. My wife simply gave me the money to pay for the building and loan shares, as they came due she gave me the money.

"Q. How was it, Mr. Marks, that these shares were paid for out of the account of the partnership?

"A. Well, when you went over to the Building and Loan to pay your loan, there was usually a great big string of people that would take half an hour and sometimes three-quarters. I went over there one night to pay my building and loan, there was such a crowd there I couldn't wait, I had to come back and take care of my store. The next morning when I went there to pay the building and loan, I found that they had charged me a dollar for a fine, and I kicked about it. The gentleman, Mr. Oliver, that just was here, he suggested to me that I should do the same as a lot of others were doing, to have it taken from my bank account, and that would save me from having to be fined, and I wouldn't have to wait in line a half an hour or so, and I agreed to that.

"Q. Did your wife give you all of the money that went towards the payment of these shares each month?

"A. Yes, sir.

"Q. Did she pay you each month for the original ten shares or was that handled separately?

"A. No. The ten shares, sir, we paid for ourselves. That was my arrangement that we pay for those ten shares ourselves, but the money for her building and loan she used to give me, and it was deposited in the bank in the same way as I made my other deposits, and it was deducted from the amount of balance that we had every month.

"Q. Did you have any other bank account with the bank?

"A. No, sir.

"Q. Did you have a personal bank account in your name?

"A. No, sir.

"Q. Did your wife have one?

"A. No, sir.

Mr. Neiwirth: That is all.

That Mrs. Marks loaned to the partnership business the sum of \$2,000.00, and at the time this money was passed to the partnership, a certificate of ten shares of stock was transferred to her name from the partnership, which had a value of \$350.00, and that the agreement to re-pay was to continue the payments on the said ten shares of stock until maturity or when the sum amounted to \$2,000.00 on the books of the building and loan association. As to the other forty-five shares of stock, the testimony also is wholly uncontradicted; that Mr. Marks, acting as the agent of Mrs. Marks, and who, incidentally negotiated all of Mrs. Mark's transactions with the building and loan association, as the record will disclose, took out for Mrs. Marks forty-five additional shares from time to time, and that the moneys for the payment of the said forty-five shares of stock were given to Mr. Marks each month, by Mrs. Marks. Mr. Marks, having no other bank account other than that of the partnership, inadvertently deposited the moneys in the accounts of the partnership, and had deductions made from the said account for fifty-five shares, which was the property of Mrs. Marks.

The testimony introduced by Mrs. Marks readily shows an income each week in her household, of a sufficient amount to permit a surplus sufficient to pay for forty-five shares each month, which testimony also stands entirely uncontradicted; there being an income from a boarder, plus the income from her sons, as well as a weekly allowance from

her husband. Pages 26 and 27 of testimony of Mrs. Marks:

“Q. How many persons or members of your family were there at home in 1922?”

“A. The youngest one.

“Q. What is his name?”

“A. Ralph.

“Q. Ralph?”

“A. (Witness nods yes).

“Q. Was Sidney Marks at home?”

“A. Oh, I didn't know what you asked me. I thought you—(interrupted).

“Q. How many members lived with you?”

“A. They were all home.

“Q. And what income did you have in your home from the various members of your family?”

“A. I have a young woman that is staying with me for the last fourteen years. In the beginning, the first few years, she gave me ten dollars a week. Later on, why, when things got dearer, she paid me \$12 a week and, with the children working, why, I got all that was—that I had to have.

“Q. Did your sons contribute to your home each week?”

“A. Yes, sir.

“Q. Did your husband contribute each week?”

“A. Yes, sir.

It further appears from the testimony that there was a good and valuable consideration passed between Mrs. Marks and the partnership, and stands uncontradicted, the reasonableness of which was substantiated by the evidence of the fact that Mrs. Marks sold a piece of real estate from which she acquired \$1000.00 in cash, and that in addition thereto, had \$1000.00 from the sale of liberty bonds and war savings stamps, which testimony, in its present form, in my opinion, eliminates any ques-

tion concerning the position of the complainant as to his rights to any consideration in the moneys so deducted from the account of the partnership, which testimony also establishes, and it appears uncontradicted, as a true, proper and valuable consideration for the assignment of the shares, as well as this defendant's, Hannah Marks, rights and interest in said assignment.

The record further discloses that between the time of the assignment and the date of the bankruptcy, the sum of \$2115.83 was paid through the partnership accounts and on account of the building and loan shares, which if, conceded for the purpose of argument, was not moneys which were advanced to the partnership by Mrs. Marks, the partnership, nevertheless, was indebted to Hannah Marks to the sum of \$2000 for and on account of the loan made to the said partnership by her, and which obviously stands out as being an indebtedness due from the partnership to Mrs. Marks, in the amount of \$2000.00, which appears in the testimony and uncontradicted.

In support of this contention, the case of *Cole vs. Lee's Executors*, Court of Errors and Appeals, December 12, 1889, 18 Atl. Rep. page 854, distinctly holds:

“When the fact that the husband received his wife's money was established by proof, there was established a liability on his part to account in equity to her for at least the principal sum received, which liability would afford a consideration sufficient to support a mortgage.”

which has been held in this case, amongst other things as to the rights of creditors.

I respectfully submit that the complainant does not cite any circumstance or facts establishing a

principal of law from the testimony, nor is any law offered in support of the same, but instead, has submitted conclusions without logic or proper inference from the testimony, also (probably by inadvertence) misstated the fact that the deductions from the bank account of the partnership was made at the suggestion of Mr. Marks, whereas, the testimony, page 14, ll. 28-31, testimony of Mr. Oliver, discloses that Mr. Oliver, complainant's witness, recommended the deductions to be made from the bank account, and then "But at that time I suggest to me that he would let me charge the account each month, take care of his dues, and that he agreed to."

To the Honorable Court of Errors and Appeals, in the last resort in all causes; the appellant prays that the decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as this Honorable Court shall seem meet.

Respectfully submitted,

HARRY S. NEIWIRTH,  
Solicitor for Appellant.

