

INDEX

	PAGE
Notice of Appeal	1
Petition of Appeal.....	2
Interlocutory Decree	10
Bill of Complaint	15
Exhibit A	29
Exhibit B	30
Exhibit C	31
Exhibit D	32
Exhibit E	32
Exhibit F	33
Affidavit of Otto A. Stiefel	34
Order of Restraint	37
Order Continuing Restraint	39
Answer and Counter-claim	41
Affidavit of Reynolds C. Massey	55
Affidavit of Charles E. Dalrymple.....	57
Order to Show Cause	60
Replication and Answer to Counter-claim..	62
Affidavit of Otto A. Stiefel.....	65
Restraining Order	69
Defendant's' Replication to Counter-claim.	73
Answer of Clara Seider and Others to Counter-claim	74
Answer of Louis A. Kempf to Counter- claim	76
Answer of John Grabach to Counter-claim.	79
Replication	82
Decree Pro Confesso	83
Replication to Answer of Louis A. Kempf.	85
Replication to Answer of John Grabach....	86
Replication to Answer of Martha Shaw and Others	87
Deposition of Otto G. Horster.....	88

	PAGE
TESTIMONY.	
<i>For Complainants.</i>	
Charles H. Imhoff,	
direct examination	117
cross "	118
Norbury C. Murray,	
direct examination	122
cross "	130
re-direct "	132
John Contrell, Jr.,	
direct examination	133
Howard Kirk,	
direct examination	135
cross "	137
re-direct "	138
Hugo B. Woerner,	
direct examination	138
cross "	140
<i>For Defendants.</i>	
George T. Vickers,	
direct examination	143
cross "	146, 150
Charles Dalrymple,	
direct examination	155
cross "	160
Louis Kempf,	
direct examination	162
cross "	165
Ellen Minchin,	
direct examination	167
cross "	170
Otto A. Stiefel,	
direct examination	171
cross "	172

	Off'd	P't'd
EXHIBITS.		
D. 1. (Also C. 1.) Bill of Sale....	94, 122	177
D. 2. Deed	94, 122	179
D. 3. Trust Agreement	94, 122	183
C. 4. Four Letters	129	188
C. 2 and C. 3. Stock Certificates of Stuyvesant Development Company	129	192
C. 5, C. 6 and C. 7. Assignments and Promissory Note	136	192
C. 8. Letter—Horster to Kempf...	141	192
C. 9. Letter—Lehlbach to Horster.	141	194
Stipulation re Claims.....		196
Affidavit of Olive V. Wetsell.....		198
Affidavit of Mary Ulicsnik		201
Affidavit of Herman F. Nagel		203
Affidavit of George T. Rockwell...		204
Affidavit of Karl Riester		206
Exhibits D. 1 to D. 5.....	156	
Affidavit of Ellen Minchin		208
Affidavit of Charles W. Weeks...		212
Orders and Writs in Attachment Suit		214
Opinion of Vice-Chancellor		228

NOTICE OF APPEAL.

Filed February 10, 1928.

62—696.

In Chancery of New Jersey 10

Between

MARY ULICSNIK and others,
Complainants,

and

CHARLES E. DALRYMPLE and
others,

Defendants.

On Bill.

*Notice of
Appeal.*

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The complainants hereby appeal from the interlocutory decree (advised by Hon. Alonzo Church, Vice-Chancellor, which decree bears date February 1, 1928), and from the whole and every part thereof, made in this Court, in the above-stated cause, to the Court of Errors and Appeals in the last resort in all causes.

Dated, February 9, 1928.

OTTO A. STIEFEL, 30
Solicitor for and of Counsel
with Complainants.

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

OTTO A. STIEFEL,
Of Counsel with Complainants.

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PETITION OF APPEAL.

Filed February 25, 1928.

New Jersey Court of Errors and Appeals

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Between

MARY ULICSNIK, UNION CEMETERY ASSOCIATION, GEORGE T. ROCKWELL, KARL RIESTER and BERTHA, his wife, and HERMAN NAGEL,

Complainants-Appellants,

and

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CHARLES E. DALRYMPLE, ELLEN MINCHIN, MARY E. RILEY, MARGARET McLAUGHLIN, OTTO G. HORSTER, HELEN C. HORSTER, STUYVESANT DEVELOPMENT COMPANY and FIRST NATIONAL BANK OF HOBOKEN,

Defendants-Respondents,

and

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CLARA SIEDER, MARTHA SHAW, MINNA DOVER, REINHOLD KNIEP, LOUIS KNIEP, ANNA KRAEMER, KARL KNIEP, LUDWIG LAUERHAUS, LOUIS KEMPF and JOHN GRABACH,

Defendants-Appellants.

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On Bill.

Petition of Appeal from a Decree of the Court of Chancery.

Petition of Appeal.

To the Honorable Court of Errors and Appeals in the last resort in all causes:

The petition of Mary Ulicsnik, Union Cemetery Association, George T. Rockwell, Karl Riester and Bertha, his wife; Herman Nagel, Clara Sieder, Martha Shaw, Minna Dover, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep, Ludwig Lauerhaus, Louis Kempf and John Grabach, the appellants in the above-entitled cause, shows that:

Petitioners find themselves aggrieved by an interlocutory decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date February 1, 1927, in a certain cause wherein said Mary Ulicsnik, Union Cemetery Association, George T. Rockwell, Karl Riester and Bertha, his wife, as well as Herman Nagel, are complainants and said Charles E. Dalrymple, Ellen Minchin, Mary E. Riley, Margaret McLaughlin, Helen C. Horster, Stuyvesant Development Company, First National Bank of Hoboken, Clara Sieder, Martha Shaw, Minna Dover, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep, Ludwig Lauerhaus, Louis Kempf and John Grabach are defendants, and find themselves thus aggrieved in this respect, to wit:

That said decree orders, adjudges and decrees as follows:

First—"that the assignments and transfers made and dated December 15 and 16, 1925, and given by Otto G. Horster to Louis Kempf, whereby said Otto G. Horster assigned and transferred to said Louis Kempf the ten shares of capital stock of Stuyvesant Development Company and an alleged interest in certain bonds valued at

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Petition of Appeal.

\$15,000.00, be and they are hereby set aside as null and void and of no effect,"

10 Second—"that the assignment or bill of sale made and dated on or about December 22, 1925, whereby said Otto G. Horster sold, assigned or transferred to George T. Rockwell, Karl Kniep and Mary Ulicsnik, his entire real and personal estate, be and the same is hereby set aside as null and void and of no effect,"

20 Third—"that the deed of real estate made and dated on or about December 22, 1925, and recorded in Book T 73 of Deeds for Essex County at page 122, whereby said Otto G. Horster and Helen C. Horster, his wife, conveyed certain real estate in the City of East Orange to George T. Rockwell, Karl Kniep and Mary Ulicsnik, be and the same is hereby set aside as null and void and of no effect, provided, however, that any interest complainants may have acquired by said conveyance from Mrs. Horster is reserved to them,"

30 Fourth—"that Charles F. Lynch be and he hereby is appointed receiver of the rights and credits, moneys and effects, goods and chattels and real estate named and described in, or comprehended by, the aforesaid sales, assignments, transfers and deed, particular reference being made to the following items:

1. Ten shares of stock in the Stuyvesant Development Company, standing in the name of Otto G. Horster.

2. All the right, title and interest of Otto G. Horster in and to certain bonds of Union Cemetery Association, alleged to have been, on December 15, 1925, in the hands of the president of the First National Bank of Hoboken.

40 3. All the right, title and interest of Otto G. Horster in and to a certain collection of postage stamps alleged on Decem-

Petition of Appeal.

ber 22, 1925, to have been in the hands of Fidelity Union Trust Company as collateral security for a debt.

4. All the right, title and interest of Otto G. Horster in and to the real estate heretofore mentioned.

5. A certain check in the sum of \$10,000.00 drawn by Stuyvesant Development Company on the First National Bank of Hoboken, payable to Otto G. Horster and certified, which is now on deposit with the Clerk of this Court. 10

6. All other property of said Otto G. Horster, whether real, personal or mixed, excepting his household furniture, and bank account on deposit with Liberty Trust Company,"

Fifth—"that the receiver, before entering upon his duties, give bond to the Chancellor, with sufficient sureties to be approved by Francis Child, one of the Special Masters of this Court, in the sum of Fifteen Thousand Dollars conditioned that he faithfully perform his duties as such receiver," 20

Sixth—"that any and all persons shall, upon presentation of a certified copy of this decree, make proper assignment, conveyance and delivery to the receiver of any and all property of the defendant, Otto G. Horster, heretofore described, in their possession or under their control, and that all suits or other proceedings against the said property be and the same are hereby stayed," 30

Seventh—"that until the further order of this Court, the receiver be and he is hereby authorized forthwith to take and have complete and exclusive control, possession and custody of all of the said property, including the right to collect income therefrom," 40

Petition of Appeal.

10 Eighth—"that the said receiver shall, and he hereby is authorized to institute, prosecute or defend, compromise, adjust, intervene in or become a party to such suits, actions, or proceedings in law or in equity as may in his judgment be necessary or proper for the discovery, recovery, protection, maintenance and preservation of the assets of Otto G. Horster, hereinbefore described,"

Ninth—"that the receiver may use the subpoena of this Court to bring before him such persons or evidence as he may deem necessary and proper for examination, to the end that a complete recovery of the said assets may be made,"

20 Tenth—"that the receiver take into possession all the assets of the said Otto G. Horster, and proceed to collect all choses in action and reduce them all to cash on such terms as he may deem for the best interest of the creditors without the necessity of obtaining prior approval of this Court, and, upon the discovery, recovery and conversion to cash of all of said assets which he can find, report to this Court the amount in his hands for distribution,"

30 Eleventh—"that the receiver inquire into the amount, validity and priority of the claims of the complainants and the defendants in and to the said assets and report thereon to this Court,"

Twelfth—"that the question of priority of claims of all the parties to this suit in and to the assets in the hands of said receiver, and also the question of the amount due to the auditor in attachment and the amount of fees to be allowed counsel, be reserved for adjudication upon the coming in of the receiver's report."

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Petition of Appeal.

And petitioners humbly appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

1. That it orders, adjudges and decrees that the assignments and transfers to Louis Kempf, above mentioned, be set aside as null and void and of no effect. 10

2. That it orders, adjudges and decrees that the assignment or bill of sale to George T. Rockwell, Karl Kniep and Mary Ulicsnik, made and dated on or about December 22, 1925, be set aside as null and void and of no effect.

3. That said decree orders, adjudges and decrees that the deed of real estate made and dated on or about December 22, 1925, whereby Otto G. Horster and Helen C. Horster, his wife, conveyed certain real estate in the City of East Orange to George T. Rockwell, Karl Kniep and Mary Ulicsnik be set aside as null and void and of no effect. 20

4. That in and by said decree Charles F. Lynch was appointed receiver of all the property "described in or comprehended by the aforesaid sales, assignments, transfers and deed." 30

5. That in and by said decree it is ordered, adjudged and decreed that all persons shall upon presentation of a certified copy of said decree make proper assignments, conveyance and delivery of all property aforesaid in their possession or under their control, and that all suits or other proceedings against the said property be stayed by said decree.

6. That in and by said decree it is ordered, adjudged and decreed that the said receiver is 40

Petition of Appeal.

authorized forthwith to have complete and exclusive control, possession and custody of all the property aforesaid, including the right to collect income therefrom.

10 7. That in and by said decree, said receiver is authorized to institute, prosecute or defend, compromise, adjust, intervene in or become a party to such suits, actions or proceedings in law or in equity as may in his judgment be necessary or proper for the discovery, recovery, protection, maintenance and preservation of all the property aforesaid.

20 8. That in and by said decree it is ordered, adjudged and decreed that the receiver aforesaid take into his possession all the property aforesaid and proceed to reduce part of the same to cash and upon the discovery, recovery and conversion to cash of all said property (together with any other property which he may convert into cash) to report to this Court the amount in his hands for distribution.

30 9. That in and by said decree it is not adjudged that the assignment to Louis Kempf of the ten shares of capital stock of Stuyvesant Development Company was a good and valid assignment of said shares as security for the payment of the indebtedness of Otto G. Horster to Union Cemetery Association, existing on December 15, 1925, together with all interest accrued and to accrue thereon, and that by such assignment said Louis Kempf, as trustee for Union Cemetery Association, and said association, as beneficiary, were entitled to have and to hold said shares of stock, as security, for said debt and interest until the payment or satisfaction thereof, against all claims and demands of Charles E.

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Petition of Appeal.

Dalrymple, Ellen Minchin, Margaret McLaughlin and Mary E. Riley.

10 10. That in and by said decree it was not adjudged that said Charles E. Dalrymple, Ellen Minchin, Mary Riley and Margaret McLaughlin have no right, title and interest in the check for \$10,000.00 above mentioned, or the proceeds thereof.

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11. That in and by said decree it was not adjudged that the rights of Mary Ulicsnik, Karl Riester and Bertha, his wife; George T. Rockwell, Herman Nagel, Karl Kniep and John Grabach in and to said check for \$10,000.00, the stock aforesaid of Stuyvesant Development Company, the real property aforesaid, the proceeds of the stamp collection aforesaid, and the proceeds of the cemetery bonds aforesaid, were to the extent of the debts hereinafter set forth, before, prior and paramount to any rights of Charles E. Dalrymple, Ellen Minchin, Mary Riley and Margaret McLaughlin therein, viz.:

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Mary Ulicsnik	\$9,500.00	
George T. Rockwell	10,000.00	
Karl Kniep	10,000.00	
Karl Riester and Bertha, his		
wife	9,000.00	30
Herman Nagel	500.00	
John Grabach	450.00	
Plus interest in each instance.		

Petitioners, therefore, pray that said decree of the Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and the petitioners may have such other and further relief in the premises as to this Court shall seem proper.

OTTO A. STIEFEL, 40
Solicitor for and of Counsel with Appellants.

INTERLOCUTORY DECREE.

Filed February 1, 1928.

Dkt. 62-696

IN CHANCERY OF NEW JERSEY.

10

Between

MARY ULICSNIK, *et als.*,

Complainants,

and

CHARLES E. DALRYMPLE,
et als.,

Defendants.

On Bill, &c.

*Interlocutory
Decree.*

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This cause having come on to be heard in the presence of Otto A. Stiefel, solicitor of complainants, Arthur T. Vanderbilt, by Reynolds C. Massey, solicitor of the defendants Ellen Minchin and Mary E. Riley, Hugo Woerner, solicitor of the defendants Clara Sieder, Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep and Ludwig Lauerhaus, Lehlbach, Johnson & Ormond, by Frederick A. Lehlbach, solicitor of the defendant Louis Kempf, Arthur A. Werthmann, solicitor of the defendant John Grabach, and Charles M. Myers, solicitor of the defendant Margaret McLaughlin, and it appearing that decree *pro confesso* on the counterclaim has been taken against the defendants, Otto G. Horster, Helen C. Horster, Charles E. Dalrymple, Stuyvesant Development Company and First National Bank of Hoboken, and the Court having examined the pleadings and having taken proofs orally and in open court and heard

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Interlocutory Decree.

the arguments of counsel thereon, and the Court having duly considered the said pleadings, proofs and arguments, and it appearing to the satisfaction of the Court that the transfers of property hereinafter described are fraudulent, and that the defendants Ellen Minchin, Mary E. Riley and Margaret McLaughlin are entitled to relief from the result of such fraud:

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It is on this 1st day of February, 1928, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, that the assignments and transfers made and dated December 15th and 16, 1925, and given by Otto G. Horster to Louis Kempf, whereby said Otto G. Horster assigned and transferred to said Louis Kempf the ten shares of capital stock of Stuyvesant Development Company and an alleged interest in certain bonds valued at \$15,000.00, be and they are hereby set aside as null and void and of no effect, and

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the assignment or bill of sale made and dated on or about December 22, 1925, whereby said Otto G. Horster, sold, assigned or transferred to George T. Rockwell, Karl Kniep and Mary Ulicsник, his entire real and personal estate, be and the same is hereby set aside as null and void and of no effect, and

30

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the deed of real estate made and dated on or about December 22, 1925, and recorded in Book T 73 of Deeds for Essex County at page 122, whereby said Otto G. Horster and Helen C. Horster, his wife, conveyed certain real estate in the City of East Orange to George T. Rockwell, Karl Kniep and Mary Ulicsник, be and the same is hereby set aside as null and void and of no

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Interlocutory Decree.

effect, provided however that any interest complainants may have acquired by said conveyance from Mrs. Horster is reserved to them—

10 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Charles F. Lynch be and he hereby is appointed receiver of the rights and credits, moneys and effects, goods and chattels and real estate named and described in, or comprehended by, the aforesaid sales, assignments, transfers and deed, particular reference being made to the following items:

1. Ten shares of stock in the Stuyvesant Development Company, standing in the name of Otto G. Horster.

20 2. All the right, title and interest of Otto G. Horster in and to certain bonds of Union Cemetery Association, alleged to have been, on December 15, 1925, in the hands of the president of the First National Bank of Hoboken.

3. All the right, title and interest of Otto G. Horster in and to a certain collection of postage stamps alleged on December 22, 1925, to have been in the hands of Fidelity Union Trust Company as collateral security for a debt.

30 4. All the right, title and interest of Otto G. Horster in and to the real estate heretofore mentioned.

5. A certain check in the sum of \$10,000.00 drawn by Stuyvesant Development Company on the First National Bank of Hoboken, payable to Otto G. Horster and certified, which is now on deposit with the Clerk of this Court.

