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Notice of Appeal.

NOTICE OF APPEAL.

Filed December 29, 1921.

In Chancery of New Jersey

Between

DYMTRO SEMENOWICH, VREELAND-
KEARNY LUMBER Co., a corpora-
tion; WILLIAM H. BARKHORN COM-
PANY, a corporation,

Complainants,

and

MAYK MELNYK and OLENA MELNYK,
his wife; MICHAEL NOVAK and
MARY NOVAK, his wife, and NICHOLAS
YACENTY,

Defendants.

On Bill, &c.

*Notice of
Appeal.*

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To Leonard J. Fruzinski:

TAKE NOTICE that the defendant, Michael Novak, hereby
appeals from the decree and from the whole and every
part thereof, entered on the 15th day of December, 1921,
on the cross-bill filed by Leonard J. Fruzinski in said
cause, to the Court of Errors and Appeals in the last
resort in all causes.

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Dated December 24, 1921.

RIKER & RIKER,
*Solicitors of Defendant,
Michael Novak.*

THEO. McC. MARSH,
Of Counsel.

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Notice of Appeal.

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

THEO. McC. MARSH,
Of Counsel with Defendant,
Michael Novak.

01
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Service acknowledged December 27, 1921.

LEVY & FENSTER,
Solicitors of L. J. Fruzinski.

02
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03
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04
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Notice of Appeal.

NOTICE OF APPEAL.

Filed December 29, 1921.

To Mayk Melnyk, Olena Melnyk and Leonard J. Fruzinski:

TAKE NOTICE that the defendant hereby appeals from so much of the final decree in the above-entitled cause, made on the 25th day of January, 1921, and amended by decree dated December 15, 1921, which declares and determines that the amount due to Michael Novak as between the said Michael Novak and Mayk Melnyk or his assigns is \$5,250.00, to the Court of Errors and Appeals in the last resort in all causes. 10

Dated December 24, 1921.

RIKER & RIKER,
Solicitors of Defendant,
Michael Novak. 20

THEO. McC. MARSH,
Of Counsel.

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

THEO. McC. MARSH,
Of Counsel with Defendant,
Michael Novak. 30

Service acknowledged December 26, 1921.

LEVY & FENSTER,
Solicitors of L. J. Fruzinski,
Mayk Melnyk, Wife.

Petition of Appeal.

PETITION OF APPEAL.

Filed January 5, 1922.

New Jersey Court of Errors and Appeals

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Between

DYMTRO SEMENOWICH, VREELAND-
KEARNY LUMBER Co., a corpora-
tion; WILLIAM H. BARKHORN COM-
PANY, a corporation,
Complainants-Appellees,

and

20

MAYK MELNYK and OLENA MELNYK,
his wife; MICHAEL NOVAK and
MARY NOVAK, his wife, and NICHOLAS
YACENTY,
Defendants-Appellants.

On Bill.

*Petition of
Appeal.*

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

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The petition of Michael Novak, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 25th day of January, 1921, and amended by decree dated December 15, 1921, wherein Dymtro Semenovich, *et als.*, were complainants and Michael Novak, *et als.*, were defendants, in this respect, to wit:

That the said decree adjudges that the sum of \$5,250.00 with interest from December 1, 1920, be fixed and deter-

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Petition of Appeal.

mined as the amount due to said Michael Novak on said date on his lien.

And your petitioner humbly appeals from that part of said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the sum to which said Michael Novak is entitled is \$5,900.00, being the amount advanced by Michael Novak to Mayk Melnyk, and the sum of \$650.00 representing the amount of rents received by Michael Novak in excess of charges should not have been deducted therefrom as Michael Novak was entitled to all of said rents. 10

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, and set aside, and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

RIKER & RIKER, 20
Solicitors of Appellant.

THEO. McC. MARSH,
Of Counsel with Appellant.

Service acknowledged January, 1922.

LEVY & FENSTER,
*Solicitors of Leonard J. Fruzinski,
Mayk Melnyk, Wife.* 30

Petition of Appeal.

PETITION OF APPEAL.

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

10 The petition of Michael Novak, the appellant in the
above-stated cause, respectfully shows that your petitioner
finds himself aggrieved by a decree made in the Court
of Chancery bearing date the 15th day of December, 1921,
wherein Leonard J. Fruzinski was the cross-complainant
and Michael Novak, *et als.*, defendants, in these respects,
to wit, that the said decree adjudges:

(a) That said Michael Novak shall account to the said
Leonard J. Fruzinski for all rents collected by him from
the first day of December, 1920.

20 (b) That Michael Novak shall convey the lands and
premises to Leonard J. Fruzinski upon being paid the
amount due under the decree of this Court bearing date
January 25, 1921, together with amounts paid to com-
plainants and counsel.

(c) That the decree made in this cause on the 25th
day of January, 1921, be amended by changing the recital
to read as follows:

30 "and it appearing from said agreement and from
the testimony that the said Michael Novak holds
said property in trust for Mayk Melnyk to the
extent of his lien thereon for money advanced by
him, to wit, the sum of five thousand, two hundred
and fifty dollars to December 1st, 1920."

Your petitioner humbly appeals from the said decree
of the Chancellor as aforesaid upon the ground:

(a) That Leonard J. Fruzinski is not entitled to an
accounting for the rents, issues and profits from said
premises, but the defendant, Michael Novak, is entitled
to retain same under an agreement by and between Michael
Novak and Mayk Melnyk, assignor of said Leonard J.
Fruzinski.

Petition of Appeal.

(b) And upon the ground that Leonard J. Fruzinski is not entitled to any relief in equity as the assignee and grantee of Mayk Melnyk, who has been determined by this Court to be guilty of fraudulent conduct in the premises;

(c) And for that the said decree amends the decree of January 25, 1921, whereas the said original decree correctly recited the facts as presented by the pleadings and proofs taken in said cause. 10

(d) And for that said decree is in divers other respects contrary to law and equity.

Your petitioner therefore prays that said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

RIKER & RIKER, 20
Solicitors of Appellant.

THEO. McC. MARSH,
Of Counsel with Appellant.

Service acknowledged January, 1922.

LEVY & FENSTER,
Solicitors of L. J. Fruzinski.

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Bill of Complaint.

BILL OF COMPLAINT.

Filed.

IN CHANCERY OF NEW JERSEY.

10 *Between*

DYMTRO SEMENOWICH, VREELAND-
KEARNY LUMBER Co., a corpora-
tion; WILLIAM H. BARKHORN COM-
PANY, a corporation,

Complainants,

and

20

MAYK MELNYK and OLENA MELNYK,
his wife; MICHAEL NOVAK and
MARY NOVAK, his wife, and NICHOLAS
YACENTY,

Defendants.

*Bill of
Complaint.*

*To His Honor, Edwin Robert Walker, Chancellor of the
State of New Jersey:.*

30 Complaining shows unto your Honor, your orators,
Dymtro Semenowich, Vreeland-Kearny Lumber Co., a
corporation, and William H. Barkhorn Co., a corpora-
tion, of the State of New Jersey, located in the City of
Newark, County of Essex and State of New Jersey.

40 1. That the said defendants, Mayk Melnyk and Olena
Melnyk, his wife, were on or about the 16th day of Novem-
ber, 1918, and prior thereto, and to the day and date of
the filing of this bill, seized and possessed in fee sim-
ple, of certain land and real estate, hereinafter mentioned
and described, situate, lying and being in the Town of
Irvington, County of Essex and State of New Jersey,
that is to say:

Bill of Complaint.

First Tract: BEGINNING at a point twenty-five feet westerly from the corner formed by the intersection of the westerly side of Twenty-first street and the southerly side of Sixteenth avenue; thence westerly along the southerly side of Sixteenth avenue seventy-five feet; thence southerly one hundred feet; thence easterly seventy-five feet; thence northerly one hundred feet to the point and place of BEGINNING. 10

Being lots 25, 26 and 27 on map of lots owned by Joseph Karrakas, Irvington, N. J.

Second Tract: BEGINNING on the easterly side of Twenty-second street at a point therein distant one hundred and one feet and eleven hundredths of a foot southerly from the corner formed by the intersection of the easterly line of Twenty-second street and the southerly line of Sixteenth avenue; thence running easterly seventy-one feet and one one-hundredths of a foot; thence southerly forty-two feet and seven-hundredths of a foot; thence westerly seventy-three feet and thirty-one hundredths of a foot to the said easterly line of Twenty-second street; thence northerly along said easterly side of Twenty-second street thirty-one feet and fifty-two hundredths of a foot to the point and place of BEGINNING. 20

Being lot No. 23.

Third Tract: BEGINNING at a point in the easterly line of Twenty-second street distant southerly one hundred and thirty-two feet and sixty-three hundredths of a foot from the corner formed by the intersection of the aforesaid easterly line of Twenty-second street with the southerly line of Sixteenth avenue; thence running south thirty-three degrees thirty-three and one-half minutes west thirty-one feet and fifty hundredths of a foot along the said easterly line of Twenty-second street; thence south fifty-six degrees twenty-six minutes east seventy-five feet and seventy-one hundredths of a foot; thence north twenty-nine degrees nineteen minutes east thirty-one feet and 30

Bill of Complaint.

fifty-eight hundredths of a foot; thence north fifty-six degrees twenty-six minutes west parallel with the second course seventy-three feet and thirty hundredths of a foot to the point and place of BEGINNING.

Being known and designated as lot No. 22 on aforesaid map.

- 10 Fourth Tract: BEGINNING at the southeast corner of Grove street and Sixteenth avenue; thence running along Grove street southerly twenty-five feet; thence easterly and at right angles to the same one hundred feet; thence north twenty-four degrees thirty-seven minutes east thirty-eight feet and eleven hundredths of a foot to Sixteenth avenue; thence along the same north sixty-three degrees twenty-three minutes west ninety-five feet and seventy-seven hundredths of a foot to the place of BEGINNING.
- 20 Being lot 1 on map of property of estate of Conrad Nolde, deceased; Nicholas Weber, executor, situated in the Town of Irvington, N. J. Harrison Van Duyne & Son, surveyor, October, 1910.
2. And your orators further show that on or about the 16th day of November, 1918, and for a long time prior thereto, the said Mayk Melnyk and Olena Melnyk, his wife, two of the defendants herein, and while they were seized and possessed of the said real estate and property, were indebted to your orators, and divers other creditors, in various amounts, and while being so seized of the said property, and while being so indebted, the said Mayk Melnyk and Olena Melnyk, his wife, did on or about the 16th day of November, 1918, with intent to cheat and defraud your orators and divers other creditors, to whom they were then and there indebted, convey or pretend to convey the said land and premises, as hereinabove described, to one Michael Novak, for and in consideration of \$1.00, and that on the same day and year the said Michael Novak and Mary Novak, his wife, did
- 30 then and there file a declaration of trust to one Nicholas
- 40

Bill of Complaint.

Yacenty, declaring that the said Michael Novak holds said land and premises in trust, and for the use and benefit of the said Nicholas Yacenty and Mayk Melnyk, all of which acts and doings on the part of the said Mayk Melnyk and Olena Melnyk, his wife, Michael Novak and Mary Novak, his wife, and Nicholas Yacenty were done through connivance and conspiracy, and with intent to cheat and defraud your orators and divers other creditors of the said Mayk Melnyk and Olena Melnyk, his wife, to whom they were then indebted. 10

3. And your orators further show unto your Honor that the said Mayk Melnyk and Olena Melnyk, his wife, are indebted to the complainants herein, in the following amounts: Judgment obtained by Dymtro Semenowich for \$1,936 in the Essex County Circuit Court on May 23, 1919, being on a note made and executed by the said Mayk Melnyk and Olena Melnyk, his wife, on July 1, 1916, given to secure the sum of \$1,650, for cash money loaned and advanced to the said Mayk and Olena Melnyk, with interest thereon; that no part of the said judgment or note has been paid. 20

4. That the said Mayk Melnyk was indebted to the Vreeland-Kearny Lumber Co., a corporation, in the sum of \$1,250.20, a long time prior to the conveyance of said land and premises by the said Mayk Melnyk and Olena Melnyk, his wife, to Michael Novak, on November 16, 1918, for which judgment was recovered in the Essex County Circuit Court, on January 29th, 1920, in the sum of \$1,250.20, besides costs and interest, against the said Mayk Melnyk. 30

5. That the said Mayk Melnyk was indebted to William H. Barkhorn Co., a corporation, in the sum of \$1,227.50, a long time prior to the conveyance of said land and premises by the said Mayk Melnyk and Olena Melnyk, his wife, and for which judgment was recovered by the said William H. Barkhorn Co., a corporation, 40

Bill of Complaint.

against Mayk Melnyk, in the Essex County Circuit Court, on the 29th day of January, 1920, for \$1,227.50, besides costs and interest; that no part of the said judgments above mentioned were paid; and that the total amounts are still due and owing.

10 6. And your orators further show unto your Honor that the aggregate amount of said claims, due to your orators, and contracted by the said Mayk Melnyk and Olena Melnyk, his wife, is \$4,414; that the said Michael Novak and Mary Novak, his wife, and Nicholas Yacenty, well knew that the said claims were due and owing a long time prior to the conveyance or pretended conveyance by the said Mayk Melnyk and Olena Melnyk, his wife, to Michael Novak, and the declaration of trust given by the said Michael Novak and Mary Novak, his wife, to the
20 said Nicholas Yacenty; that the said pretended conveyances were for the purpose of and through the connivance and conspiracy on the part of the defendants, and divers other persons whose names at this time are unknown to your orators, and with intent to cheat and defraud your orators of their said claims and judgments.

7. And your orators further show unto your Honor that executions have been issued, directed to the Sheriff of the County of Essex, directing him to make a levy on the goods, chattels and real estate of the said Mayk Melnyk and Olena Melnyk, his wife, for and in behalf of the
30 complainants herein, and which executions have been returned unsatisfied, with the levy annexed on the above described land and premises; that no part of the said execution on said judgment has been paid, and that the full amount is due and owing.

8. And your orators further show unto your Honor that the said Sheriff cannot proceed to sell the said property, by reason of the said title or pretended title is in one Michael Novak, who on the 16th day of November, 1918, gave a declaration of trust to one Nicholas Yacenty, which declaration of trust was acknowledged on the same
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Bill of Complaint.

date and year and recorded on the 4th day of June, 1919, in consideration of \$1.00 in which the said Michael Novak and Mary Novak, his wife, declare that they hold the property in trust for one Nicholas Yacenty and Mayk Melnyk, and he, the said Michael Novak, is to receive the rents, issues and profits thereof, and apply the same towards the payment of all expenses in the upkeep of the said property, the remainder thereof to belong to the said Michael Novak, all of which acts and conduct on the part of the said Michael Novak and Mary Novak, his wife; Mayk Melnyk and Olena Melnyk, his wife, and Nicholas Yacenty are fraudulent and done to carry out the fraudulent design, for the purpose of cheating and defrauding your orators; that the said declaration of trust filed by the said Michael Novak and Mary Novak, his wife, to the said Nicholas Yacenty, is for the purpose of, and done with the intent to carry out the conspiracy and connivance on the part of the said Mayk Melnyk and Olena Melnyk, his wife; Michael Novak and Mary Novak, his wife, and the said Nicholas Yacenty, for the purpose of cheating and defrauding your orators and divers other creditors of the said Mayk Melnyk and Olena Melnyk, his wife.

9. And your orators further show unto your Honor, that being so seized and possessed of the said tracts of land and real estate as aforesaid, and your orators were informed and verily believe it to be true, and so charge it is worth about \$75,000 and upwards, afterwards, at or about the dates and times and by the pretended deeds hereinafter mentioned and after the said debts to your orators had accrued and had become due and payable, and in order to secure the said property for the use and benefit of the said Mayk Melnyk and Olena Melnyk, his wife, and to protect it from the claims and demands of your orators and to prevent the collection of your orators' claims and judgments, the said Mayk and Olena Melnyk, his wife; Michael Novak, Nicholas Yacenty and divers other persons, contriving to defraud your orators, did by

Bill of Complaint.

deed bearing date November 16, 1918, and recorded in Book Y 60 of Deeds for Essex County, page 151, pretend to convey the said tracts of land hereinabove described, to the said Michael Novak, who is a friend, and who, your orators were informed and verily believe it to be true, is a relative to the said Mayk Melnyk and Olena Melnyk, his wife, and on the same date and year
10 the said Michael Novak and Mary Novak, his wife, executed a declaration of trust to Nicholas Yacenty, which is recorded in the Register's Office of Essex County, in Book R 61, page 270, pretending that the said Michael Novak holds in trust the said lands and premises, for the use and benefit of the said Nicholas Yacenty and Mayk Melnyk, for the nominal consideration of \$1.00, all of which acts and doings on the part of the defendants are fraudulent, and with a fraudulent design, connivance and conspiracy on the part of the said defendants, Michael
20 Novak and Mary Novak, his wife; Mayk Melnyk and Olena Melnyk, his wife, and the said Nicholas Yacenty, to cheat and defraud your orators of the moneys due to your orators.

10. And your orators further show unto your Honor that the said Mayk Melnyk and Olena Melnyk, his wife, and Michael Novak and Mary Novak, his wife, and Nicholas Yacenty, in making said deeds of conveyance and declaration of trust, of the said real estate, fraudulently
30 colluded and conspired together for the purpose of defrauding, hindering and delaying your orators, in the collection of the said claims, and satisfaction of said judgments recovered as aforesaid.

11. And your orators further show that they have been informed and verily believe it to be true, and therefore expressly so charge, that no consideration whatever was paid for the conveyance or declaration of trust by the said Michael Novak or Nicholas Yacenty, but that the said Michael Novak and Mary, his wife, and Nicholas
40 Yacenty hold said real estate, in trust, and for the uses

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and benefit of the said Mayk Melnyk and Olena Melnyk, his wife.

12. And your orators further show unto your Honor that they have been informed and verily believe it to be true that the deed of conveyance was made to the said Michael Novak, and said declaration of trust given to the said Nicholas Yacenty, for the purpose of, and with intent to cheat and defraud your orators and divers other creditors of the said Mayk Melnyk and Olena Melnyk, his wife, and that the said Michael Novak and Mary Novak, his wife, for the purpose of cheating and defrauding your orators, and divers other creditors, which your orators expressly so charge, refused to satisfy or pay your orators, as well as other creditors of the said Mayk Melnyk and Olena Melnyk, his wife, and that the said Michael Novak and Mary Novak, his wife, have refused to convey the said land and premises, to the said Mayk Melnyk and Olena Melnyk, his wife, all of which acts and doings on the part of the said Michael Novak and Mary Novak, his wife, and Nicholas Yacenty are fraudulent, and with a fraudulent design, for the purpose of cheating and defrauding your orators.

13. And your orators further show unto your Honor that the rents, issues and profits of the said real estate is received by the said Mayk Melnyk and Olena Melnyk, his wife, and the same is held in trust for the use and benefit of the said Mayk Melnyk and Olena Melnyk, his wife, and not for the said Michael Novak.

14. And your orators further show unto your Honor that the fraudulent or pretended conveyances were made without any consideration and for the purpose of cheating and defrauding your orators and divers other creditors.

15. And your orators further show unto your Honor that the said Michael Novak, by virtue of the alleged delivery to him of the fraudulent deed, pretends that he is the owner of the said land and premises.

Bill of Complaint.

16. And your orators further show unto your Honor that they have frequently and in a friendly manner applied to the said Mayk Melnyk and Olena Melnyk, his wife; Michael Novak and Nicholas Yacenty, to pay your orators, their said claims and judgments, or to cause the said premises to be conveyed to Mayk Melnyk and Olena Melnyk, his wife, so that the same may be sold for the collection and satisfaction of the said judgments, and who are entitled to the payment of their said judgments out of the said lands and real estate or in case of sale thereof, out of the proceeds of such sale and that a good and clear title given therefore to the purchaser or purchasers thereof, as in equity and good conscience they ought to have done and as your orators well hoped they would have done, but which they wholly refused to do.

In consideration whereof, and for as much as your orators are remediless in the premises at the common law and cannot have adequate relief except by the aid of this Honorable Court, to the end therefore, that the said Mayk Melnyk and Olena Melnyk, his wife; Michael Novak and Mary Novak, his wife, and Nicholas Yacenty, and all other persons who have contrived and conspired with a fraudulent design, for the purpose of cheating and defrauding your orators, and whose names are at the present time unknown to your orators, be made party defendants, may without oath (oath is hereby expressly waived) full, true, direct and perfect answer make, to all and singular, the charges and matters aforesaid, as fully and particularly as if the same were here again repeated and they thereunto particularly interrogated; and that the said defendants or one of them may be decreed to pay your orators the full amounts due and owing by the said Mayk Melnyk and Olena Malnyk, his wife, with interest thereon, besides costs; and that the said fraudulent conveyances made or suffered between the said defendants and affecting the said land and real estate, may be set aside and declared null and void, and that the said declaration of trust may

Bill of Complaint.

be set aside and declared null and void, and that the said lands may be sold free, clear and discharged of and free from said fraudulent deeds and declaration of trust, and the proceeds thereof or such part of the same as may be necessary may be applied to the payment and satisfaction of the several judgments of your orators, as aforesaid; and that your orators may have such other and further relief in the premises as the nature of the case may require as may be agreeable to equity and good conscience. 10

MAY IT PLEASE YOUR HONOR, the premises considered, to grant unto your Honor the State's writ of subpoena issued out of and under the seal of this Honorable Court, and directed to the said Mayk Melnyk and Olena Melnyk, his wife; Michael Novak and Mary Novak, his wife, and Nicholas Yacenty, therein and thereby commanding them and each of them, on a certain day and under a certain penalty, to be therein expressed, personally to be and appear before your Honor, in this Honorable Court, then and there to answer the premises and to stand to and abide by and perform such order or decree therein as to your Honor shall seem meet and as shall be agreeable to equity and good conscience. 20

And your orators will ever pray, &c.

WM. GREENFIELD,
LEVY & FENSTER,
*Solicitors for and of Counsel
with Complainants.* 30

Answer of Michael Novak and Mary Novak.

ANSWER OF MICHAEL NOVAK AND MARY NOVAK.

Filed April 16, 1920.

The answer of Michael Novak and Mary Novak, his wife, to the bill of complaint filed in this cause respectfully shows:

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1. These defendants admit that the defendants, Mayk Melnyk and Olena Melnyk, his wife, were, on the 16th day of November, 1918, and prior thereto, seized of the lands and premises described in said paragraph one of the bill of complaint, but deny that they are now seized and possessed of the same.

20

2. These defendants admit that on or about November 16, 1918, and prior thereto, the said Mayk Melnyk and Olena Melnyk, his wife, were seized of the premises described in the bill of complaint, but whether they were indebted to the complainants and divers other creditors these defendants have no knowledge and leave the complainants to make such proof thereof as they may be advised. These defendants admit that the said Mayk Melnyk and Olena, his wife, did, on or about the 16th day of November, 1918, convey to Michael Novak the premises described in the first paragraph of the bill, but deny that it was done with intent to cheat and defraud the complainants and other creditors. These defendants admit that they executed a declaration of trust to one Nicholas Yacenty and admit that the same is recorded in the Register's Office in the County of Essex, and that the same speaks for itself, but these defendants deny that any of their acts and doings were with intent to cheat and defraud the complainants and other creditors of Mayk Melnyk and Olena Melnyk, his wife.

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3. These defendants say they have no knowledge of the matters contained in the third paragraph of the bill of complaint, and leave the complainants to make such proof thereof as they may be advised.

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Answer of Michael Novak and Mary Novak.

4. These defendants say they have no knowledge of the matters contained in the fourth paragraph of the bill of complaint and leave the complainants to make such proof thereof as they may be advised.

5. These defendants say they have no knowledge of the matters contained in the fifth paragraph of the bill of complaint and leave the complainants to make such proof thereof as they may be advised. 10

6. These defendants deny that they well knew that the said claims of the complainants were due and owing a long time prior to the conveyance to the said Michael Novak, and they deny that the said conveyance was for the purpose of cheating and defrauding the complainants of their claims and judgments.

7. These defendants have no knowledge of the matters contained in the seventh paragraph and leave the complainants to make such proof thereof as they may be advised. 20

8. These defendants admit that they gave a declaration of trust and if the contents of the same is correctly described in the eighth paragraph, they admit what is said in relation thereto, but they deny that any of their acts and conduct were fraudulent and for the purpose of cheating and defrauding the complainants or other creditors of Mayk Melnyk and Olena Melnyk.

9. The ninth paragraph is denied, except that said premises described in the bill of complaint were conveyed to the defendant, Michael Novak. 30

10. The tenth paragraph is denied in so far as these defendants are concerned, and so far as the others are concerned, these defendants have no knowledge.

11. The eleventh paragraph is denied.

12. The twelfth paragraph is denied.

13. The thirteenth paragraph is denied, and these defendants say that the rents, issues and profits from the 40

Answer of Michael Novak and Mary Novak.

said premises are collected and applied by the said Michael Novak in accordance with said declaration of trust.

14. The fourteenth paragraph is denied.

15. The fifteenth paragraph is denied, except that the said Michael Novak claims to be the owner of the said lands and premises, subject to the provisions of said
10 declaration of trust.

16. The sixteenth paragraph is denied.

17. That at the time of the conveyance of the said premises to said Michael Novak there were large arrears of taxes against said properties and large arrears of interest on the mortgages which were then liens against said properties; that the said Michael Novak agreed to pay said arrearages and in addition thereto \$1,500 in cash, as the consideration of said conveyance. That said debts
20 against the properties and cash amounted to \$3,251.85, without the addition of interest and costs in relation to the taxes, and it was agreed that Mayk Melnyk would be given credit for any difference between the sum of \$3,400 and the amount actually paid, if less than \$3,400, and Michael Novak would be credited with any amount in excess of \$3,400; that the amount actually paid to satisfy the taxes and interest amounted to \$1,841.25, which, together with the sum of \$1,500, made a total of \$3,341.25, leaving an amount due to Mayk Melnyk of \$58.75, which
30 difference was paid to him. That upon the conveyance of said premises to the said Michael Novak he and his said wife signed and delivered a declaration of trust, a true copy of which is hereto annexed and made part of this answer.

18. That in pursuance of said declaration of trust and agreement to purchase, the said Michael Novak proceeded to collect the rents, issues and profits of said lands and premises, and paid the taxes, insurance, assessments, water and other municipal liens and charges, and reduced the mortgages on said premises by paying off a mortgage
40 held by one Dreyfuss, amounting to \$1,000.00 and a mort-

Answer of Michael Novak and Mary Novak.

gage held by one Rosie Wirtschafter, amounting to \$1,000.00. That said Michael Novak has expended large sums of money in and about the making of extraordinary repairs and alterations to said premises.

19. That the said Michael Novak, after the making of said conveyance and declaration of trust, at the request of said Mayk Melnyk, paid certain of his indebtedness, upon the agreement and understanding that he would be repaid for the same with lawful interest, upon the conveyance of said premises, or that said declaration of trust would be surrendered by the said Yacenty and Melnyk and said premises become the sole property of said Michael Novak, for the sum of twenty-nine thousand dollars (\$29,000.00), by the said Michael Novak paying the difference between the liens on said property and the sum of twenty-nine thousand dollars (\$29,000.00), and receiving credit for the amount paid and to be paid, mentioned in the declaration of trust, and the further moneys advanced to said Michael Melnyk.

20. That these defendants, upon the repayment to them of the moneys expended in accordance with the terms of said declaration of trust, and the sum of five hundred dollars (\$500.00), to be paid in accordance therewith, with interest on such sums as the same may be payable upon, offer to convey said premises to such persons as this Court may designate.

RIKER & RIKER,
Solicitors of the Defendants,
Michael Novak and Mary Novak.

Reply to Answer of Michael Novak and Wife.

**REPLY TO ANSWER OF MICHAEL NOVAK AND
MARY NOVAK.**

Filed.

10 The complainants replying to the answer of the defendants, Michael Novak and Mary Novak, say:

1. These complainants join issue on paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 inclusive of the answer of the defendants, Michael Novak and Mary Novak, his wife.

2. These complainants deny the allegations set forth in paragraph 13 of said answer, wherein the defendants aver that the rents, issues and profits from the said premises are collected and applied by the said Michael Novak in accordance with his declaration of trust.

20 3. These complainants join issue on paragraphs 14, 15 and 16 of the said answer.

4. These complainants deny the allegations set forth in paragraph 17 of said answer, particularly where the defendants aver that the said defendant, Michael Novak, has paid the sum of \$1,500, or any part thereof, to the said Mayk Melnyk and Olena Melnyk, his wife, or that there was any such adjustment as set forth in said paragraph 17.

30 5. These complainants have no knowledge or information sufficient to form any belief as to the allegations set forth in paragraph 18 of the said answer, and leave the defendants to prove the same; but these complainants aver that if such payments were made as set out in the said paragraph it was done by a preconceived, fraudulent scheme and design to defraud the creditors of the said Mayk Melnyk.

6. These complainants deny each and every allegation set forth in paragraph 19 of the said answer.

Cross-bill of Michael Novak.

7. These complainants deny each and every allegation set forth in paragraph 20 of the said answer.

WM. GREENFIELD,
*Solicitor for and of Counsel with
Complainants, Dymtro Semenowich.*

LEVY & FENSTER, 10
*Solicitors for Complainants, Vreeland-Kearny
Lumber Co., and William H. Barkhorn Co.*

CROSS-BILL OF MICHAEL NOVAK.

Filed November 16, 1920.

By way of cross-bill and counter-claim against the complainants, Dymtro Semenowich, Vreeland-Kearny Lumber Company, a corporation, and William H. Barkhorn Company, a corporation, and against the defendants, Mayk Melnyk, Olina Melnyk and Nicholas Yacenty, the defendant, Michael Novak says:

1. That on or about the 18th day of November, 1918, the defendants Mayk Melnyk and Olena Melnyk, his wife, conveyed the premises described in the bill of complaint in the above-entitled cause to this defendant, which said deed having been duly acknowledged, was recorded in the Register's Office of Essex County on the 18th day of November, 1918, in Book Y 60 of Deeds for said county on pages 151, &c. 20
30

2. That on or about the 18th day of November, 1918, this defendant and his wife, Mary Novak, executed a certain instrument reciting that the premises conveyed to them as hereinabove set forth were held by said Michael Novak in trust for the defendant, Nicholas Yacenty and Mayk Melnyk, upon terms more specifically set forth in said instrument and to which the defendant begs leave to refer should it be necessary so to do, which said instru- 40

Cross-bill of Michael Novak.

ment having been duly acknowledged was recorded on the 4th day of June, 1919, in Book R 61 of Deeds for said County at page 272.

10 3. That the conveyance by the defendants, Mayk Melnyk and Olena Melnyk, his wife, to this defendant as aforesaid was made and executed for and in consideration of the sum of thirty-four hundred dollars (\$3,400), which was then and there paid by said defendant, Michael Novak, to the said Mayk Melnyk and Olena Melnyk, his wife, or for his, her or their benefits, or in the payment of certain unpaid taxes and other liens against the said premises.

20 4. That in and by the said agreement or declaration of trust as aforesaid, it was provided that the said defendant Michael Novak should make all necessary repairs to premises conveyed to him as aforesaid, or suitable alterations to the premises described as the first tract in said deed aforesaid, and that upon re-payment to him of the sum of thirty-four hundred dollars, together with the moneys advanced by him in and about the alterations of the buildings as aforesaid, and with interest thereon at 6 per cent., and provided further that all rents, issues and profits arising from the said premises were to be retained by said defendant after payment of taxes, assessments, municipal charges and rates and the making of ordinary repairs, and upon payment to the defendant of 30 the sum of five hundred dollars as and for his services in connection with the handling of said premises, the said premises should be conveyed to the said Nicholas Yacenty, or other person designated by him.

40 5. That in accordance with the said deed and declaration of trust this defendant has entered into possession of said premises and has collected the rents, issues and profits arising therefrom and has paid the taxes, interest and other charges against the said premises and has made repairs to the same.

Cross-bill of Michael Novak.

6. This defendant further says and charges the fact to be that said deed so as aforesaid executed by said Mayk Melnyk and Olena Melnyk, his wife, to this defendant, was in fact a mortgage in the principal sum of thirty-nine hundred dollars, thirty-four hundred dollars being money advanced as aforesaid and five hundred dollars for services as aforesaid, and that no part of the same has been paid and that the full amount is now due and owing to this defendant with interest. 10

7. That on or about the 5th day of May, 1919, this defendant was compelled to pay and did pay the sum of one thousand dollars on account of the principal due on the said mortgage held by one David Dreyfuss being then a lien on a part of said premises so as aforesaid conveyed to him; that on or about the 24th day of July, 1919, he paid a further sum of one thousand dollars on account of the principal then being due on a certain other mortgage held by Rosie Wirtschafter, which said mortgage was then a lien on a part of the said premises; and that he has from time to time made payment to the Commercial Building & Loan Association on account of the principal of its mortgage being a lien on part of said premises; and this defendant says that he is entitled to be subrogated to the rights of said mortgages by virtue of such payments and that he be entitled to a lien for the amount of two thousand dollars with interest thereon from the dates of the payments as aforesaid, and for the amount paid to the Commercial Building & Loan Association against the said premises. 20 30

8. This defendant further says that the complainant, Dymtro Semenowich and Vreeland-Kearny Lumber Company, a corporation, and William H. Barkhorn Company, a corporation, are the holders of certain judgments against the said Mayk Melnyk and Olena Melnyk, his wife, which said judgments are set forth more particularly in said bill of complaint, but that the interest of said complainants 40

Cross-bill of Michael Novak.

by virtue of said judgments are subsequent and subject to the liens of this defendant as aforesaid.

9. This defendant further says that he is without adequate remedy in the courts of law and therefore prays that the defendants, Mayk Melnyk and Olena Melnyk, his wife, Nicholas Yacenty, Dymtro Semenowich, Vreeland-
10 Kearny Lumber Company, a corporation, and William H. Barkhorn Company, a corporation, who are hereby named as defendants to this cross-bill and counter-claim may answer the same and each statement therein made; that the deed made and executed by said Mayk Melnyk and Olena Melnyk, his wife, to this defendant, bearing date November 18, 1919, may be declared to be a mortgage; that the defendant may be decreed to have a lien on said premises to the extent of his payments on prior liens thereof by subrogation; that an account may be taken of the
20 amount due the said defendant on his said mortgage and by virtue of his payments as alleged; and that the defendants to this cross-bill and counter-claim, or some one of them, may be decreed to pay the defendant the amount so found due, together with interest and costs, by a short day, to be appointed by this Court, and that in default of such payment that they and each of them be debarred and foreclosed from all equity and redemption in the premises, and that a decree may be made for the sale of the mortgaged premises to pay to said Michael Novak
30 the amount so found due, together with interest and costs.

RIKER & RIKER,

*Solicitors of and of Counsel with
Defendant, Michael Novak.*

Answer to Cross-bill.

**ANSWER TO CROSS-BILL AND COUNTER-CLAIM OF
MICHAEL NOVAK.**

Filed.

The complainants, Dmytro Semenowich, Vreeland-Kearny Lumber Co., a corporation, and William H. Barkhorn Company, a corporation, by way of answer to cross-bill and counter-claim of Michael Novak, say: 10

1. These complainants admit the allegations set forth in paragraph 1 of the defendant, Michael Novak's cross-bill, wherein it avers that the defendants, Mayk Melnyk and Olena Melnyk, his wife, conveyed the premises described in the bill of complaint on or about November 18, 1918, to Michael Novak, and aver and say, that the said deed of conveyance was made in fraud of creditors and without any consideration.

2. The complainants admit the allegations set forth in paragraph 2 of the cross-bill, and aver and say, that the said instrument mentioned therein was given without any consideration and in fraud of the complainants and divers other creditors. 20

3. The complainants deny each and every allegation set forth in paragraph 3 of the defendant's cross-bill.

4. The complainants deny the allegations set forth in paragraph 4 of the defendant's cross-bill, so much wherein it avers that the defendant, Michael Novak, has advanced the sum of \$3,400, or any other sum of money in the alteration to the premises described as the first tract in said deed aforesaid, or by any other person or persons in behalf of Michael Novak, or that he is entitled to receive said sums of money with interest thereon. 30

As to so much of paragraph 4, wherein it avers, that the defendant, Michael Novak, is to receive the sum of \$500 for his services rendered and to be rendered in the handling of said premises or that he is entitled to the repayment of the taxes, assessments and interest, these 40

Answer to Cross-bill.

complainants have no knowledge nor information sufficient to form any belief, but leave the defendant, Michael Novak, to prove the same.

5. These complainants admit the allegations set forth in paragraph 5, wherein it avers, that the said Michael Novak has received the rents, issues and profits arising
10 from said premises.

These complainants have no knowledge nor information sufficient to form any belief, as to whether the said defendant, Michael Novak, paid the taxes, interest and other charges against the said premises, and deny that he has made any repairs or that he is entitled to the repayment thereof.

6. The complainants deny each and every allegation set forth in paragraph 6 of the defendant's cross-bill.

7. These complainants have no knowledge nor information
20 sufficient to form any belief as to the allegations set forth in paragraph 7, wherein it avers that the defendant, Michael Novak, paid the sum of \$1,000 on account of principal due on mortgage held by one David Dreyfuss, or that he has paid the sum of \$1,000 on account of principal on mortgage held by Rosie Wirtshafter, or that he has made payments to the Commercial Building & Loan Association on account of principal on its mortgage, or that he is entitled to a lien for the sum of \$2,000, or any other sum
30 or sums, or that he is entitled to be subrogated to the rights of said mortgages.

8. These complainants answering paragraph 8 deny that the said Michael Novak is entitled to a prior lien to the judgments held and recovered by the complainants against the defendants, Mayk Melnyk and Olena Melnyk, his wife.

9. These complainants deny each and every allegation set forth in paragraph 9 of the defendant's cross-bill, wherein it avers that the said Michael Novak is entitled
40 to have a lien on said premises to the extent of his pay-

Replication to Cross-bill.

ments, if any, on prior liens thereof by subrogation, or that he is entitled to any sum or sums of money whatsoever from the complainants or from the defendants, Mayk Melnyk and Olena Melnyk, his wife.

And these complainants further aver, that the said Michael Novak has conspired with the said Mayk Melnyk and Olena Melnyk to deceive and defraud their creditors, and therefore is not entitled to any claim or lien against the lands and premises described in the bill of complaint. 10

WM. GREENFIELD and
LEVY & FENSTER,

Solicitors for and of Counsel with Complainants.

REPLICATION TO CROSS-BILL AND COUNTER-CLAIM. 20

Filed November 19, 1920.

The defendants, Michael Novak and Mary Novak, join issue on the answer filed by the complainants to the cross-bill and counter-claim of these defendants.

RIKER & RIKER,

Solicitors of Defendants.

30

40

Opening.

IN CHANCERY OF NEW JERSEY.

OCTOBER 11, 1920.

Between

10

DYMTRO SEMENOWICH, *et als.*,
Complainants,

and

MAYK MELNYK, *et als.*,
Defendants.

20 Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor John H. Backes, Vice-Chancellor, at the Chancery Chambers in the City of Newark, New Jersey, in the presence of Mr. William Greenfield, for complainants, and Mr. Andrew Van Blarcom (Riker & Riker), for defendants.

30 *Mr. Greenfield.* This is a bill filed to set aside a fraudulent conveyance. The complainants are judgment creditors, amounting to about \$5,000. In 1918 Mayk Melnyk and wife were the owners of certain property; Mayk Melnyk was then indebted to the different creditors, and some suits were pending when he sold to Michael Novak—agreed that the property should be transferred to him and then the creditors would not be able to levy upon the property. With that scheme in mind they transferred the property to Novak and the judgments were entered and were not paid. Now we contend that this conveyance was a fraud on the creditors and ask for a decree setting it aside.

Mr. Van Blarcom. The defense is, your Honor, that at the time a declaration of trust was signed.

The Court. He has not said anything about it.

40 *Mr. Van Blarcom.* There was, and recorded at the court house. We claim we have performed the terms of

Opening.

the declaration of trust, paid the money that we should have paid under it, and we hold in trust.

The Court. What is the trust?

Mr. Van Blarcom. To collect the rent and apply them towards the payment of taxes, assessments, fire insurances, minor repairs, and the balance of the rent for his services, and if it wasn't redeemed, I think, within two years, he was entitled to the fee absolutely. 10

The Court. And what?

Mr. Van Blarcom. And nothing else. The title was to be absolute, if it was not redeemed, and \$500 a year for services.

The Court. Well, what did Novak do to get title?

Mr. Van Blarcom. He had to pay \$3,400, a lot of back taxes and back interest and \$1,500 in cash. We have receipts, I think, for every one of those items, except possibly one or two small ones. 20

The Court. Do you claim the ownership of the property now?

Mr. Van Blarcom. No.

The Court. Whom do you represent?

Mr. Van Blarcom. Mr. Novak, the present owner of the legal title.

The Court. You stand in the position of mortgagee?

Mr. Van Blarcom. Yes. 30

The Court. You ask for affirmative release?

Mr. Van Blarcom. No; maybe I should have, but I did not. I merely set up payment. Besides the amount paid in the declaration of trust we paid one third mortgage off entirely, also \$1,000 on account of another mortgage, which we have receipts for and which we were permitted to do under the declaration of trust.

The Court. Who was the trust declared in favor of?

Mr. Van Blarcom. A man by the name of Yosente and also Melnyk. 40

Opening.

The Court. Melnyk and wife made the trust?

Mr. Van Blarcom. Yes; also a man named Yosente was mentioned.

The Court. Why?

Mr. Van Blarcom. I don't know why.

The Court. Is that to be developed?

10 *Mr. Van Blarcom.* Yes; I suppose so.

The Court. Do you represent Yosente?

Mr. Van Blarcom. I do not.

Mr. Greenfield. I represent Yosente to a certain extent. I recovered a judgment for him against Mr. Melnyk but he has no legal right to the property at all.

The Court. How do you represent him?

Mr. Greenfield. Since this suit was instituted he came to me and wanted to know if I could recover this money—
20 the claim which he had against Melnyk and on behalf of him I recovered a judgment against Melnyk.

The Court. You claim to be a judgment creditor against Melnyk and claim no interest under the declaration of trust.

Mr. Greenfield. I wish to call the Court's attention to the fact that the declaration of trust was only recorded on the 14th day of June, 1919, and the deeds of conveyance were made in November, 1918. Up to that time the
30 record was a complete record title in Novak. We contend that if we establish the fraud Novak cannot recover even though he has laid out good money, he having taken part in the fraud.

The Court. If he is guilty of actual fraud I presume that is so, but suppose a legal fraud was committed which entitles you to have the conveyance set aside, what have you to say then?

Mr. Greenfield. I still think he is not entitled under a decision that I have in 109 Atlantic.

40 (Reading.)

Mayk Melnyk, direct.

The Court. Reversal on the amount due simply. No question about the law.

MAYK MELNYK, sworn for complaiants.

Direct examination by Mr. Greenfield.

Q Mr. Melnyk, where do you live? A Owego, New York. 10

Q How long have you lived there? A Will be two years next April.

Q Now, before you moved there where did you live? A I lived in Irvington, N. J.

Q And how long had you been living in Irvington, N. J.? A I think about five years.

Q Do you know Mr. Novak? A Yes, sir.

Q And you owned some property, some in Newark and some in Irvington? A Yes, sir.

Q Whereabouts was the property in Irvington? A Well, Irvington, 366, 368 Sixteenth avenue and 348, 350 Sixteenth avenue. and 362 Sixteenth avenue, corner of Grove street. 20

Q What kind of property was that, Sixteenth avenue, 348? A Moving picture and one building, store.

Q Corner? A No, not the corner; the middle.

Q Who built that? A I built it.

Q And what kind of a property was the other tract that you mentioned on 16th avenue and Grove street? A Four-family house and five stores. 30

Q Corner? A Corner.

Q And have you got any other property—did you have any other property besides that? A Not now.

Q How about 22nd street? A That was sold.

Q Sold to whom? A Well, I can't remember that name.

Q Wasn't two lots there belonging to you transferred to Novak? A That is 22nd street next from corner—that is the moving picture over there.

Mayk Melnyk, direct.

Q That belonged to you? A That belonged to me.

Q And you transferred that to Novak? A Novak; yes, sir.

Q How big a tract is that? A 75 by 75.

Q Now, at that time, in November, 1918, when you made the deed to Novak, did you owe any money to anybody? A Sure I owed.

Q To whom? A Well, I owe creditors, brick yard, lumber.

Q What lumber? A Vreeland, Kearney and Barkhorn and Cook & Genung.

Q How much did you owe to Barkhorn? A I believe about more than eleven hundred, something like that.

Q How much to Vreeland-Kearney Lumber Company? A About the same.

Q Did you owe any money on a note to Semenowich?

A Yes, sir.

Q How much? A Well, it was \$1,500 and interest on it.

Q Did you owe that on that note at the time you transferred the property to Novak? A Yes, sir.

Q And you owed Cook & Genung? A Yes, sir.

Q Owe anybody else? A Oh, yes.

Q How much did you owe to Cook & Genung? A I believe pretty near \$400; something like that.

Q Now, at the time you transferred the property were there any lawsuits pending against you? A Yes, sir.

Q How many? A Two.

Q How many? A Semenowich and Barkhorn.

Q Now, when you transferred the property did you say anything—how did you come to transfer their property to Novak? A I remember one time I come in Mr. Rossback's office and Mr. Rossback started to talk to me; he says, "Mike, I see you got some Court," you know, that somebody started to sue you.

Q How did you come to go to Mr. Rossback's office?

A Well, I come in—I had business with him, you know—

Mayk Melnyk, direct.

came into his office; he start to talk to me; he says, "I see you got some suit against you." I said yes; he told me "what will you do?" I told him, "Well, I don't know what I will be doing." He says, "Well, you must do something."

Q Rossback told you that you must do something? A Yes, sir. 10

Q Was Rossback your lawyer at that time? A Yes, sir.

Q Did he represent anybody else at that time? A I don't know.

Q Did he represent Novak? A Well, I don't know; maybe.

Q Now, after the conversation you had with Mr. Rossback, did you go back there? A Well, he told me—he says, "Well, what will you do with that judgment against you?" I told him, "Well, I think, sell the property, I will pay up." He says, "Mr Novak was in my office and spoke to me, wanted to help you something for that matter." I told him, "Well, I don't know how he will be help out;" he says, "Well, you go to Novak; come in tomorrow and we will speak over that." 20

Q Did you go to Novak? A Yes, sir.

Q Did you talk it over? A Well, I come in next day to Rossback's office and we talked.

Q When Mr. Rossback told you to go see Mr. Novak— A Yes, sir. 30

Q Did you go to see him that night? A Yes, sir.

Q Where did you see Novak? A At his house.

Q Now, did you talk it over with him that night in his house, with Novak? A Not everything. I told him "Mr. Rossback wants to see you and come in there and we will talk something." He says, "I know about."

Q He said he knew all about it? A Yes, sir.

Q Now, did you go back the next day to Mr. Rossback's office and did you meet Mr. Novak there? A Yes, sir. 40

Mayk Melnyk, direct.

Q What was said in that meeting? A Well, Novak says to me, "If you want me to help you, because if you get a judgment against you and that judgment come in, start to foreclose your property; you lose it, and never get a penny; if you turn that property to me I will hold it until you get customer to sell it for better prices and pay up." "Well," I told him, "Well, I think that will be good."

10

Q Did you do it? A Yes, sir; I did that.

Q Who transacted the business there? A Mr. Ross-back.

Q And did you sign a deed then for the property? A Yes, sir.

Q Now, after that did you sign a declaration of trust? Was there any declaration of trust or agreement signed at the same time; that day? A Well, same day; only I believe this was recorded before because the same day was judgment against me. You know, they call him in court.

20

Q The judgment was already against you on that day? A Yes, sir.

Q Was that the day the deed was recorded? A He fixed up the deed before dinner time and contract after dinner.

Q The deed was recorded before dinner time? A Yes, sir.

Q On that day? A Yes, sir.

30

Q Now, at that time the conveyance was made to Novak of this property? Do you know what judgment it was at that time? A Barkhorn something over \$800.

Q Did you ever pay that judgment? A Yes, sir; I pay.

Q When? A Well, I sold property to him.