40 6. All other property of said Otto G. Horster whether real, personal or mixed, excepting his household furniture, and bank account on deposit with Liberty Trust Company, and

Interlocutory Decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the receiver, before entering upon his duties, give bond to the Chancellor, with sufficient sureties to be approved by Francis Child one of the Special Masters of this Court in the sum of Fifteen thousand dollars conditioned that he faithfully perform his duties as such receiver, and 10

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any and all persons shall, upon presentation of a certified copy of this decree, make proper assignment, conveyance and delivery to the receiver of any and all property of the defendant, Otto G. Horster, heretofore described, in their possession or under their control, and that all suits or other proceedings against the said property be and the same are hereby stayed, and 20

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that until the further order of this Court, the receiver be and he is hereby authorized forthwith to take and have complete and exclusive control, possession and custody of all of the said property, including the right to collect income therefrom, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said receiver shall, and he hereby is authorized to institute, prosecute or defend, compromise, adjust, intervene in or become a party to such suits, actions, or proceedings in law or in equity as may in his judgment be necessary or proper for the discovery, recovery, protection, maintenance and preservation of the assets of Otto G. Horster, hereinbefore described, and 30

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the receiver may use the subpoena of this Court to bring before him such persons or evidence as he may deem necessary and proper for 40

Interlocutory Decree.

examination, to the end that a complete discovery of the said assets may be made, and

10 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the receiver take into possession all the assets of the said Otto G. Horster, and proceed to collect all choses in action and reduce them all to cash on such terms as he may deem for the best interest of the creditors without the necessity of obtaining prior approval of this Court, and, upon the discovery, recovery and conversion to cash of all of said assets which he can find, report to this Court the amount in his hands for distribution, and

20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the receiver inquire into the amount, validity and priority of the claims of the complainants and the defendants in and to the said assets, and report thereon to this Court, and

30 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the question of priority of claims of all the parties to this suit in and to the assets in the hands of said receiver, and also the question of the amount due to the auditor in attachment and the amount of fees to be allowed counsel, be reserved for adjudication upon the coming in of the receiver's report.

EDWIN ROBERT WALKER,

C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

BILL OF COMPLAINT.

Filed January 7, 1927.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chan- 10
cellor of the State of New Jersey.

The complainants, Mary Ulicsnik of the Township of Maplewood, Essex County, New Jersey; Union Cemetery Association, a corporation, whose principal office is in the City of Newark, in said County; Karl Riester and Bertha, his wife; Herman Nagel and George T. Rockwell, of said city, respectfully show that:

1. Union Cemetery Association is a corpora- 20
tion duly organized and subsisting under the laws of the State of New Jersey. Pursuant to the provisions of the statute entitled "An Act to authorize the incorporation of rural cemetery associations and regulate cemeteries" said corporation and its affairs are managed by trustees. Said corporation, at all times hereinafter mentioned, was existent and was managed in the manner just set forth.

2. On December 15, 1925, one Louis Kempf 30
was one of the trustees of said corporation.

3. On said day one Otto G. Horster was indebted to and liable to said Union Cemetery Association for and on account of moneys received by said Otto G. Horster, theretofore, for the use of said Association, as well as for interest upon said moneys. The amount of the principal of said indebtedness was in excess of \$22,000.00, and as nearly as these complainants 40

Bill of Complaint.

can now state, and according to the best of their knowledge, information and belief was \$22,500.00.

10 4. In order to secure the payment of the principal amount due to Union Cemetery Association as just set forth, as well as all interest accrued and to accrue thereon, said Otto G. Horster on or about said December 15, 1925, delivered to said Louis Kempf as trustee as aforesaid and for and on behalf of said Union Cemetery Association the following described securities, promissory note, and assignments of bonds and of shares of stock, namely:

20 (a) Certificate, issued by Stuyvesant Development Co., a New Jersey corporation unto said Otto G. Horster, certifying that he is the owner of three shares of the capital stock of said company, a copy of which certificate marked Exhibit A, is hereto annexed and made a part hereof.

(b) Certificate, issued by Stuyvesant Development Co., a New Jersey corporation unto said Otto G. Horster, certifying that he is the owner of seven shares of the capital stock of said company, a copy of which certificate, marked Exhibit B, is hereto annexed and made a part hereof.

30 (c) Assignments, respectively, of said shares of stock, in writing, endorsed upon the aforesaid certificates, signed by said Otto G. Horster the forms of which said assignments are respectively set forth at the foot of Exhibit A and at the foot of Exhibit B aforesaid.

40 (d) An assignment of said shares of stock bearing date December 15, 1925, signed by said Otto G. Horster, a copy whereof is hereto annexed, marked Exhibit C and made a part hereof.

Bill of Complaint.

(e) A written assignment of certain bonds of Union Cemetery Association held at that time by a certain Committee of which the president of the First National Bank of Hoboken was then a member, which bonds are described in said assignment, of which a copy is hereto annexed, made a part hereof and marked Exhibit D. 10

(f) A promissory note of said Otto G. Horster of the terms and tenor of Exhibit E hereto annexed and made a part hereof.

5. The bonds described in Exhibit D were one-third of certain bonds theretofore deposited with the Committee aforesaid by Stuyvesant Development Co. Complainants are credibly informed and verily believe that said bonds are bonds purporting to have been issued by complainant Union Cemetery Association. 20

6. No part of the indebtedness of said Otto G. Horster aforesaid, since the delivery of the note, securities and assignments of bonds and shares of stock, has been paid.

7. In the month of December, 1925, Otto G. Horster, above-mentioned, was indebted and liable to complainants Mary Ulicsnik, George T. Rockwell, Karl Riester (and Bertha, his wife) and Herman Nagel, as well as to a certain Karl Kniep and a certain John Grabach, for and on account of sundry monies received, respectively from said persons, for their respective uses, as well as for interest upon said monies. 30

Bill of Complaint.

8. The respective amounts of the monies thus received are as follows:

	From Karl Kniep	\$ 9,000.00
	“ Karl Riester and his	
	said wife	9,000.00
	“ Mary Ulicsnik	9,500.00
10	“ George T. Rockwell....	10,000.00
	“ Herman Nagel	500.00
	“ John Grabach	450.00

9. In order to secure the payment of the amounts due to respective parties just named, as well as all interest accrued and to accrue thereon, and also all costs incurred and to be incurred in that connection, said Otto G. Horster, did, in the month of December, 1925, deliver unto said Mary Ulicsnik, Karl Kniep and George T. Rockwell, the following:

(a) A bill of sale unto said three persons last named, made and executed under the hand and seal of said Otto G. Horster, in and by which bill of sale, said Otto G. Horster did grant, bargain, sell, assign, transfer and set over unto said three persons (and their survivor or survivors, their administrators, executors, successors and assigns) personal property and choses in action, owned by said Otto G. Horster, described in said bill of sale, in part as follows, viz: “All of my right, title and interest in and to my shares of the capital stock of Stuyvesant Development Company and in and to all and singular the assets of said Company.”

(b) The deed of said Otto G. Horster and Helen C. Horster, his wife, conveying to said George T. Rockwell, Karl Kniep and Mary Ulicsnik, as joint tenants, certain premises in the City of East Orange, Essex County, New Jersey;

Bill of Complaint.

(c) An instrument evidencing an agreement between said George T. Rockwell, Karl Kniep and Mary Ulicsnik, of the one part, and said Otto G. Horster and Helen C. Horster, his wife, in and by which it is provided that the aforesaid conveyance and the sale, transfer and assignment evidenced by the aforesaid bill of sale, were made as security for the payment of all and singular the debts and liabilities listed above in paragraph 8 of this bill of complaint, “together with interest and costs.”

10. The just described bill of sale, deed and instrument evidencing their purposes are in the possession of Mary Ulicsnik, one of these complainants; and these complainants hereby offer to produce the same if that appear to be necessary or if they be required so to do.

11. Said deed on December 22, 1925, and again on December 31, 1925, was duly acknowledged according to law by Otto G. Horster and Helen C. Horster. Thereafter, namely, on January 4, 1926, said deed was duly recorded (pursuant to the form of the statute in such case made and provided) in the Office of the Register of Deeds and Mortgages for the County of Essex, on pages 122-123 of Book T 73 of Deeds for said County.

12. The premises conveyed by said deed are commonly known as No. 158 Steuben street, in East Orange aforesaid. The value of said premises does not exceed \$15,000.00 and possibly no more than \$10,000.00 may be realized upon a sale and conveyance thereof.

13. Said premises consists of a tract of land (having a frontage of twenty-five feet on Steuben street and being about one hundred feet in depth) and a “two family” dwelling house erected there-

Bill of Complaint.

on; said dwelling was erected many years ago and in contrast with two family dwelling houses of a more modern type, is not so attractive as to warrant any expectation or belief that more than \$10,000.00, as aforesaid, could be realized therefrom.

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14. The above-mentioned bill of sale executed by Otto G. Horster, sold, assigned, transferred and set over unto Mary Ulicsnik, Karl Kniep and George T. Rockwell, in addition to the interest of Otto G. Horster in the above-mentioned shares of stock of Stuyvesant Development Co., and the assets of said Company, all his right, title and interest in certain other personal property and choses in action; such other personal property and choses of action are enumerated in said bill of sale as follows:

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"2. All my right, title and interest in and to certain bonds of Union Cemetery Association which I own or in which I have an interest."

"3. All my right, title and interest in and to my collection of postage stamps."

"4. All my right, title and interest in and to my 'Title Searching Plant.' "

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"5. Except as hereinafter reserved, all monies whatsoever, due or to grow due to me."

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"6. All of my property, real and personal of whatsoever the same may consist and wheresoever the same may be situate, whether cognate or akin to the above specifically described property or not, and I hereby agree to do whatever is necessary or proper to enable the transferees herein named to obtain possession of, and the proper evidence of title to, the property hereby conveyed and/or transferred, excepting and reserving from the effect of this instrument, however,

Bill of Complaint.

all of my household furniture and also to the extent of \$500, my bank balance."

15. No part of the indebtedness of Otto G. Horster described in paragraphs 7 and 8 of this bill of complaint has been paid or satisfied.

16. In the months of December, 1925, and January, 1926, due and sufficient notice was given to Stuyvesant Development Co., above-mentioned, of the assignments and transfers and transactions described in paragraphs 4 and 9 of this bill of complaint, and of the claims and demands of the various parties, above mentioned, arising therefrom.

10

17. Stuyvesant Development Co. is a corporation organized under the laws of the State of New Jersey and was such at all times hereinbefore mentioned; it was organized and subsists under and by virtue of the provisions of an act entitled "An Act concerning corporations (Revision of 1896)." During the course of its existence, it has issued, of its authorized capital stock, thirty shares; of said shares one-third in number were issued to Otto G. Horster aforesaid, one-third to John J. Fallon, Esq., of Hoboken, New Jersey, and one-third to George T. Vickers, of Jersey City. Said shares were issued and outstanding at all times hereinbefore mentioned and they constitute all the shares of the capital stock of the company now issued and outstanding.

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18. At all times hereinbefore and hereinafter stated said Otto G. Horster, John J. Fallon and George T. Vickers constituted the Board of Directors of Stuyvesant Development Co., the said George T. Vickers, in addition being president of said company, the said Fallon being its treasurer and the said Horster its secretary.

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Bill of Complaint.

19. On March 5, 1926, after notice given as above set forth, Stuyvesant Development Co. took certain steps with a view to distributing ratably amongst its stockholders or their assigns a fund of \$30,000.00, belonging to said company, capable of such distribution. In that connection there was paid to George T. Vickers aforesaid the sum of \$10,000.00 and to John J. Fallon a like sum. At the same time the company caused to be drawn its check on First National Bank of Hoboken (a national bank doing business in the State of New Jersey) payable in the sum of \$10,000.00 to the order of Otto G. Horster.

20. Said check was entrusted to the president of Stuyvesant Development Co., George T. Vickers above mentioned; and at the same time said George T. Vickers was instructed by said company not to deliver said check to said Otto G. Horster unless all the above-mentioned assignees gave their consent thereto, that is to say, unless Union Cemetery Association, Louis Kempf, Mary Ulicsnik, Karl Kniep and George T. Rockwell gave such consent.

21. On March 11, 1926, there was held at the office of Norbury C. Murray, then attorney of Otto G. Horster (in the City of Newark, County of Essex aforesaid) a meeting and conference of all the parties interested in said check by reason of the matters and things hereinbefore set forth—including said Otto G. Horster and said Stuyvesant Development Co. Each and every one of said parties was there represented by his, her or its attorney or agent, duly authorized in that behalf.

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Bill of Complaint.

22. Otto G. Horster was not a participant in said conference in person, but attended during said conference at the office of his said attorney; and then and there he, said Otto G. Horster, by and through his said attorney duly authorized in that behalf disclaimed all and any right to have and receive said check aforesaid or the moneys represented thereby and offered himself ready and willing to endorse said check in blank or otherwise for the benefit of all the assignees aforesaid or such assignee or assignees, amongst them, as they might agree upon, or as might afterwards be determined entitled to receive said check or the proceeds thereof. Said assignees were unable to unanimously agree as to which one of them or which of them was or were entitled to or should receive said check and the whole proceeds thereof, but it was finally agreed at said conference by all the parties represented there (including Stuyvesant Development Co. aforesaid and George T. Vickers its president) that the latter should procure the certification of said check and hold the same certified for the benefit of said assignees, and deliver said check to such one or more of them as they might agree upon or as might be determined in or by a competent suit in that behalf, upon satisfactory proof of such agreement or of such determination.

23. Pursuant to said agreement, and with the full knowledge and consent of all the stockholders and directors, above mentioned, of Stuyvesant Development Co., said George T. Vickers procured the certification of said check by First National Bank of Hoboken aforesaid, such certification being made on March 13, 1926; and said George T. Vickers from said date, held said check so certified, for the benefit of the assignees

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Bill of Complaint.

above mentioned pursuant to the aforesaid agreement in that behalf—until (in breach and disregard of said agreement and the trusts therefrom arising) he afterwards, namely, on or about November 9, 1926, delivered said check to one Charles E. Dalrymple.

10 24. Said Charles E. Darymple is the person of that name mentioned and referred to in a certain order made by Honorable William S. Gum-
mere, Chief Justice of the New Jersey Supreme Court in a certain action wherein Ellen Minchin is plaintiff and Otto G. Horster is defendant, a copy of which order is hereto annexed, marked Exhibit F and made a part hereof.

20 25. Said action was commenced by the issuance of a writ of attachment out of the Supreme Court of the State of New Jersey on March 20, 1926. In and by said writ the Sheriff of the County of Hudson was commanded to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Otto G. Horster, defendant, wheresoever they might be found in said County, to compel his appearance to answer said Ellen Minchin in an action at law.

30 26. Under and by virtue of said writ John M. Hamman, Sheriff of Hudson County, pretended to execute said writ by going to the office of said George T. Vickers, in Jersey City, and then and there declaring that he attached the rights and credits, moneys and effects, goods and chattels, lands and tenements of Otto G. Horster, said defendant in said suit; and by making an inventory and appraisal of his property allegedly attached, namely, "a certified check, for \$10,000.00 in the possession of Colonel Vickers, at 999
40 Bergen avenue, Jersey City due the defendant."

Bill of Complaint.

27. After said alleged attachment and the making of the order of which a copy is attached as aforesaid, and under color thereof, but without any order compelling or directing him so to do, George T. Vickers, as aforesaid, on or about November 9, 1926, delivered unto Charles E. Dalrymple aforesaid the check described in paragraph 19 of this bill of complaint. 10

28. Said check was so delivered without the consent of Stuyvesant Development Co. or any of the above mentioned assignees or of said Otto G. Horster, but was made in disregard of the rights of said assignees, the agreement described in paragraph 22 of this bill of complaint and the right of said Otto G. Horster and his duty to apply the proceeds of said check pursuant to his assignments hereinbefore described or one of them. 20

29. Complainants are advised and say that said Charles E. Dalrymple was not entitled to have or receive said check, as against these complainants or any of the assignees above mentioned for the following reasons namely:

(a) Because of the matters and things hereinabove premised.

(b) Because the record of the action wherein Ellen Minchin is plaintiff, above mentioned, and the proceedings therein of record and in the files, in said action in said New Jersey Supreme Court, disclose that the above-mentioned writ of attachment was issued pursuant to an order of Isidor Kalisch, a Supreme Court Commissioner of the State of New Jersey, in and by which order it is not prescribed that any bond shall be given pursuant to the provisions of an act entitled "An Act to regulate the practice of law (Revision of 30
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Bill of Complaint.

10 Nineteen hundred and three)," approved April 14, 1903, as supplemented and amended; but such record and proceedings disclose that said order and said writ of attachment were issued pursuant to an act entitled "An Act for the relief of creditors against absent, fraudulent and absconding debtors (Revision of Nineteen hundred and one)"; wherefore any order for the appointment of an auditor in said action should have been made by the New Jersey Supreme Court and the order (of which a copy is hereto annexed), being made by a justice of said court is invalid.

20 (c) Because said writ of attachment, as disclosed by said record and proceedings and the order for the issuance of said writ, part of said record and proceedings was based upon affidavits (referred to in said order and constituting part of said record and proceedings) which affidavits are entitled in a cause not pending at the time said affidavits were verified, namely, the action commenced by the issuance of said writ of attachment.

30 30. Charles E. Dalrymple still retains possession of said check and claims that he is entitled to retain possession thereof and to the \$10,000.00 represented by said check and is endeavoring to procure the payment to him by First National Bank of Hoboken aforesaid of said \$10,000.00.

40 31. In aid of said claim he procured from the Chief Justice of said New Jersey Supreme Court a rule to show cause directing said First National Bank of Hoboken and Otto G. Horster to show cause why the latter should not endorse said check over to said Charles E. Dalrymple; said rule was abandoned on December 18, 1926, but

Bill of Complaint.

theretofore, said Charles E. Dalrymple caused to be issued a writ of *scire facias* against said bank.

32. These complainants and the other assignees above mentioned, because of the form and practice at law, may not be able to appear and assert their rights in defense to said writ or with a view to defeating the objects sought to be accomplished by said writ. 10

33. Complainants requested Karl Kniep to join with them in exhibiting this bill, but he (through his attorney) requested that he be made a party defendant to this bill, setting up and claiming that his rights are superior to those of Louis Kempf and Union Cemetery Association, and that by joining as complainant those alleged rights might be prejudiced. But by nothing in this bill is it intended that the rights or claims of the complainants or any of them, as between themselves or with respect to one another, shall be in any way prejudiced by reason of their joinder in this bill or any statement therein, said complainants being advised that they and the other assignees above mentioned have an interest in common in the application of the proceeds of the aforementioned check of \$10,000.00 to their claims or to such of their claims as may be prior in point of time or of equity; and in preventing the misapplication of said proceeds by said Charles E. Dalrymple to claims presented to him as "auditor," as aforesaid. 20 30

34. Complainants requested John Grabach, Otto G. Horster and Helen C. Horster, his wife, to join in exhibiting this bill, but they have declined so to do. Because of their interest in the subject matter of the complaint herein, they as 40

Bill of Complaint.

well as Karl Kniep are joined as parties defendant hereto.