Q You transferred property to him? A Yes, sir.

Q Who transferred it, did you or did Novak? A No, I.

Q You did? A Yes, sir.

40

Mayk Melnyk, direct.

Q When, before or after you transferred the property to Novak—some property to Novak? A Well, after.

Q After. So that property, the one that you conveyed to Barkhorn, as you say, was not transferred to Novak?

A No, sir.

Q Now, was there any other judgment or any suits at that time? A Mr. Semenowich.

10

Q And that was never paid? A No.

Q Now, at the time the conveyance was made by you to Novak of this property, did you get any money? A Well, I get and give back.

Q You got it and gave it back? A Yes, sir.

Q Why did you give it back? Why did you get it and why did you give it back? A He says like that.

Q Who says? A Novak.

Q What did he say? A Because that was I only transferred the property until I get a little better price and sold it and pay my creditors and Mr. Novak. He says, "When we make transaction, we must have some show, I pay you some money."

20

Q Now, after you got the money what did you do with it? A Well, I get it cashed from him \$800 and Mr. Rossback took right away for more service \$200, and \$600 handed to me; and after a little while I loaned him back \$500 to Mr. Rossback.

Q How about the \$300—how much did you give him back?

30

The Court. \$800; \$200 for services and gave him \$500 back.

Q Where is the other \$100? A One hundred dollars, I used it for my living.

Q You used for living—who got the \$500? A Mr. Rossback; I loaned him.

Q From whom did you get the \$800? A Mr. Novak.

Q How did you come to give Rossback \$500? A He needed the money; because he need the money I shall lend him.

40

Mayk Melnyk, direct.

Q Did you ever get that back? A I get it after.

Q Did Mr. Rossback ever pay you back the \$500? A Oh, yes; later.

Q Did you ever give Novak the \$800 back?

Mr. Van Blarcom. I object to it as leading.

Mr. Greenfield. I asked him if he ever returned the \$800 to Novak?

The Witness. Sure.

Q When? A Oh, about some part of January.

Q January of the same year? A Yes, sir.

Q What year? A 1919.

Q Now, how did you come to give Novak the \$800? A Because he needed him to pay taxes, and assessments or something like that.

Q Now did you ever get any of the rent for the time Novak had the property? A No.

Q Did he ever account to you for the rent? A No.

Q Do you know whether or not the properties that you conveyed to Novak were rented—occupied by tenants? A Yes; some was. I think one store only empty.

Q The others were all occupied? A Yes, sir.

Q Now, do you know how much rent he collected? A I don't know.

Q Do you know how much the moving picture house pays? A Well, the moving picture was first year \$100, second year was \$125 and third year, I think was \$150.

Q A year or a month? A No, sir; month.

Q A month. Now, did you ever demand the return of the property from Mr. Novak? A Yes, sir.

Q What did he say? A He laugh at me.

Q Did you ever ask him to account for the rent? A I told him I figure out how much you took and everything; he says, "You got nothing to say to me; I am boss; I got the deed."

Q Now, Mr. Melnyk, did you ever receive any notice about a customer to buy this property? A Yes, sir.

Mayk Melnyk, direct.

Q And didn't you ask Mr. Novak to sell the property to the customer that you received notice about? A I no ask him.

Q Did you ever go to see Novak about that? A Well, I say to him, "I have deposit for moving picture and 16th avenue grocery property"—I come in to Novak, I tell him, "Mr. Novak, come in to the lawyer's office of Mr. Rossback and figure out how much will be coming to you; I want to settle up what due you because I need the money to pay my creditors," and Mr. Novak he refused it. 10

Q What did he say? A He says he has the property—he no nothing to do.

Q I show you a letter and ask you whether you ever received this letter? A Yes, sir; I received it.

(Paper offered in evidence and marked Exhibit C. 1 for identification.)

Q I show you another letter. Did you ever receive this letter? A Yes, sir; I received it. 20

(Paper offered in evidence and marked Exhibit C. 2 for identification.)

Q After you received those letters; did you go to see—take the first letter dated March 15th, did you go to see Mr. Novak? A Yes, sir.

Q Did you tell him about this offer? A I told him I got a deposit from moving picture on Grove street property; he says he don't care what you got; he says that property is mine. 30

Q Did you show him the letter? A I told him.

Q Did you show him the letter? A Mr. Rossback, I think, showed him it. I was with him in Mr. Rossback's office.

Q And the property is now in the possession and control of Mr. Novak? A Yes, sir.

Q He still collects the rents? A Yes, sir

Mayk Melnyk, cross.

Q Mr. Melnyk, there were other judgments against you, weren't there than the three judgments now in suit; that is the Semenowich, Barkhorn and the Vreeland-Kearney Lumber Company? A I got one Kuzu.

Q You got other judgments besides? A Yes, sir; I got a couple.

10 Q Did Mr. Novak have anything to do with the other judgments—do you know whether he bought any of those judgments? A (No answer.)

Q Do you know whether or not Novak went to any of the creditors and asked them to bring suit against you? Do you know that? A I know couple before I transferred the property to him because he was going to them and asked to buy judgment to him and come into me and make trouble.

Q Novak done that? A Yes, sir.

20 Q That was before the property was transferred? A Before I transferred the property?

Cross examination by Mr. Van Blarcom.

Q Where is the declaration of trust, Mr. Melnyk? A I don't know what they fixed up because I never heard before something like that.

Q What? A I don't know what kind of declaration of trust; I can't explain it.

Q Did you put the paper on record in the court house?

30 A Mr. Novak—what, that paper? Yes, I put that.

Q Where is it then? A What?

Q Where is the paper? A What do you mean? I don't understand.

Q You put the paper on record, didn't you, at the court house? A Yes, sir.

Q Where is that paper? A The paper?

Q Where is the paper? A I put it on record.

Q It came back, didn't it? A Yes.

40 Q Where is it? Where is the paper? A I don't get you.

Mayk Melnyk, cross.

Q Where is the paper that you put on record at the court house? A Court house? Which—what paper? I must get you. I don't understand you.

Q What paper did you think I meant when you said you put a paper on record? A That was some paper what—after about two years or between three year time—any time I want property back from him, and he supposed to turn around it to Nicholas Yosente. 10

Q Where is that paper? A That paper, I think I got it home, that paper.

Q Didn't bring it with you, eh? A No.

Mr. Van Blarcom. Have you a certified copy of it here?

Mr. Greenfield. Yes.

Q Why was Nicholas Yosente's name put in here, because you owed him some money? A I owed him money. 20

Q That is the reason his name was put in it? A Yes, sir.

Q When you asked Mr. Novak to convey this property, did you offer him any money? A I told him to tell me how much you got and come in and settle up and he wouldn't listen.

Q Did Mr. Yosente ask him, if you know? A I know he asked him.

Q Were you present? A Well, I no was present. I told him— 30

Q Is Yosente here in court? A No, sir.

Q He is not here. Now, how was this money turned over to you? A What money?

Q This \$800 you speak of? A He brung it to Mr. Rossback's office.

Q In cash or— A I don't know, cash or check, because Mr. Rossback took that.

Q He took it? A Yes, sir.

The Court. \$200, and you loaned Mr. Rossback \$500? 40

Mayk Melnyk, cross.

The Witness. He has taken right away on that eight, \$200 for some services and \$600 turned around and give me check.

Q Gave you a check and you gave it back to him?

A And after a little while I gave him back \$500 and \$100 I keep.

10 Q How long after did you give it back to him? A Maybe weeks, I don't know. I can't remember that exactly.

Q You had a bank account at that time—checking account in the bank? A I have in the Springfield Avenue Trust Co.

Q You had a checking account, did you not? A Yes, sir.

Q You signed checks? A Well, for a time I believe I didn't pay with check.

20 Q What did you say? A I think I held that money in my pocket, what I get from Mr. Rossback, until I gave it back to Rossback.

Q There was \$800 paid by Mr. Novak? A Yes, sir.

Q And Mr. Rossback took it, you say? A Yes, sir.

Q And kept \$200? A Yes, sir.

Q And gave you \$600? A Yes, sir.

Q Was that in check or cash? A Check.

Q What did you do with that check? A Cashed it.

30 Q Cashed it? A Yes, sir

Q Whereabouts? A Well, I forget what bank. I think some Broad street—I couldn't remember. I think the National Newark Banking Company, I think, something like that; I forget myself.

Q What did you do with this \$600 in cash? A Well, I hold it about a week; after I loaned him to Rossback \$500.

Q Why didn't you put it in your bank? A Well, I hold it because I sometime all the time had money with me.

Mayk Melnyk, cross.

Q You had plenty of money? A No; I told him I hold it me, you know—I no put it in the bank.

Q Then, when was it you turned \$800 over to Novak?

A It was some January.

Q January? A Yes, sir.

Q What part of January? A Well, I believe after the 15th—pretty near 20th—something like that. I can't remember; I know some part of January anyhow. 10

Q That is after you loaned Mr. Rossback \$500? A Oh, after; yes.

Q When did Mr. Rossback pay the \$500 back? A He paid me about three times, you know, about summer time.

Q Did you pay Mr. Novak back by cash or check? A Cash.

Q Where did you get that cash from? A My wife has in the Howard Savings Bank.

Q You drew it out of your wife's account? A Yes, sir. 20

Q Is your wife here? A No.

Q Where is she? A She is over there; she is in Owego now.

Q Got the bank book with you? A No; she take and she have a couple of hundred dollars. When she take and left I think the bank take the bank book, you see, when she drew out the money.

Q When did you pay this \$800 to Novak? A That was in January. 30

Q About the 15th you said? A Or after; I believe it was something around like 20th. I can't remember the date.

Q That is in the year 1919? A Yes, sir.

Q What is your wife's name? A Olina.

Q Melnyk? A Yes, sir.

Q Did you go down to the bank and take the \$100 out? A My wife, she go.

Q Did you go along? A No; she go herself. 40

Mayk Melnyk, cross.

Q Were you with her? A No, I was no with her.

Q Then she gave you \$800? A Yes, sir.

Q What sized bills was it in? A I couldn't remember.

Q That was only a little more than about a year and a half ago—don't you remember? A I don't know if it was \$20 bills or \$10 bills; I couldn't remember. I know she go draw that. I can't tell you I know what bills.

Q Was this money ever paid back to you, the \$800? A No; he needed to pay taxes and insurances and everything, because that \$800 was just brung to Rossback's office because sometimes Rossback call him in court he must prove that was the money paid.

Q Where did you pay Mr. Novak this \$800? A Maple avenue, Irvington.

Q Whereabouts, somebody's house? A That is Mr. Geegan's house, saloonkeeper, corner of Maple avenue and 16th avenue.

Q At night—evening, you paid it? A No; morning. He came in—

Q What arrangement did you have with Mr. Novak to take this property over, what was he to pay? A What?

Q What was Mr. Novak to pay when you turned this property over to him? A He only hold it to me until I get a customer to sell it and pay up my creditors.

Q Well, wasn't he to pay certain charges at the time? A Well, he have some—I guess some little judgment and pay the taxes.

Q He had to pay up some little judgments? A Yes, sir.

Q He had to pay up a lot of interest, too, that you owed, didn't he? A I think so; he has got on the paper what he paid.

Q You didn't have money enough to pay your taxes and interest at that time, did you? A Well—

Mayk Melnyk, cross.

Q At the time you conveyed this property to him you didn't have money to pay the taxes and interest and mortgages, did you? A Well, I had part, but not all.

Q You didn't have money enough, did you? A No. I tell you I had some money but Mr. Novak speak to me if they have that and that judgment, make you trouble because if they come in and take appraisals and property will be sold for auction cheap; he did say when you turn it over to me, I hold it a little while and judgment will not touch that property. When you get better price and pay judgment—I will pay judgment and still have something besides that money to myself. That is why I turned around the property to Mr. Novak. 10

Q At that time you hadn't even paid your taxes for 1917, had you? A I believe that is—what?

Q You hadn't paid your taxes for 1917? A No.

Q Why hadn't you done that, if you had money? A Well, my wife she has only money—she have over \$1,000. 20

Q Why didn't you get her to pay the taxes? A That is the way I explained to you. Mr. Novak told me if I pay that will be better to the judgment and taken property proceeding, foreclosed. He says if you turn around to me for a time I will hold it until you get customer and sell that property.

Q When did he tell you that? A He tell me before I make the deed to him.

Q How long before? A Oh, just about a day. 30

Q Why hadn't you paid the 1917 taxes before this? This was the last of 1918. If your wife had the money why didn't she pay the taxes for 1917? A Why, I no pay? Because I just had for the time received some little money for what I make before I make that arrangement.

Q How long had your wife had the \$1,000 in the bank? A Well, she had it a short time. I got money from the insurance.

Q What kind of insurance? A Fire insurance, \$900, and I give to my wife, because I owed my wife \$2,500, 40

Mayk Melnyk, cross.

but she sold property year or two and she all the time claim I have no change, to give back when I get that money and give it to her part what I owe you.

Q When did you get that money from the fire insurance company? A That was sometime before that deal was through.

10 Q What? A Some little while before the deal was through.

Q How long before? A Oh, maybe a week or two weeks.

Q What company did you get it from? A I don't know what company because that was Mr. Poppik, insurance man.

Q Mr. Poppik gave it to you? He gave you a check, I suppose, didn't he? A Yes, sir.

Q What did you do with the check? A I cashed him
20 and give him to my wife.

Q You cashed him? A You know, get the money.

Q Was there a mortgage on the place when the fire occurred? A Well, that was besides the mortgage. For that property there was no mortgage.

Q Did the property burn down? A No; that was a shop.

Q Did it burn down? A Yes, sir.

Q How much insurance did you get? A Well, I get
30 \$900.

Q And you cashed a check and gave your wife the cash? A Yes, sir.

Q Why didn't you give her the check? A I cashed it because she don't know what to do with checks. She don't know—

Q Now, Mr. Novak said he needed this \$800 you returned to him to pay taxes and assessments? A He said he need that because we make arrangement not to put cash up from the land, only pay what needed.

The Court. What is that?

Mayk Melnyk, cross.

The Witness. Because we had some arrangement between us, he no supposed to put up the cash, only keep property for me until I get the customer, that's the reason I turned around back to him.

Q You mean to say in January, 1919, he said he wanted some money to pay the taxes? A He says—I don't know if he pay for the tax or because I had arrangement with me that money, \$800, he get it back any time what I get it. 10

Q You were going to pay that \$800 back to him? A Yes, sir.

Q Have you still a bank account in the Springfield Avenue Trust Company? A Well, I have a couple of dollars. I never drewed the book. I don't know if they keep account there or not. I don't know.

Q When was it you asked Mr. Novak to convey this property back to you? A A couple of time. 20

Q When the first time? A First year and second year—I can't tell you exactly what date, because when I come into Newark I get a letter from Mr. Rossback—I go to Mr. Novak—I tell Mr. Novak we need to settle up because I got a customer now, I want to sell my property and settle up my creditors. He laughed at me; he says, "Go on, don't bother me."

Q What did you say to that? A I said, "What do you think we will do? I want to pay my creditors." He says, "Oh, no talking; go away from me." 30

Q Did you get a lawyer then? A Well, Mr. Rossback—Mr. Rossback tell me to go to Novak and settle up. I bring him one time to Mr. Rossback's office. Same thing. He wouldn't fight with Mr. Rossback. He says to Mr. Rossback, "You have nothing to do at all with the property;" he says, "I got a deposit." He says, "I don't care for the deposit; I am boss;" he says, "go ahead, sue me if you want to;" he says, "before you get a trial you never get it." 40

Mayk Melnyk, cross.

Q Didn't you arrange with Mr. Novak as a matter of fact to sell him this property for \$29,000? A No, sir.

Q And he to pay the mortgages and things? A No, sir.

10 Q Nothing like that said? A No. He told me one time—I told him, “Oh, I don't want you to sell my property; I want to sell it myself, or something, because I see he no act square with me.”

Q After he signed this paper to Mr. Yosente at the time the deal went through—after that didn't you agree with him that he should take the property for \$29,000? A No, sir.

Q Didn't you talk that over at all? A He talked to me he wants to get that property for twenty-nine; I tell him no, that property worth more.

20 Q What did your customer want to pay for it? A Well, my customer was to pay \$18,000 for the moving picture and \$12,500 for the grocery property.

Q Have you got that in writing? A Mr. Rossback have agreement.

Q What? A Mr. Rossback have agreement.

Q Now, what were the figures again? A \$18,000 and \$12,500.

Q That was all the property, wasn't it? A Yes.

Q Was that for all the property? A Yes, sir; all the property.

30 Q What judgments were there against you at the time this transfer was made? A Judgment—oh, that time I paid judgment before I transferred that to Novak, the same day, \$800 was against me in the court house, I believe.

Q You transferred a piece of property to the man to pay that judgment, is that right? A What?

Q The \$800 judgment you speak of, did you transfer a piece of property to that man? A Yes, sir.

40 Q That had nothing to do with the Mr. Novak matter? A No.

Mayk Melnyk, cross.

Q Nobody else had a judgment against you then? A
No.

Q Do you know when these other judgments were obtained? A I don't know. I couldn't tell you. After—when that property was transferred, after.

Q What other property did you own at the time you made this conveyance of this property to Mr. Novak? A 10
22nd street, 16th avenue.

Q What did they do with that property? A That goes to foreclose because I have some two mortgages, and that property goes to foreclosure.

Q What other property had you? A The other property was at _____ and 20th street.

Q What did you do with that? A I sold that.

Q To whom? A One to _____ and one to _____ and

Q How soon after you conveyed the property to Novak did you sell that? A Well, that was before. 20

Q I want to know what other property than the property that you sold to Novak did you own on the day that you made this conveyance to Novak? A No; I no had no more.

Q No other property? A Just 22nd and 16th.

Q That was foreclosed? A Yes, sir.

Q Why didn't you put that in this deed? A He no want it.

Q Where did you get the property from that you conveyed to Barkhorn—where did you get that property from? A That I sold to by brother-in-law, one house. 30

Q And your brother-in-law held the property? A My brother sold it to him.

Q In payment of the judgment? A Yes, sir.

The Court. It would be interesting to me to know what relation existed between these two at the time this conveyance was made. As far as the record shows they were complete strangers. 40

Mayk Melnyk, cross.

Q How long had you known Mr. Novak? A Oh, I know him over ten years.

Q How many properties did you own altogether at the time you had this trouble? A 16th avenue, 22nd street, and two houses and that what I turned around to Mr. Novak.

10 Q What were they? How many pieces did you have besides what you transferred to Mr. Novak? A Two pieces.

Q Two pieces besides his, eh? A Yes, sir.

Q Weren't there four pieces of property you owned besides what you transferred to Mr. Novak? A They were sold.

Q How long before? A Well, one same day I sold it to Mr. Joseph.

Q Is Mr. Novak any relation of yours? A No.

20 Q Had you done business with him before? A Yes, sir.

Q What business was Mr. Novak in at that time? A He is real estate, you know, and builder.

Q What business were you in? A I was builder, too.

30 Q How did he come to speak to you about this transaction, what interest had he in you? A Well, because he was interested all the time, sometimes helping me, loan money, and I say before that he come to my place—told him go ahead and sue me, and after he buy that judgment and come into to me and he say, "Now, Melnyk, you must sell some property to pay that judgment;" I sold for little or nothing to pay that judgment. He is all the time making business like he must get money—couple of dollars out of me all the time, he make it, because he know all about my business and lives not far away from me.

Q How does he know all your business; did you tell him? A My friends tell him—some I tell him myself.

Mayk Melnyk, re-direct.

Re-direct examination by Mr. Greenfield.

Q What amount of mortgages have you got on the property?

The Court. At the time of this transaction? Let me get this location. There are four properties all in the same plot? 10

Mr. Greenfield. No, your Honor; three. One is located on 16th avenue 25 feet from 21st street, 75 feet on 16th avenue by 100 feet deep. That is the moving picture and drug store; then 22nd street, 101 feet from 16th avenue, 63½ by 75 feet deep.

The Court. Occupied as a grocery?

The Witness. Open air moving picture.

Mr. Greenfield. Then there is one on the corner of 16th and Grove streets, 25 feet.

The Court. Where is that with reference to the movie and drug store? 20

Mr. Greenfield. That is about a block away on the corner. There are stores in there.

The Court. How many stores?

Mr. Greenfield. Five and four families.

The Court. The front on Grove street is 25 feet.

Mr. Greenfield. The rear is 38 feet.

Q Now, on Grove and 16th avenue property, where the five stores are, how much mortgage is there on there? A \$17,000 bank mortgage, \$1,500 second and \$1,000 third. 30

Q Now, on the moving picture and the drug store? A That was \$9,500 first and \$2,000 second.

Q And on the open air moving picture? A \$600 building loan and \$100 was paid.

Q That is \$500? A Yes, sir.

Q Were these the mortgages that were on there at the time you transferred to Novak? A Yes, sir. 40

Mayk Melnyk, re-cross.

Re-cross examination by Mr. Van Blarcom.

Q This agreement that Mr. Novak gave you to Yosente, didn't you turn that over to Vreeland-Kearney? A Yes, sir.

Q So it is not home? A I got only copy home; he make a new paper.

10

Q Who did? A Mr. Levy.

Q So Mr. Levy has got that paper then, has he? Did you give it to him? A I think he give it to me back; I couldn't tell you exactly.

Q You transferred it to Vreeland & Kearney? A Yes, sir; that is my brother-in-law's house.

Q Yosente transferred it? A Yes, sir.

Q Is that your brother-in-law, Yosente? A Yes, sir.

Q What did you owe Yosente? A I owe him more than \$1,100.

20

Q What did you owe him then, at that time? A That is what I owe him, over \$1,100.

Q Back in November, 1918? A Yes, sir.

Q Where is that paper?

Mr. Van Blarcom. Mr. Levy, have you the original?

Mr. Levy. I never saw the original

The Court. This lawyer that he speaks of, Mr. Rossback, is he here?

30

Mr. Van Blarcom. No, Mr. Rossback is not here.

The Court. The mortgages amount to \$21,500.

Mr. Van Blarcom. That is what is recorded in the deed of transfer.

The Court. How much back interest was due on your mortgages at that time?

The Witness. Interest, I believe, was six months.

40

Q And one year back taxes? A Yes, sir.

Adam J. Rossback, direct.

Q What did the tax amount to on all the properties?

A I couldn't tell you; I think it is in the paper.

Q You weren't even collecting the rents at the time you turned the property over to Mr. Novak? A He collected after.

Q You were not collecting at the time? A No, I no more collect. 10

Q Hadn't the property been sold at a tax sale? Hadn't the property been sold for taxes? A Yes, sir.

Q And wasn't the man collecting the rent who bought the property at the tax sale? A He had no collecting; he bought the tax sale—I collect them.

Q Did you collect the rents up to the time you sold to Mr. Novak? A Yes, sir.

ADAM J. ROSSBACK, sworn for complainants.

Direct examination by Mr. Greenfield.

20

Q You are a counsellor-at-law of this State? A Yes, sir.

Q I show you a letter marked Exhibit P. 1 for identification. Is that from your office? A Yes, sir.

Q And you wrote that at whose request? A I dictated the letter.

Q You received an offer of \$18,500 and \$12,500, is that right? A Yes, sir; I think I did.

Q And did you receive also a deposit? A We made a temporary agreement with one of the purchasers conditioned upon our being able to convey and we— 30

Q Was that the price which was agreed upon? A To the best of my recollection, that was the price, yes, sir.

Mr. Greenfield. I offer that in evidence.

(Paper marked Exhibit C. 1, by striking out the words "for identification.")

Q On April 7th, 1919, did you send this letter—(handing witness letter)? A I presume I did. It is my letter-head and my stenographer's signature. 40

Leonora Holcomb, direct.

Q It was signed by your authority? A Yes, sir.

Mr. Greenfield. I offer that in evidence.

(Paper marked Exhibit P. 2, by striking out the words "for identification.")

10 Q Did you request Mr. Novak to turn over that property? A Turn over what?

Q Did you request Mr. Novak to convey the property before you wrote the letter informing Mr. Melnyk that he refused to turn it over? A I do not believe I requested him. I may have mentioned the transaction to him.

Q And you say here Novak refused to deliver the property even though the full amount is paid in; was that correct? A Why, that is the letter. I have no recollection excepting what is in the letter. Now probably I did ask him—if I read the letter.

20 Q Mr. Rossback, you would not have written the letter at that time— A If I read the letter probably I can tell. I haven't read this letter. Yes; from this letter I would say I had asked Novak before whether he was to turn it over and told him about the deposit.

Q Yes, and what did he say? A He refused to do so, my recollection.

30 Q I show you, Mr. Rossback, a statement and ask you whether this comes from your office? A I do not think this does. This may be a copy, signed H. Rossback, that would not come from my office. It may be a copy of one that does—incorrect copy because it has—

LEONORA HOLCOMB, sworn for complainant.

Direct examination by Mr. Greenfield.

Q You are in the County Clerk's office? A Yes, sir.

40 Q Have you a record of a judgment and execution in the case of Semenowich *vs.* Mayk Melnyk and Olina Melnyk? A (Producing paper.)

Adam J. Rossback, further direct.

The Court. You neither admit nor deny these judgments?

Mr. Van Blarcom. I don't know. I take it for granted they are correct, but the merest form of proof will be enough.

The Court. Look them over. Suppose you show what papers you have. 10

Mr. Greenfield. I am showing them to him. Do you admit the recovery of the judgment?

Mr. Van Blarcom. I suppose so.

The Court. You make the admission. That will be all. Now, did Mr. Melnyk testify to the existence of the debts represented by these judgments?

Mr. Greenfield. Yes, sir.

The Court. You better ask him whether the debts represented by these judgments recovered by the three defendants, existed at the time he made the conveyance to Mr. Novak. 20

MAYK MELNYK, recalled.

Re-direct examination by Mr. Greenfield.

Q Mr. Melnyk, at the time you conveyed the property to Mr. Novak, did you owe the money for which judgments were recovered by Semenowich, the Kearney Lumber Company and Barkhorn & Company? A Yes, sir. 30

Q And they haven't been paid? A No.

Q Still due and owing? A Yes, sir.

ADAM J. ROSSBACK, recalled for

Further direct examination by Mr. Greenfield.

Q Mr. Rossback, you were present at the time these conveyances were made? A Yes, sir.

Q By Melnyk to Novak? A Yes, sir. 40

Adam J. Rossback, further direct.

Q There was an arrangement for the meeting of the parties in your office? A I presume they met there pursuant to arrangement; yes, sir.

Q You prepared the deeds or caused them to be prepared in your office? A I did.

10 Q And at that time you took the acknowledgment of the deed? A The deed will show.

Q Was there any money passed?

The Court. Why don't you ask him how it came about.

20 Q How did you come to make these arrangements to meet there and what arrangement was made? A Mr. Melnyk was very hard pressed for money. He had judgments being entered up against him daily—small judgments—and his property had been sold for taxes and the purchaser at the tax sale had actually gone into possession, collecting rents; he had—oh, two or three mortgages on the property and the mortgagee had already started another case—threatened to foreclose—and it was felt that something would have to be done to preserve this property and pay Melnyk's debts because it might be sacrificed by a clash of the creditors against the property, and Novak was the man who had the money and he offered to advance it under agreement to hold it as that paper states, and that is what was done.

30 Q Was there any money passed at that time? A I have a record here of the moneys that have gone through my hand.

Q Will you let me have the date? A Yes, sir; I think there was \$400—no I have no record of any money being passed on that date, but on the 5th of July—5th of December, next there was \$400 paid by Novak. In the meantime he must have taken care of some taxes and interests (interrupted)—

40 *The Court.* Wait. Strike out after "in the meantime he must."

Adam J. Rossback, cross.

Q No money was paid on that day? A Not to my recollection.

Q When was the declaration of trust signed? A Same time, I think, by Novak, and his wife came in a few days later, I believe, or the same day, I imagine.

Q But it was not recorded until the 4th day of June, 1919? A Whatever the record shows.

Q Who kept that declaration of trust that day? A I did.

Q I beg pardon? A I did.

Q And during November, 1918, November 16th, 1918, up to the time of recording, there were several judgments entered against Melnyk, weren't there? A That I don't know.

Q Don't you remember the Semenowich judgment? A I remember the Semenowich judgment, but I don't know just when it was recorded.

Cross examination by Mr. Van Blarcom.

Q When did the parties first come to your office, if you remember? A Why, they had been coming to my office for some time in connection with the transfer to Mr. Novak of Melnyk's property; because properties were going up a little at that time and Novak, I think, got one or two buyers and the parties had come to my office in connection with those matters.

Q On these particular properties, when did they first come? The same day the deed was drawn or before that? A I think before that.

Q How long before? A Oh, few days possibly.

Q What had been the talk between them? A Why the talk had been generally—I don't know the words—to conserve the property against a dissipation by suit of creditors and judgments and mortgages and tax claims.

Q Were there mortgages pressing at the time? A Yes, sir.

Q How were they going to conserve it, for the creditors then? A Why, Novak was to pay up these things,

Adam J. Rossback, cross.

good part of them, those that were pressing, and take the pressure off of the property.

Q And at that time was there a list of charges prepared that Novak should do? A There was.

10 Q I show you a paper which is undated, but is headed list of charges to be paid by Michael Novak as part of the consideration for the payment of 16th and Grove streets under deed recorded November 18th, 1918, signed Rossback, and I ask you if that was the paper that was prepared? A Yes, sir.

Q And did that show—that mentions \$3,400, does it not? A Yes, sir.

Mr. Van Blarcom. I offer this in evidence.

Paper marked Exhibit D. 1.

20 Q Now, Mr. Rossback, I show you a letter or paper on your letterhead dated November 16, 1918, which recites the receipt of \$150 liberty bond; is that part of the transaction? A It is, sir; yes, sir.

30 Q I also show you a check for \$800 to the order of Mayk Melnyk, dated December 9, 1918, also your receipt endorsed by Melnyk and deposited by you as attorney; also your receipt dated December 10, 1918, showing receipt of check for \$800 and cancellation Gudowski for which \$91.50 was advanced, also the sum of \$23 was advanced in cash on account of piano; and ask you if those papers are part of the transaction? A They are part of the transaction, yes, sir.

Q Here is a receipt on your letterhead dated 1-21-19, received from Mr. Novak note of \$275, paid back with interest at 5 per cent, Springfield Avenue Trust Company for Mayk Melnyk; is that part of the transaction or what is that? A That is a note that Mr. Novak paid. This is the receipt for the note which he had given to me and paid probably.

40 Q Is that part of the transaction, do you know? A Part of the transaction as I understand it.

Adam J. Rossback, cross.

Q Now, do you know — this paper which has been offered in evidence headed list of charges to be paid— recites the payment of \$1,500 in cash. Do you know of your own knowledge whether that was paid or not? A What?

Q Was the \$1,500 in cash paid or not? A To Mr. Melnyk? 10

Q Yes. A I have no record of it.

The Court. What?

Witness. I have no record of it and do not remember it.

Q Well, this receipt of November 16, shows a balance after liberty bonds of \$1,350? A Yes, sir.

Q Does that mean a balance of \$1,500? A Balance of \$1,500.

Q And then your receipt of December 10, 1918, which records \$914.50, was that on account of the \$1,500 also? A I think so. 20

Q And the receipt of \$121.19, mentioning note of \$275, was that on account of the \$1,500? A That was on account of the \$1,500, too.

Q Well, then, these transactions passed through your office, and did you understand me a minute ago to ask you whether \$1,500 was paid in cash or by this method? A Why, I understood in cash.

The Court. Do these figures, receipts and checks aggregate \$1,500? 30

Mr. Van Blarcom. Very close to it, all except \$50.

I offer these papers in evidence.

Papers marked Exhibit D. 2, 3 and 4.

Q Mr. Melnyk says he loaned you \$500 out of this \$800? A I never borrowed five cents from him. On the eighteenth of December he gave me \$500, but that was on account of the general transaction that we had together. 40

Adam J. Rossback, cross.

On the same day I advanced \$1,640 on account of a mortgage on another property that was being foreclosed, second mortgage, we took over in order to conserve for him by a buyer whom he had already entered into an agreement with and the property was struck off at the sale and turned to me and to his buyer and I got my money back.
 10 That was part of that transaction.

Q He didn't lend you that \$500 that you returned in the spring or summer? A No; it was not a loan; it was paid on account of money we needed to put through these properties and in the spring he got whatever balance was coming to him. Maybe that is what he means.

Q Did Novak at the time of this transaction hand you a check for \$800, you retaining \$200 and handing \$600 back to Novak? A Back to Melnyk.

Q Yes. A Yes, sir; on the eighth of December, Novak gave me \$800 and on the twelfth I paid \$401.80
 20 taxes and on the same day I gave Melnyk check for \$600. I gave him \$600 out of it and I charged Melnyk with whatever I paid him and give him credit for what I received.

Q You were taking care of several other matters with Melnyk besides the Novak matter? A Yes, sir.

Q When you speak of \$400 taxes paid out of the \$800, where was it? A I think it must be on this other property. That had nothing to do with this transaction.

Q Do you know anything about Mrs. Melnyk's financial affairs? A Why, I never supposed Mr. Melnyk—
 30

Q Not what you supposed, but any personal knowledge of what Melnyk told you or Mrs. Melnyk told you in his presence? A I cannot speak of my own knowledge. I never knew her to have any money.

Q As a matter of fact, he was hard pressed? A Absolutely.

Q The German Bank, now the United States Savings Bank held a mortgage on the property? A They do.

Q Had they started to foreclose? A I do not think they had but they threatened to.
 40

Adam J. Rossback, re-direct.

Q That was the main piece, the largest piece? A The German Savings Bank? No, Security Savings Bank, I think, on this corner property of Grove street—Security. The German held on some other property.

Re-direct examination by Mr. Greenfield.

Q Mr. Rossback, did you purchase the property on Twenty-second street under foreclosure? A Yes, sir. 10

Q Wasn't there a second mortgage of \$1,500 on that property? A There was.

Q Isn't it a fact, the money that was paid, second mortgage, paid on this by Mr. Novak from you? A Mr. Novak had nothing to do with that.

Q Did he pay that mortgage? A He did not.

Q Who paid it? A I did. I advanced the balance of the money that was necessary in order to make up the amount of that mortgage.

Q Where did you get the other money? A What money? 20

Q You say you advanced to make up? A Yes, sir.

Q How much did you advance to make up that money? A I cannot tell without going over the figures, just at that time. I have a list here of moneys I received and moneys I paid.

Q What is that made from? A From my recollection at the time—my knowledge at the time.

Q When did you make that? Do you keep books? A I kept a memorandum like this. 30

Q Are these original memoranda? A This is not an original but it is taken from the original which I kept at the time.

Q Keep no books? A No.

Q Now, how much was it? A I can't tell without figuring it up. I think about six or seven hundred dollars I advanced at that time my own money in order to take over the mortgage knowing I was protected, of course. I took it over in my name and sold to Mr. Melnyk. 40

Adam J. Rossback, by the Court.

Q Who was that? A Amade.

Q Didn't Mr. Novak buy that mortgage? A No, sir.

Q And pay \$1,350 for it? A That was the mortgage that was given back by Amade after Amade got the title.

Q Aren't these receipts representing the payment of that particular mortgage—on that particular property?

10 A I do not think so.

Q Not what you think.

The Court. You mean these receipts?

Q Receipts D. 3 and D. 2—aren't these receipts showing payment for that mortgage? A No, because these antedate that transaction by four or five months.

By the Court.

20 Q The deed by Melnyk to Novak was given to Novak for what purpose, did you say? A Why for the purpose of conserving the properties to creditors. Creditors were pressing Melnyk very badly and the mortgages and tax claims had been outstanding and the Harrington Company had already gone into possession of the Grove street property and started to collect rents.

Q It then was conveyed to Novak for the purpose of rescuing the property from the purchasers, is that what you mean? A Yes, sir; for the rescuing it.

30 Q And to conserve it for the benefit of unsecured creditors of Melnyk? A Yes, sir.

Q Why wasn't that incorporated in the declaration of trust? A It was to the extent that he was to turn it back just as soon as he got his money. There was another feature—

Q Are you familiar with the paper? A I know it but I do not recall the language. There was another feature about it—

40 Q Read it and tell me why the creditors were not provided for in the declaration of trust. Just read it to yourself. A I have read it. I suppose that it may have

Adam J. Rossback, by the Court.

been due to my lack of ability to draw it that way or lack of thought in the matter, or it may have been due to not embarrassing Novak by any claims of creditors sustained in the agreement. There is a provision there about changing the garage, too. It was thought at that time that the garage might need changing; moving picture place might be changed into a garage, and the reason that Novak might change that into a garage if necessary, he to advance the money, and I thought the insertion of any such arrangement—in fact it never occurred to me to put that in, that it might—might hamper Novak handling the property. 10

Q Why was Yosente declared to be the subject of trust, why was that? A Melnyk said that he owed Yosente some money and this was a means of repaying it; that is what he told me, that he was his brother-in-law and if he could provide for his brother-in-law it would be the right thing. 20

Q How did you think the creditors would be protected under a scheme of that kind? A Why, I felt that if the property was foreclosed or sold under execution, forced sale, it certainly would not work in the interest of the creditors.

Q But you make no provision—I observe you make no provision for the creditors except possibly Yosente. How did you think under this scheme as laid out in this declaration of trust you were protecting the creditors? A Well, in this way, if Melnyk or Novak—if Melnyk kept a hold on this property he would be in a position to take care of his creditor. 30

Q There is no declaration in favor of Melnyk, is there? A He is mentioned in the latter part of it, and after protecting his brother-in-law, he felt that his brother-in-law would protect him after he protected Yosente. Yosente is his brother-in-law.

Q There was protection afforded to Yosente if he availed himself of it, but where do you see any scheme as 40

Adam J. Rossback, by the Court.

laid out in the declaration of trust in protection of the creditors? A Excepting that they were in no worse position than they were before with reference to this property and perhaps in a better position by being taken care of and sold at a better price.

10 Q But you observe, and didn't you at that time, that this conveyance to Novak obstructed them in the execution of possible judgment? A Well, yes; there were a few small judgments coming in and they were being taken care of.

Q Any obligation on the part of Novak to pay the judgments? A There was in that agreement.

Q In the declaration of trust? A He was to take care of it.

Q Of these complainant judgment creditors? A They were not in line at that time.

20 Q You knew that Melnyk was heavily indebted, did you not? A No; I didn't know he was heavily indebted. I knew he was being worried by a lot of small claims.

Q Any provision made for the payment of these claims, and all of them, by Novak? A I don't believe there is any special provision in there, but I know—

30 Q Why wasn't the declaration of trust put on record immediately after the deed to Novak was put on record? A Why it was arranged at that time between the parties that the declaration of trust was to remain with me unrecorded.

Q Why? A So that Novak could handle the property extrajudicially, if he had occasion to.

Q So that the creditors would be lead to believe that Melnyk conveyed the property to Novak absolutely? A Well, the thought was not considered just at that time; the thought was to carry out one of these provisions in the agreement—for instance, changing it—turning the garage into a movie—into a garage.

40 Q Why did you put it on in June, 1919? A I didn't put it on. Melnyk put it on.

Adam J. Rossback, re-direct.

Q Why? A I gave it to him because Novak refused to carry out the understanding at that time. He claimed that he—

Q What understanding? A Why of turning it back under the agreement—under the declaration of trust.

Q What understanding was there between Novak and Melnyk aside from that which appears in the declaration of trust, any? A The understanding was that—no; I guess that is conclusive and that is about all there was to it excepting a few outstanding claims—small claims—he was to pay, I believe. 10

Q No understanding that Novak was to take care of Melnyk's creditors? A No, excepting one or two which had already obtained judgment at that time, as I understand it.

Q And incorporated in this list? A They were not incorporated in the list.

Q What is the \$1,500 cash item mentioned in the list intended to cover? A Cash, \$1,500—well, my recollection is that Melnyk was to get this money himself at that time. 20

Q What was the understanding as between the two as to what Melnyk was to do with the \$1,500? A Why, he was going to buy a farm at that time and he wanted some money. He was always in need of money—

Q Wanted to buy a farm when he owed all these debts? A Well, he was going to get on the farm and establish himself in the farming business. 30

Re-direct examination by Mr. Greenfield.

Q At the time these conveyances were made this suit of Semenowich was pending in the Essex County Circuit Court, was it not? A Yes, sir.

Q You appeared for the defendant, for Mr. Melnyk? A Yes, sir.

Q You appeared as an attorney of record and filed an answer? A I don't know about—that time I did. 40

Adam J. Rossback, re-cross.

Q And the case when it was reached was not contested?
A The case was contested—it was defended excepting Mr. Melnyk did not appear. I appeared for Mr. Melnyk as he told me to.

Q But at the time these conveyances were made to Novak this suit was pending and you knew about that—
10 you had knowledge of it, being attorney of record for Melnyk? A I believe your suit was pending. I don't know the date. I don't remember the date when it was pending—I hadn't the thing in hand at the time.

By the Court.

Q Did you know of the debt? A The Semenowich debt? I believe I did.

Q Was there any arrangement as between Melnyk and Novak for its payment? A There was, with this understanding that just as soon as the property could be sold
20 and sold to advantage that these creditors would be paid.

Re-cross examination by Mr. Van Blarcom.

Q Well, what was Novak told about the general situation regarding Melnyk's indebtedness? What was he told about Melnyk's indebtedness? A Why, he knew about these judgments, the small judgments that were being entered up.

Q Did he know about the large debts? A I don't think so.
30

Q When I speak of the larger debts I mean the three debts represented by the complainant? A I don't think so. They were old, long standing debts and Melnyk was paying on account.

Q Novak knew about the arrearages of taxes and arrearages of interest on the mortgage, I suppose?

The Court. And the small debts?

A Yes, sir.

Q You spoke of a farm. Where was that farm? A
40 Why up in Owego, N. Y.

Michael Novak, direct.

Q Did Novak understand that \$1,500 was desired by Melnyk to buy that farm? A He didn't exactly buy the farm.

Q Answer the question. A Whether he knew that he wanted the \$500 to buy the farm?

Q \$1,500? A I do not think he did. I knew he wanted to establish himself in some business and supposed he wanted enough of it to do so. 10

Q Was any arrangement made as between the two that some part of the \$1,500 was to be applied to the debts?

A Well, yes; I think that Novak himself applied part of it to the payment of that note, for instance.

Q Later on? A Later on, without ever giving it to Melnyk.

Q This note you refer to is what? A Note in the Springfield Avenue Trust Company which he gave me and I handed him a receipt for. 20

Q Why was that paid? A Well, because that was one of the claims—and whether Novak was an endorser on it or not I don't know, I am not sure.

COMPLAINANT RESTS.

MICHAEL NOVAK, sworn for defendants.

Direct examination by Mr. Van Blarcom.

Q You are one of the defendants in this case, are you not? A Yes, sir. 30

Q When did you begin negotiations with Mr. Melnyk about these properties? A Sometime in 1918, November 16th or 15th Mr. Rossback wrote me a letter to come down to his office. I went down to his office and Mr. Melnyk was there and Mr. Melnyk told me, "Mr. Novak, buy my property." "Well," I said, "I got no money here and I can't buy your property and your property is in very bad shape, moving picture roof leaking and two months wasn't paid rent, and the rent some company—Harrington Company was collecting the rent from the 16th avenue 40

Michael Novak, direct.

property and Mr. Mike what had the moving picture rented he not paid him two months rent because he got notice from the Harrington Company and Mr. Melnyk not fix the condition of the building.

10 Q How did you know about that? A I was there, and I was looking it up, and after he told me I should buy the property, well, I buy it. He says pay the taxes and pay everything what is owed and give us \$1,500 cash. I says, "I cannot do now, I can give you \$150 liberty bonds what I got by me and in 30 days maybe I can get the money together," and I gave in \$2,000 second mortgage to Melnyk that is on the corner of 16th avenue where I have a second mortgage Well, they were satisfied with that; and after I paid them all taxes to the Harrington Company—I paid taxes of 1917 that was—

20 Q We will come to the tax payments later. Have you told us now everything that was said at the time you had these dealings? Why, did you understand, that Melnyk wanted to sell his property? A He couldn't pay taxes of 1917 and couldn't collect the rent any more because from the Harrington Company from Jersey City he went up and collected the rent already, and he had notice to foreclose. Mr. Monik, agent for Mrs. Wirtschafter—he wanted to foreclose the mortgage, and Mr. Dryfus, he wanted to have his mortgage, too, or paid something. I went to Mr. 30 Dreyfus—

Q We want to stick to what was said and done at the time you had these meetings. What was said about how much money Mr. Melnyk owed? A I don't know how much money. Only two judgments on record, I guess. I paid them small judgments what was against the property. Judgment was after, about six months or eight months later.

40 Q Did you know he owed a big bill to Wiltse and Kearney and these other people? A I don't know his business.

Michael Novak, direct.

Q You don't know that? A Only the judgments that was recorded, I know about that, and I went to the man and paid the judgments.

Q Now, then this paper which has been marked Exhibit D. 1 that contains a list of the different things you were going to pay? A Yes, sir; 1917 taxes, one year's interest.

Q Now, I show you receipted tax bill for 1917 which says lots 25 to 27, total \$413.65. Does that represent the first item on this paper Exhibit D. 1? A Yes; that is the one. 10

Mr. Van Blarcom. I have here what appears to be receipts for all these items mentioned in Exhibit D. 1 except for the \$60 which is the third item on the exhibit.

The Court. Ask him whether he has paid them all.

Q Did you pay all these charges on this Exhibit D. 1? A Yes, sir. The \$60 I paid on the second mortgage, moving picture, to Mr. Rossback, \$60. 20

Q So you paid all of them? A All of them.

Q I show you what purports to be receipts for all these items except the \$60. Do they represent the receipts? A Yes, sir.

Mr. Van Blarcom. I offer them in evidence.

(Papers marked Exhibit D. 2.) 30

Q Now, about the payment of the \$1,500 which is mentioned in this Exhibit D. 1, did you pay that to Mr. Melnyk? A I paid.

Q And you paid some of it through Mr. Rossback, did you? A Yes, sir; I paid Mr. Rossback and Mr. Melnyk.

Q Now, here are three receipts which have already been marked Exhibits D, 2, 3 and 4, showing liberty bonds \$150—was that on account of the \$1,500? A Yes, sir; that was the deposit. 40

Michael Novak, direct.

Q And here is the receipt— A \$914.60; that was check and small judgment.

Q That was the judgment of Sudowski? A Yes, sir.

Q You paid that off? A Yes, sir.

10 Q And then here is Exhibit D. 4 which refers to a note of \$275. A That is the Springfield Avenue Trust Company. I endorsed the note. I gave another note \$250, I paid for him his own note.

Q Melnyk's own note? A Yes, sir.

Q Now, is that the note you paid, dated January 16th, 1919? A Yes, sir. I asked Mr. Rossback should I pay the note, you are attorney for the Springfield Avenue and a shareholder and he says you pay it and I will give you account for the credit.

20 Q Note dated January 16th, 1919. Is that Mr. Melnyk's signature? A Mr. Melnyk's signature; yes, sir.

Q And you got this note how? A From the bank.

Q Springfield Avenue Trust Company? A Yes, sir.

Q And do you know Mr. _____ up at the Trust Company? A Yes, sir.

Q At the same time you got the note did you see him or at a different time? A Give me a receipt.

Q Did you get that receipt from him? A Yes, sir; I got the receipt.

30

The Court. What did they aggregate?

Q Was this \$250 note and the \$275 note the same or a different transaction? A I don't know exactly. I paid him. You got to count together how much is paid because I not give him any money until I got receipt what I paid.

40

Q Here is the note here. Mr. Rossback says in his receipt before—it says \$121.19, that is January 21, 1919, received from Mr. Novak note for \$275 paid by him with interest at 5 per cent., Springfield Avenue Trust

Michael Novak, direct.

Company for Mayk Melnyk. A That is the note I endorsed.

Q Was it \$250 and renewed for \$275? A No; that is another one, Melnyk's own note and I endorsed it.

Q Did you get that money back? A No; I didn't get any back.

Q You paid in more than \$1,500? A More, yes, sir; 10
I gave him a couple of notes.