35. The following named persons are parties to the suit in which said Charles E. Dalrymple is functioning as above stated, that is to say, Ellen Minchin as plaintiff; Mary Riley, as applying creditor; Margaret McLaughlin, as applying creditor, and Otto G. Horster as defendant.

36. Complainants are without adequate remedy in the courts of law and therefore pray:

1. That Otto G. Horster and Helen C. Horster, his wife; John Grabach, Karl Kniep, Charles E. Dalrymple, Ellen Minchin, Mary Riley, Margaret McLaughlin, Stuyvesant Development Company and First National Bank of Hoboken, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That by its decree this Court shall enjoin the said Charles E. Dalrymple from disposing of the check for \$10,000.00 aforesaid, and shall order and direct said Charles E. Dalrymple to turn over and deliver said check to an officer of this Court to be named or appointed for that purpose.

3. That in and by such decree this Court shall enjoin the said Charles E. Dalrymple from pursuing the writ of *scire facias* aforesaid and First National Bank from paying the sum of \$10,000.00 to any person or persons except such officer of this Court.

4. That in and by such decree this Court shall declare and decree that said Charles E. Dalrymple, Ellen Minchin, Mary Riley and Margaret McLaughlin have no right, title and interest in said check.

5. That in and by such decree or such order as this Court may make, Otto G. Horster may be

Bill of Complaint—Exhibit A.

ordered and directed to endorse said check over to the officer of this Court, aforesaid.

6. That in and by said decree this Court may direct in what manner should be ascertained the respective rights of the complainants and of Karl Kniep and John Grabach in the proceeds of said check and that this Court may proceed thereupon to adjudge the respective rights of said parties in said proceeds.

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

OTTO A. STIEFEL,
Solicitor for and of Counsel
with Complainants.

Exhibit A.

Number 3

Shares 3

STUYVESANT DEVELOPMENT COMPANY

THIS CERTIFIES THAT Otto G. Horster is the owner of Three.....

Shares of the Capital Stock of

STUYVESANT DEVELOPMENT COMPANY transferable only on the books of this Corporation in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its corporate seal to be hereunto affixed this 14th day of December, A. D. 1912.

George T. Vickers
President

John J. Fallon,
Treasurer

Bill of Complaint—Exhibit B.

Endorsed on back.

10 For Value Received I hereby sell, assign and transfer unto Louis Kempf the within three Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocable constitute and appoint him my Attorney to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises. Otto G. Horster.

Dated Dec. 16 1925

In the presence of

Norbury Murray

20

Exhibit B.

Number 6

Shares 7

STUYVESANT DEVELOPMENT COMPANY.

THIS CERTIFIES THAT Otto G. Horster is the owner of seven Shares of the Capital Stock of STUYVESANT DEVELOPMENT COMPANY transferable only on the books of this Corporation in person by Attorney upon surrender of this Certificate properly endorsed.

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In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this 15th day of December A. D. 1912.

George T. Vickers, Pres. John J. Fallon, Treas.

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Bill of Complaint—Exhibit C.

Endorsed on back.

For Value Received I hereby sell, assign and transfer unto Louis Kempf the within seven shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint him my Attorney to transfer the said Stock on the books of the within named Corporation with full power of substitution in

10

Otto G. Horster.

Dated Dec 16 1925

In the presence of

Norbury Murray

Exhibit C.

20

Hollywood Cemetery, December 15, 1925

In consideration of \$1.00 I hereby assign and transfer all my right title and interest in stock of Stuyvesant Development Co to Louis Kempf his heirs and assigns forever and I agree to deliver said stock which is now unpledged at 9:30 a. m. Dec. 16th at my office, Wiss Building, Newark, N. J.

Otto G. Horster

30

Witnesses:

Henry C. Pfaff, Fred Ardrey, H. L. De Puy.

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*Bill of Complaint—Exhibits D. and E.***Exhibit D.**

Hollywood Cemetery, December 15, 1925

10 In consideration of one dollar I hereby assign to Louis Kempf all my right title and interest in all bonds (standing in my name), of the Stuyvesant Development Co. which bonds are now held by a Committee one of whom is Mr. Young, President of Hoboken 1st National Bank and I state I own \$15,000 worth of said bonds.

Otto G. Horster.

Witnesses: Henry C Pfaff, Fred Ardrey, H. L. De Puy.

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Exhibit E.

\$35000.00 December 15, 1925

On Demand after date I promise to pay to the order of Louis Kempf, Thirty five thousand.....00/100 Dollars
Payable at Liberty Trust Co.
Value received

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No. Due Otto G. Horster.

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*Bill of Complaint—Exhibit F.***Exhibit F.**

NEW JERSEY SUPREME COURT.

ELLEN MINCHIN,	} <i>Action at Law.</i>	10
<i>Plaintiff,</i>		
<i>vs.</i>	} <i>Order of Pub- lication Ap- pointing an Auditor.</i>	
OTTO G. HORSTER,		
<i>Defendant.</i>		

The Writ of Attachment in this case having been returned served by the Sheriff of the County of Essex and the Sheriff of the County of Hudson and no appearance having been entered in said cause by the defendant,

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It is on this 5th day of June 1926, on motion of Arthur T. Vanderbilt, attorney for the plaintiff,

ORDERED that a notice of the issuing of said attachment at whose suit, against whose estate, and for what sum, and when returned, shall be published in the Newark Evening News once a week for four successive weeks; and it is

FURTHER ORDERED that Charles E. Dalrymple be appointed auditor to adjust and ascertain the amount due to the plaintiff and each of the applying creditors.

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WILLIAM S. GUMMERE,
C. J.

A True Copy,
Edward J. Kelleher,
Clerk.

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Bill of Complaint—Affidavit of Otto A. Stiefel.

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

OTTO A. STIEFEL, being duly sworn according to law, on his oath says:

10 1. I am the solicitor of Union Cemetery Association and the other complainants named in the foregoing bill of complaint. I personally caused to be prepared and drafted said bill of complaint. I believe every fact alleged in said bill of complaint to be true. I am verifying said bill of complaint myself, because I am more familiar with all the facts than is possibly any other person and am the one person who has assuredly seen and inspected all the original documents named in the foregoing bill of complaint (which
20 are not part of the public records) and true copies of such documents as are part of the public records certified to be true either by a duly qualified public officer or informally through the agency of copies furnished to me by the attorneys at law involved in the litigation described in the bill of complaint. I have personally seen and inspected the original documents, copies of which are annexed to said bill of complaint and marked Exhibits A, B, C, D and E. I have seen Otto G.
30 Horster sign his name on numerous occasions and believe that his signature to the said original documents are all genuine. This belief is supported by admissions made to me by Otto G. Horster.

2. The bill of sale, deed and agreement described in paragraph 9 of the bill of complaint are all in my own possession. I believe they are truly described in said bill. The facts set forth in paragraphs 19 to 22 inclusive of the bill of complaint
40 are known to me from my participation in

Bill of Complaint—Affidavit of Otto A. Stiefel.

the conference on March 11, 1926, in the office of Norbury C. Murray, mentioned in said bill of complaint.

3. It was I who made the suggestion to George T. Vickers that the \$10,000.00 check should be certified and that he should hold the same certified for the benefit of the assignees mentioned in paragraph 22 of the bill of complaint, I know of my own personal knowledge that the agreement described in said paragraph was reached as therein set forth. 10

4. My knowledge of the attachment and proceedings described in paragraphs 24, 25 and 26 of the bill of complaint, was derived from examination of true copies of the papers filed in said cause. 20

5. I know that the check was delivered to Charles E. Dalrymple as described in paragraph 27 of the bill of complaint; this, through conversation with Mr. Massey, attorney at law, associated with Arthur T. Vanderbilt, who is attorney of Charles E. Dalrymple, also through admissions made to me by John J. Fallon, treasurer of Stuyvesant Development Co., who signed said check on behalf of said company; also from copies of the rule to show cause and other documents in relation thereto furnished to me by Mr. Gaede, attorney of First National Bank of Hoboken. A copy of the writ of *scire facias* has been furnished to me by Mr. Vanderbilt aforesaid. 30

6. I know from admissions of Otto G. Horster to me and from the documents in my possession that he is indebted to the persons and in the sums described in paragraph 3 and paragraphs 7 and 8 of the bill of complaint; I also
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Bill of Complaint—Affidavit of Otto A. Stiefel.

know from such admissions to Otto G. Horster to me and from the fact that I am in charge of the affairs of Mary Ulicsnik in this connection and have been in charge of the same for the past year—that no part of said indebtedness has been paid.

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OTTO A. STIEFEL.

Sworn and subscribed to before me
this 6th day of January, 1927.

JOHN A. McKENNA,
Attorney at Law of N. J.

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ORDER.

Filed January 7, 1927.

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK and others,
Complainants,

and

CHARLES E. DALRYMPLE and
others,

Defendants.

10

*On Bill.
Order.*

The matter of this order being opened to the Court by Otto A. Stiefel, of counsel with complainants, upon filing the bill of complaint in the above-entitled cause, and the Court having considered the same as well as the affidavit thereto attached, and it appearing to the Court that the complainants are entitled to relief pending the final determination of said cause and that the subject matter of the complaint, namely, the check hereinafter mentioned, should be safeguarded, under the directions of this Court, pending such final determination, and that the complainants may be entitled to other relief pending such final determination,

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30

It is, on this 7th day of January, A. D. 1927, on motion of Otto A. Stiefel, as solicitor for the complainants, ORDERED,

1. That Charles E. Dalrymple, one of the defendants in the above-entitled suit, show cause before the Chancellor at the Chancery Chambers,

40

Order.

in Newark, on Tuesday, the 25th day of January, 1927, why he should not deliver into the custody of an officer to be appointed by this Court the certain check of Stuyvesant Development Co., bearing date on or about March 5, 1926, drawn on First National Bank of Hoboken, New Jersey, payable to the order of Otto G. Horster, in the sum of \$10,000.00, certified by said bank on or about March 13, 1926—being the check described in the bill of complaint herein.

2. That pending the further order of this Court, said Charles E. Dalrymple desist and refrain from transferring or delivering said check to any person or persons whomsoever and from presenting said check to said First National Bank of Hoboken for payment and from taking any steps to procure the payment of the \$10,000.00 mentioned in said check, unto himself or to any other person or persons.

3. That copy of this order and of the bill of complaint in this cause and the affidavit of Otto A. Stiefel aforesaid, be served upon said Charles E. Dalrymple, within five days from the day of the date of this order, which copies shall be true copies and certified to be such by the solicitor of the complainants, instead of by the Clerk of this Court.

EDWIN ROBERT WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ORDER.

62—698.

Filed January 25, 1927.

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK and others,
Complainants,

and

CHARLES E. DALRYMPLE and
others,
Defendants.

On Bill.

Order.

This matter being opened to the Court by Otto A. Stiefel, of counsel with complainants, at the time named in the order to show cause filed in the above-entitled cause on January 7, 1927, and it appearing to the Court by the written admission of Charles E. Dalrymple, one of the defendants in this cause, that a true copy of the bill of complaint and of said order to show cause were served on said defendant on January 8, 1927, pursuant to the directions of said order, and it appearing to the Court that the complainants are entitled to relief pending the final hearing of the above-entitled cause, to the extent hereinafter provided and ordered, and neither said Charles E. Dalrymple nor anyone in his behalf appearing to oppose the application for this order, it is on this 25th day of January, 1927, on motion of Otto A. Stiefel, as solicitor of complainants, ORDERED:

Order.

10 1. That said Charles E. Dalrymple shall within five days from the day of the service upon him of a copy of this order, deliver unto the Clerk of this Court the certain check of Stuyvesant Development Co., bearing date on or about March 5, 1926, drawn on First National Bank of Hoboken, New Jersey, payable to the order of Otto G. Horster in the sum of \$10,000.00, certified by said bank on or about March 13, 1926, being the check of that tenor described in the bill of complaint.

3. That the restraint imposed on said Charles E. Dalrymple in and by said order be and the same hereby is continued.

20 4. That the copy of this order to be served on said Charles E. Dalrymple may be certified by the solicitor of complainants to be a true copy instead of by the Clerk of this Court and that service of such a copy shall be held and taken to be sufficient in this behalf.

EDWIN ROBERT WALKER,
C.

Respectfully advised,

30 JOHN H. BACKES,
V.-C.

ANSWER AND COUNTER-CLAIM.

Filed May 21, 1927.

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK, *et als.*,
Complainants,
and
CHARLES E. DALRYMPLE, *et als.*,
Defendants.

On Bill, &c.
Answer and
Counter-
claim.

10

The defendants, Ellen Minchin and Mary E. Riley, answering the bill of complaint filed in the above-entitled cause, say that: 20

1. As to paragraphs 1 to 10 of said complaint, these defendants have no knowledge or information sufficient to form a belief and therefore call upon complainants to prove the same.

2. As to paragraphs 11, 12 and 13 of said bill of complaint, these defendants admit that there is a deed of record as described and that the premises described therein are commonly known as 158 Steuben street, East Orange, New Jersey, but have no information as to the value of said land and premises and therefore deny that said value will not exceed \$15,000.00. 30

3. As to paragraphs 14 and 15 of said bill these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

4. Paragraph 16 of said bill is denied. 40

Answer and Counter-claim.

5. Paragraphs 17, 18 and 19 are admitted.

6. As to paragraph 20 of said bill, these defendants admit that certain consents were required as a prerequisite of the power of said George T. Vickers to deliver said check but have
10 no knowledge or information sufficient to form a belief as to the names of the parties of whom such consent was required, and call upon complainants to prove the names of such parties.

7. As to paragraphs 21, 22 and 23, these defendants admit that on or about March 11, 1926, there was a conference of creditors of Otto G. Horster at the place named but have no knowledge or information sufficient to form a belief as to what was said and done at the said conference and therefore call upon complainants to
20 prove the same. These defendants deny that George E. Vickers agreed to hold said check for the benefit of any parties excepting those who should after that time establish a right thereto through Otto G. Horster.

8. These defendants admit paragraph 24 of said complaint.

9. As to paragraph 25, these defendants deny
30 that said action was commenced by the issuance of the writ and say that said action was commenced by the executing and the filing of the affidavits and order for the writ.

10. As to paragraph 26, these defendants say that the Sheriff of Hudson County did execute said writ as stated and that the execution of said writ was in due form of law.

11. These defendants admit paragraph 27 of
40 said complaint.

Answer and Counter-claim.

12. These defendants deny paragraphs 28 and 29 of said complaint.

13. These defendants admit that at the time of filing of said bill Charles E. Dalrymple still retained possession of said check, but that since the filing of said bill said check has been delivered to the Clerk of this Court pursuant to the order of this Court directed to said Charles E. Dalrymple.
10

14. These defendants deny paragraphs 31 and 32 of said complaint.

15. These defendants have no knowledge or information sufficient to form a belief as to the contents of paragraphs 33 and 34 of said complaint and therefore deny the same.
20

17. As a first defense to the allegations of said bill, these defendants allege that the assignments and promissory note described in paragraph 4 of said complaint are void under the Statute of Frauds, having been given for an inadequate consideration and resulting in the insolvency of said Otto G. Horster.

18. As a second defense to the allegations of said bill, these defendants allege that the assignments to said Louis Kempf if considered valid did not have the effect of transferring to said Louis Kempf the right to collect dividends on said certificates of stock unless and until said Louis Kempf or his legal representative should procure the entry of the transfer of said stock on the books of the corporation and that the Stuyvesant Development Company was permitted by law to recognize and did recognize the exclusive right of Otto G. Horster to receive the check for dividends on said stock.
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Answer and Counter-claim.

19. As a third defense to the allegations of said bill, these defendants allege that the assignments and transfers of property by Otto G. Horster to Mary Ulicsnik, Karl Kniep and George T. Rockwell mentioned in paragraphs 9 to 14 of complainant's bill are void and of no effect because they amount to a transfer of all of the property to said Otto G. Horster to a trustee for certain creditors to the exclusion of others.

20. As a fourth defense to the allegations of the said bill these defendants allege that complainants are guilty of laches in that they failed to give proper notice of their said assignments to the Stuyvesant Development Company, and that they failed to take into possession any of the personal property of said Horster except said certificate of stock, that they permitted said Horster to maintain his office equipment undisturbed for months after the date of said assignments, representing himself to be still in business, that they permitted said Horster to occupy the house at 158 Steuben street, East Orange, New Jersey, free of rent, and that they failed to take any further steps whatever, prior to the attachment suit of this defendant, to take into possession the property of said Horster to establish their alleged equitable interests therein.

21. As a fifth defense to the allegations of said bill, these defendants allege that complainants are seeking equity without offering to do equity in that they pray that the entire fund be applied on account of their claim to the total exclusion of the claims of the defendants Ellen Minchin, Mary E. Riley and Margaret McLaughlin.

22. As a sixth defense to the allegations of said complaint, these defendants allege that all

Answer and Counter-claim.

of said assignments were intended by Otto G. Horster to be given in trust for the equal benefit of all of this creditors and that complainants in seeking to otherwise construe the effect of said assignments are parties to an attempted fraud and by reason thereof said assignments are void and of not effect.

23. As a seventh defense to the allegations of said bill, these defendants allege that she and Mary E. Riley and Margaret McLaughlin hold a first lien on the said certified check as a result of their writ of attachment and the levy upon said check pursuant thereto and the other proceedings taken in their behalf in said attachment suit.

These defendants therefore pray that complainants' bill of complaint be dismissed with costs to this defendant most wrongfully sustained.

Counter-claim.

By way of counter-claim against complainants and by way of complaint against the defendants and other parties hereinafter named, the defendants Ellen Minchin and Mary E. Riley respectfully show that:

1. On the 20th day of March, 1926, defendant Ellen Minchin by due and sufficient proceedings caused writs of attachment to issue out of the New Jersey Supreme Court directed to the Sheriff of Essex County and the Sheriff of Hudson County, respectively, commanding them to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Otto G. Horster, wheresoever they might be found in said counties, to compel his appearance to answer

Answer and Counter-claim.

said Ellen Minchin in an action at law to her damage \$9,000.00.

10 2. Pursuant to said writ of attachment issued to the Sheriff of Hudson County, said Sheriff on March 22, 1926, made levy upon a certain certified check payable to Otto G. Horster in the sum of \$10,000.00, made by Stuyvesant Development Company and held by George T. Vickers at 999 Bergen avenue, Jersey City, New Jersey.