Q Did you pay off anything on account of these mortgages? A I paid to Mr. Monik on account of Mrs. Wirtschafter \$1,000, interest, and I paid Mr. Spindel and Dreyfus \$1,000 on the first mortgage because he wanted to foreclose it. He says to me, "You pay \$1,000, I will leave the mortgage for longer."

Q Certified check dated 5-3-19, which is Morris J. Monik to your order? A Yes, sir.

Q Bearing your endorsement and that of Daniel Dreyfus. Is that the check you paid to Mr. Dreyfus? A 20
Yes, sir; that is the check to Mr. Dreyfus.

Q \$1,000 on account of principal and \$100 interest?
A Yes, sir.

Q What was the principal of the mortgage? A
\$9,500, and I paid \$1,000 off, \$8,500 balance.

Q That is the first mortgage on the moving picture? A
Yes, sir.

Q I show you receipt dated February 11th, 1920, letterhead of Isaac Spangenthol, attorney, signed Daniel Dreyfus and marked copy. Did you get that from Mr. Dreyfus afterwards? A Yes, sir; I gave it to Mr. Spangenthol to write it for him. 30

Mr. Van Blarcom. I offer these in evidence as one exhibit.

(Papers marked Exhibit 5.)

Q Now, I show you bond and mortgage made by Mayk Melnyk and Olina his wife to Rosie Wirtschafter, dated March 16, 1916, cancelled of record by the Register of 40

Michael Novak, direct.

Essex County on the 24th day of July, 1919, and ask you if you paid off that mortgage? A Yes, sir; I paid it off to Mr. Monik who is right here in court.

Q What property? A 362 Sixteenth avenue. That was the third mortgage.

Q That is the corner of Grove street and 16th avenue?

10 A Yes, sir.

Q What street number was that? A 362 Sixteenth avenue, Irvington.

Q Do you know whether Mrs. Wirtschafter signed that receipt? A I don't know because I got it off of Mr. Monik who was the agent representing her.

Q You paid \$1,000 on the mortgage and it is cancelled of record? A Yes, sir.

Q Now, I show you note dated December 19, 1916, made by Mr. Melnyk to Daniel Sass, \$50? A Yes, sir.

Q What about that? A I paid this note to Mr. Sass.

20 Q You paid that to Mr. Sass? A Yes, sir.

Q Why did you pay it? A Because he had no money and he told me to pay it.

Q You paid that note? A I paid it.

Q When, about the time of this transaction or before or after? A I guess it was the same time.

The Court. Is that included in the list?

Mr. Van Blarcom. No, it is not.

30 Q How did you happen to pay this Daniel Sass? A Well, I paid him altogether.

Q Why did you do it? A He come to me and Mr. Melnyk come to me and asked him for money, he says he has got no money—well, I paid the note.

Q Why should you pay it? A He told me to pay it.

Q Why, did you have any of his money? A No—well, I paid him on account of that.

Q Did you have any of Melnyk's money at that time? A Melnyk's money? That is the way he say, first this property he give me in trust, second time I buy it for

40

Michael Novak, direct.

\$29,000. He speak to me to keep the property, fix it up my property, is in bad shape; he says you can have it for \$29,000. I got a customer for \$30,000, the moving picture man offered him \$18,000 and for Grove street property he offered him \$12,000, and while Melnyk speak to me and ask "What is this to buy self this property"? "Certainly to buy myself"; he says, "All right, how much you going to give me?" I says, "I will give you \$29,000 because the \$30,000 you got to pay the agent." He says, "All right, I am satisfied," and on account I give him \$200 money. He says he needed it—he bought a farm in New York State and he want the money. He has got no money to bring him up there and I give him \$200, two notes. 10

Q When did you buy it for \$29,000? A For \$29,000 was bought I guess in March, about 26th or 28th of March, 1919.

Q After? A Yes, after. 20

Q Now, you say you took it in trust the first time? A First time I took it to pay everything, but the second time I bought it for \$29,000.

Q How much did you understand that everything would be? A All, everything would be \$29,000.

Q No; I mean when you got the deed, when you say you took it in trust to pay up everything? A Everything.

Q What did you then understand everything to be? A Well, I had to give him \$1,500 cash, or \$1,500 and pay all arrears of taxes, 1917, mortgage interest for 1918. All that I paid because he couldn't collect any more rent. 30

Q Because other parties had bought the property at the tax sale? A Parties bought it for tax sale; yes, sir.

Q How about the other debts? A I don't know nothing about the other debts; I know only about two judgments, and judgment I got receipt for.

Q Was it two or one? A Two or one I don't know. 40

Michael Novak, direct.

Q Were you to pay those judgments? A Yes, sir; there was judgments I was willing to pay.

Q You are willing to pay them? A Yes, sir.

Q You were willing to pay them? A Yes, sir.

Q Now, how about the other debts, these large debts here that these people are suing on? A I don't know about the debts. That is about six months or eight months after.

Q Did you know there were large debts? A I didn't know nothing about it. If I had I wouldn't take the property.

Q Did you understand you were to pay these large debts, too? A No, sir; I don't know nothing about it, about the judgments.

Q Why did you make a deed of trust? A Well, I give deed—

Q Melnyk gave you a deed for the property? A Yes, sir.

Q And you gave him a paper back? A I gave him a paper back.

Q Do you know what that paper meant? A Well, Mr. Rossback told me it was an agreement and when Mr. Melnyk wants to buy the property back he give me \$500 profit for my trouble and rent I am entitled to that and the necessary repairing I got to pay for. What is new work I got to buy, I got to charge Mr. Melnyk, room painting or hall painting or paper I got to charge everything to Mr. Melnyk, because Mr. Melnyk couldn't work any more, everybody jumped on him and he wanted to foreclose it and Harrington Company collected rent; he couldn't move yet.

Q Did the Harrington Company have a tax title? A Yes, sir.

Q Had a tax title for all three properties? A For them two lots and for them three properties, all of them.

Q And were they collecting rent? A He was collecting rent, not all; there was some rent collected.

Michael Novak, direct.

Q Of all three properties? A No; only from the corner.

Q What do you mean by the corner? A 362 Sixteenth avenue.

Q Grove street? A Yes, sir; because Mr. Mike, the moving picture man, he not pay the rent—he not pay to the company—he had notice. 10

Q They tried to collect from him? A He tried to collect but don't pay it because the moving picture property was in bad shape, Mr. Melnyk never fixed it, never invested in it a penny. It was raining in. When I take the property over I fixed all the property and when property get higher he wanted it back. He went to Mr. Mike and signed over agreement and tried to get the property back. Mr. Levy come for his statement. I gave him my statement which, pay that money back you can have the property back. He don't want to do that. 20

Q Now, when you gave him this declaration of trust—you know the paper I mean? A Yes, sir. 20

Q Was there any other understanding that should not be put on record? A I don't know about that. I signed it. What happened to it, I don't know any more.

Q Was there any agreement between you and Rossback and Melnyk that that should not be out on record? Was there any understanding that it should be kept off the record? A Well, I don't know nothing about it. I signed it and I let Mr. Rossback have it. 30

Q Was there any understanding that it should not be put on record? A No.

Q Why did you make this deed of trust over to Yosente? Why didn't you make it back to Melnyk—do you understand me? A Yes, sir. Well, that is the way we make the agreement and Mr. Rossback tell me that way and I sign it right up.

Q Was Rossback your lawyer? A No, Mr. Melnyk's lawyer. I had some time in a business way—I sold my property—I depending on him, yes; I went to him. 40

Michael Novak, direct.

Q You depended on him when you signed this paper?

The Court. Is there anything more that you want than an accounting?

Mr. Greenfield. I do not think I have cross examined him.

10 *The Court.* Do you insist upon the \$500?

Mr. Van Blarcom. I have it in my answer, your Honor. My memory of just what the declaration of trust says on that subject, I am not sure about.

The Court. I will give you leave to file a cross-bill that you may be paid what is coming to you. You will have to account for all the rents you have received, with interest, and you will be credited with the money that you paid out for repairs, improvements and in paying these prior obligations, with interest. Do you insist upon the \$500?

20 *Mr. Van Blarcom.* I don't know.

The Court. What have you to say about it?

Mr. Greenfield. I do not think he is entitled to it.

The Court. Isn't the laborer worthy of his hire? There is no fraud disclosed.

30 File your cross-complaint, to which there will be a formal answer and see whether you can agree on the amount. If you can I will order it paid within 30 days; if not paid, I will order execution. Novak gets a mortgage instead of a deed.

Final Decree.

FINAL DECREE.

Filed January 25, 1921.

This cause coming on to be heard in the presence of William Greenfield and Louis Levy, of counsel with the complainants, and Riker & Riker, of counsel with the defendants, Michael Novak and Mary Novak, his wife, and it appearing to the Court that process of subpoena for the defendants, Mayk Melnyk, Olena Melnyk and Nicholas Yacenty, has been issued and returned served upon the defendant, Nicholas Yacenty, and that due notice of the order of this Court made on the twentieth day of February, 1920, directing the defendants, Mayk Melnyk and Olena Melnyk, his wife, to plead, answer or demur to the complainants' bill on or before the 22nd day of April, 1920, has been duly published and mailed to the said defendants in the manner as in said order directed and prescribed, and that said Mayk Melnyk and Olena Melnyk, his wife, and Nicholas Yacenty have not, nor have any of them, pleaded, answered or demurred to said bill within the time limited by law, and the said order, or at any other time, but have wholly failed and neglected so to do, and the Court having duly considered the pleadings, proofs, testimony and arguments presented on behalf of the respective parties appearing, and

It appearing to the Court that the defendants, Mayk Melnyk and Olena Melnyk, his wife, did on or about the 18th day of November, 1918, convey the premises described in the bill of complaint to the defendant, Michael Novak, situate, lying and being in the Town of Irvington, County of Essex and State of New Jersey, described as follows:

First Tract: Beginning at a point twenty-five feet westerly from the corner formed by the intersection of the westerly side of Twenty-first street and the southerly side of Sixteenth avenue; thence westerly along the southerly side of Sixteenth avenue seventy-five feet; thence

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Final Decree.

southerly one hundred feet; thence easterly seventy-five feet; thence northerly one hundred feet to the point and place of beginning.

Being lots 25, 26 and 27 on map of lots owned by Joseph Karrakus, Irvington, N. J.

10 Second Tract: Beginning on the easterly side of Twenty-second street at a point therein distant one hundred and one feet and eleven hundredths of a foot southerly from the corner formed by the intersection of the easterly line of Twenty-second street and the southerly line of Sixteenth avenue; thence running easterly seventy-one feet and one one-hundredths of a foot; thence southerly forty-two feet and seven hundredths of a foot; thence westerly seventy-three feet and thirty-one hundredths of a foot to the said easterly line of Twenty-second street; thence northerly along said easterly side of Twenty-second street thirty-one feet and fifty-two hundredths of a foot to the point and place of beginning.

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Being lot No. 23.

30 Third Tract: Beginning at a point in the easterly line of Twenty-second street distant southerly one hundred and thirty-two feet and sixty-three hundredths of a foot from the corner formed by the intersection of the aforesaid easterly line of Twenty-second street with the southerly line of Sixteenth avenue; thence running south thirty-three degrees thirty-three and one-half minutes west thirty-one feet and fifty hundredths of a foot along the said easterly line of Twenty-second street; thence south fifty-six degrees twenty-six minutes east seventy-five feet and seventy-one hundredths of a foot; thence north twenty-nine degrees nineteen minutes east thirty-one feet and fifty-eight hundredths of a foot; thence north fifty-six degrees twenty-six minutes west parallel with the second course seventy-three feet and thirty hundredths of a foot to the point and place of beginning.

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40 Being known and designated as lot No. 22 on aforesaid map.

Final Decree.

Fourth Tract: Beginning at the southeast corner of Grove street and Sixteenth avenue; thence running along Grove street southerly twenty-five feet; thence easterly and at right angles to the same one hundred feet; thence north twenty-four degrees thirty-seven minutes east thirty-eight feet and eleven hundredths of a foot to Sixteenth avenue; thence along the same north sixty-three degrees twenty-three minutes west ninety-five feet and seventy-seven hundredths of a foot to the place of beginning. 10

Being lot 1 on map of property of estate of Conrad Nolde, deceased; Nicholas Weber, executor, situated in the Town of Irvington, N. J.; Harrison Van Duyne & Son, surveyor, October, 1910.

Which said deed was recorded in the Register's Office of Essex County on the 18th day of November, 1918, in Book Y. 60 of Deeds for said county, at page 151; and it appearing to the Court upon the execution of said deed a certain agreement was made by and between the parties setting forth the terms and condition upon which the said Michael Novak held the said premises, which said agreement bears date the sixteenth day of November, 1918, and was recorded in the Register's Office of Essex County in Book B 61 of Deeds for said county, at page 270, and it appearing from said agreement and from the testimony that the deed of said Mayk Melnyk and Olena Melnyk, his wife, to said Michael Novak was made and executed by them with intent to cheat and defraud the complainants, but was taken by the defendant, Michael Novak, to secure to him the sum of \$3,400.00 then advanced by him, and 20 30

It further appearing to the Court that the said Michael Novak did on or about the 5th day of May, 1919, pay to one David Dreyfuss the sum of \$1,000.00, being a payment on account of the principal due on a certain mortgage held by said David Dreyfuss and which said mortgage was a prior lien on a part of the premises described in the bill of complaint, and did also on or about the 24th 40

Final Decree.

day of July, 1919, pay to one Rosie Wirtschafter a further sum of \$1,000.00 on account of the principal then being due on a certain other mortgage held by said Rosie Wirtschafter, which said mortgage was then a prior lien on a part of said premises, and that the defendant, Michael Novak, is entitled to be subrogated to the rights of such mortgages to the extent of \$2,000.00, and

10 It further appearing to the Court that in accordance with the said agreement made and entered into between the defendants, Mayk Melnyk and Olena Melnyk, his wife, bearing date November 18, 1918, that the said Michael Novak is entitled to the sum of \$500.00 as and for his services in connection with the administration of said premises, and

20 It further appearing to the Court that the said Michael Novak has entered into possession of the premises described in the bill of complaint as aforesaid, and has taken and collected the rents, issues and profits arising therefrom and has paid taxes, interest on mortgages, insurance, repairs and other expenses in connection with the up-keep and management of said premises and has duly stated an account thereof to December 1, 1920, wherefrom it appears that said Michael Novak has received for said rents over and above all charges and expenses the sum of \$650.00, and

30 It further appearing to the Court that there is due to the said Michael Novak the sum of \$5,250.00 as of December 1, 1920, with interest from such date, for money advanced by him as aforesaid and that the said defendant is entitled to an equitable lien for such amount against the premises as herein described, and

40 It appearing to the Court that the complainant, Dymtro Semenowich, is the owner of a certain judgment against Mayk Melnyk and Olena Melnyk, his wife, in the sum of \$1,936.00, recovered in the Essex County Circuit Court on the 23rd day of May, 1919; and that the Vreeland-Kearney Lumber Company, a corporation, complainant,

Final Decree.

is the holder of a certain other judgment recovered against the said Mayk Melnyk and Olena Melnyk, his wife, in the sum of \$1,250.00 in the Essex County Circuit Court on the 29th day of January, 1920; and that the complainant, Wm. H. Barkhorn Company, a corporation, is the holder of a certain other judgment against the said Mayk Melnyk in the sum of \$1,227.50 recovered in the Essex County Circuit Court on the 29th day of January, 1920, and

It appearing to the Court that executions have been issued on said judgments and that the deed from the defendants, Mayk Melnyk and wife, to Michael Novak hereinbefore referred to should be set aside in so far as to enable the said complainants to satisfy said judgments of and from the premises described in the bill of complaint in the above-entitled cause, subject, however, in all respects to the lien of said defendant, Michael Novak, for the sum of \$5,250.00 with interest from December 1, 1920, as aforesaid, and other liens on said premises prior to the lien of said judgments.

It is, thereupon, on this 25th day of January, 1921, on motion of Riker & Riker, of counsel for the defendants, Michael Novak and Mary Novak, his wife; ORDERED, ADJUDGED and DECREED, and the Chancellor, by virtue of the power and authority of this Court, does hereby order, adjudge and decree that the bill of complaint filed by the complainants and the cross-bill of defendant, Michael Novak, be and the same hereby are taken as confessed against the defendants, Mayk Melnyk and Olena Melnyk, his wife, and Nicholas Yacenty, and

It is further ORDERED that the deed made and executed by Mayk Melnyk and Olena Melnyk, his wife, bearing date the 16th day of November, 1918, to the defendant, Michael Novak, which said deed was recorded in the Register's Office of the County of Essex in Book Y. 60 of Deeds for said county, at page 151, be set aside in so far as to enable the complainants to satisfy their said judgments from the

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Final Decree.

premises herein described, but subject, however, to the equitable lien of the defendant, Michael Novak, therein and his taxed costs in this cause, and

It is further ORDERED that the defendant, Michael Novak, be discharged from any further obligation to account for his administration of said premises up to December
 10 1, 1920, and that the sum of \$5,250.00 with interest from December 1, 1920, be fixed and determined as the amount due to said Michael Novak on said date on his lien, and

It is further ORDERED that unless the defendants, Mary Melnyk and Olena Melnyk, his wife, shall within sixty days after the date hereof pay to the defendant, Michael Novak, or his solicitors the sum of \$5,250.00, with interest from December 1, 1920, and taxed costs, and to the complainant, Dymtro Semenowich, or to his solicitors, the amount due to him upon his judgment in this cause referred to,
 20 together with interest thereon from the date thereof and costs of said suit and taxed costs of this suit, and to pay to the complainant, Vreeland-Kearney Lumber Company, a corporation, the amount due to it upon its judgment in this cause referred to, together with interest due thereon and cost of said suit and taxed costs of this suit, and to the complainant, Wm. H. Barkhorn Company, a corporation, the amount due it upon its judgment in this cause referred to and interest thereon and cost of such
 30 suit and taxed costs of this suit, that the premises as herein described be sold to raise and pay, first, to the defendant, Michael Novak, the sum of \$5,250.00, with interest from December 1, 1920, and his costs to be taxed, and secondly, unto the complainant, Dymtro Semenowich, or to his solicitors, the sum of \$2,070.66, with interest thereon to be computed from the day of the date hereof, and the costs of said complainant to be taxed, and thirdly, to the complainant, Vreeland-Kearney Lumber Company, the sum of \$1,334.94, with interest thereon to be computed from the day of the date hereof, and its costs to
 40 be taxed, and fourthly, unto the complainant, Wm. H.

Final Decree.

Barkhorn Company, the sum of \$1,310.88, with interest thereon, to be computed from the day of the date hereof, and its costs to be taxed, and that a writ of *feri facias* do issue for that purpose out of this Court directed to the Sheriff of the County of Essex, commanding him to make sale according to law of the said premises to raise and pay the sums of money to the said defendant, Michael Novak, and said complainants in the amount and in the order as hereinabove specified, with interest and costs as aforesaid, and that in case more money should be raised by said sale than should be sufficient to answer said payment such surplus money be brought into this court and be deposited with the Clerk to abide the further order of this Court; unless otherwise previously disposed of by the order of this Court; and that the Sheriff make return to this Court of his proceedings by virtue of his said writ.

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It is further ORDERED that the Sheriff of the County of Essex, to whom were directed the writs of execution issued out of the Circuit Court in the County of Essex and hereinbefore referred to, at the suit of the said several complainants and against said defendants, Mayk Melnyk and Olena Melnyk, his wife, as mentioned and set forth, may proceed to sell the said tracts of land and premises described in the said bill of complaint, to satisfy said judgments if requested so to do by said complainants, such sale to be subject, however, in all respects to the equitable lien of the said Michael Novak in the sum of \$5,250.00, with interest as aforesaid, and his taxed costs in this cause, and

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It is further ORDERED that there be paid to William Greenfield and Louis Levy, as solicitors for and of counsel with complainants, the sum of \$500.00 as and for their counsel fee in this suit, and that such sums be included

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Final Decree.

as part of the taxed costs of the complainants in this cause
and be collected with the other items of said bill.

E. R. WALKER,

C.

Respectfully advised,

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JOHN H. BACKES,
V.-C.

We hereby consent to the entry of the within decree.

LEVY & FENSTER,
*Solicitors for Wm. H. Barkhorn Co.,
Vreeland-Kearney Lumber Co.*

WILLIAM GREENFIELD,
Solicitor for Dymtro Semenowich.

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Petition of Michael Novak.

PETITION OF MICHAEL NOVAK.

Filed June 7, 1921.

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

The petition of Michael Novak, of the Town of Irvington, County of Essex and State of New Jersey, respectfully shows: 10

1. That the final decree in the above-entitled cause was entered on or about the twenty-fifth day of January, 1921, which said decree fixed and determined the amount of an equitable lien in favor of your petitioner and the amounts due to the complainants, and provided that a writ of *fieri facias* should issue out of this Court to satisfy the same, if the amount as therein specified were not paid within sixty days from the date thereof. 20

2. That the payments specified in said decree were not made within the sixty days, and that a writ of *fieri facias* has been issued out of the Court of Chancery in said cause, directed to the Sheriff of the County of Essex and authorizing him to sell the premises therein described to satisfy said decree.

3. Your petitioner further shows that the defendants, Mayk Melnyk and Olena Melnyk, his wife, claim and allege that any surplus money arising from the sale of the premises belongs to them by the terms of said decree. 30

4. Your petitioner further shows that he is advised and believes that in accordance with said decree such surplus money belongs to him; that he is unable to safely sell the premises or bid thereon at such sale until it shall be definitely determined by this Court whether the surplus money arising on such sale will belong to your petitioner or to Mayk Melnyk and Olena Melnyk.

Your petitioner therefore prays that an Order may be made by this Honorable Court, determining and declaring 40

Petition of Michael Novak.

the rights of your petitioner and the defendants Mayk Melnyk and Olena Melnyk his wife, as arising under and by virtue of said decree in and to any surplus money, or amending or adding to such final decree a determination of this Court, decreeing that the surplus money arising on said sale belongs to your petitioner and that the defend-
 10 ants Mayk Melnyk and Olena Melnyk have no interest therein, and such other and further relief as may be equitable and just.

And your petitioner will ever pray, etc.

MICHAEL NOVAK,
Petitioner.

RIKER & RIKER,
Solicitors of Petitioner.

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

MICHAEL NOVAK, being duly sworn according to law, upon his oath deposes and says; that he is the petitioner in the foregoing petition named, and that the matters and things therein contained are true to the best of his knowledge and belief.

MICHAEL NOVAK

30 Sworn and subscribed to before
 me this seventh day of
 June, 1921.

SAMUEL P. WATSON,
Notary Public of New Jersey.

Order to Show Cause.

ORDER TO SHOW CAUSE.

Filed June 7, 1921.

Upon reading and filing the petition of Michael Novak in the above-entitled cause, and it appearing to the Court that the said petitioner is unable to determine from the terms of the said decree to whom any surplus money arising from a sale of the premises as described in the writ of *feri facias* issued in the said cause, belongs, and praying that this Court may determine and declare the rights of the petitioner, and defendant Mayk Melnyk and Olena Melnyk, his wife, in and to such surplus money, it is on this 7th day of June, 1920, on motion of Riker & Riker, solicitors of the petitioner ORDERED, that Mayk Melnyk and Olena Melnyk, his wife, show cause before this Honorable Court on Tuesday, the 21st day of June, 1921, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Chancery Chambers, in the Prudential Building, Newark, N. J., why an order should not be made determining and declaring the right of said petitioner in and to such surplus money, or adding to and amending said final decree in such a manner as to declare and determine the rights of the petitioner and the said defendants Mayk Melnyk and Olena Melnyk, his wife, in and to such surplus money.

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It is further ORDERED, that a true but uncertified copy of the petition and of this order be served upon said Mayk Melnyk and Olena Melnyk, his wife, or their solicitors, within five days of the date hereof and it is further

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ORDERED, that service upon said Mayk Melnyk and Olena Melnyk, his wife, may be made by mailing such copies to them at their postoffice address by registered mail within five days from the date hereof.

Respectfully advised,

JOHN H. BACKES,

V.-C.

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Opinion of Vice-Chancellor on Order to Show Cause.

**OPINION OF VICE-CHANCELLOR ON ORDER TO
SHOW CAUSE.**

SEMENOWICH et al. v. MELNYK et al.
(No. 47/611.)