3. Pursuant to said writ of attachment the Sheriff of Essex County on March 26 and March 31, 1926, made levy upon the following property of the defendant Otto G. Horster:

20 (a) Collection of stamps in Fidelity Union Trust Co. as collateral security for loan of \$3,000.00.

(b) Real estate at No. 158 Steuben street, East Orange, N. J., described as follows:

All that lot, tract or parcel of land and premises hereinafter particular described, situate, lying and being in the City of East Orange, County of Essex and State of New Jersey:

30 BEGINNING in the Easterly line of Steuben Street, formerly called South 18th Street, at a point therein distant Southwesterly Five Hundred Ten and ninety-six hundredths feet from the intersection of the Easterly line of Steuben Street with the Southerly line of 9th Avenue; running thence along Steuben Street southwesterly twenty-five feet; thence Southeasterly at right angles to Steuben Street one hundred feet; thence Northeasterly parallel with Steuben Street twenty-five feet; thence northwesterly on a straight line to the place of BEGINNING.

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Answer and Counter-claim.

4. Said Otto G. Horster has at no time entered appearance in said attachment suit.

5. The defendant Mary E. Riley applied and was admitted as a creditor of said Otto G. Horster in said attachment suit.

6. The defendant Margaret McLaughlin applied and was admitted as a creditor of Otto G. Horster in said attachment suit. 10

7. No other party to this suit has at any time applied as a creditor in said attachment suit or as a claimant of any of said attached property.

8. Due and sufficient proceedings were taken in said attachment suit, so that on November 3, 1926, final judgment was entered in the New Jersey Supreme Court in said attachment suit 20 for the attaching creditor, Ellen Minchin, in the sum of \$4,692.50, for the applying creditor, Mary E. Riley, in the sum of \$9,745.22 and for the applying creditor, Margaret McLaughlin, in the sum of \$3,055.00, besides costs of suit, which have been taxed at \$214.36 for the attaching creditor and \$9.10 each for the applying creditors.

9. No part of the said judgment against the attached property of Otto G. Horster has been satisfied except the sum of \$75.00 collected by 30 Charles E. Dalrymple, the auditor duly appointed in said attachment suit, from Charles J. Schroeder, Constable, one of the debtors of said Horster, being part of the proceeds of sale of an automobile owned by said Horster.

10. Defendants Ellen Minchin and Mary E. Riley, allege that the assignments and transfers made by Otto G. Horster to Louis Kempf mentioned in paragraph four of the bill of com- 40

Answer and Counter-claim.

plaint are void as to the defendants Ellen Minchin, Mary E. Riley and Margaret McLaughlin, for the following reasons:

10 (a) The transfer of stock to said Louis Kempf was not recorded on the books of Stuyvesant Development Co., and no steps were taken to secure any transfer of said stock on the books of the company.

20 (b) The assignments of said stock and bonds did not purport to be assignments in trust, but purported to be a consummated sale, and were made for an inadequate consideration, and procured by duress, in that said Horster stood in fear of a criminal complaint against him and made said assignments for the purpose of avoiding such criminal complaint.

11. Defendants, Ellen Minchin and Mary E. Riley, allege that the assignments and transfers made by Otto G. Horster to Mary Ulicsnik, Karl Kniep and George T. Rockwell, mentioned in paragraphs nine to fourteen of the bill of complaint, are void as to the defendants Ellen Minchin, Mary E. Riley and Margaret McLaughlin, for the following reasons:

30 (a) They constitute a general assignment of all the property of said Otto G. Horster, in trust for the benefit of certain creditors excluding other creditors.

(b) Said bill of sale and deed are in form absolute transfers of the property therein described, and were obtained from said Otto G. Horster by duress, and for an inadequate consideration.

40 (c) The sale of personal property described in said bill of sale, was never consummated, there

Answer and Counter-claim.

being no delivery of the property therein described.

12. Defendants, Ellen Minchin and Mary Riley, allege that the deed of said real estate made by Otto G. Horster, as described in paragraphs nine to thirteen of the bill of complaint and recorded in the office of the Register of Essex County in Book T 73 of Deeds for said County, at page 122, is void as to these defendants for the following reasons:

10 (a) Said deed constitutes a part of a general assignment of all of the property of said Otto G. Horster for the benefit of certain creditors.

(b) Said deed was obtained from Otto G. Horster by duress and for an inadequate consideration.

20 13. These defendants are informed and believe that said Mary Ulicsnik, Karl Kniep (or his legal representatives), and George T. Rockwell, have collected the rents and profits of said real estate ever since the execution of said deed.

14. These defendants are informed and believe that the collection of stamps of said Otto G. Horster is still held by Fidelity Union Trust Company, the lien of said holder against the same having been satisfied in full by sale of a part of said stamps. Defendants are further informed and believe that the value of said stamps remaining in the hands of Fidelity Union Trust Company is more than \$10,000.00, and that the Fidelity Union Trust Company stands ready and willing to deliver the same to whomever this Court may designate.

15. Said Charles E. Dalrymple, the duly appointed auditor in said attachment suit, has de-

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Answer and Counter-claim.

manded of the Fidelity Union Trust Company said collection of stamps by virtue of the levy thereon theretofore made by the Sheriff of Essex County and by virtue of his authority as auditor. Said Fidelity Union Trust Company, by its duly authorized agent and attorney, upon the original demand made by said auditor, promised that after satisfying its lien it would deliver said stamps to said auditor, but upon later inquiry by said auditor he was informed by the agent and attorney of said Fidelity Union Trust Company that a notice of a claim of Mary Ulicsnik, Karl Kniep and George T. Rockwell had in the meantime been received and that the said stamps were ready to be delivered to such party as should establish an unquestionable prior right to the same.

16. Pursuant to an order of this Court in this cause, said Charles E. Dalrymple, the duly appointed auditor in said attachment suit, has turned over said certified check to the Clerk of this Court. Said check is drawn on the First National Bank of Hoboken by Stuyvesant Development Company, dated March 5, 1926, and drawn to the order of Otto G. Horster and certified. Said check was delivered to said auditor by George T. Vickers, president of Stuyvesant Development Company, upon written demand by said auditor, claiming said check by virtue of the levy theretofore made on said check of the Sheriff of Hudson County, and by virtue of his authority as auditor in said attachment suit. On account of said order of this Court these defendants are prevented from pursuing their remedies at law against said check and against the money on deposit represented thereby.

Answer and Counter-claim.

17. The defendant, Karl Kniep, departed this life on March 19, 1927, leaving a last will and testament which was probated in Essex County on April 1, 1927, and letters testamentary have been issued thereon to Martha Shaw, Minna Dorer and Clara Sieder. The next of kin, heirs at law, legatees, and devisees of the estate of said Karl Kniep, deceased, appearing in the record of said probate proceedings, to have an interest in the bill of sale and deed described in paragraphs nine to fourteen of complainants' complaint, are as follows:

Clara Sieder....daughter....Newark, N. J.	
Martha Shaw daughter South Orange, N. J.	
Minna Dorer...daughter...East Orange, N. J.	
Reihold Kniep.....son.....Irvington, N. J.	
Louis Kniep....son....East Orange, N. J.	20
Anna Creamer...daughter...Newark, N. J.	
Karl Kniep....son....East Orange, N. J.	
Ludwig Lauerhause grandson Asheville, N. C.	

18. On account of the said conflicting claims to the property of said Horster it has been impossible to liquidate the same, and the total value of the assets of said Horster remains unknown, and this situation has existed and remained unchanged ever since the making of said assignments in December, 1925.

These defendants have no adequate and complete remedy at law and therefore pray:

1. That the complainants, Mary Ulicsnik, Union Cemetery Association, Karl Reister, and Bertha Reister, his wife; Herman Nagel and George T. Rockwell, and the defendants, Otto G. Horster and Helen C. Horster, his wife; John Grabach, Charles E. Dalrymple, Margaret Mc-

Answer and Counter-claim.

Laughlin, Stuyvesant Development Company, and First National Bank of Hoboken, and the said Louis Kempf, all of whom are made defendants to this counter-claim, may answer this counter-claim and each statement therein made.

10 2. That a decree may be entered declaring void and setting aside the conveyance, and bill of sale, described in the bill of complaint, made December, 1925, by Otto G. Horster and Helen C. Horster, his wife, to Mary Ulicsnik, Karl Kniep and George T. Rockwell, and also declaring void, and setting aside the assignment or sale of stock of Stuyvesant Development Company and bonds, Union Cemetery Association, described in the bill of complaint, made in December, 1925, by Otto G. Horster to Louis Kempf.

20 3. That such decree shall declare that the defendants, Ellen Minchin, Mary E. Riley and Margaret McLaughlin, have a lien on the said property of Otto G. Horster attached in said attachment suit, to the extent of their respective judgments therein entered, with costs and interest, and that such lien be declared to be prior to the claims of all other parties to this suit.

30 4. That a receiver be appointed forthwith to take possession of the property of said Otto G. Horster described in the complaint and in this counter-claim, and all other property of the said Otto G. Horster, which he may be found to have possessed or in which he may be found to have had an interest at the time of the making of the said sale and assignment to Mary Ulicsnik, Karl Kniep and George T. Rockwell.

40 5. That said receiver shall be ordered to liquidate the said property and reduce the same

Answer and Counter-claim.

to cash, and hold the proceeds thereof to be distributed among the parties to this suit in accordance with such decree as this Court shall make.

6. That an order may be entered commanding the said Otto G. Horster, Louis Kempf, Mary Ulicsnik, George T. Rockwell and the aforesaid heirs of Karl Kniep, deceased, and to deliver up and account for the said property of Otto G. Horster to such receiver, and commanding the said Fidelity Union Trust Company to deliver up to such receiver the collection of stamps aforesaid, and commanding the Clerk of this Court to deliver up to said receiver the certified check aforesaid, and commanding the said Otto G. Horster to endorse to said receiver the said certified check, and that said parties in the meantime be restrained and enjoined from otherwise disposing of any of said property.

7. That an order to show cause with restraint in the meantime may be issued ordering the said Otto G. Horster, Fidelity Union Trust Company, Louis Kempf, Mary Ulicsnik, George T. Rockwell, and the aforesaid heirs of Karl Kniep, deceased, to show cause at an early date why the prayer of this counter-claim should not be granted and why a receiver should not be appointed to take possession of and liquidate the said property of Otto G. Horster, and commanding the said parties absolutely to desist and refrain from otherwise disposing of any of said property until further order of this Court, and ordering said Otto G. Horster to show cause why he should not endorse said certified check to such receiver.

8. That a writ of subpoena may issue commanding said defendants to answer this counter-

Answer and Counter-claim.

claim and each statement therein made, and to abide by such decree as this Court shall make in the premises.

- 10 9. That the defendants, Ellen Minchin and Mary E. Riley, may have such other relief as may be equitable and just.

ARTHUR T. VANDERBILT,
Solicitor of Defendants
Ellen Minchin and Mary E. Riley.

JOHN W. MCGEEHAN, JR.,
Of Counsel with Defendant
Mary E. Riley.

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*Affidavit of Reynolds C. Massey.***AFFIDAVITS.**

Filed May 21, 1927.

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK, *et als.*,

Complainants,

and

CHARLES E. DALRYMPLE, *et als.*,

Defendants.

On Bill, &c.

Affidavits.

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

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REYNOLDS C. MASSEY, being duly sworn according to law, on his oath deposes and says:

1. I am an attorney at law of the State of New Jersey, and acting for Arthur T. Vanderbilt, attorney of record of Ellen Minchin in her attachment suit against Otto G. Horster in the New Jersey Supreme Court; I have personally prepared and conducted the proceedings in her behalf in said attachment suit, and am personally familiar with all of said proceedings.

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2. I have read the counter-claim of Ellen Minchin and Mary E. Riley about to be filed in the above-entitled suit and the proceedings in said attachment suit, described in said counter-claim, are truly stated therein.

3. It is true that in said attachment suit the Sheriff of Hudson County made levy upon a certain certified check, payable to Otto G. Horster, is in the possession of George T. Vickers at

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Affidavit of Reynolds C. Massey.

999 Bergen avenue, Jersey City, New Jersey, as by the Sheriff's return appears of record and that the Sheriff of Essex County made levy upon the following described property of the defendant, Otto G. Horster:

10 (a) Collection of stamps in Fidelity Union Trust Company, as collateral security for loan of \$3,000.

(b) Real estate at No. 158 Steuben street, East Orange, N. J., described by metes and bounds; all of which appears of record in said sheriff's return.

20 4. It is further true that the defendant Otto G. Horster made no appearance to defend said suit, although he was called and appeared as a witness in proceedings before the auditor in said suit to discover his property and assets.

5. Mary E. Riley and Margaret McLaughlin applied and were admitted as creditors of said Otto G. Horster in said attachment suit.

6. No claim of ownership of any of the said property attached has been filed in said attachment suit, in behalf of any of the parties to this suit.

30 7. On November 3, 1926, final judgment was entered in said attachment suit, against the said attached property of the defendant Otto G. Horster, for the attaching creditor, Ellen Minchin, in the sum of \$4,692.50, for the applying creditor, Mary E. Riley, in the sum of \$9,745.22, and for the applying creditor, Margaret McLaughlin, in the sum of \$3,055, besides costs of suit which have been taxed at \$214.36 for the attaching creditor and \$9.10 each for the applying creditors.

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Affidavit of Charles E. Dalrymple.

8. No part of the said judgment or costs has been satisfied except the sum of \$75, collected by Charles E. Dalrymple, the auditor duly appointed in said attachment suit, from Charles J. Schroeder, constable, one of the debtors of said Horster, being part of the proceeds of sale of an automobile owned by said Horster.

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REYNOLDS C. MASSEY.

Subscribed and sworn to before
me this day of ,
1927.

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

CHARLES E. DALRYMPLE, of full age, being duly sworn according to law, on his oath deposes and says:

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1. I am an attorney and counsellor at law of the State of New Jersey.

2. On the fifth day of June, 1926, an order was made in the New Jersey Supreme Court in an attachment suit wherein Ellen Minchin was plaintiff and Otto G. Horster was defendant, appointing me as auditor to adjust and ascertain the amount due to the plaintiff and each of the applying creditors in said suit.

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3. Pursuant to the instructions in said order and to the statute defining the authority of an auditor in such case, I considered proofs and reported on the claim of Ellen Minchin, the attaching creditor, and Mary E. Riley and Margaret McLaughlin, the applying creditors.

4. Pursuant to my report and on November 3, 1926, judgment by default was entered in said

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Affidavit of Charles E. Dalrymple.

suit for the attaching creditor Ellen Minchin in the sum of \$4,692.50, for the applying creditor Margaret McLaughlin in the sum of \$214.36, besides cost of suit including an auditor's fee in the sum of \$100 allowed to me and an attorney's fee in the sum of \$50 allowed to Arthur T. Vanderbilt, attorney for Ellen Minchin.

5. On November 10, 1926, I made demand upon George T. Vickers for possession of the certified check for \$10,000, held by him and theretofore attached by the Sheriff of Hudson County, in said suit. Said George T. Vickers, believing it his duty so to do, delivered said check to me as auditor. I then endeavored to cash said check at the First National Bank of Hoboken, which bank was the drawee. Payment was refused by said bank on the ground that no endorsement would warrant payment excepting the endorsement of Otto G. Horster.

6. A proceeding on writ of *scire facias* was forthwith started against said bank for the collection of said \$10,000 by me, which proceeding is still pending.

7. While said proceeding on said writ of *scire facias* was pending, complainants Mary Ulicsnik and others by their counsel, Otto A. Stiefel, filed their bill of complaint herein and obtained an order of this Court ordering that said certified check be deposited with the Clerk of this Court.

8. Pursuant to said order, I deposited said check with Thomas Barber, Clerk of this Court.

9. Immediately after the entry of said judgment I communicated with the Fidelity Union Trust Company in reference to the collection of stamps of said Otto G. Horster, and was assured

Affidavit of Charles E. Dalrymple.

that as soon as the lien of said Fidelity Union Trust Company for the amount due on a note of said Horster for \$3,000, could be satisfied by a sale of part of said stamps, the balance of the stamps or of the proceeds of sale thereof would be delivered to me as auditor by virtue of the levy theretofore made by the Sheriff of Essex County and by virtue of my authority as auditor.

10. Subsequently I have been informed by Fidelity Union Trust Company that its said lien has been satisfied by the sale of part of said stamps, but that it had received a notice of a claim of Mary Ulicsnik and others and that a bill of interpleader in this Court would be filed unless the parties in interest could agree as to the priority of their claims to said stamps.

11. I have been unable to collect any money for the satisfaction of said judgment from any of the assets of said Otto G. Horster excepting the sum of \$75, received from Charles J. Schroeder, constable, one of the debtors of said Horster, being part of the proceeds of sale of an automobile owned by said Horster.

CHARLES E. DALRYMPLE.

Subscribed and sworn to before
me this day of ,
1927.

ORDER TO SHOW CAUSE.

Filed May 21, 1927.

IN CHANCERY OF NEW JERSEY.

10 *Between*MARY ULICSNIK, *et als.*,
Complainants,

and

CHARLES E. DALRYMPLE, *et als.*,
Defendants.*On Bill, &c.**Order to
Show Cause.*

20 This matter being opened to the Court by Arthur T. Vanderbilt, of counsel with the defendant Ellen Minchin, and John W. McGeehan, of counsel with the defendant Mary E. Riley, and upon reading and filing the answer and counter-claim of said defendants, and the affidavits of Reynolds C. Massey and Charles E. Dalrymple presented therewith; and it appearing from complainants' bill and the answer and counter-claim of said defendants and the affidavits filed therewith that said defendants show good cause for this order;

30 It is on this 21st day of May, A. D. 1927, ORDERED, that Otto G. Horster, Fidelity Union Trust Company, Louis Kempf, Mary Ulicsnik, George T. Rockwell and the heirs of Karl Kniep, deceased, namely Clara Sieder, Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep and Ludwig Lauerhaus, show cause before this Court at the Chancery Chambers, Industrial Building, 1060 Broad street, Newark, New Jersey, on Tuesday, the 7th
40 day of June, A. D. 1927, at ten o'clock in the

Order to Show Cause.

forenoon or as soon thereafter as the matter can be heard, why the prayer of the counter-claim of Ellen Minchin and Mary E. Riley, defendants in the above-entitled suit, should not be granted, and why a receiver should not be appointed to take possession of and liquidate the property of Otto G. Horster, assigned by him to Louis Kempf on December 15, 1925, and all the property of said Otto G. Horster, of which he was possessed or in which he had any right, in the month of December, 1925, excepting that which he reserved to himself in his bill of sale to Mary Ulicsnik, Karl Kniep and George T. Rockwell, and that they further show cause why the said Otto G. Horster should not be ordered to endorse to said receiver the certified check of Stuyvesant Development Company, now held by the Clerk of this Court.