(Court of Chancery of New Jersey, July 25, 1921.)

10 Where the grantee of land made a declaration of trust, setting out that he held title only as security for a loan advanced to the grantor, and later, in a suit by the grantor's creditors to declare the deed fraudulent, asked for nothing more than the money advanced by him on the land, he is bound by decree for this amount, and, there being no fraud in fact, cannot later claim surplus brought by sale of land over grantor's debts, on the theory that the grantor made the conveyance in fraud of his creditors, and that equity will not help him regain it.

20 Suit by Dymatro Semenowich and others against Mauk Melnyk and others to set aside a deed as in fraud of creditors, in which a decree was entered upholding the deed as a mortgage only to that extent of the grantee's advances, and ordering the property sold. On petition of defendant Novak, the grantee, to determine right to a surplus brought by sale of the land over the loan and creditors' claims. Right of petitioner to surplus denied.

Riker & Riker and Theodore McC. Marsh, all of Newark, for petitioner.

30 Levy & Fenster and William Greenfield, all of Newark, for respondents.

BACKES, V. C.

40 The bill in this case was filed by judgment creditors of the defendant Melnyk to set aside a conveyance of land made by him to the defendant Novak, alleging that it was made to cheat and defraud them. Novak answered, denying fraud, setting up that the deed was in the nature of a mortgage, and cross-billed, praying that it be declared a mortgage. On the hearing it was held that the deed was given as security, and valid as a mortgage, but it

Opinion of Vice-Chancellor on Order to Show Cause.

was void as to the complainants' judgments. A decree was accordingly entered, upholding the deed to the extent of Novak's advances, but, subject to his lien, it was set aside as against the complainants' judgments, and the property was ordered to be sold to satisfy Novak's lien and the complainants' judgments, and a *fi. fa.* is now in the hands of the sheriff. Novak has petitioned the Court to determine who will be entitled to the possible surplus. He wants to know how to bid. I do not pause to consider whether he is entitled to the Court's judgment *in limine* under the act of 1915 (P. L. 184, par. 7), or upon the authority of *Point Breeze Ferry Co. v. Bragaw*, 47 N. J. Eq. 298, 20 Atl. 967, or *State Mutual B. & L. Ass'n v. O'Callahan*, 65 N. J. Eq. 738, 55 Atl. 1002, cited by him. I think he is not, but, as the matter is pressing and no objection is raised, I will pass upon the question. 10

Novak claims to be entitled to the surplus, and he rests his claim on the ground that the deed to him was executed by Melnyk with intent to cheat and defraud creditors, that although voidable as to creditors it was good *inter partes*, and that equity will not aid the wrongdoer. *Geroso v. De Maio*, 75 N. J. Eq. 410, 72 Atl. 432. The claim is based upon the recitals in the final decree, rather than upon the facts disclosed at the hearing which led to that instrument. The decree does recite that— 20

“The deed of said Myak Melnyk and Olena Malnyk, his wife, to said Michael Novak, was made and executed by them with intent to cheat and defraud the complainants, but was taken by the defendant Michael Novak to secure to him the sum of \$3,400, then advanced by him.” 30

This is an inadvertance. Actual intent to cheat and defraud was not shown at the trial, as I recall the testimony, and surely the cause was not presented nor decided upon that theory. At the time Melnyk made the deed to Novak he was in financial troubles, and appealed to him for assistance, which was promised and given. 40

Opinion of Vice-Chancellor on Order to Show Cause.

With the making of the deed, Novak executed a declaration of trust, in which the negotiation between the two is set out in detail, and the declaration was later recorded in the office of the register of deeds of Essex County. In his pleading, and at the trial, Novak asserted his rights under the deed as declared in his contemporaneous declaration, and asked for nothing more than the lien vouched to him by these documents. The final decree fixes the extent of his lien and interest in the property at \$5,250. He is bound by that sum.

As the debts of the complainants were in existence at the time the deed to Novak was made, it was set aside as to them as a voluntary conveyance. Had it been held that the transaction was corrupt, a moral fraud, as Novak now asserts it was, and to which he must needs have been privy, the deed would have been set aside in favor of the complainants, not only as to Melnyk, but also as to Novak. *Horton v. Bamford*, 79 N. J. Eq. 356, 81 Atl. 761. Novak's priority as a lien holder was sustained because of the absence of fraud in fact, although as to Melnyk the deed was fraudulent in law as against his existing creditors. C. S. p. 2617, pr. 11. Melnyk's claim to the surplus arises out of the declaration of trust, and not out of any supposed resulting trust tainted with fraud. The rule that a conveyance made with intent to defraud creditors is good as between the parties cannot be applied in the circumstances. The test here is: Could Melnyk recover his title on an original bill against Novak under the terms of the declaration of trust, and the defense set up by Novak, as he has here set up—that he took and held the property as security? I have no doubt he could. Novak's estate in the property is limited by his money decree. He can have no more, nor can he, in conscience, ask for more. Whatever remains, after he and the complainant creditors are satisfied, reverts to Melnyk.

If Novak relies upon the recital in the final decree as *res adjudicata*, the recital will be corrected on application.

Petition to File Cross-bill.

PETITION TO FILE CROSS-BILL.

Filed.

IN CHANCERY OF NEW JERSEY.

Between

DMYTRO SEMENOWICH, VREELAND-
KEARNEY LUMBER Co., a corpora-
tion and WILLIAM H. BARKHORN
Co., a corporation,

Complainants,

and

MAYK MELNYK and OLENA MELNYK,
his wife, MICHAEL NOVAK and
MARY NOVAK, his wife and NICH-
OLAS YACENTY,

Defendants.

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On Bill, Etc.

Petition.

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

The petition of Leonard J. Fruzinski, respectfully shows unto your Honor:

1. That on April 15, 1921, your petitioner became the purchaser of the premises described in the bill of complaint filed in the above cause by deed made by Mayk Melnyk and Olena Melnyk, his wife, and recorded in the Register's Office of Essex County on May 2, 1921, in Book D 65 of Deeds for said county, on pages 83-85.

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2. Your petitioner further shows that at the time of the purchase of the said premises by your petitioner the same were subject to several claims including that of one Michael Novak.

3. That the said Michael Novak is in possession of the said premises under decree of this Court made in

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Petition to File Cross-bill.

the above-entitled cause, and that under the terms of said decree the said Michael Novak is entitled to the sum of Fifty-two Hundred and Fifty Dollars together with interest from December 1, 1920; that since the said date, the said Michael Novak has issued execution under the decree in the above-stated cause and has advertised
 10 the properties for sale; and that since the said date, he has collected all the rents, issues and profits from the said premises.

4. That the said Mayk Melnyk and Olena Melnyk, his wife, have assigned to your petitioner all their interest in the rents, issues and profits collected by the said Michael Novak from the tenants occupying the above premises above stated.

5. Your petitioner is advised and believes, that the proceeds of said sale and the rents collected by the said
 20 Michael Novak will be much more than sufficient to satisfy the debt of the said Michael Novak, and furthermore, your petitioner is ready and willing to pay the said Michael Novak all moneys due and owing to him under the decree of this Court hereinabove referred to.

6. You petitioner therefore prays that he may be admitted as a party defendant in the above-entitled cause of action, and that he may be allowed to file a cross-bill to redeem the said property described in the said bill of complaint filed in the above cause, so that a receiver may be
 30 appointed for the collection of the rents and issues of the said property until the determination of the said proceedings on your petitioner's cross-bill so as to protect your petitioner's interest in the said premises as owner thereof.

And that your petitioner may have such other and further relief as may be equitable and just in the premises.

LEVY & FENSTER,
Solicitors for and

WM. GREENFIELD,
Of Counsel with Petitioner.

Petition to File Cross-bill.

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

LEONARD J. FRUZINSKI, being duly sworn according to law, on his oath deposes and says, that he is the petitioner in the foregoing petition named; and that the matters and things therein contained are true to the best of his knowledge and belief.

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LEONARD J. FRUZINSKI.

Sworn and subscribed to before me on this twenty-seventh day of October, A. D. 1921, at Newark, N. J.

BENJAMIN L. APPEL,
Atty. at Law of N. J.

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Cross-bill of Leonard J. Fruzinski.

CROSS-BILL OF LEONARD J. FRUZINSKI.

Filed.

By way of cross-bill and counter-claim against Michael Novak and Mary Novak, his wife, two of the defendants herein, the defendant, Leonard J. Fruzinski, says:

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1. That the said defendants, Mayk Melnyk and Olena Melnyk, his wife, were seized and possessed in fee simple of certain tracts of land and premises, hereinafter described, situate, lying and being in the Town of Irvington, County of Essex and State of New Jersey, that is to say:

20 First Tract: BEGINNING at a point twenty-five feet westerly from the corner formed by the intersection of the westerly side of Twenty-first street and the southerly side of Sixteenth avenue; thence westerly along the southerly side of Sixteenth avenue seventy-five feet; thence southerly one hundred feet; thence easterly seventy-five feet; thence northerly one hundred feet to the point and place of BEGINNING.

Being lots 25, 26 and 27 on map of lots owned by Joseph Karrakis in the Town of Irvington, made April, 1910, by I. J. Casey, Jr., surveyor.

30 Second Tract: BEGINNING on the easterly side of Twenty-second street at a point therein distant one hundred and one feet and eleven one-hundredths of a foot southerly from the corner formed by the intersection of the easterly line of Twenty-second street and the southerly line of Sixteenth avenue; thence running easterly seventy-one feet and one one-hundredths of a foot; thence southerly forty-two feet and seven one-hundredths of a foot; thence westerly seventy-three feet and thirty-one one-hundredths of a foot to the said easterly line of Twenty-second street; thence northerly along said easterly line of Twenty-second street thirty-one feet and fifty-two one-hundredths of a foot to the point and place of BEGINNING. Being lot No. 23.

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Cross-bill of Leonard J. Fruzinski.

Third Tract: BEGINNING at a point in the easterly line of Twenty-second street distant southerly one hundred and thirty-two feet and sixty-three one-hundredths of a foot from the corner formed by the intersection of the aforesaid easterly line of Twenty-second street with the southerly line of Sixteenth avenue; thence running south thirty-three degrees thirty-three and one-half minutes west thirty-one feet and fifty-one one-hundredths of a foot along the said easterly line of Twenty-second street; thence south fifty-six degrees, twenty-six minutes east seventy-five feet and seventy-one one-hundredths of a foot; thence north twenty-nine degrees nineteen minutes east thirty-one feet and fifty-eight one-hundredths of a foot; thence north fifty-six degrees, twenty-six minutes west parallel with the second course seventy-three feet and thirty one-hundredths of a foot to the point or place of BEGINNING. Being known and designated at lot No. 22 on aforesaid map.

Fourth Tract: BEGINNING at the southwest corner of Grove street and Sixteenth avenue; thence running along Grove street southerly twenty-five feet; thence easterly and at right angles to the same one hundred feet; thence north twenty-four degrees thirty-seven minutes east thirty-eight feet and eleven one-hundredths of a foot to Sixteenth avenue; thence along the same north sixty-three degrees twenty-three minutes west ninety-five feet and seventy-seven one-hundredths of a foot to the place of BEGINNING. Being Lot No. 1 on Map of Property of Estate of Conrad Nolde, deceased, Nicholas Weber, Executor, situated in the Town of Irvington, N. J., Harrison R. Van Duyne & Son, Surveyors, October, 1910.

2. That the said Mayk Melnyk and Olena Melnyk, his wife, being indebted to one, Michael Novak, did on or about November 16, 1918, convey the above-described premises to the said Michael Novak to secure the payment of said debts; and about the same time the said Michael Novak and wife executed a declaration of trust in favor of one,

Cross-bill of Leonard J. Fruzinski.

Nicholas Yacenty, by the terms of which it appears that the said Michael Novak holds the said properties in trust for Nicholas Yacenty.

10 3. That on or about February 7, 1920, Dmytro Semenovich, Vreeland-Kearney Lumber Co. and William H. Barkhorn Co., a corporation, filed a bill in this Court to have the deed made by Mayk Melnyk and Olena Melnyk, his wife to Michael Novak set aside.

20 4. That the said matter was referred to Honorable John H. Backes, Vice-Chancellor, and that after considering the pleadings, proofs and testimony in the said matter, a final decree was entered on January 25, 1921, by the terms of which it was ordered, adjudged and decreed, that the deed made by Mayk Melnyk and Olena Melnyk, his wife, to Michael Novak be set aside and for nothing holden, subject to the equitable lien of the defendant, Michael Novak, and his taxed costs; and that the said Michael Novak be discharged from any further obligation to account of his administration of said premises up to December 1, 1920; and that the sum of Fifty-two Hundred and Fifty Dollars, with interest from December 1, 1920, be fixed and determined as the amount due to the said Michael Novak on said date on his lien; that the said Michael Novak is in possession of the said premises and has collected the rents, issues and profits from the same since December 1, 1920.

30 5. That the defendant, Leonard J. Fruzinski requested and demanded the said Michael Novak to account for all the rents received by him since December 1, 1920, from the tenants occupying the said premises, and also an accounting of his expenses in connection therewith, and also that he surrender the said premises to this defendant, Leonard J. Fruzinski, upon the receipt of the moneys due and owing to him, but that the said Michael Novak has refused to account or surrender the said premises and is now in possession and collects all rents therefrom.

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Cross-bill of Leonard J. Fruzinski.

6. That the said defendant, Leonard J. Fruzinski has also requested the said Michael Novak to give him a statement of the amount due to him under the decree of this Court, and which the said Leonard J. Fruzinski, has been and now is able, ready, willing and desirous to pay, and take possession of the said premises, but that the said Michael Novak has refused to give him a statement of same or in any way account or surrender the premises to this defendant, Leonard J. Fruzinski. 10

7. And this defendant, Leonard J. Fruzinski, further shows, that although the said Michael Novak collects the rents from said properties, to pay all charges, costs and disbursements in the up-keep of the said properties, he has wholly failed and neglected to pay the taxes and assessments and has also neglected to make the repairs on said properties although he keeps and retains all the rents and issues from the said land and premises collected by him from the tenants in occupancy and possession thereof, and that the buildings are now in a very delapidated and ruinous condition. 20

8. And this defendant, Leonard J. Fruzinski, further shows, that he is entitled to redeem the said premises, and that he is ready, willing, able and anxious to redeem the said properties, and has demanded of the said Michael Novak a statement of the amount due to him, but that the said Michael Novak has refused to do so.

9. And that this defendant, Leonard J. Fruzinski, by way of cross-bill further avers, that although the said Michael Novak has filed a cross-bill in the above-entitled cause of action, praying that an accounting may be taken of the amount due to the said Michael Novak on his said mortgage and decree and praying that the said defendants or any one of them in the above cause, pay to him, the said Michael Novak, the amount so found due to him with interest and costs, by a short day to be appointed by this Court and although this defendant offered to pay him the amount due to him and requested an accounting, so that 30 40

Cross-bill of Leonard J. Fruzinski.

he may know the amount due to him, the said defendant, Michael Novak, wholly refused to do so.

10 10. Wherefore this defendant, Leonard J. Fruzinski, prays that a receiver may be appointed to take immediate possession of the said premises to collect the rents, issues and profits thereof, and that the said Michael Novak do
 20 forthwith render an accounting so that the amount due to him may be discovered, and that this defendant, Leonard J. Fruzinski, may know the amount and pay the same to him, and take possession of the said premises, and unless a receiver is appointed, the said Micheal Novak will wholly ruin the said premises and greatly damage and injure this defendant, Leonard J. Fruzinski.

20 That the said Leonard J. Fruzinski prays that the said Michael Novak be directed to answer the within cross-bill and also prays to have such further and other relief in the premises as the nature of this cause may require.

LEVY & FENSTER,
Solicitors for Defendant,
Leonard J. Fruzinski.

WM. GREENFIELD,
Of Counsel with Defendant,
Leonard J. Fruzinski.

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Order Allowing Cross-bill.

ORDER ALLOWING CROSS-BILL.

Filed.

This matter being opened to the Court by Levy & Fenster, solicitors for Leonard J. Fruzinski, and in the presence of Riker & Riker, of counsel with the defendant, Michael Novak, as to permitting the said Leonard J. Fruzinski to be made a party defendant in the above-entitled cause, so that he may file a cross-bill and any other pleadings in connection with the said cause and also for an order to have a receiver appointed for the collection of rents and issues of said property until the termination of the above cause.

10

It is on this ninth day of November, 1921, ordered, adjudged and decreed that the said Leonard J. Fruzinski be admitted as a party defendant in the above-stated cause so as to file a cross-bill and any other pleadings necessary in this suit, and it is further ordered that the application for the appointment of a receiver for the collection of rents and issues of said property be denied.

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And it is further ordered that the defendant Michael Novak file his answer to said cross-bill within two weeks from the date hereof.

E. R. WALKER,

C.

Respectfully advised,

30

JOHN H. BACKES,

V.-C.

We hereby consent to the entry of the above order.

RIKER & RIKER,
Solicitors of Michael Novak.

40

Answer of Michael Novak to Cross-bill.

ANSWER OF MICHAEL NOVAK TO CROSS-BILL.

Filed.

The defendants, Michael Novak and Mary Novak, his wife, in answer to the cross-bill of the defendant, Leonard J. Fruzinski, say:

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1. That they admit that the defendants, Mayk Melnyk and Olena Melnyk, his wife, were formerly seized and possessed of certain lands and premises situate in the Town of Irvington, and described in the bill of complaint and cross-bill of Leonard J. Fruzinski in said cause.

20

2. That they admit that Mayk Melnyk and Olena Melnyk, his wife, did on or about November 16, 1918, convey the above-described premises to said Michael Novak for a certain consideration then and there paid by the said Michael Novak to said Mayk Melnyk, and that the said Michael Novak executed a declaration of trust to one Nicholas Yacenty, for the terms of which these defendants beg leave to refer to said declaration of trust should it be necessary so to do.

3. That they admit the allegations of paragraph three of said cross-bill.

30

4. That they further admit that a final decree was entered in the said cause on the 25th day of January, 1921, for the terms of which they beg leave to refer to said final decree.

5. The defendant, Michael Novak, admits that Leonard J. Fruzinski has requested him to account for all the rents received from the premises in the said cross-bill arising since December 1, 1920, and that this defendant has not accounted, and that he is still in possession of said lands and premises and collecting the rents thereof.

40

6. These defendants further say they are prepared and have been at all times ready and willing to make a statement of the amount due to this defendant under

Answer of Michael Novak to Cross-bill.

the decree of this Court, but say they have no knowledge as to whether Leonard J. Fruzinski is able and willing to pay the same.

7. These defendants deny the allegations of paragraphs seven and eight of the said cross-bill.

8. These defendants further say that they admit that the defendant, Michael Novak, filed a cross-bill in the above-entitled cause, and that they beg leave to refer to the same should it be necessary so to do to ascertain more exactly the terms thereof. 10

9. These defendants further say that the declaration of trust made and executed by these defendants to Nicholas Yacenty and hereinbefore referred to provided that all the rents, issues and profits arising from said lands and premises after the payment of the taxes and other expenses should be retained by the defendant, Michael Novak, as and for his services in connection with the handling of said lands and premises; that this defendant did account for the rents, issues and profits arising up to December 1, 1920, at the request of the complainants, but that such accounting was made for the benefit of the creditors of the said Mayk Melnyk only; that the defendant, Leonard J. Fruzinski, is the assignee of Mayk Melnyk and that his interest in said lands is subject to the terms of the declaration of trust. This defendant therefore says that neither Mayk Melnyk nor the said defendant, Leonard J. Fruzinski, is entitled to any accounting from this defendant for the rents, issues and profits, and that the sum of \$650.00 allowed by the original decree to the creditors as the amount of rents collected by Michael Novak in excess of disbursements is now due and owing to the defendant, Michael Novak, in accordance with the terms of the declaration of trust in addition to the amount specified in said final decree. 20 30

10. The defendant, Michael Novak, further shows that he has purchased all of the right, title and interest of the complainants, Dmytro Semenowich, Vreeland-Kearney 40

Answer of Michael Novak to Cross-bill.

Lumber Company and Wm. H. Barkhorn Company in the final decree in the above-entitled cause, and that the amount set forth in said decree as due and owing to the said complainants is now due and owing to this defendant, together with interest thereon from the date of said decree.

10 11. This defendant further says that he has paid to the solicitors of said complainants the counsel fees and taxed costs set forth in said decree and has taken an assignment thereof, and that he is entitled to be repaid the amount of said counsel fees and interest, together with interest from the date of said final decree.

12. These defendants further say that the amounts as above specified are due to this defendant if the Court shall direct him to re-convey said lands and premises to the defendant, Leonard J. Fruzinski.

FIRST DEFENSE.

20

By way of further defense to the cross-bill in the above-entitled cause this defendant, Michael Novak, says:

1. That the bill of complaint in the above-entitled cause alleged that the deed from Mayk Melnyk to this defendant bearing date the 16th day of November, 1918, should be set aside and for nothing holden on the ground that same was made in fraud of the complainants, and that said final decree in said cause determined that the said Mayk Melnyk was guilty of fraudulent conduct in connection with said conveyance, and set the same aside for the benefit of the creditors, and that the said Mayk Melnyk and this defendant, Leonard J. Fruzinski, who has succeeded to the rights and interest of the said Mayk Melnyk, have no right or standing in this Honorable Court by reason of the fraud of said Mayk Melnyk and no right to ask for a redemption of said lands and premises or for any relief in equity in connection therewith.

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RIKER & RIKER,

*Solicitors for and of Counsel
with Michael Novak.*

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Decree.

DECREE.

Filed January 25, 1922.

This cause coming on to be heard in the presence of Levy & Fenster, solicitors for, and William Greenfield, of counsel, with Leonard J. Fruzinski, and Riker & Riker, of counsel with the defendant, Michael Novak, and it appearing to the Court that the above-entitled cause came on for hearing upon pleadings, proofs and arguments and that a final decree was entered in said cause on January 25, 1921, fixing and determining the rights of the respective parties appearing, and it further appearing that since the date of said decree, Leonard J. Fruzinski acquired title to the premises described in the bill of complaint in the above-entitled cause, by deed from Mayk Melnyk and wife, and which deed was duly recorded in the Register's Office of Essex County, and also acquired title to all the right, title and interest in said Mayk Melnyk, in and to the rents, issues and profits collected by the said Michael Novak.

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20

It further appearing to the Court that the said Leonard J. Fruzinski filed a petition to be made a party defendant in the above-entitled cause, and on the tenth day of November, 1921, it was ordered that he be admitted as a party defendant to the same.

It further appearing to the Court that the said Leonard J. Fruzinski filed a cross-petition to have the said Michael Novak account for the rents, issues and profits since December 1, 1920, and also to redeem the property described in the bill of complaint.

30

It is thereupon, on this 15th day of December, 1921, on motion of Levy & Fenster, solicitors for the said Leonard J. Fruzinski, ordered, adjudged and decreed that the proofs taken in the prior hearings to be considered as of the same force and affect as though taken in connection with the hearing on the cross-bill filed by the said Leonard J. Fruzinski in this cause.

40

Decree.

It is further ordered that the said Michael Novak account to said Leonard J. Fruzinski for the rents, issues and profits from the said premises from December 1, 1920, and the said accounting to be referred to Joseph L. Smith, Esq., one of the Special Masters of this Court to hear the same and report his findings to this Court.

10 It is further ordered that the said Michael Novak convey the said lands and premises to said Leonard J. Fruzinski upon being paid the amount due under the decree of this Court, bearing date January 25, 1921, together with the amounts paid by the said Michael Novak to Dymtro Semenowich, Vreeland-Kearney Lumber Co., William H. Barkhorn Co., and to William Greenfield and Louis Levy for the claims referred to in said decree with interest thereon. That the right of said Leonard J. Fruzinski to redeem said property is to expire thirty days after the accounting is determined by said parties.

20 It is further ordered that that part of the decree hereinbefore referred to which reads as follows:

“And it appearing from said agreement and from the testimony that the deed of the said Mayk Melnyk and Olena Melnyk, his wife, to said Michael Novak was made and executed by them with intent to cheat and defraud the complainants,” to be modified to read as follows:

30 “And it appearing from said agreement and from the testimony that the said Michael Novak holds said property in trust for Mayk Melnyk to the extent of his lien thereon for money advanced by him, to wit, the sum of five thousand two hundred and fifty dollars, to December 1, 1920.”