And it is further ORDERED, that a true copy of this order certified by the solicitor of Ellen Minchin be served upon Otto A. Stiefel, solicitor of the complainants, upon Louis Kempf, Otto G. Horster and Fidelity Union Trust Company, and that a copy be mailed to each of the said heirs of Karl Kniep, deceased, at such addresses as are given for them in the office of the Surrogate of Essex County, within six days from the date of this order.

Respectfully advised,

ALONZO CHURCH,
V.-C.

A true copy.

ARTHUR T. VANDERBILT.

**REPLICATION AND ANSWER TO
COUNTER-CLAIM.**

Filed June 7, 1927.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARY ULICSNIK, <i>et als.</i> , <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.</i> , <i>Defendants.</i>	}	<i>On Bill, &c.</i> <i>Replication</i> <i>and Answer</i> <i>to Counter-</i> <i>claim.</i>
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20 The complainants join issue on the answer of the defendants Ellen Minchin and Mary E. Riley.

As to the counter-claim contained in said answer, complainants say:

30 1. They admit that there was issued a writ of attachment of the tenor set forth in the first paragraph of said defendants' counter-claim, but deny that said writ is based upon "due and sufficient proceedings," as in said first paragraph of the counter-claim alleged; and here repeat what is set forth in paragraph 29 (C) of complainants' complaint.

2. Paragraph two of the counter-claim is denied.

3. Paragraph three of the counter-claim is denied.

4. Paragraphs four, five and six of the counter-claim are admitted.

40 5. Complainants have no knowledge or information sufficient to form a belief as to the

Replication and Answer to Counter-claim.

matters set forth in paragraph seven of the counter-claim.

6. Referring to paragraph eight of the counter-claim complainants admit that on November 3, 1926, an entry of a judgment or judgments in favor of the persons mentioned in said paragraph, was made in the records of the New Jersey Supreme Court; but these complainants say that said judgment or judgments are not based upon any due and sufficient proceedings, but are without any warrant in law and void. 10

7. Complainants have no knowledge or information sufficient to form a belief as to the matters set forth in paragraph nine.

8. Referring to paragraph ten of the counter-claim, complainants have no knowledge or information sufficient to form a belief in respect to the allegation in said paragraph "that said Horster stood in fear of a criminal complaint against him"; all other allegations in said paragraph are denied. 20

9. Referring to paragraph eleven of the counter-claim, complainants deny that the assignments and transfers in said paragraph mentioned are void, as to the defendants Ellen Minchin and Mary E. Riley and Margaret McLaughlin, for the reasons assigned in said paragraph or for any other reasons. 30

10. Paragraph twelve of the counter-claim is denied.

11. Paragraph thirteen of the counter-claim is admitted.

12. Referring to paragraph fourteen of the counter-claim, complainants are credibly informed 40

Replication and Answer to Counter-claim.

and verily believe, and therefore allege that all the stamps, in said paragraph mentioned, have been sold by Fidelity Union Trust Company or under its directions, which stands ready and willing to pay unto the person or persons that may be entitled thereto, the net proceeds of such sale. 10

13. Referring to paragraph fifteen of the counter-claim, complainants have no knowledge or information sufficient to form a belief as to the matters therein set forth.

14. Referring to paragraph sixteen of the counter-claim, complainants believe that the check therein mentioned has been transmitted to the Clerk of this Court. They admit that the check is of the tenor described in said paragraph, but deny that the check was delivered in manner and form described in said paragraph. 20

15. Referring to paragraph seventeen of the counter-claim, complainants believe that the allegations in said paragraph are true.

16. Referring to paragraph eighteen of the counter-claim, complainants say that the value of the property (both real and personal) sold, assigned and transferred by Otto G. Horster (alone or in company with Helen C. Horster, his wife), unto complainants or any of them or anyone on their behalf or on behalf of any of them, is at the present time less than the aggregate of the indebtedness secured by said property or to be paid out of the proceeds thereof; and that by reason thereof Ellen Minchin and Mary E. Riley can have no interest therein; that in the period intervening between December, 1925, and March 22, 1926, it would not have been possible to liquidate the assets of Otto G. Horster affected 30 40

Affidavit of Otto A. Stiefel.

by the assignments in said paragraph mentioned; that neither during said period nor at any time since would a sale of the shares of stock of Stuyvesant Development Company, affected by said assignment, have produced more than a mere fraction of their true value; that any sale of said stock would gravely prejudice the rights of complainants. 10

SECOND DEFENSE.

1. Ellen Minchin and Mary E. Riley at the time of the issuance of the writs of attachment mentioned in the first paragraph of the counter-claim, had full notice of the rights of complainants in and to all property mentioned in paragraphs two and three of such counter-claim. 20

OTTO A. STIEFEL,
Solicitor of Complainants.

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

OTTO A. STIEFEL, being duly sworn according to law, on his oath says:

1. I am the solicitor of the complainants Union Cemetery Association, Mary Ulicsnik and others, on whose behalf I have prepared the foregoing replication and answer to counter-claim of Ellen Minchin and Mary E. Riley. 30

2. I believe I am more familiar with the facts relating to the subject matters of the counter-claim than is any other person whose affidavit is available or could be obtained at this time.

3. I have conferred with Mr. Imhoff, an officer of Fidelity Union Trust Company, who had in 40

Affidavit of Otto A. Stiefel.

charge the sale of the stamps mentioned in the counter-claim aforesaid. Said interview took place at the office of said company about ten days ago; at said interview Mr. Imhoff showed me the files of his company relating to said stamps and informed me that said stamps had
 10 been sold and that there were available about \$5,800, remaining out of the proceeds of said sale, after deduction therefrom of the amount of the indebtedness of Otto G. Horster to said company.

4. On behalf of Mary Ulicsnik and Karl Kniep and George T. Rockwell, I have since, about January, 1926, collected rents accruing from the premises on Steuben street, East Orange, mentioned in said counter-claim. The first floor of
 20 said premises is occupied by a tenant, who during the whole of the period just mentioned, has paid a rental of \$45 monthly. The second floor of said premises is occupied by Otto G. Horster and his wife. The building in question is an old-fashioned two-family dwelling house occupying the best part of an ordinary city lot, 25 feet by 100 feet in dimensions. The tax bill affecting said premises stating the tax in respect thereto
 30 for the year 1926, sets forth that the tax is based upon a valuation of \$4,900. At the time of the conveyance of said premises to Mary Ulicsnik, George T. Rockwell and Karl Kniep, a valuation of \$10,000 to \$12,000 was placed upon said premises by the parties in interest, as the greatest value that could be assigned thereto.

5. The conveyance (as shown by the deed in my personal possession) was to the three persons named, "as joint tenants and not as tenants
 40 in common."

Affidavit of Otto A. Stiefel.

6. The shares of stock of Stuyvesant Development Company are necessarily involved in the outcome of certain litigation wherein Fidelity Union Trust Company, as trustee, is complainant and Union Cemetery Association, and others, are defendants. Stuyvesant Development Company is one of the defendants to said suit. Said
 10 suit was brought to foreclose a mortgage given by Union Cemetery Association to said trustee and purporting to mortgage all its lands. I am familiar with the facts involved in that litigation. I represent Union Cemetery Association therein. Arthur T. Vanderbilt represents the two persons, holders of bonds alleged to be secured by said mortgage, who caused said foreclosure suit to be instituted. Until the determination or settle-
 20 ment of said suit the rights of Stuyvesant Development Company, if any, in said lands will be incapable of ascertainment. Stuyvesant Development Company has no assets aside from its interests, if any, in said Cemetery lands, certain bonds of said Cemetery or the proceeds thereof—as far as I can ascertain by inquiry of George T. Vickers and Otto G. Horster, two of the three directors of the said company. Union Cemetery Association as well as Mary Ulicsnik and George
 30 T. Rockwell do not wish a forced sale of the shares of stock of Otto G. Horster in said company, or any sale pending the outcome of the foreclosure litigation aforesaid. Howard F. Kirk, an attorney of high standing, whose office is in the City of Newark, is in possession of the stock certificates involved and I have the utmost confidence that they are perfectly safe in his hands.

7. I believe that the appointment of a receiver without a power of sale, as sought by the defendants Ellen Minchin and Mary E. Riley
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Affidavit of Otto A. Stiefel.

would be of no benefit to any of the parties to the counter-claim. I believe that the appointment of a receiver with power of sale would mean the destruction of the value (if there be any value) of the stock of Stuyvesant Development Company assigned by Otto G. Horster to Union Cemetery and afterwards to Mary Ulicsnik and others. I know from my conversation with the two persons, holders of the cemetery bonds aforesaid, and especially my conversations with Frederick Greenberg, one of said persons, that they have in mind the possibility of acquiring said shares of stock; but I know of no other person or persons who would bid therefor at either public or private sale.

OTTO A. STIEFEL.

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Sworn and subscribed to before
me this 6th day of June, 1927.

SAMUEL D. WILLIAMS,
Master in Chancery of New Jersey.

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RESTRAINING ORDER.

Filed September 21, 1927.

IN CHANCERY OF NEW JERSEY.

Dkt. 62-696

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Between

MARY ULICSNIK, *et als.*,
Complainants,

and

CHARLES E. DALRYMPLE, *et als.*,
Defendants.

On Bill, &c.
Restraining
Order.

The complainants having filed their bill of complaint herein, duly verified, wherein they allege that they with others, are holders in trust of certain assignments and a deed of property received from the defendant Otto G. Horster; and the defendants Ellen Minchin and Mary E. Riley having filed their counter-claim herein, duly verified, wherein they allege that they hold a judgment in attachment against the property of the defendant Otto G. Horster, in the New Jersey Supreme Court, which judgment stands wholly unsatisfied; and also allege that there remains due upon said judgment the sum of \$4,692, plus interest and costs payable to the defendant Ellen Minchin, and the sum of \$9,745.22 plus interest and costs payable to the defendant Mary E. Riley, and the sum of \$3,055 plus interest and costs payable to the defendant Margaret McLaughlin, and also allege that the assignments and deed given to Mary Ulicsnik, Karl Kniep and George T. Rockwell, and the assignment given to Louis

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Restraining Order.

Kempf are totally insufficient in law and void, and also allege that said property is held in trust for said Otto G. Horster and his creditors, and that said trust was created by said Otto G. Horster; now upon reading said bill and answer and counter-claim and the supporting affidavits there-
 10 with filed; and it appearing that the order to show cause heretofore issued on the twenty-first day of May, A. D. 1927, has been served upon all the parties named therein in accordance with the terms of said order; and upon consent of Otto A. Stiefel, solicitor of complainants, and Hugo Woerner, solicitor of defendants Clara Seider, Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep and Ludwig Lauerhaus; and no other parties
 20 having appeared in answer to said order to show cause;

It is on this 21st day of September, A. D. 1927, ORDERED, that the complainants Mary Ulics-
 nik, George T. Rockwell and Union Cemetery Association, and the defendants Otto G. Horster, Louis Kempf and Fidelity Union Trust Company, be, and they hereby are, until the final hearing in this cause and further order of this Court, restrained and strictly enjoined from selling,
 30 transferring or otherwise disposing of any of the property of Otto G. Horster, alleged to be held in trust by them or some of them, particular reference being made to the following property.

- (1) Shares of stock in the Stuyvesant Development Company.
- (2) Law library and office equipment.
- (3) Promissory notes and any other choses in action not specially mentioned.
- (4) Collection of stamps.
- 40 (5) Bonds of Union Cemetery Association.

Restraining Order.

(6) Real estate consisting of two-family house and lot known as 158 Steuben street, East Orange, New Jersey.

(7) Any and all dividends, rents, profits, interest or other income which has accrued or may hereafter accrue on account of any of such prop-
 10 erty.

Provided however, that the foregoing restraint and injunction shall not be held or taken to prevent Otto A. Stiefel as attorney for the complainants Mary Ulics-
 nik and George T. Rockwell, from collecting or receiving the rents or issues of or from the premises on Steuben street, as aforesaid, or from paying, out of any such rents heretofore collected by him or hereafter to be collected by him, taxes past due or to become
 20 due, insurance premiums past due or to become due or charges for or in connection with the upkeep of said premises.

Provided further, that by nothing hereinbefore contained shall the complainants or any of them be precluded from bringing any suit or suits to recover on any of the aforementioned promissory notes and any other choses in action aforesaid; or from proceeding to collect any judgment or judgments obtained in any such action or
 30 actions.

And it is further ordered that any of the complainants or defendants above mentioned, may, upon five days' notice, apply for a modification of this order.

EDWIN ROBERT WALKER,
 C.

Respectfully advised,

ALONZO CHURCH,
 V.-C.

Restraining Order.

We hereby consent to the entry of a restraining order in accordance with the above form.

Solicitor of Complainants.

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Solicitor of Defendants Clara Seider,
Martha Shaw, Minna Dorer, Reinhold
Knep, Louis Kempf, Anna
Kraemer, Karl Knep and Ludwig
Lauerhaus.

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**DEFENDANTS' REPLICATION TO
COUNTER-CLAIM.**

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK, *et als.*,
Complainants,
and
CHARLES E. DALRYMPLE, *et als.*,
Defendants.

On Bill, &c. 10
Defendants'
Replication
to Counter-
claim.

The defendants Ellen Minchin and Mary E.
Riley, join issue on the answer of complainants
to defendants' counter-claim.

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ARTHUR T. VANDERBILT,
Solicitor of Defendants
Ellen Minchin and Mary E. Riley.

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**ANSWER OF CLARA SEIDER AND OTHERS
TO COUNTER-CLAIM.**

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARY ULICSNIK, <i>et als.</i> , <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.</i> , <i>Defendants.</i>	}	<i>On Bill, &c.</i> <i>Answer to</i> <i>Counter-</i> <i>claim.</i>
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20 The answer of the defendants Clara Seider, Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna K. Kraemer and Karl Kniep, Jr.

These defendants Clara Seider, Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna K. Kraemer and Karl Kniep, Jr., answering the counter-claim of the defendants Ellen Minchin and Mary E. Riley, say that:

30 1. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9.

2. Paragraphs 10, 11 and 12 are denied.

3. Paragraph 13 is admitted.

40 4. These defendants admit that the collection of stamps of Otto G. Horster is held by the Fidelity Union Trust Company, but these defendants have no knowledge or information sufficient to form a belief as to the rest of the statements made in said paragraph.

Answer to Counter-claim.

5. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 15 and 16.

6. Paragraph 17 is admitted.

7. Paragraph 18 is denied.

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HUGO WOERNER,
Solicitor of Defendants Clara Seider,
Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna K. Kraemer and Karl Kniep, Jr.

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**ANSWER OF LOUIS A. KEMPF TO
COUNTER-CLAIM.**

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARY ULICSNIK, <i>et als.</i> , <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.</i> , <i>Defendants.</i>	}	<i>On Bill, &c.</i> <i>Answer of</i> <i>Louis A.</i> <i>Kempf to</i> <i>Counter-</i> <i>Claim of</i> <i>Defendants</i> <i>Ellen Minchin</i> <i>and Mary E.</i> <i>Riley.</i>
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20 The answer of Louis A. Kempf, brought in as a defendant to the counter-claim of the defendants Ellen Minchin and Mary E. Riley. This defendant, Louis A. Kempf, called Louis Kempf in said counter-claim, answering said counter-claim, says that:

1. He has not sufficient knowledge to form a belief and leaves the counter-claimants to their proof of paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 30 13, 14, 15, 17 of the counter-claim.

2. As to paragraph 7, this defendant has no knowledge except so far as he himself is concerned he admits that he has not applied as a creditor in the attachment suit therein mentioned.

3. He denies paragraph 10 of the counter-claim.

40 4. As to paragraph 16 of the counter-claim, this defendant has no knowledge that the check therein mentioned has been transmitted to the

Answer to Counter-claim.

Clerk of this Court. He admits the description of the said check. All other facts in said paragraph 16 of the counter-claim are denied.

5. Referring to paragraph 18 of the counter-claim, this defendant says that the value of the stock assigned and transferred by Otto G. Horster to this defendant on behalf of Union Cemetery Association, could not at the time of assignment or at any time thereafter up to the present time, be sold or disposed of for a sum equal to the amount of the indebtedness of said Horster to said Union Cemetery Association to secure which the assignment to this defendant was made, and a sale of said stock would prejudice the rights of this defendant as trustee and said Union Cemetery Association as beneficiary under the trust. 10 20

6. Said counter-claimants at the time of the issuance of the writs of attachment mentioned in paragraph one of the counter-claim, had full notice of the assignment to this defendant and had full notice of the rights of this defendant thereunder as trustee and of the rights of said Union Cemetery Association as beneficiary, to the shares of stock of Stuyvesant Development Company, assigned to this defendant and of all the equitable proceeds of said stock including stock dividends. 30

7. This defendant claims no right in said stock of Stuyvesant Development Company for the personal benefit of himself, except for such lawful compensation as he may be entitled to as trustee holder of said stock for the security of said Union Cemetery Association, but as such trustee and on behalf of said Union Cemetery Association, claims the first right to said stock 40

and to all proceeds therefrom until the full payment of the claim of said Union Cemetery Association, and especially claims a right to the dividend on said stock evidenced by the \$10,000 check mentioned in the counter-claim.

10 LEHLBACH, JOHNSON & ORMOND,
Solicitors of Defendant Louis A. Kempf.

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IN CHANCERY OF NEW JERSEY.

<i>Between</i> MARY ULICSNIK, <i>et als.</i>, <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.</i>, <i>Defendants.</i>	}	<i>On Bill, &c.</i> <i>Answer of</i> <i>Defendant</i> <i>John Gra-</i> <i>bach to</i> <i>Counter-</i> <i>claim of</i> <i>Ellen Min-</i> <i>chin and</i> <i>Mary E.</i> <i>Riley.</i>
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1. Defendant admits there was issued a writ of attachment of the tenor set forth in the first paragraph of said counter-claim, but denies that said writ is based upon due and sufficient proceedings.