E. R. WALKER,

Respectfully advised,

C.

JOHN H. BACKES,

V.-C.

We hereby consent to above form.

40

RIKER & RIKER,
Solicitors of Michael Novak.

Exhibits.

EXHIBITS.

TO WHOM THESE PRESENTS MAY COME, by Michael Novak and Mary Novak, his wife, of the City of Newark, County of Essex and State of New Jersey:

WHEREAS, on the 16th day of November, A. D. 1918, Mayk Melnyk and Olena Melnyk, his wife, in consideration of thirty-four hundred dollars to them in hand by deed under their hand and seal did grant and convey in fee unto me, the said Michael Novak, all those certain tracts or parcels of land and premises hereinafter particularly described situate, lying and being in the Town of Irvington, Essex County, New Jersey, described as follows:

10

First Tract: Beginning at a point twenty-five feet westerly from the corner formed by the intersection of the westerly side of Twenty-first street and the southerly side of Sixteenth avenue; thence westerly along the southerly side of Sixteenth avenue seventy-five feet; thence southerly one hundred feet; thence easterly seventy-five feet; thence northerly one hundred feet to the point and place of beginning.

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Being lots 25, 26 and 27 on Map of lots owned by Joseph Karrakis, in the Town of Irvington, made April, 1910, by I. J. Casey, Jr., surveyor.

Second Tract: Beginning on the easterly side of Twenty-second street at a point therein distant one hundred and one feet and eleven one-hundredths of a foot southerly from the corner formed by the intersection of the easterly line of Twenty-second street and the southerly line of Sixteenth avenue; thence running easterly seventy-one feet and one one-hundredths of a foot; thence southerly forty-two feet and seven one-hundredths of a foot; thence westerly seventy-three feet and thirty-one one-hundredths of a foot to the said easterly line of Twenty-second street; thence northerly along said easterly line of Twenty-second street thirty-one feet and fifty-two one-hundredths of a

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Exhibits.

foot to the point and place of beginning. Being lot No. 23.

10 Third Tract: Beginning at a point in the easterly line of Twenty-second street distant southerly one hundred and thirty-two feet and sixty-three one-hundredths of a foot from the corner formed by the intersection of the aforesaid easterly line of Twenty-second street with the southerly line of Sixteenth avenue; thence running south thirty-three degrees, thirty-three and one-half minutes west thirty-one feet and fifty-one one-hundredths of a foot along the said easterly line of Twenty-second street; thence south fifty-six degrees, twenty-six minutes east seventy-five feet and seventy-one one-hundredths of a foot; thence north twenty-nine degrees, nineteen minutes east thirty-one feet and fifty-eight one-hundredths of a foot; thence north fifty-six degrees, twenty-six minutes west parallel with the second course seventy-three feet and thirty one-hundredths of a foot to the point and place of beginning. Being known and designated as lot No. 22 on aforesaid map.

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30 Fourth Tract: Beginning at the southeast corner of Grove street and Sixteenth avenue; thence running along Grove street southerly twenty-five feet; thence easterly and at right angles to the same one hundred feet; thence north twenty-four degrees thirty-seven minutes east thirty-eight feet and eleven one-hundredths of a foot to Sixteenth avenue; thence along the same north sixty-three degrees, twenty-three minutes west ninety-five feet and seventy-seven one-hundredths of a foot to the place of beginning. Being lot No. 1 on map of property of estate of Conrad Nolde, deceased; Nicholas Weber, executor, situate in the Town of Irvington, N. J., Harrison Va. Duyné & Son, surveyors, October, 1910.

40 Now KNOW YE, that I, the said Michael Novak, and the said Mary Novak, his wife, do, in consideration of one dollar to us in hand paid by Nicholas Yacenty of the Town of Irvington, Essex County, New Jersey, hereby

Exhibits.

make known, admit and declare that said premises were so conveyed to me, the said Michael Novak, and that I now hold and will continue to hold the same in trust for the following uses and purposes: to collect the rents, issues and profits of the said land and premises and apply the same to the payment of the interest on the mortgages thereon and to taxes, insurance, assessments, water and all other municipal rates or charges, with full power to reduce any of the present mortgage or mortgages upon said premises, either in whole or in part, and substitute or replace the same by other mortgage or mortgages as to me the said Michael Novak may seem fit, accounting, however, for any excess of present mortgages and being given credit for any reduction within the period hereinafter provided for, and to make all necessary repairs to said premises and to make suitable alterations to the premises on the first tract above described, in the event of the moving picture house now upon said tract becoming unprofitable and not productive, and I, the said Michael Novak, do for myself, my heirs, executors and administrators, covenant and agree to and with the said Nicholas Yacenty, his heirs and assigns, that we, the said Michael Novak and Mary Novak, his wife, and each of our heirs, executors, shall and will convey the said premises or any part thereof by good and sufficient deed to the said Nicholas Yacenty, or his assigns, whenever and as soon as I or they shall be thereunto requested in writing, under the seal of the said Nicholas Yacenty, free of dower, and clear and discharged of and from all and every encumbrance thereon by me and my heirs, excepting those placed thereon according to the terms of the foregoing declaration of trust, provided, however, that said request to so convey as aforesaid shall be made within three years from the date hereof and upon the repayment to me of the sum of thirty-four hundred dollars, advanced by me upon the execution of the deed aforesaid, and the said declaration of trust, and all moneys

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Exhibits.

advanced by me in and about the alteration of the buildings upon the first tract above described in the event of such alterations being necessary under the terms of this agreement, with interest on said sum at 6 per cent. per annum, all rents, profits and issues arising from and through said premises are to be retained by me, after
 10 the payment of taxes, assessments, municipal charges and rates, &c., and the making of ordinary repairs, as and for my services in connection with the handling of said premises.

In the event of the said Nicholas Yacenty requesting a conveyance to him within two years from the date hereof then the said Nicholas Yacenty shall pay to me and the said Michael Novak the sum of five hundred dollars (\$500.00) over and above any and all rents collected by me and remaining after the payment of the charges afore-
 20 said, as and for my services in connection with the handling of said premises, but in the event of the said Nicholas Yacenty requesting said conveyance after the expiration of two years from the date hereof then I shall and will convey said premises without the payment of five hundred dollars (\$500.00), retaining only as and for my services in connection with the handling of said premises the said rents and profits arising from said premises remaining after deducting from the taxes, interest, insurance, water rates, etc., the said Nicholas Yacenty is also to reimburse
 30 me for any expenses incurred in the placing of any new mortgages upon said premises that become necessary by reason of said mortgages being called in, and in the event of any of the mortgages being in excess of the present mortgages now upon said premises, then I am to account for the excess of the said new mortgages over the prior mortgages.

In the event of the said Nicholas Yacenty not repaying said sum of money advanced by me as aforesaid, together with the charges for services and disbursements
 40 aforesaid, within the term of three years from the date

Exhibits.

hereof, then the interest of the said Nicholas Yacenty and Mayk Melnyk in said premises shall cease and determine and my title to said premises shall then be absolute and irrevocable.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and affixed their seals this 16th day of November, A. D. 1918.

10

MICHAEL NOVAK (L. S.)

her

MARY (X) NOVAK (L. S.)

mark

A. D. 1918.

Signed, sealed and delivered
in the presence of

ADAM J. ROSSBACK.

20

NOTE.

Above agreement acknowledged November 16, 1918.
Recorded June 4, 1919, in Essex County Book R. 61,
page 272.

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Exhibits.

DEED

	MAYK MELNYK and OLENA	Bk Y 60—151
	MELNYK, his wf	Dated Nov 16, 1918
	to	Ack'd Nov 16, 1918
	MICHAEL NOVAK	Rec'd Nov 18, 1918
10	Wtty	Cons. \$3400.
		Hab. in fee
		Covts usual

Conv prem

1st tr: Beg at apt 25' Wly fr the cor fmd by inter of the Wly si of 21st St and the Sly si of 16th Ave; th Wly alg Sly si of 16th Ave 75'; th Sly 100'; th Ely 75'; th Nly 100' to pt and pl of Beg.

Bg lots Nos. 25, 26, 27 on map of lots owned by Jos. Karrakis, in the Town of Irv, md April 1910 by I. J. Casey, Jr., surv'r.

2nd tr: Beg on the Ely si of 22nd St at a pt therein dist 101.11' Sly fr the cor fmd by inter of Ely li of 22nd St and Sly of 16th Ave; th rng Ely 71' 1/100 of a foot; th Sly 42.7'; th Wly 73.31' to sd Ely li of 22nd St; th Nly alg sd Ely li of 22nd St 31.52' to pt and pl of Beg.

Bg lot No. 23 on sd map.

3rd tr: Beg at pt in Ely li of 22nd St dist Sly 132.63' fr cor fmd by inter of the afsd Ely li of 22nd St with Sly li of 16th Ave; th rng S 33° 33 1/2' W 31.51' alg sd Ely li of 22nd St; th S 56° 26' E 75.71'; th N 29° 19' E 31.58'; th N 56° 26' W par with 2nd course 73.31' to pt or pl of Beg.

Lot #22 on sd map.

4th tr: Beg at SE cor of Grove St and 16th Ave; th rng alg Grove St Sly 25'; th Ely and at rt ang to sa 100'; th N 24° 37' E 38.11' to 16th Ave; th alg N 63° 23' W 95.77' to pl of Beg.

Exhibits.

Bg lot #1 on map of prop of Est of Conrad Nolde, dec'd Nicholas Weber, Ex'r, sit in Irvington, N. J., Harrison Van Duyne & Son, surv'r, Oct. 1910.

1st, 2nd, 3rd tracts subj to 3 mtges aggregating \$12,000. Taxes for year 1917—\$359.38 with int. Taxes for year 1918—\$377. Last two items party of 2nd pt agrees to pay. Sa having been allowed part of purchase price. 10

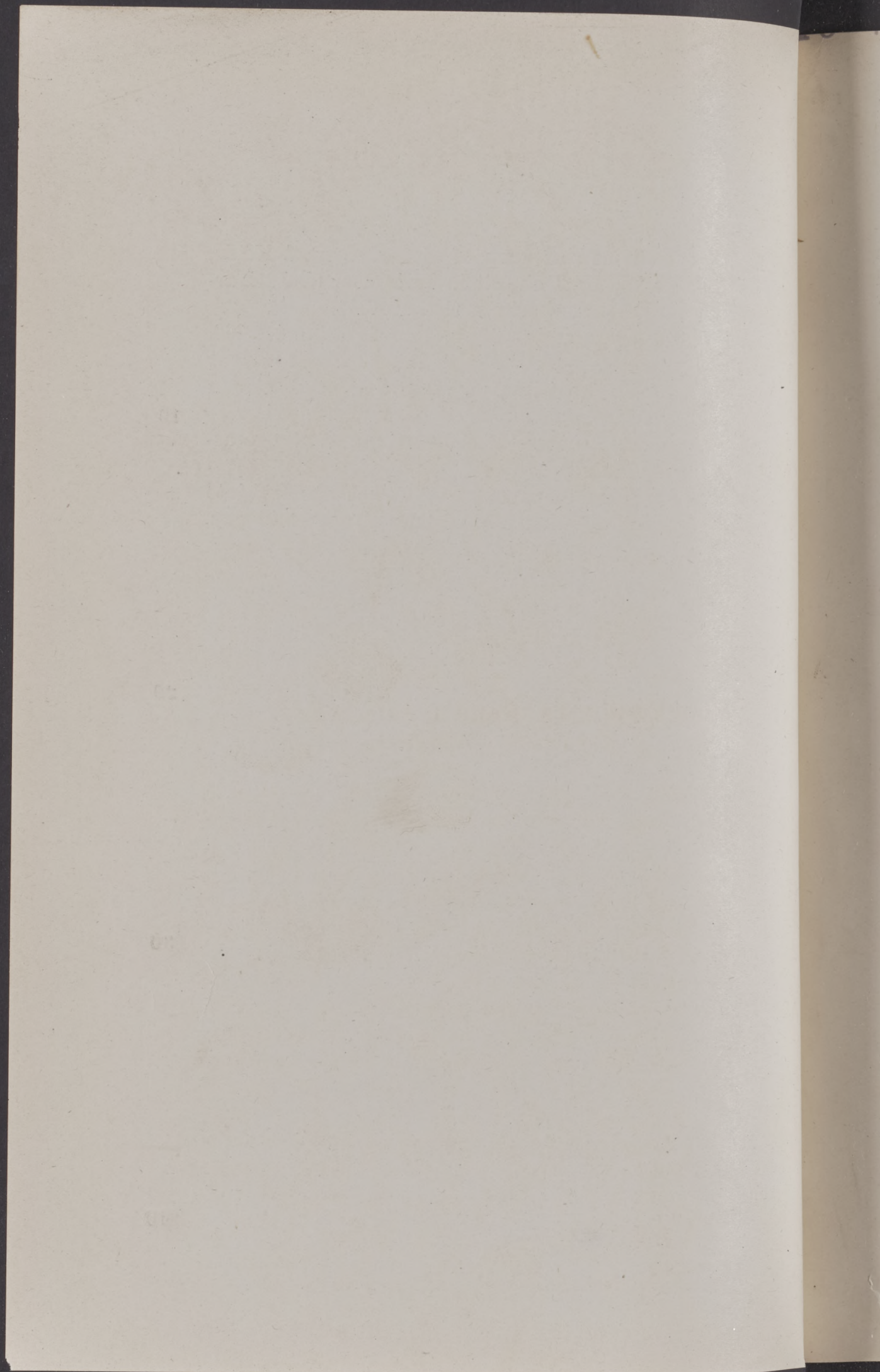
4th tr: Subj to 3 mtges—\$9,500—3rd \$1000. Same assumed by party of 2nd pt.

4th tr: 1st liable to payment of \$1,000. also subj to taxes 1917 and 1918, wh party of 2nd pt agrees to pay. Sa having been allowed part of cons.

* * * * *

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New Jersey Court of Errors and Appeals

Between

DYMTRO SEMENOWICH, VREELAND-
KEARNEY LUMBER Co., a corpora-
tion; WILLIAM H. BARKHORN Co.,
a corporation,

Complainants-Appellees,

and

MAYK MELNYK and OLENA MELNYK,
his wife; MICHAEL NOVAK and
MARY NOVAK, his wife, and NICH-
OLAS YACENTY,

Defendants-Appellants.

On Bill, etc.

*On Appeal from
Decree in
Chancery.*

BRIEF FOR LEONARD J. FRUZINSKI, Complainant-Appellee.

On November 16, 1918, Mayk Melnyk, who was then the owner of certain property located in Irvington, did convey the same to Michael Novak by warranty deed. At the same time Michael Novak and wife executed an instrument called in these proceedings a declaration of trust on November 16, 1918, and which was kept off record until June 4, 1919, whereby Michael Novak agreed to hold the property for a period of three years; to collect the rents, issues and profits, and pay all necessary carrying charges and convey the property to one Yacenty, upon repayment to him a certain sum of money as set forth in the declaration of trust (see p. 105 of the printed State of the Case).

Mr. Novak went into possession of the property under this deed and agreement and continues to occupy the same until the present date. The conveyance made by Mayk

Melnyk to Michael Novak was for one express purpose, although the declaration of trust was evasive and not in accordance with the agreement, as stated to by counsel for the defendants at the opening of the trial before the learned Vice-Chancellor at page 31, folios 20 to 30, in reply to the Court's question.

The Court. What did Novak do to get title?

Mr. Van Blarcom. He had to pay \$3,400, a lot of back taxes and back interest and \$1,500 in cash.

The Court. Do you claim the ownership of the property now?

Mr. Van Blarcom. No.

The Court. Whom do you represent?

Mr. Van Blarcom. Mr. Novak, the present owner of the legal title.

The Court. You stand in the position of mortgagee?

Mr. Van Blarcom. Yes.

The Court. Who was the trust declared in favor of?

Mr. Van Blarcom. A man by the name of Yacenty and also Melnyk.

At that time Mayk Melnyk was indebted to several creditors and by arrangement with Mr. Novak and negotiations conducted through the law offices of Adam J. Rossbach, who at that time represented both parties, and which was for one specific purpose, Novak to pay the pressing creditors and to hold title until a purchaser could be obtained for the properties, and when the property is sold to pay the creditors, or within the three years, Mayk Melnyk was to repay Novak all moneys that he (Novak) was to expend, and get a reconveyance of the properties or convey to such persons as shall be indicated or requested and the moneys realized, above the expenses, to be applied towards the payment of all creditors and the surplus, if any, to Melnyk.

During the entire proceedings in the case before the learned Vice-Chancellor, the defendant, Michael Novak, did not in any way set up that the conveyance to him was

in fraud of creditors, and at no time, throughout the entire testimony or by the statement of counsel, did Novak claim title by reason of the fraudulent conduct on the part of Mayk Melnyk. While Novak held title to the property, judgments were recovered against Mayk Melnyk, by the following creditors: Dymtro Semenowich, Vreeland-Kearney Lumber Co., and William H. Barkhorn Co., a corporation. The bill was filed by the creditors attacking the conveyance on the ground of fraud.

After the trial, the Court in its final decree found as follows (see p. 80 of the printed State of the Case):

“It further appearing to the Court that there is due to Michael Novak the sum of \$5,250, as of December 1, 1920, with interest from such date, for money advanced by him as aforesaid and that the said defendant is entitled to an equitable lien for such amount against the premises as herein described.”

And on page 81, in the final decree, folio 40:

“It is further ordered that the deed made and executed by Mayk Melnyk and Olena Melnyk, his wife, bearing date November 16, 1918, to the defendant, Michael Novak, which said deed was recorded in the Register's Office of the County of Essex in Book Y 60 of Deeds for said county, at page 151, be set aside in so far as to enable the complainants to satisfy their said judgments from the premises herein described, but subject, however, to the equitable lien of the defendant, Michael Novak, therein and his taxed costs in this cause; and

It is further ordered that the defendant, Michael Novak, be discharged from any further obligation to account for his administration of said premises up to December 1, 1920, and that the sum of \$5,250, with interest thereon from December 1, 1920, be fixed and determined as the amount due to said Michael Novak on said date as his lien.”

This decree stands uncontroverted not complained of by Novak. Following this decree the creditors' claims were satisfied by Novak and the judgments assigned to Novak and the rights of these creditors no longer concern

us. After this settlement, Michael Novak issued execution and proceeded to advertise the premises for sale. While the sale was being advertised, the defendant, Mayk Melnyk, contended that if any surplus moneys after the payment to Michael Novak the sum of \$5,250, and that the creditors which claims were assigned to Michael Novak were paid, belonged to him (Mayk Melnyk). Application was made by Novak to the Chancery Court to determine this question and an opinion rendered by Vice-Chancellor Backes, which determined that Novak's rights limited him (Novak) to the sum of \$5,250, and that the surplus, if any, belonged to the defendant, Mayk Melnyk. In the meantime Melnyk conveyed all his interest in the property to Fruzinski.

Fruzinski applied to the Court and was admitted as a party defendant by reason of the deed of conveyance made by Mayk Melnyk and wife to him for the same property or whatever interest he (Melnyk) may have had. Mr. Fruzinski was permitted to file a cross bill to redeem, which he did.

In the answer of Novak to the cross bill, at page 100 of the printed State of the Case, the defendant, Novak, says that he was prepared, ready and willing and able to make a statement of the amount due to the defendants, but he did not know that Leonard J. Fruzinski was entitled to it. In the answer, the defendant admits that he is not entitled to the surplus funds outside of the \$5,250 and moneys which he has advanced in the payment of the judgment creditors. But he (Novak) now claims the property by reason of the fraudulent or alleged fraudulent conduct of Mayk Melnyk, which he, Michael Novak, was a party to the fraud.

POINT I.

The sole question for this Court to determine on this appeal is, did the Vice-Chancellor in his learned opinion err in determining that Michael Novak is not entitled to

the surplus funds, if any surplus funds should accrue in the sale of the property on the execution?

2. Was the act on the part of Mayk Melnyk fraudulent and participated in by Michael Novak?

The answer must be as in the findings of the learned Vice-Chancellor that there is no fraud established, in the conveyance of the premises to Michael Novak, but, on the contrary, the conveyance by Melnyk to Novak was in trust for certain specific purposes and such purpose, conveyance and trust was accepted by Novak.

Counsel for the complainant-appellee (Leonard J. Fruzinski) will not attempt to controvert any of the authorities cited by counsel for the appellant. That law is too elementary. That where there is a fraudulent conduct on the part of the parties, the Court of Equity will not aid a fraudulent wrongdoer. It would be rather impudent on counsel's part to attempt to refute the elementary principle of law established in this state.

It is respectfully submitted that that is not the question before this Court to be determined in the suit at bar. The sole question for the Court to determine is, did the Vice-Chancellor err in determining from the facts before him, after hearing and seeing the witnesses, that the complainant did not establish fraudulent design. With that view, the Court determined as in the case of *Horton v. Bamford*, 81 Atl. Rep., page 761:

“In the absence of satisfactory proof of actual fraud, a transfer by a debtor will be sustained to the extent of the consideration actually given, and declared void as to the residue, the amplified principle being that where a court of equity is asked to set aside a deed as voluntary and fraudulent as against creditors, and the evidence is not sufficient to induce the Court to avoid the deed absolutely, but merely excites a well-grounded suspicion, as to the adequacy of the consideration and the fairness of the transaction, the Court will permit the conveyance to stand as security for the consideration actually given.”

That is where the Court found that Novak should have the property as security for his money and that when the security is repaid he should reconvey the property.

Counsel further desires to call the Court's attention to the testimony given by the appellant. Nowhere does he claim anything more than the lien for money actually advanced. The Court determined that he should have his lien as to the money. Can he now say, "that while the Court has found that I am entitled to my money advanced by me, that I should have the property also."

It is respectfully submitted that he does not come within the graces of the Court of Equity, and the Court so found it, and the decree should be affirmed.

Hence, counsel for the complainant-appellee does not feel justified in imposing upon the Court to refute the law as laid down in the case of *Bourgeois v. Risley Land Co.*, 82 Equity, page 211, and *Campbell v. Weber*, 80 Equity, page 553, and other authorities that he cites are too elementary to attempt to refute. But it seems to me that counsel fails to draw the distinction with the case at bar, which is directly in line with the case of *Horton v. Bamford*, *supra*.

See page 47 of the printed State of the Case, folios 20 to 30:

Q When was it you asked Novak to reconvey the property back to you? A A couple of times.

Q When the first time? A First year and second year—I can't tell you exactly what date, because when I come into Newark I got a letter from Mr. Rossbach—I go to Mr. Novak, I tell Mr. Novak we need to settle up because I got a customer now, I want to sell my property and settle up my creditors. He laughed at me; he says, "Go on, don't bother me."

Q What did you say to that? A I said, "What do you think we will do? I want to pay my creditors." He says, "Oh, no talking, go away from me."

Adam J. Rossbach, who represented both parties and who, as you would say in common parlance, engineered the whole transaction (see testimony of Adam J. Rossbach, pp. 54, 62 and 64 of the printed State of the Case), in response to the Court's questions, that the whole transaction was gone over, and the specific purpose was, that he (Novak) was to pay the creditors, and any moneys expended by him would be repaid, plus six per cent. interest and \$500 for his services. At no time was there a fraudulent design, scheme or intention on the part of Melnyk to defraud his creditors. Mr. Melnyk testified that Novak was to help him financially, so that he could pay his obligations. While Mr. Novak's mind was warped as to his honesty, that he had no intention to pay the creditors and to grab Melnyk's property, and not only to defraud him, but also to defraud Melnyk's creditors, demonstrated and proved by his testimony, and that he almost succeeded, is no question. Now, he comes into court, with one breath he admits that he is not entitled to the property, does not claim title, and in the second breath, while he has the property in mind, he wants the money, and when we are ready to pay it, he wants the property, too. It is an inconsistent claim, and the Vice-Chancellor rightfully says that he will not allow such schemes as attempted to by Novak to grab the property and money.

POINT II.