2. Paragraph two is denied.

3. Paragraph three is denied.

4. Paragraphs four, five and six are admitted. 30

5. Referring to paragraph seven, defendant has no knowledge or information sufficient to form a belief.

6. Referring to paragraph eight, defendant admits that on November 3, 1926, an entry of judgments in favor of the persons mentioned in said paragraph was made in the records of the New Jersey Supreme Court, but defendant says that said judgments are not based upon any due

Answer to Counter-claim.

and sufficient proceedings, but are without warrant in law and void.

7. Defendant has no knowledge or information sufficient to form a belief as to the matter set forth in paragraph nine.

10 8. Referring to paragraph ten, defendant has no knowledge or information sufficient to form a belief in respect to the allegations "that said Horster stood in fear of a criminal complaint against him"; all other allegations are denied.

9. Paragraph eleven is denied.

10. Paragraph 12 is denied.

11. Paragraph thirteen is admitted.

20 12. Referring to paragraph fourteen, defendant has no knowledge or information sufficient to form a belief.

13. Referring to paragraph fifteen, defendant has no knowledge or information sufficient to form a belief.

14. Referring to paragraph sixteen, defendant has no knowledge or information sufficient to form a belief.

30 15. Referring to paragraph seventeen, defendant believes that the allegations in said paragraph are true.

16. Referring to paragraph eighteen, defendant has no knowledge or information sufficient to form a belief.

SECOND DEFENSE.

40 1. Ellen Minchin and Mary E. Riley at the time of the issuance of the writs of attachment

Answer to Counter-claim.

mentioned in the first paragraph of the counter-claim, had full notice of the rights of complainants and this defendant in and to all property mentioned in paragraphs two and three of counter-claim.

ARTHUR A. WERTHMANN,
Solicitor for Defendant. 10

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REPLICATION.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARY ULICSNIK, <i>et als.</i> , <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.</i> , <i>Defendants.</i>	}	<i>On Bill, &c.</i> <i>Replication.</i>
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20 The replication of the defendants Ellen Minchin and Mary E. Riley to the answer of the defendants Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna Kraemer and Carl Kniep, Jr., says that:

These defendants join issue on said answer to said counter-claim.

ARTHUR T. VANDERBILT,
 Solicitor of Defendants
 Ellen Minchin and Mary E. Riley.

30 Similar replications to answers of Louis A. Kempf and John Grabach, defendants, were filed on behalf of the defendants Ellen Minchin and Mary E. Riley, by the solicitor of said defendants.

DECREE PRO CONFESSO.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARY ULICSNIK, <i>et als.</i> , <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.,</i> <i>Defendants.</i>	}	<i>On Bill, etc.</i> <i>Decree Pro</i> <i>Confesso.</i>	10
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20 This cause being opened to the Court by Arthur T. Vanderbilt, solicitor of the defendants Ellen Minchin and Mary E. Reilly, and it appearing that at the instance of said defendants, process of subpoena calling upon the defendants Otto G. Horster, Helen C. Horster, John Grabach, Charles E. Dalrymple, Margaret McLaughlin and Louis Kempf, and the heirs of Karl Kniep, namely Clara Sieder, Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep and Ludwig Lauerhaus, and Stuyvesant Development Company and First National Bank of Hoboken, to answer the counter-claim of said defendants filed herein, has been duly issued and returned served upon defendants Otto G. Horster and Helen C. Horster his wife, John Grabach, and First National Bank of Hoboken, and that service of process of subpoena as aforesaid has been acknowledged by Charles M. Myers, solicitor of defendant Margaret McLaughlin and Charles E. Dalrymple, solicitor *pro se*, and by Hugo Woerner, solicitor

Decree Pro Confesso.

of defendants Clara Sieder, Martha Shaw, Minna Dorer, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep, and Ludwig Lauerhaus; and by George T. Vickers, solicitor for Stuyvesant Development Company.

10 And it further appearing that the defendants Otto G. Horster, Helen C. Horster, his wife, Charles E. Dalrymple, Margaret McLaughlin, Stuyvesant Development Company and First National Bank of Hoboken, have not nor has any of them filed an answer to said bill of complaint within the time limited by law, but have wholly failed and neglected so to do;

It is thereupon on this 3rd day of September, A. D. 1927, on motion of Arthur T. Vanderbilt, solicitor of defendants Ellen Minchin and Mary E. Reilly ORDERED and DECREED that the counter-claim of said defendants Ellen Minchin and Mary E. Reilly be, and the same is hereby taken as confessed against the said defendants Otto G. Horster and Helen C. Horster his wife, Margaret McLaughlin, Charles E. Dalrymple, Stuyvesant Development Company, and First National Bank of Hoboken, to the end that such decree may be made against them as the Court shall deem equitable and just.

30

E. R. WALKER,
C.

Filed September 3, 1927.

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REPLICATION TO ANSWER OF
LOUIS A. KEMPF.

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK, *et als.*,
Complainants,

and

CHARLES E. DALRYMPLE,
et als.,

Defendants.

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On Bill, etc.

*Replication
to Answer of
Louis A.
Kempf.*

The defendants Ellen Minchin and Mary E. Riley join issue on the answer of Louis A. Kempf to the counter-claim of Ellen Minchin and Mary E. Riley. 20

ARTHUR T. VANDERBILT,
Solicitor of Defendants,
Ellen Minchin and Mary E. Riley.

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REPLICATION TO ANSWER OF
JOHN GRABACH.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i>	MARY ULICSNIK, <i>et als.</i> , <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.</i> , <i>Defendants.</i>	<i>On Bill, etc.</i> <i>Replication</i> <i>of Defend-</i> <i>ants Ellen</i> <i>Minchin and</i> <i>Mary E.</i> <i>Riley to An-</i> <i>swer of De-</i> <i>fendant John</i> <i>Grabach.</i>
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20 Defendants Ellen Minchin and Mary E. Riley
join issue on the answer of defendant, John
Grabach.

ARTHUR T. VANDERBILT,
Solicitor of Defendants,
Ellen Minchin and Mary
E. Riley.

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REPLICATION TO ANSWER OF
MARTHA SHAW AND OTHERS.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i>	MARY ULICSNIK, <i>et als.</i> , <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, <i>et als.</i> , <i>Defendants.</i>	<i>On Bill, etc.</i> <i>Replication.</i>
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The replication of the defendants Ellen Min-
chin and Mary E. Riley to the answer of the de-
fendants, Martha Shaw, Minna Dorrer, Rinhold
Knep, Louis Knep, Anna Kraemer and Carl
Knep, Jr., says that: 20

These defendants join issue on said answer to
said counter-claim.

ARTHUR T. VANDERBILT,
Solicitor of Defendants,
Ellen Minchin and Mary
E. Riley.

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DEPOSITION OF OTTO G. HORSTER.

IN CHANCERY OF NEW JERSEY.

Between

10	MARY ULICSNIK, <i>et als.</i> , Complainants, and CHARLES E. DALRYMPLE, <i>et als.</i> , Defendants.	On Bill, etc. Deposition of Otto G. Horster.
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20 Transcript of shorthand notes of the testimony of Otto G. Horster given in the above-entitled matter on Wednesday, October 12, 1927, at four o'clock in the afternoon, at his home, 158 Steuben street, East Orange, New Jersey, before Herman Winard, a notary public of New Jersey.

Appearances:

Otto A. Stiefel, Esq., on behalf of the complainants.

30 Reynolds C. Massey, Esq., for Arthur T. Vanderbilt, Esq., attorney for Ellen Minchin and Mary E. Riley, defendants.

Hugo Woerner, Esq., on behalf of Martha Shaw, Minna Dorer, Rinehold Kniep, Louis Kniep, Anna Kraemer and Karl Kniep, Clara Seider.

Herman Winard, stenographer and notary public

(Deposition taken by virtue of stipulation entered into between counsel for the respective parties.)

Deposition of Otto G. Horster.

OTTO G. HORSTER, sworn by the notary public.

Examination by Mr. Massey.

Q Mr. Horster, do you recall making assignments to Louis Kempf on December 15, 1925? A Yes.

Q Do you recall making an assignment of your shares of stock in the Stuyvesant Development Company? A Yes.

Q Do you recall that you assigned anything else besides that stock on that date? A I don't recall.

Q Do you recall assigning any bonds—giving an assignment for any bonds? A What kind of bonds?

Q Bonds of the Stuyvesant Development Com- 20
pany, held by a committee, one of whom was
Mr. Young, president of the Hoboken Bank— A
Oh, yes.

Q —in the sum of \$15,000? A Yes. Any interest that I had I assigned.

Q At that time were there bonds in the sum of \$15,000 of the Stuyvesant Development Company in existence? A Not fifteen thousand. You got that mixed up. There was \$200,000 of bonds that the Union Cemetery Association put up as collateral security for a \$15,000 note, and I assumed at that time that I had an equitable interest in those bonds, and those are the bonds that I assigned.

Q Then, you say that they were not bonds of the Stuyvesant Development Company, but were bonds of the Union Cemetery Association?

A Right. There are no bonds. The Stuyvesant Development Company never issued any bonds.

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Deposition of Otto G. Horster.

Q How much of those bonds, the par value of those bonds, did you claim as your property?
A None that I know of.

Q At that time. A I thought that I had an equitable interest in it, whatever there was above the \$15,000, plus interest for so many years.

10 Q Mr. Horster, at the time you made that assignment of your equitable interest in the bonds, what did you think was the value of it?
A I didn't know. I had no idea that they had any value that I know of.

Q What did you think was the value of your shares in the Stuyvesant Development Company?

A It was nothing definite. I had an idea that we would get some money for the stock of the Stuyvesant Development Company, but that has
20 been dissipated to some extent since by what your office did in the matter of the suit of the cemetery trying to knock the Stuyvesant out.

Q Did you make a promissory note to Mr. Kempf at that time? A I did.

Q In the sum of \$35,000? A I don't remember the exact amount; something like that.

Q A demand note at the same time? A Yes.

Q Where were these papers signed? A In my office.

30 Q In the Wiss Building? A In the Wiss Building.

Q Do you remember who was present? A I do.

Q Who was present? A Mr. Fred Ardrey, Henry C. Pfaff, Mr. H. L. Depue and Mr. Wentz.

Q Mr. William F. Wentz? A William F. Wentz. Mr. Kirk was there.

Q Howard F. Kirk? A Howard F. Kirk was there; and I think Mr. Kempf, Louis Kempf—I
40 am not sure; I think he was there.

Deposition of Otto G. Horster.

Q Was there any consideration for your signing these papers, Mr. Horster? A Yes. I owed the cemetery the money, and I assigned that stock to them.

Q Do you know how much money you owed the cemetery association? A I think it was
10 \$22,000.

Q Was that the only consideration for your assigning this stock? A Yes, it was.

Q The stock and the bonds and the making of this note? A Yes, sir.

Q For \$35,000? A There was a question of whether I owed more than \$22,000, and in order to protect the cemetery I made the note for the \$35,000, which was in excess, of course, of what I owed them, but to satisfy everybody that I wanted to pay what I owed.
20

Q How long had you owed that money, that \$22,000? A How long? Well, at that time a very short time.

Q Was the other additional doubtful sum that you speak of a separate item of some kind? What caused the doubt of how much you owed? A Well, the question was whether I owed that or whether the Stuyvesant Development Company owed that.

Q Do you remember how much the other sum was? A I think it was \$10,000.
30

Q Is that the entire consideration? A Right.

Q The past due debts and \$10,000, all a total of approximately \$32,000—\$10,000 and— A \$22,500 that I owed and \$10,000 that the Stuyvesant owed; but they weren't certain whether it was the Stuyvesant debt or mine.

Q On whose first motion were these assignments made? A Mine.

Q On your first motion? A Yes, sir.
40

Deposition of Otto G. Horster.

Q When did you first communicate with anyone with reference to the making of the assignment? That was December 15th? A On December 14th.

Q The day before? A The day before.

Q With whom did you communicate? A Mr. Ardrey, Mr. irk and Mr. Pfaff.

Q Where did you communicate with them? A I was staying at my sister's at the time, and it was at her house.

Q At your sister's house? A Yes.

Q Where was that? A Stuyvesant avenue.

Q Who was present then? A I just told you.

Q They were all present? A Yes.

Q Were those gentlemen interested in the cemetery association? A They were trustees of the cemetery association.

Q Did they know of these debts before? A Before they met there?

Q Yes. A Yes.

Q Can you remember what was said between you and them at that conference—I mean leading up to the making of the assignments? A Why, I acknowledged the debt to them and offered that assignment as security for the debt.

Q Has it ever been determined whether your debt to the cemetery association was \$22,500 or \$32,500? A Determined by whom?

Q By anybody. A It always was in my mind that it was \$22,500, and I think that the cemetery association recognizes that, too.

Mr. Stiefel: Speaking for the cemetery association and referring to the bill of complaint, I think it is perfectly plain that the cemetery association confines its claim to \$22,500, plus interest.

Deposition of Otto G. Horster.

Q Was anything said about the form of these assignments at the time they were made, Mr. Horster? A I don't know what you mean by "form of assignments."

Q As to whether it should be a straight assignment, irrevocable, or any construction, or how the assignments were to be made. A You mean the assignment of the Stuyvesant stock?

Q Yes, and the bonds. A That was given as collateral security for that note.

Q Why were the note and the assignments made to Louis Kempf personally? A He was one of the trustees of the cemetery association and he was a friend of mine.

Q Did he take as trustee? A For the cemetery association.

Q For the cemetery association. Did he take as trustee for you? A Well, it was understood that if there was any more realized than the debt that I owed the cemetery that that was to be returned to me or to my creditors.

Q Did you have anything to protect your interest in these securities? Did you get anything at that time? A No, I didn't.

Q Did you get anything at any other time to protect your interest? A From the cemetery association or from Mr. Kempf?

Q Or Mr. Kempf. A No.

Q Do you know whether the cemetery association got anything from Louis Kempf to protect its supposed interest? A I don't know.

Q Now, on December 22nd, do you recall making further assignments of your property to other people? A To Mary Ulicsnik and others?

Q Yes. A Yes.

Deposition of Otto G. Horster.

Mr. Stiefel: Mr. Massey, I now show you Mr. Norbury Murray's copy of the bill of sale, the original of which I have in my safe. You may use the copy at this hearing instead of the original. I will produce the original at the hearing before Vice-Chancellor Church. I have here the original deed and a duplicate original of the trust agreement executed by Mr. Horster and the other parties on or as of December 22, 1925. You may use those originals.

Mr. Massey: Then, these will be marked—the bill of sale D. 1 and the deed D. 2 and the trust agreement D. 3.

(Papers so marked.)

20 Q On December 22, 1925—that was seven days after the assignment to Kempf—do you recall assignments and other transfers of property made to George T. Rockwell, Carl Kniep and Mary Ulicsnik? A Right.

Q The bill of sale marked Exhibit D. 1, just produced by Mr. Stiefel, from yourself to George T. Rockwell, Carl Kniep and Mary Ulicsnik, says, "One: I convey all my right, title and interest in and to my shares of the capital stock of the Stuyvesant Development Company and in and to all and singular the assets of said company." Is that the same stock that was assigned to Kempf on the 15th? A Yes, sir.

Q Why was this placed in this assignment? A Because, as I told you, I expected more from the Stuyvesant Development stock than my indebtedness to the cemetery, and whatever that excess was was to go to these people. I think it is mentioned in there that it is subject to a prior assignment, isn't it?

Deposition of Otto G. Horster.

Mr. Stiefel: I admit that at the time of the execution of the assignment to Rockwell, Kniep and Ulicsnik I knew of the prior assignment to the Union Cemetery Association. I knew of it because it had been communicated to me by Mr. Norbury Murray, Mr. Horster's attorney, who officiated in connection with the assignments to Rockwell, Ulicsnik and Kniep.

Mr. Woerner: That admission does not bind the clients I represent.

Q The second item on this list of property described in this bill of sale is bonds of the Union Cemetery Association. Is that the same group of bonds or interest in bonds that you undertook to assign to Mr. Kempf the week before? A Yes.

Q The third is, "All my right, title and interest in and to my collection of postage stamps." What was that? A A collection of postage stamps that I had then, prior to that date, put up as collateral security with the Fidelity Union Trust Company for a note that I owed—I think \$3,500—and they were to sell it, take out one of their notes, and the balance of the money was to be paid to those trustee. I might add that the stamps have since been sold, and that the Fidelity—I don't know just what amount—they have in hand about \$8,000 above my indebtedness to them, whatever the amount is.

Q Did you ever have any other collection of stamps besides those? A No.

Q Did that constitute all of the stamps that you had accumulated altogether? A The entire group.

Deposition of Otto G. Horster.

Mr. Stiefel: When you say that you mean at this time?

The Witness: My entire collection at that time, yes.

10 Q Had you had other stamps of considerable value before in your possession and disposed of them? A No.

Q Were these the only stamps of substantial value, large value, that you had owned at any time? A Yes, unless an occasional stamp that might have been exchanged or sold; but not for a year before that.

Q Had you disposed of any in bulk previous to that? A No.

20 Q It says, "No. 4: All my right, title and interest in and to my title searching plant." A Right.

Q What was your "right, title and interest" in that? A I had pledged that with—

30 Q Mr. Rosinger? A —the Rosinger firm, and with the understanding that if I could redeem the pledge by the following first of April I was to have the plant back. I was unable to redeem the pledge; I was unable to pay it; and as the result it belonged to them. But if I had been able by the following April to redeem that pledge, this plant was to go to me.

Q Of what did this title searching plant consist? A Title searches.

Q What was the extent? A I can't tell you. There were thousands of searches in it.

Q The next item on the list is, "Except as hereinafter reserved, all moneys whatsoever due or to grow due to me." A Right.

40 Q Of what did that consist? A Well, primarily of a note, or note of George T. Vickers

Deposition of Otto G. Horster.

made payable to me, which I bought and he didn't pay me for.

10 Q Anything else of substantial value? A Well, I had a contract also through Colonel Vickers, with a friend of his, who got some \$8,000 from me for oil stock which has never been delivered to me, and I didn't seem to be able to get any trace of them—a personal friend of Colonel Vickers sold it to me.

Q Do you know anything about the value of that contract at all? A I think it was a waste of paper, typewriting.

Q How much money did you invest in it? A \$8,000.

20 Q Was there anything else in the form of choses in action, rights to collect anything from other people that you had that was of value at that time? A I don't know of any definitely. There were some book accounts, but I never collected any of it, and I don't know what has happened—that is, money due me for work done.

Q Where were the records of this? A In my office.

Q Do you know what became of those? A I don't.

30 Q Your office in the Wiss Building? A Yes.

Q Were any of those delivered to George T. Rockwell, Carl Kneip or Mary Ulicsnik, to your knowledge? A Yes. I delivered the notes to them.

Q Which notes were those? A Colonel Vickers's, the George T. Vickers' notes. I think I delivered the contract for that oil stock.

40 Q Did you deliver your books of account showing the charges? A I haven't been in the office since.

Deposition of Otto G. Horster.

Q Did you deliver to them the keys to your office, access to your office to get these notes? A I don't know that I did. I gave them permission to go down there and get whatever they wanted, whatever they could get.

10 Q Have you any idea how much money you had in outstanding accounts? A Not now. I don't think there was very much—a few hundred dollars.

Q The next item is, "All my property, real and personal, of whatsoever the same may consist," and so forth.

Mr. Stiefel: "Except." You better read the "except."

20 Q —excepting and reserving all of my household furniture, and also to the extent of \$500 my bank balance." Can you think of anything that would be included in that paragraph on property? A Anything that was said there, anything that I had. I didn't have much above it. I didn't have a \$500 balance to begin with, and what I did have I turned over to the Liberty Trust Company for the money that I owed them.

30 Q So you don't think of anything else excepting what has already been mentioned in the way of property that you had—that is, outside of your real estate? A Yes.

Q You said that your bank balance was all due and owing to the Liberty Trust Company? A Right, all but a few dollars.

Q What was your household furniture? A You can see it here.

40 Q The furniture in how many rooms? A Seven rooms.

Deposition of Otto G. Horster.

Q And the used furniture value of that would be how much? A Well, I got it twenty-five years.

Q You have had it twenty-five years? A Most of it.

Q The deed Exhibit D. 2, Mr. Horster, conveys what property? A This property, 158 Steuben. 10

Q This property in which you are now living. The house is a two-family house? A Yes.

Q Do you know the market value of it, of the property, the house and lot? A Now? I estimated it at about \$12,000 at that time; but I don't know what it is now.

Q Was it encumbered? A No.

Q No charges against it, A No, except 20 possibly taxes.

Q This trust agreement, Exhibit D. 3, declares that these three parties—Mary Ulicsnik, Carl Kneip and George T. Rockwell, will hold this property, this real estate and personal property described in the deed and bill of sale, in trust, for the following purposes: One: As security for the payment of all the debts and liabilities listed in the schedule marked Exhibit A. Exhibit A says, "Carl Kneip, \$9,000." Did 30 you owe Carl Kneip \$9,000? A Yes, sir.

Q When did that debt arise? A I don't remember.

Q Did that debt arise prior to December 22nd, when the assignment was made? A Oh, yes.

Q At least how long prior? A I don't remember now.

Q Was it more than a year? A I wouldn't say that. I don't think so. I am not sure. 40

Deposition of Otto G. Horster.

Q The next one is Carl Riester, between six thousand and nine thousand dollars. Did you owe Carl Riester that much money at that time?

A Yes, I did. I owed everyone of the creditors that are named there the amounts that are named at that time.

10 Q Did you owe at that time money to Ellen Minchin? A I did.

Q Why was her name not placed in this list?

Mr. Stiefel: I object to that question. It is immaterial.

A I don't know.

Q Mr. Horster, did you know at that time why her name and the amount that was due to her was not placed in that list?

20 Mr. Stiefel: The same objection for the same reason.

A I don't know whether I knew at that time or not. I don't remember it. I don't know why we didn't put her name in. I know this—it may be the explanation of it—that at that time agreements had been made on behalf of the Stuyvesant Development Company, under and on behalf—and prior to that time—and on behalf of myself, on which I was to realize out of my stock of the Stuyvesant Development Company and debts owing to me sufficient to pay everybody all the moneys that I owed them. For some reason or another your clients have backed out of that agreement, and I didn't get the money; but I expected it was to be paid, the final payment on February 26th of the following year. I was to have my money and I expected to be able to pay everything that I owed.

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Deposition of Otto G. Horster.

Q Was the money that you owed to Mrs. Minchin mentioned at the time of this transaction?

Mr. Stiefel: I object on the ground it is immaterial.

10

A No.

Q Did you know at that time that you owed money to Margaret McLaughlin? A Yes.

Q And was that fact mentioned at the time? A I don't think so.

Q Did you know that you owed money to Mary E. Riley at that time? A I did.

Q Was that fact mentioned? A I don't think so.

Q At the time of these assignments? A I only made a general statement at that time that I owed more money than I thought I could take care of.

20

Q You did make a general statement, you say? A That I owed more money, yes.

Q Was there anything said about how much more money? A No.

Q Was anything asked about how much more money? A It may have been asked, but I don't remember.

30

Q Did you let Mrs. Minchin or Mary E. Riley or Margaret McLaughlin know about these assignments to Mr. Kempf or to these other parties? A No.

Q Mr. Horster, was there any other consideration for your making these assignments, making this bill of sale and this deed and trust agreement on December 22nd—

Mr. Stiefel: I object on the ground it is immaterial.

40

Deposition of Otto G. Horster.

Q —besides the past due debts? A No, no other considerations, except the fact that I owed them the money.

Q When and where was the first communication between you and any of these parties leading up to the making of this bill of sale and deed on December 22nd? 10

Mr. Woerner: Objected to as immaterial.

A I don't remember when nor do I remember where. In fact, I made that assignment voluntarily. I don't think that I talked with any of the three parties about the assignment before I made it.

Q Were this bill of sale and deed made at someone else's suggestion or at your suggestion? 20

A At my suggestion to Norbury Murray, who drew up the assignments as my attorney. He drew up the assignments and the deed and I executed them at his office.

Q Who was present when they were executed? A Norbury Murray.

Q Was he the only one? A Yes.

Q When they were executed? A When they were executed.

Q Had you seen Mrs. Ulicsnik, Rockwell, Kneip or any of those parties immediately prior? 30

Mr. Woerner: You mean in connection with the signing of these papers?

Mr. Massey: Yes, in connection with the signing of these papers.

A Only in this way, that I met them and told them that I was going to make—I met Mrs. Ulicsnik and told her—she is the only one that I 40

Deposition of Otto G. Horster.

met—I told her that I intended to make this assignment for the benefit of these creditors. I didn't meet Mr. Kneip until we had sent for him and Mr. Rockwell to be at the office of Burnett, Sorg & Murray when I executed this assignment.

Q Did you meet any representatives of these parties prior to the making of the assignment? 10
A No.

Q Who first started the idea of your making this bill of sale and deed? A Norbury Murray. He and I talked it over, and I told him generally what my situation was, and he suggested that that was the proper thing for me to do, and I realized that it was, and I volunteered to do it.

Q Did you tell Mr. Murray about the other obligations to Mrs. Minchin? A I don't think I did, not at that time, because, as I said to you before, I expected to get my money on the 26th of February, and I thought I could pay them personally without going into any assignment. 20

By Mr. Stiefel.

Q Mr. Horster, you have been more or less bed-ridden for a good many months now, haven't you? A It will be two years next Monday.

Mr. Stiefel: I ask the stenographer to note that the testimony of Mr. Horster was taken while he was reclining in a bed in this room in this house. 30

Q This house at the time you deeded it to Mary Ulicsnik and others stood in the name of your wife and yourself as tenants by the entirety, I believe; is that correct? A Right.

Q You were very friendly with Mr. Kempf at the time you made the assignment to him as trustee? A Yes. 40

Deposition of Otto G. Horster.

Q And continued to be friendly thereafter?
A Yes.

Q And trusted him? A Absolutely.

Q And trusted the cemetery association not to exact anything more from you than they were legally entitled to? A Right.

10 Q And you had full trust at that time in Mr. Ardrey, the president of the cemetery association? A Absolutely, and have yet in everyone of them.

Q And Mr. Ardrey unfortunately died a few days ago? A Yes.

Q The notes of George Vickers are, as far as you know, the notes that I hold and which I am supposed to collect? A Yes, sir.

20 Q You are the secretary of the Stuyvesant Development Company? A Yes, sir.

Q And the Stuyvesant Development Company had notice of all these assignments? A Yes, sir.

Q Mr. Horster, I show you what purports to be a copy of a letter from yourself to Mr. Kempf. I haven't the original here; but look at that. Do you remember writing a letter of that tenor? A Yes. I wrote such a letter to Mr. Kempf.

30 Mr. Stiefel: Subject to the production of the original, if it can be found, and I assume it can, and this is a copy, I would like to have this marked in the case.

Mr. Massey: You mailed it to Mr. Kempf?

The Witness: Yes, and I got an acknowledgment from Mr. Lehlbach of the receipt by Mr. Kempf.

40 Mr. Stiefel: I will offer that copy subject to the production of the original. I haven't the original, and I want Mr. Horster to tell us that he sent a letter like that.

(Paper marked Exhibit C. 1.)

Deposition of Otto G. Horster.

Q Now, Mr. Horster, do you remember receiving an answer to that letter from Mr. Lehlbach? A Yes.

Q I show you what purports to be a copy of that. A I think I have the original somewhere; but if I find it I will have my wife send it to you. I think I have it. Yes. 10

Mr. Stiefel: Subject to the production of the original, I would like to have this copy marked as Exhibit C. 2.

(Paper marked Exhibit C. 2.)

Q Your records in the Wiss Building were captured by the owners of that building, I believe? A Yes.

Q And you haven't had access to them since? 20
A Two years practically.

By Mr. Woerner.

Q You say you expected to receive considerable money on February 26, 1926, from the Stuyvesant Development Company? A Yes.

Q Have you any idea of the amount you were to get? A I stated the amount in that letter to Kempf, because I didn't want Kempf to dispose of that stock without giving me notice of what I had to get. 30

Q Was it a considerable amount? A Oh, yes. I expected to realize out of that Stuyvesant stock something like \$115,000 at the time.

Q Was that through a sale that had been made of the bonds? A Through an agreement to sell, a contract or agreements which were unfortunately never executed because of the purchaser having found a way in his judgment of acquiring that stock without paying for it. 40

Deposition of Otto G. Horster.

Q With whom was that agreement made? A That was made with a syndicate represented by Frederick Greenberg. The men in it were Mr. Marsa, Mr. Rose, and I don't remember the others—Augenblick and Greenberg. There were others in it, but I don't remember the names.

10 Q And you had agreed to sell your stock to them to get this amount? A The agreement was a complicated agreement by which they were to acquire the lot on the west side of Stuyvesant avenue, the property of the Union Cemetery Association, yet the Union Cemetery Association was, according to our estimates, indebted to the Stuyvesant. They were also to buy the stock of the Stuyvesant, and all in all it was estimated that I was to get approximately \$115,000 at that
20 time.

Q In cash? A In cash.

By Mr. Stiefel.

Q These gentlemen—Greenberg, Augenblick and others, are the clients of Mr. Arthur T. Vanderbilt in the suit of Fidelity Union Trust Company against the cemetery association and others? A Instead of carrying out the agree-
30 ments, they acquired the bonds of the cemetery and attempted and are now attempting a foreclosure of the mortgage and bonds and so cut out the Stuyvesant Development Company of any rights it may have.

Certificate of Notary Public.

I, Herman Winard, a Notary Public of New Jersey, do hereby certify that the foregoing deposition was taken before me at the time and place and under the stipulations and agreements, and in the presence of counsel for the respective parties as therein stated; that the deposition was taken in shorthand by me and afterwards re-
duced to typewriting. 10

And I further certify that the foregoing is a true transcript of my shorthand notes.

HERMAN WINARD,
A Notary Public of New Jersey.

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Opening.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

10 MARY ULICSNIK, *et als.*,
Complainants,

and

CHARLES E. DALRYMPLE,
et als.,
Defendants.

October 27, 1927.

20 Transcript of shorthand notes of testimony
taken in the above-entitled cause before his
Honor Alonzo Church, Vice-Chancellor, at the
Chancery Chambers, Newark, New Jersey, in
the presence of Otto A. Stiefel for complainants
Mary Ulicsник and others; Arthur T. Vanderbilt
(by R. C. Massey) for Ellen Minchin, Mary E.
Riley and Charles E. Dalrymple; Huga Woerner
for defendant Karl Kniep Estate; Charles M.
Myers for Margaret McLaughlin, Arthur A.
30 Worthman for John Grabach; Lehlbach, Johnson
& Ormond (by Mr. Lehlbach) for Louis A.
Kempf; John Contrell, Jr., for Mr. Geo. K.
Rockwell, one of the trustees.

Mr. Stiefel: Your Honor please, in this very
complicated case, I appear for the complainants,
and it is so complicated that I am going to ask
the indulgence of the Court while I endeavor to
explain it to the Court. I think that possibly
will be of some assistance. If I go too far I
40 know the Court will stop me.

Opening.

There are a large number of parties interested;
I venture to say there are about twelve different
interests, twelve different individuals, and I rep-
resent the first claimant to a fund now in court,
represented by a check of \$10,000 now in the
custody of the clerk, and who also have claims
upon other assets formerly of Otto G. Horster, 10
which I will describe in a minute.

I think the position of my clients, or the claims
of my clients and those of the other parties, can
be best disclosed to the Court if I take the matter
up in order of time, historically, as it were.

On December 15, 1926, Otto G. Horster was
indebted to the Union Cemetery Association in
the sum of at least \$22,500. On that day he
made an assignment to Mr. Kempf, Louis Kempf, 20
one of the trustees of that association, on behalf
of the association, of all his rights, title and in-
terest in certain stock certificates and the stock
represented thereby, namely, the stock of the
Stuyvesant Development Company.

I think I ought to explain to you, in order that
there may be a full understanding of this case,
what Stuyvesant Development Company stock is.
The Union Cemetery Association was founded
about the year 1910 and did not get along well. 30
About 1915 or 1912 there was formed the Stuy-
vesant Development Company. It has three
stockholders, Mr. Horster, Colonel Vickers and
Mr. Fallon, now Vice-Chancellor. Each one of
them held a third of the stock of that company.
That company was formed with a view to carry-
ing along the Union Cemetery Association and
contracts, alleged contracts were made between
the Union Cemetery Association and the Develop-
ment Company. Things went along for years, 40

Opening.

until finally, in the year 1926, there was commenced a chancery suit which is being heard by Vice-Chancellor Backes, and he is very familiar with this whole matter, and that is a foreclosure suit brought to foreclose a million-dollar bond issue on this cemetery association, given way
10 back in 1910.

Now, the Stuyvesant Development Company has no interest outside of this interest in the cemetery association or in cemetery association bonds. It does not do any general business. In other words, its existence is dependent, so to speak, from a practical standpoint, on the Union Cemetery and its fortunes are dependent upon that. This stock therefore, has no market value. It is a stock, in fact, which has a value, if any,
20 only because the Union Cemetery Association, or somebody mixed up with the Union Cemetery Association, is going to pay some money to the Stuyvesant Development Company.

Well, Horster assigned this stock to Kempf as collateral security, so to speak, or as security in order to insure a payment of this indebtedness of \$22,500. That was in December, 1925—December 15th. Mr. Norbury Murray, I think, represented Mr. Horster then. At any rate, he did
30 later in that month, and he found it necessary to call together, late in the month of December, 1925, other creditors of Horster, whose claims aggregated about \$40,000. The exact figures, of course, will be furnished to you. And late in December there was prepared a bill of sale, a deed and a trust agreement by which these creditors were to get all the assets of Horster except \$500 and his household furniture to hold as
40 security for the payment of the \$40,000 owing to

Opening.

them, with power to sell and dispose of these assets in order to bring about the payment of their claim.

They took with full knowledge of the prior assignment to Kempf of the Stuyvesant Development Company stock, and they took subject to the right of the Union Cemetery Association which
10 held a prior assignment, but these creditors in the latter part of December, 1926, Ulicsnik, Rockwell—whatever their names may be—are the second in point of time.

Well, things went along with everybody hoping that a speedy settlement might be effected, when there came along the third group in point of time, represented by Mr. Vanderbilt, and Margaret McLaughlin and some other parties, whose names will be mentioned to you, or one of them,
20 caused to be sued out a writ of attachment and attached several things: One, this ten-thousand-dollar check, secondly, all right, title and interest of Horster in the real estate that I have mentioned before, and perhaps some other things. Yes, I believe his right, title and interest in a stamp collection put up as security with the Fidelity Trust Company for a loan. Nobody claims any priority to the Fidelity there.
30

Now, I should say something about this real estate. This real estate was conveyed to Ulicsnik, Rockwell and others at the end of December, in company with the trust agreement, by a deed which was recorded prior to the attachment. The Stuyvesant Development Company received notice of the two assignments which precede the attachment, one of them to the Union Cemetery Association, as I have said, and the other to Rockwell, Ulicsnik and the second group.
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Opening.

Other notices were sent out to various parties, so the situation is: there are three groups of claimants; first, the Union Cemetery Association; second, Ulicsnik, Rockwell and that group, and, third, the attaching creditors, who come last in point of time.

10 Their claims did not appear until about March of the year 1926.

Now, my position on behalf of the complainants and the reason why I filed the bill was this: Early in March, 1926, Colonel Vickers, the president of the Stuyvesant Development Company, appeared in the office of Norbury Murray, and there showed them or stated that he had a check of \$10,000 of the Stuyvesant Development Company ready to turn over to that one or those of the parties that were present who might be entitled thereto, or to turn it over to anybody, if they all could agree, but he would not turn it over to anybody unless they all consented that it be turned over and his company released. He did that because he had received notice then of the prior assignments. The attachment was not then working at that meeting, which was held in Mr. Norbury's office, and at which all the assignees or transferees were represented. No agreement was reached. They could not agree as to who was to get the money or the check, with the result that it was said to Colonel Vickers: "You have that check certified and hold it and we hope in a few days to work out our problems amongst ourselves and then you can turn over the check. We will all sign a paper to that effect, or somebody will go into court or get a direction, but you hold the check for the benefit of those who are here today." And he said, "All

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Opening.

right." And he went away and he had the check certified.

When I found that check leave his possession and go into the possession of the auditor in the attachment suit, to whom Colonel Vickers delivered it, I, of course, set up a breach of trust and the absence of any right in the auditor to that. And, at this point, I may say that the Chief Justice on an application before him indicated that he had no more right to it than if he had gone into a safe and taken it out, and the Chief Justice refused to do what the attaching creditors wanted done with it.