The next question is, will the Court reverse the learned Vice-Chancellor's opinion and aid and assist Novak's double contention? The first contention is as set out by the learned Vice-Chancellor in his opinion in page 90, folio 10, of the printed State of the Case:

"In his pleading, and at the trial, Novak asserted his rights under the deed as declared in his contemporaneous declaration and asked for nothing more than the lien vouched to him by these documents. The final decree fixes the extent of his lien and interest in the property at \$5,250. He is bound by that sum.

As the debts of the complainants were in existence at the time the deed to Novak was made, it was set aside as to them as a voluntary conveyance. *Had it been held that the transaction was corrupt, a moral fraud*, as Novak now asserts it was, and to which he must needs have been privy, the deed would have been set aside in favor of the complainants, not only as to Melnyk but also as to Novak."

The Court found that there was no fraud as far as the creditors were concerned, and that was by reason of Novak's fraudulent conduct after the conveyance, and not at the time of the conveyance, that is, he agreed to pay the creditors and when he obtained the property, he failed to carry out the agreement.

Counsel further begs to call the Court's attention that in the decree the sum of \$5,250, which includes \$500 for his services, plus six per cent. interest, having been accepted by Novak. In his answer to the cross bill to redeem, filed by Leonard J. Fruzinski, he admits that he is ready, willing and able to account, but that he does not know whether or not Fruzinski was willing and able to pay him. In another breath he avers that Fruzinski is ready to pay, but he does not want it, but wants to keep the property.

It is respectfully submitted that that contention is too preposterous to ask the Court to consider or give any credence to such contention as that on the part of Novak. Fruzinski stands in the place of Melnyk and claims the surplus funds arising out of the declaration of trust and not by a supposed trust tainted with fraud. Every case must be decided on facts presented and applicable to the case at bar. An agreement was made with one object, in that so far as Melnyk is concerned, Novak was to look after his (Melnyk's) creditors. Novak failed. Demand for reconveyance was made for the purpose to sell the property and pay his (Melnyk's) creditors, and the surplus funds arising therefrom to go to Melnyk, so that the creditors should not be defrauded through the acts and

conduct of Novak, as in the case of *Horton v. Bamford*, *supra*, page 356. If this conveyance was fraudulent, then the deed would have been set aside in favor of the complainants, not only as to Melnyk but also as to Novak. The Court will not aid one fraudulent schemer and deny the other. Both parties are standing in the same position. In other words, they are *para crimis*. Novak contends that he is entitled to all the funds, yet counsel cites in his brief, the declaration of trust. In his brief on the bottom of page 10 he quotes the following: "That he, Novak, will convey the property to Nicholas Yacenty provided that the request to so convey shall be made within three years from the date hereof, and upon the repayment to him of the sum of \$3,400, advanced by him upon the execution of the deed aforesaid, and the said declaration of trust and all moneys advanced by him in and about the alteration of the building, upon the first tract above described, with interest on said sum at six per cent. per annum, *all rents, profits and issues arising from and through said premises are to be retained by me (Novak) after the payment of taxes, assessments, municipal charges and rates, etc., and the making of ordinary repairs, as and for my (Novak) services in connection with the handling of said premises.*" The Court will perceive that he is not make any extraordinary repairs, but ordinary repairs, and that he is to retain all the issues and profits. The question is, until when, is he to keep and collect the rents, issues and profits? The answer is, no longer than three years, after a demand for reconveyance is made. In other words, the construction of the declaration of trust must be, that Yacenty or whoever will stand in his place or Melnyk, or whoever will be in his place, is authorized to demand the reconveyance, by offering to pay any and all sums of money, plus the rents, issues and profits, plus interest at the rate of six per cent. per annum, and \$500. He was then bound to reconvey, as he agreed to, in the deed of trust, that was offered to him, a demand within the first and second years to reconvey the property to Melnyk, as testified to by Melnyk.

Hence, when such demand was made, he was bound to reconvey, and if he failed, he is then estopped from claiming the rents, issues and profits from the date of such demand. To cite any authorities would be an imposition on the Court on the part of counsel. It is rather difficult to understand Novak. At one time he asked for his money, ready to account, and his only excuse is, that he did not know that Fruzinski or any one in behalf of Melnyk was ready to pay. At the same time, he says, "If you are ready to pay it, I am not ready to give up the property." Such is the position of Novak. Surely, the Court will not sustain such double action.

On that particular point I desire to call the Court's attention to the statement of counsel, as testified to by him at the opening of the trial, on page 31 of the printed State of the Case, folios 20 to 30. Novak does not claim ownership or title to the property.

The question as to reconveyance demanded of Novak, as testified to by Melnyk and Adam J. Rossbach, stands uncontradicted. Novak did not deny it (see p. 41, f. 20; see printed State of the Case, p. 47, ff. 20 to 30). Such demand stands uncontradicted by the letter from Rossbach. Notice from Rossbach to Melnyk states that Novak refuses to convey it. It seems to me, that Novak should not be heard to say at this time, that he is entitled to the surplus funds or that he is entitled to anything more than the moneys actually advanced by him and the amount decreed to and accepted by him, namely, \$5,250, up to December 1, 1920.

The Court must bear in mind that there is no appeal from the decree, decreeing to him the sum of \$5,250; which is acceptable to him.

It is respectfully submitted that the decree denying Novak's claim to any surplus funds should be affirmed with costs.

LEVY & FENSTER,
Solicitors, and

WILLIAM GREENFIELD,
Of Counsel with Complainant-Appellee.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN :

Annie Jonosko, :

Complainant-Appellant, : ON APPEAL FROM CHANCERY.

- and - : MEMORANDUM OF AUTHORITIES.

Harry H. Weinberger, :

Defendant-Respondent. :

The following authorities were submitted to the Court by counsel of the complainant-appellant upon the oral argument of this appeal:

6 N. J. Digest, #12,487 (j) and cases therein cited.

6 Corpus Juris, 683.

Wakeman vs. Dodd, 27 N.J.Eq., 564.

Marr vs. Marr, 73 N.J.Eq., 643.

Humphreys & Sumner,

Of counsel with Complainant-Appellant

RECEIVED NEW JERSEY COURT OF ERRORS AND APPEALS

FILED IN CASE NO. 100-1000

MAR. 1, 1922

Filed after the Oral Argument
by leave of Court.

THE SUPREME COURT OF THE STATE OF NEW YORK

PLAINT

Amie Jansko,

Complainant-Appellant

vs.

- and -

MEMORANDUM OF DECISION

HARRY A. WEINBERGER,

Defendant-Respondent.

The following authorities were admitted to the
Court by counsel of the complainant-appellant upon the oral
argument of this appeal:
S. N. J. Digest, 112, 187 (1) and cases therein

also

6 Corps Code, 603.

Wolman vs. Wood, 27 J. Rep. 504.

Walt vs. Hart, 73 N. Y. 413.

Kempire & Banner,

of counsel with complainant-appellant

New Jersey Court of Errors and Appeals

Between

DYMTRO SEMENOWICH, VREELAND-
KEARNEY LUMBER Co., a corp.;
WILLIAM H. BARKHORN Co., a
corp.,

Complainants-Appellees,

and

MAYK MELNYK and OLENA MEL-
NYK, his wife; MICHAEL NOVAK
and MARY NOVAK, his wife; and
NICHOLAS YECENTY,

Defendants-Appellants.

On Bill, etc.

*On Appeal from
Decree in
Chancery.*

BRIEF FOR DEFENDANTS,

Michael Novak and Mary Novak, his wife.

Statement of Facts.

On November 16th, 1918, Mayk Melnyk who was then seized in fee of certain premises located in Irvington and Newark conveyed the same to Michael Novak by warranty deed. At the same time Michael Novak and wife executed an instrument called in these proceedings a Declaration of Trust, whereby he agreed to hold the property for a period of three years from date; to collect the rents, issues and profits, pay the necessary carrying charges, and to convey it to one Yacenty upon repayment to him of certain sums therein set forth.

Mr. Novak went into possession of the property under this Deed and Agreement and has continued to occupy same up to the present time.

MAR. 1. 1922

The complainants Dymtro Semenowich, *et als.*, were creditors of Mayk Melnyk who obtained judgment against him sometime after the date of the conveyance to Novak. This suit was instituted by them to set aside the conveyance by Melnyk to Novak as in fraud of creditors, in order that they might be enabled thereby to collect their judgments from the properties in question. Novak filed an answer denying that the conveyance was one in fraud; alleging that the conveyance was made in accordance with the agreement aforesaid.

The case was then brought on for hearing, and the Court found that the conveyance was one designed by Melnyk in fraud, but so far as Novak was concerned was to be considered as giving him an equitable lien for money advanced and not fraudulent, and directed that a cross-bill should be filed by Novak to assert his equitable lien. This was done, and a decree thereupon entered setting aside the conveyance in so far as to enable the creditors to satisfy their judgment liens, the rights of creditors to be subject however to the lien of Michael Novak. This decree and order of the Court required that Novak should make and state his account of rents collected, up to December 1, 1920, and that he should be chargeable with any excess of rents received above carrying charges. The amount fixed as such excess was \$650, and the actual investment of Novak being \$5,900, the equitable lien was held to be \$5,250, which lien was to be considered as ahead of claims of creditors. Melnyk did not answer and made no claim at the time and the figures as above fixed were used to determine the respective rights of Novak and the creditors of Melnyk.

Following this decree the creditors' claims were satisfied and assigned to Novak and the rights of these creditors no longer concern us.

After this settlement Novak issued an execution under the terms of the decree and proceeded to advertise the premises for sale. While the sale was being advertised

the defendant Melnyk, the original grantor of the premises in question, demanded the same, and alleged that any surplus moneys, after the payment to Novak of the sum of \$5,250 and that of the creditors aforementioned, belonged to him. Application was made by Novak to the Chancery Court to determine this question, and an opinion was rendered by Vice-Chancellor Backes which determined that Novak's rights were limited to the sum of \$5,250 and that the surplus, if any, belonged to the defendant Mayk Melnyk. No order was ever entered on this petition and opinion by reason of the fact that after rendering the opinion the Court determined the matter was not properly brought before the Court.

Thereupon Leonard J. Fruzinski applied to the Court to be admitted as a party defendant in the same, he having purchased the interest of Mayk Melnyk therein. The Court admitted him as a defendant and permitted him to file a cross-bill, which cross-bill prayed that he might be allowed to redeem the premises upon payment to Novak of the sum of \$5,250, together with the amounts due to the original creditors which had been purchased by Novak and that Novak should be compelled to account for the rents collected. To this cross-bill Novak filed an answer denying the right of Leonard J. Fruzinski to redeem and denying that Melnyk or his assignee Leonard J. Fruzinski had any right under the declaration of trust to the rents, issues and profits arising from the premises, as long as he, Novak, was managing the same in accordance with that declaration.

The Court determined the matter without further testimony upon the basis of that taken at the original hearing and decided that Fruzinski was entitled to redeem and that Novak must account for the rents, issues and profits.

The decree on this cross-bill was entered on the 15th day of December, 1921. From that decree the defendant Michael Novak has appealed on the following grounds:

1. That Leonard J. Fruzinski standing in the place of Mayk Melnyk has no right in this Court to redeem as Melnyk had been determined by the original decree to be a fraud doer, and therefore has no standing in equity.

2. That by virtue of the declaration of trust the rents, issues and profits as between Melnyk and Novak belong to Novak, and that he was entitled therefore to the original sum of \$5,900 and that there was no obligation to account for any rents collected subsequent to the time fixed in the original decree.

3. That the provisions of the decree of December 15th which amended the original decree was erroneous in that the original decree should not have been amended at all as it contains a correct recital of the actual facts.

In addition to the appeal on the decree of December 15, 1921, Novak has filed a further appeal from the original decree to this extent: That the said decree determines that Novak should be charged with \$650 rents collected in excess of disbursements and that his lien was fixed at \$5,250. This original decree should have been limited in its effect to an accounting as between the creditors and Novak, and that as between Melnyk and Novak the decree should have fixed the sum at \$5,900. These are the only questions raised in this appeal and the issue is to be determined solely between the rights of the original grantor and his grantee. No claims of creditors are involved in it in any way.

POINT I.

The fraudulent grantor has no right to redeem.

The first question involved in the appeal in this case is the right of Leonard J. Fruzinski to redeem the lands and premises from the lien or title of the defendant Michael Novak.

On November 16, 1918, Mayk Melnyk and wife conveyed the lands and premises in question by warranty

deed to Michael Novak. Leonard J. Fruzinski was not a party to the original action and does not appear therein until October, 1921, when he secured an assignment of the interest of Mayk Melnyk in the premises and applied to be admitted to the cause as a party defendant. His interest was acquired from Mayk Melnyk admittedly with full knowledge of the situation and he simply stands in the place of Mayk Melnyk. His rights are the same as those of Mayk Melnyk and no greater. The defendant, Novak, insists that Melnyk and his assignee Fruzinski have no right to redeem because of the fact that Melnyk conveyed the property to Novak by warranty deed; that such conveyance was in fraud of creditors so far as Melnyk was concerned; that therefore neither Mayk Melnyk nor his assignee Leonard J. Fruzinski are entitled to any relief whatsoever in equity; and that equity will leave the legal title where it finds it so far as they are concerned.

The bill of complaint filed by the creditors of Mayk Melnyk alleged that the conveyance to Novak was fraudulent and asked that the same be set aside on that basis in order that they might satisfy their judgment liens. Melnyk filed no answer to the bill and in effect therefore confessed to all of the allegations of fraud set out in the bill. He even went so far as to testify in behalf of the complainants at the trial with respect to his own fraudulent conduct in this connection. His whole testimony is an admission that this conveyance so far as he was concerned was designed to get the property in the hands of some third party to hold it temporarily so that he could get it back and that creditors could not attach it in the meantime. He attempted to include Novak in this scheme, but failed. Novak's testimony was to the effect that he had no information of the judgment creditors, who were the complainants, or of any other claims, at the time of the conveyance; that he paid \$3,400.00 at the time of the transfer to him of the premises in question,

and had further put other money in the property to reduce prior liens; that he had no knowledge of any fraudulent intent on the part of Melnyk and held the legal title of the premises by virtue of the deed and in accordance with a declaration of trust which was signed by him contemporaneously with the deed. (See Exhibit, State of Case, page 105.)

The Court determined that the creditors were entitled to have the deed set aside in so far as to enable them to satisfy their judgment liens from the property, but that this right was subject to a prior right of Novak for money which he had put into the property. Accordingly, a final decree was entered on January 25, 1921, which decree contained a recital which reads as follows: "And it appearing from said decree and from the testimony that the deed of the said Mayk Melnyk and Olena Melnyk, his wife, to said Michael Novak, was made and executed by them with intent to cheat and defraud complainants, but was taken by the defendant Michael Novak to secure to him the sum of \$3,400 then advanced by him." In accordance with this finding the Court ordered that the bill be taken as confessed against Mayk Melnyk and Olena Melnyk, his wife, and that the deed be set aside in so far as "to enable the complainants to satisfy their said judgments from the premises herein described, but subject however to the equitable lien of the defendant Michael Novak and his taxed costs."

The finding above referred to was amended by the Chancery Court by the decree entered on the cross-bill of Leonard J. Fruzinski to redeem, dated the 15th day of December, 1921, but it is insisted on the part of the complainant that the original recital correctly represented the facts brought out in the testimony. Further, the cross bill itself does not seek an amendment to the original decree and the matter was not before the Court in any way at the time the second decree was entered.

We now come to the question, who is entitled to lands after the creditors' claims have been paid, Melnyk or Novak.

The legal status between the fraudulent grantor and his grantee and the right of the fraudulent grantor to secure a reconveyance of the property has been discussed very frequently in the courts of New Jersey. Equity always refuses to assist the fraudulent grantor or to enforce any right whatsoever that he may claim, and leaves the legal title and such rights as flow therefrom where the deed itself put it. Conveyances made in fraud of creditors are good between the parties, and equity will not set them aside and restore them to the original wrongdoer. This is so regardless of what may seem to give to the grantor unjust enrichment at the expense of the grantor. One of the later cases establishing this point is that of *Geroso v. DeMaio*, 75 N. J. Eq., p. 410. In that case the complainant sought to set aside a deed on the ground that it was voluntary, but the Court found it was made for the purpose of defrauding creditors. The Court determined that no relief should be granted to the complainant, the grantor, and says as follows:

“It is manifest that under these facts this court cannot grant relief to complainant, notwithstanding the fact that the effect of the decree will be, in effect, to enable the defendants to steal complainants' property.

The courts of this state have repeatedly and uniformly held that considerations of public policy as well as the express provisions of the statute of frauds forbid relief against a transaction of this nature.”

The Court quotes from a number of New Jersey cases to the same effect, such as *Marlatt v. Warwick*, 19 N. J. Eq., p. 439; *Den v. Shotwell*, 23 N. J. Law, p. 465; see same case on appeal, 24 N. J. Law, p. 791; *Baldwin v. Campfield*, 8 N. J. E., p. 891; *Schwalber v. Ehman*, 62 N. J. Eq., p. 314.

The general rule is so well established and recognized that it seems unnecessary to quote from these cases. All affirm the same rule, that a fraudulent grantor has no right whatsoever in the Court of Equity to the property which he has conveyed. "The law disallows all proceedings in respect to illegal contracts, not from any consideration of the relative position and rights of the parties, but upon grounds of public policy." (*Geroso v. DeMaio, supra.*) This is so even in spite of the fact that the objection may not have been actually set out in the answer filed by the defendants, as it is for the Court to determine in cases of fraud what are the rights of the parties. (*Geroso v. DeMaio, supra.*)

In view of the fact that all proceedings are disallowed the grantor has no right to a reconveyance of the property and no right either to enforce a resulting trust or an express agreement to reconvey the property. The agreement of November 18, 1918, in which Novak agreed to convey to Yacenty under certain terms cannot be enforced by Melnyk, or anyone in his behalf, as the original conveyance and plan of reconveyance was designed by Melnyk in fraud. To do so would be to enforce an illegal contract and equity will not aid a fraud doer. (See *Pitney v. Bolten*, 45 N. J. Eq., p. 639; Aff. 46 N. J. Eq., p. 610.)

The situation therefore is that the legal title passed to Novak under the deed. This was set aside only to enable creditors to satisfy their judgments, subject to a prior claim of Novak to the extent of \$5,250.00. Melnyk, the fraud doer, has no right, neither has his successor Leonard J. Fruzinski.

The following quotation states the rule clearly:

"Where a conveyance is set aside by creditors of the grantor as fraudulent as against creditors, it is set aside only as to such creditors and does not operate to invest title in the grantor, his heirs or one claiming under him, and the heirs of a grantor in a fraudulent conveyance cannot claim

the property as against the grantee where the creditors' claims have afterwards been satisfied by the grantee. Any surplus resulting from the property after the payment of creditors belongs to the grantee."

Moore on Fraudulent Conveyance, Volume II, page 649.

"The surplus of proceeds remaining or profits arising from the sale of property conveyed in fraud of creditors after satisfying the claims of such creditors belongs to the grantee or his heirs and representatives, and a judgment setting aside a conveyance should provide that on satisfying the creditors, the property be returned or the surplus of proceeds be paid to the grantee. The grantor in a fraudulent conveyance or one claiming under him has no right to maintain a bill in equity against the grantee for an account of such proceeds or profits, although there was an agreement to that effect."

Moore on Fraudulent Conveyance, Volume II, page 660.

"A reconveyance (to the grantor) will not be enforced though provided for by an agreement entered into at the time * * * of the conveyance or subsequently."

Moore (*supra*, page 649).

Same rule, 12 Ruling Case Law, page 648. See also Note in 50 L. R. A. (new series), at pages 335-336.

The same rule was considered in the case of *Bourgeois v. Risley Real Estate Co.*, 82 N. J. Eq., p. 211. We quote from the opinion as follows:

"In the case of *Campbell v. Weber*, 80 N. J. Eq., p. 553, the Court of Errors and Appeals plainly intimated its view of the status of a fraudulent grantee when attacked by a judgment creditor. In that case a judgment creditor conveyed lands to his wife, through an intermediary in fraud of creditor and in setting the deed aside, Vice-Chancellor Walker expressed himself, that the present estate of the wife 'must be swept away from her because it rests upon the conveyances made to defraud the complainant or creditor; so

much, at least, as is necessary, must be swept away, but the balance, if any will be hers.' In affirming the decree the Court of Errors and Appeals took exception to this language, saying, 'We prefer to say she took an estate in fee simple, subject to the right of the judgment creditor to have the conveyance treated as void as against his debt.' This is to be regarded as a declaration that the fraudulent creditors' (grantee?) status is not to be disturbed more than is necessary to make the creditor whole." *Bourgeois v. Risley Land Co.*, at 216-217.

It is therefore respectfully insisted that the bill of Leonard J. Fruzinski to redeem the property or to have a reconveyance thereof should have been dismissed by the Court of Chancery on the ground that equity will not grant relief to a fraud doer, and that the decree of December 15, 1921, permitting such a redemption was erroneous.

POINT II.

Novak is entitled to all rents arising from the premises.

If the Court should determine that Leonard J. Fruzinski is entitled to redeem the premises, the question then arises upon what basis or terms. The defendant Novak insists that if redemption be allowed it should be limited in its terms to the provisions of the agreement entered into between Melnyk and Novak, of November 16, 1918, and described as a declaration of trust. This agreement is found on page 105 of the State of the Case, and provides, first, that he, Novak, will hold and continue to hold the premises in trust for the following uses and purposes: to collect the rents, issues and profits of the said lands and premises and apply the same to the payment of interest on the mortgage thereon and to taxes, insurance, assessments, water and all other municipal rates or charges, * * * and that he, Novak, will convey the property to Nicholas Yacenty provided

that the request to so convey shall be made within three years from the date hereof, and upon the repayment to him of the sum of \$3,400 advanced by him upon the execution of the deed aforesaid, and the said declaration of trust, and all moneys advanced by him in and about the alteration of the building, upon the first tract above described * * * with interest on said sum at 6% per annum, "*all rents, profits, and issues arising from and through said premises are to be retained by me (Novak), after the payment of taxes, assessments, municipal charges and rates, etc., and the making of ordinary repairs, as and for my (Novak), services in connection with the handling of said premises.*" And further provided that if the conveyance shall be requested within two years Yacenty should pay in addition the sum of \$500 over and above any and all rents collected by me (Novak), and remaining after the payment of the charges aforesaid, as and for my (Novak) services in connection with the handling of said premises, but in the event that the said Yacenty requesting said conveyance after the expiration of two years from the date hereof, then I (Novak) shall and will convey said premises without the payment of \$500 retaining only as and for my services in connection with the handling of said premises the said rents and profits arising from said premises remaining after deducting therefrom the taxes, interest, insurance, water rates, etc. As between Melnyk and his assignees Fruzinski and Novak this agreement controls if Fruzinski is to be allowed to redeem.

The decree of January 25, 1921, provided that Novak should receive the \$500 for services and further provided that he should account for the rents, issues and profits collected and should be charged with the sum of \$650 being the amount of rents received over and above charges and expenses. The determination is found in the decree in the suit brought by creditors. The creditors' rights are not now involved so we have no ob-

jection to the amount fixed except in so far as it may be considered as applicable to the situation now existing between Fruzinski and Novak. As between Novak and Fruzinski this \$650 is an improper and erroneous credit, and the sum instead of \$5,250 on December 1, 1920, should have been \$5,900. The decree of December 15, 1921, further provided that Novak should account to Leonard J. Fruzinski for the rents, issues and profits arising since December 1, 1920. These rents are in exactly the same situation as those collected before the final decree of January 25, 1921.

Under and by virtue of his agreement Novak is entitled to keep as and for his services these rents and Melnyk and Fruzinski are bound by the terms of the agreement under which Novak took possession. The agreement, if enforceable at all, should be enforceable as to all its terms. If Leonard J. Fruzinski is to be allowed to redeem at all it should only be after allowing Novak to retain all the rents collected as and for his services in accordance with the specific terms of the agreement entered into between the parties.

It is therefore respectfully insisted that he is entitled to \$5,900, with interest, and without charging him thereon for rents collected in excess of charges, either prior to December 1, 1920, or subsequent thereto, and that the decrees in Chancery should be modified accordingly.

Respectfully submitted,

RIKER & RIKER,
Solicitors for Michael Novak, Defendant.

THEO. McC. MARSH,
Of Counsel.