When all this developed, I said, "Here chancery ought to have a say," and I filed the bill and Vice-Chancellor Backes ordered that check turned over to the clerk of this Court, where it is now.

That is the way the ball opened. That was the initial step in this suit. After that developed, Mr. Massey's client—Mr. Vanderbilt's client filed a cross bill, or, rather, a counter-claim, as we call it today, in which they set up their alleged equities as attaching creditors, and the fundamental question, the real question in this case is and will be: "Are the rights of prior assignees and transferees good as against subsequent attaching creditors?"

"Is it not true that this is a case where there is applicable the doctrine and principle that prior in time is prior in equity, where both the debts are past due debts?" That is the fundamental question in this case.

At any rate, I, for the complainants and certain of the defendants who are virtually complainants, take the position that these transfers,

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Opening.

being prior in point of time, are prior in point of equity and cannot be successfully attacked in this Court by the attaching creditors.

Now, is there any point on which I perhaps might say anything further?

10 The Court: No.

Mr. Stiefel: I guess I have spoken at considerable length.

Mr. Massey: Your Honor, this issue is between the clients we represent and all of the others, including the complainant and the defendant. There are just two or three points in which I think the opening of counsel should be supplemented, to make it clear to your Honor. The first one is that at the time the attachment of the certified check was made in the hands of Mr. Vickers, of course, the right and credit—all rights and credits due and owing to Otto G. Horster from the Development Company were formally attached at that time. That question may be important in the decision as to who is entitled to the proceeds of the check or the debt which the check represents.

Another statement of Mr. Stiefel's was that Mr. Vickers agreed to hold the check for the benefit of the assignees who were present at that conference. Now, Mr. Vickers is here in court and that point will be clarified.

It has been our understanding all along that Mr. Vickers was holding the check for somebody to establish the right to it.

Then, the other point was in reference to the decision of the Chief Justice. That was to the right to collect the money on that check. Of course, we have no formal record of that decision here before us as to the request which prompted

Opening.

the decision. It is more or less a matter of speculation. There were some technical points involved rather than the real merit of who was entitled to collect the debts from the Stuyvesant Development Company.

The question there would be the question whether we were entitled to collect the debt by means of taking the check or whether we should collect it directly from the Stuyvesant Development Company, who made the check. The proceeding at that time was against the bank.

As to the defense, the bill, original bill filed by Mr. Stiefel, referred only to this certified check for ten thousand dollars, and asked that that be taken away from the auditor in the attachment suit to whom it had been delivered, and it was deposited in court and it is now in court.

Then, on the counter claim, after their denying the validity of the assignment, we set up a claim to the real estate, which was formally attached, and to the equity of Mr. Horster in this collection of postage stamps, which was on deposit in the Fidelity Union Trust Company and is now worth approximately a little less than six thousand dollars. The real estate is worth something around ten or twelve thousand dollars, so the amount of tangible property that we claim actually under these attachments is of about the sum of twenty-five thousand dollars. The three creditors that appeared and proved claims and entered their judgment in the attachment suit, which was uncontested all the way through, run to near twenty thousand dollars.

It may be of some importance, the fact that the Fidelity Union Trust Company, who held this collection of stamps, received no notice at all from the assignees, until long after the at-

Opening.

attachment had been made and the judgment entered and arrangements were actually under way to sell the stamps and pay the money over to the auditor and pay the judgment creditors in that attachment case.

10 There was nothing in connection with the assignments that were made which would give notice to any outside party that Mr. Horster had assigned all his property to any particular creditors. There was nothing of record anywhere excepting the deed and the deed was a straight deed. It did not mention any trust and it would appear like an ordinary sale, if anybody looked at it until such time as the stock should be transferred.

20 The issue of law as to priority and the argument as to each defendant is that the assignments were void, they are void under the statute of fraud and they are void under the statute concerning assignments, and we have the statute and a leading case which we think is clear and determines the question.

The essential facts are, most of them, not in dispute, but they will have to be proved in order to get the matter into the record.

30 Mr. Stiefel: I think, before we close these statements, Mr. Massey and I, with the consent of the other attorneys present, ought to agree that only to the extent necessary will we go into the figures due to the various claimants.

We will endeavor at the conclusion of the hearing to present a tabulation, an agreed tabulation, and, if we cannot agree, why, a speedy reference to a Master or a moment's consideration by your Honor, I think, will deal with that.

40 The Court: Have you entered your appearances? I will take a short recess.

Charles M. Imhoff, direct.

Mr. Stiefel: I see Mr. Imhoff, who has been called as a witness, here and I think he, being a banking official—I would like him to testify first, although I have not subpoenaed him.

I believe you have, Mr. Massey?

Mr. Imhoff, will you please take the stand? 10

CHARLES H. IMHOFF, sworn for the complainant.

Direct examination by Mr. Stiefel.

Q Mr. Imhoff, you are an officer of the Fidelity Union Trust Company? A Yes.

Q And you are familiar with the transactions of that company and Otto G. Horster in relation to a certain stamp collection of his? A Yes, sir. 20

Q And, I believe, the facts are that at a certain date, which you will give us, he pledged that stamp collection for a loan of about three thousand dollars; is that correct? A Yes, sir.

Q And I see that you have certain papers there. Those are the papers in connection with the loan? You sold that collection—(interrupted)

The Court: Now, wait a minute. What is the date? 30

Q What is the date? A December 17, 1925.

The Court: All right.

Q You sold that stamp collection, did you? A Yes, sir.

Q For how much? A The total amount realized was \$8,858.92.

Q And out of that you paid the note? A Of three thousand dollars, and twenty-nine dollars and a half interest. 40

Charles M. Imhoff, cross.

Q And there remains how much in your possession? A \$5,829.42.

Q And that the company is willing to pay to whomsoever the Court may order or for whom the Court may determine—in favor of whom the Court may determine? A Yes, sir.

10

Cross examination by Mr. Massey.

Q Mr. Imhoff, have all those stamps been sold? A Yes.

Q How many books were there? A I think there were twelve volumes. Twelve volumes and a loose package.

Q Now, when did the Fidelity Union Trust Company first receive notice of the claim of anybody else in those stamps besides Mr. Horster? A Why, it was on this attachment which I have here. That is dated March 20, 1926.

20

Q When the writ of attachment was served by the sheriff's office? A I don't just know what date it was served. I suppose it was served about that date.

The Court: At that time had you sold the stamps?

30

The Witness: Oh, no. Oh, no, the stamps were not sold until 1927.

Q And after that what communication was received by outside parties making claims for the stamps? A Well, I don't know as we really had any. There was one or two parties came in and talked to me about it.

Q Further communications from the same party, from the attachment creditors or the auditor in attachment? A I don't know as I get your question, Mr. Massey.

40

Charles M. Imhoff, cross.

Q When were the next steps taken in connection with placing claims on the stamps and having them sold? A I don't believe I could answer that. I don't know. I don't—(interrupted).

Q Do you remember receiving a communication from Mr. Dalrymple, the auditor in the attachment suit, Mr. Charles E. Dalrymple? A Yes; I have that here.

10

Q Have you a record of having received that? A I haven't a record of the date that it was received, but I have the paper here.

Q What was that—(interrupted)

The Court: When was that dated?

The Witness: Not dated, but it was received after the attachment, several months.

20

Q What was the nature of that claim or note?

A Shall I read it?

Q Yes.

The Court: What is the amount?

A "Whereas Otto G. Horster pledged with the Fidelity Union Trust Company a stamp collection as collateral security for a loan of three thousand dollars with interest, and whereas a writ of attachment was issued out of the New Jersey Supreme Court in the suit of Ellen Minchin against said Otto G. Horster and the goods, chattels, rights and credits in said Horster in the custody of the Fidelity Union Trust Company were attached, and whereas the note of said Horster, held by the Fidelity Union Trust Company for the sum of three thousand dollars to secure which this collateral was pledged, is past due and the amount thereof remains wholly un-

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40

Charles M. Imhoff, cross.

paid, and whereas the Fidelity Union Trust Company desires to sell such collateral for the purpose of applying the proceeds derived therefrom or so much as may be necessary to the payment of said note, and whereas in order to get the best price for the said stamp collection, it
 10 was deemed advisable to place said collection in the hands of Percy G. Dunn, of number 154 Nassau street, New York City, a dealer in such goods, to be by him sold at public sale, now, therefore, I, the undersigned, the auditor appointed in the above-mentioned suit, hereby consent to the placing of the above-mentioned stamp collection in the hands of Percy G. Dunn for sale, the amount realized therefrom, after deducting his commission of twenty per cent., to be paid to the
 20 Fidelity Union Trust Company and said Fidelity Union Trust Company to pay to me such amount as it may receive from said Percy G. Dunn, after deducting therefrom the amount due on its note. Charles Dalrymple."

Q At the time that agreement or consent was entered into, Mr. Imhoff, for the sale of the stamps, had any notice been received, or any claims of other parties to those stamps? A None whatever.

30 Q And after that did you receive notice from other parties? A I think we did. I think I had telephone advices and so on. I don't know of any legal notice that we received.

Q Do you know of any letter, written notice which was received from anybody? A I don't recall any. There might have been. Did you write me a letter, Mr. Stiefel?

Mr. Stiefel: I did. Look in the papers.

40 The Witness: I don't know as I have that here. It seems to me, I have a recollec-

Charles M. Imhoff, cross.

tion of something of that kind, but I haven't it here. I don't know where it is. Have you a copy of it?

Mr. Stiefel: I have a copy some place. Suppose, when I find my copy, we simply put it in.

The Court: Then it will be understood that a copy of the letter that he read into the record this morning will be introduced. 10

The Witness: I will make a search. Maybe I can find the original.

The Court: Well, Mr. Stiefel and Mr. Massey can agree to a copy and he will read that into the record.

Q You say you are sure that these claims of the other creditors that they sent their notice in afterwards? A Why, the only one I have received at all was the notice from Mr. Stiefel, telephoned several times, and I think there was a letter, as he says. I don't see—it must have got in the correspondence file instead of the Horster file. 20

Q And you said that was after the arrangement with Mr. Dalrymple for the sale of the stamps? A Oh, yes, yes. 30

The Court: Is that all?

Mr. Massey: That is all.

The Court: That is all, sir.

The Witness: Thank you.

The Court: Now, Mr. Imhoff can go, can't he?

Mr. Stiefel: Yes. Thank you. Mr. Murray. 40

Norbury C. Murray, direct.

NORBURY C. MURRAY, sworn for the complainant.

Direct examination by Mr. Stiefel.

Q Mr. Murray, you are a counsellor-at-law?

10 A Yes.

Q Member of the firm of Burnett & Murray? A Yes.

Q And in December, 1925, you represented Otto G. Horster, did you not? A I did.

Q Do you remember conferring with attorneys of certain creditors of Otto G. Horster, in December, 1925? A Yes.

Q And do you remember submitting to those attorneys at a conference in your office certain documents in December, 1925? A Yes.

20 Q Now, I show you three documents, two of which have already been marked as Exhibits D. 2 and D. 3 in this cause, upon the taking of the deposition of Otto G. Horster, and the third of which has not been marked, they being respectively a trust agreement, a deed and a bill of sale, showing you these documents, I ask you whether they were prepared in your office and under your direction as attorney for Otto G. Horster? A They were.

30 Q And they were delivered on or about December 22nd? A On or about their date.

Q On or about that date. Do you remember whether you attended to the recording of that deed for your office? A Yes; we did.

Mr. Stiefel: I will offer these documents at this time.

Mr. Massey: No objection.

40 (Papers marked Exhibits C. 1, D. 2 and 3.)

Norbury C. Murray, direct.

Q Mr. Murray, at the time these documents were prepared, you knew, I believe, that Otto G. Horster was indebted to Union Cemetery Association and had made an assignment to that association to secure that indebtedness of certain stock, didn't you? A Yes.

Q And you also knew of certain indebtedness of Otto G. Horster to a party represented by Judge Stickel? A Yes, the balance at that time was about \$475. 10

Q And you knew at that time that that was secured? A Yes.

Q Now, outside of— A Not by the stock, however.

Q No. In some way? A Yes.

Q And outside of those creditors and the creditors named in this trust agreement, Exhibit D. 3, did you know of any other creditors of Otto G. Horster? A No. 20

Q You remember that Mr. Contrell, Mr. Woerner and myself were present at the time of the delivery of this trust agreement and represented the creditors therein mentioned? A Yes, or some of them. No— I don't know just who represented who, but they were all represented by you three gentlemen.

Q And do you remember stating to us that all the creditors known to you were involved in and protected by this agreement, or something to that effect? A Yes. 30

Q Tell us. A I told you that the assignment of Mr. Horster's Stuyvesant Development Company stock had already been made to the cemetery association, that sixteen bonds which he owned personally had been pledged with Judge Stickel as security for the indebtedness to his client, that with those exceptions there was no 40

Norbury C. Murray, direct.

other debts of Mr. Horster that I knew of, and that these documents which you have just shown me transferred all of his assets, so far as I knew them, to the three trustees named, but, while not so mentioned, they were, in fact, subject—pledged to the cemetery association.

10 Q And, when you say "All the assets," you mean all assets except those expressly excepted by the trust agreement? A Yes.

Q In other words, you dealt with the parties named in the trust agreement of that time on the best of your belief and understanding that this trust agreement would take care of all the creditors of Horster, at that time, who had not been protected prior thereto. A That is correct.

20 Q And you knew that these attorneys, of course, relied upon that statement to the extent of believing that there were no other creditors. They knew of none. A No. As far as I know, they did not. I don't know how much they relied on it, of course, but I assume that they did.

Q Well, the dealing was upon that basis? A As far as I knew.

Q Yes. And, subsequently, when you found out that there were other creditors, you informed these attorneys and stepped out of the case? A Yes.

30 Q When you found out that you had been, perhaps, mislead, you stepped out of the case? A After that some—quite some weeks after that—those documents were delivered, I learned from outside sources other than from Mr. Horster of this Mrs. Minchin's claim; and then, following that, I learned that the—or heard from some outside sources that Mr. Horster, prior to giving this assignment, had already sold his title-searching plant and when I heard or learned
40 that I withdrew from the case.

Norbury C. Murray, direct.

Q Now, prior to withdrawing from the case and early in March, 1926, was there a conference at your office at which Colonel Vickers was present, a conference in relation to this Horster matter? A There was a conference, if my recollection serves me, it was some time in the first half of March, 1926, but the exact date I don't know. 10

Q But you remember the occasion well? A Yes; I remember the occasion.

Q And do you remember Mr. Contrell being present? A Yes.

Q And Mr. Woerner? A Yes; and Mr. Woerner.

Q You were present? A Mr. Woerner, Mr. Contrell, Mr. Stiefel, Colonel Vickers and Mr. Lehlbach and Mr. Kirk.

Q Do you remember who called that conference? A I think that I did. 20

Q And do you remember stating to any of these attorneys that they were to be there and there was to be a distribution of some money, or something of that sort? A I had heard, and I think it was from Colonel Vickers or Mr. Horster, I don't know which, that there was to be a distribution, a cash distribution on account of Mr. Horster's stock in the Stuyvesant Development Company, and, inasmuch as that had been assigned to the Cemetery Association first, and then by these documents which you have shown me we thought—I thought it best to get all parties interested together and be present at the distribuion so that there could be an agreement. 30

Q And these parties then met? A They did.

Q Did Colonel Vickers have a check there for ten thousand dollars? A He did.

Q And he participated in the conference? A He did. 40

Norbury C. Murray, direct.

Q Do you remember what he stated about this check, or what it was, what it had to do with the Stuyvesant Development Company? A He said it was a distribution on account—or a dividend of some kind on account of Mr. Horster's stock in the Stuyvesant Development Company. I don't
10 think he stated what kind of dividend it was, whether it was a dividend—an earned dividend, or whether it was a dividend in liquidation, but, anyway, it was some kind of a dividend and he was ready to turn it over to whoever was entitled to it.

Q Did you see the check by any chance? A Yes; he had it and exhibited it.

Q He exhibited it? And he wanted to deliver that check that day? A He did.

20 Q But did he make any statement that the parties present would have to agree on who was to get it? A He said he wouldn't give it to anyone unless all of those there agreed.

Q And that was on account of what he considered conflicting assignments? A That is correct.

The Court: Did he say that?

The Witness: Yes. His attitude—

30 The Court: Just say what he said.

The Witness: His attitude was this—I can't give you the exact words—there was a long conference of two or three hours—but his attitude was this, that there was an assignment of this money, of this stock, to the cemetery association, represented at that time by Mr. Kirk. The assignment had been made, I believe, to a Mr. Kempf, as trustee for the cemetery association. Mr. Kempf,
40 as a recollect it, was represented at that

Norbury C. Murray, direct.

conference by Mr. Lehlbach; the trustees under these assignments being represented by Messrs. Stiefel, Woerner and Contrell, claimed an interest in—Mr. Lehlbach claimed it on behalf of Mr. Kempf as trustee, and Mr. Kirk claimed it on behalf—as *cestui*
10 under that trust, and Mr.—Colonel Vickers said that he would not turn it over to any one of those interests unless all of the other interests represented there would consent to it.

The Court: All right.

Q Do you remember, Mr. Murray, near the close of the meeting, anything being said about having that check certified and holding it? A Yes.
20

Q Will you tell us what you recall? A There was some discussion as to whom this check should be turned over. It was suggested, first, that one be trustee of it and then another and then another, and each one declined to act as trustee. Then Colonel Vickers said that—made some remark, as I recollect it that—well, he wanted to get rid of the check, but he was not going to do it unless they would all agree. Finally, he suggested, I believe it was he, but someone, anyway,
30 suggested that the check be certified and be held until those represented at this conference could agree on who should be responsible for it. Mr. Woerner had said—taken—had said throughout the conference that he would not consent to Mr. Lehlbach's client or Mr. Kirk's client getting the check unless he, Mr. Woerner, for his client, got a part of the check or got a part of the proceeds, and that was the reason that the check was not delivered then and there by Colonel Vickers.
40

Norbury C. Murray, direct.

Q The check was not certified at the time of this conference, was it? A It was not.

Q Did Colonel Vickers say that he would have it certified? A He said that he would.

10 Q Yes. Do you recall any talk that, if the parties could not agree, it might be possible to get a Court to say who should have the check? A I am not sure whether anything was said about a court order or not. My recollection of it is, and I am sure of this, that he said that he would have the check certified and, as soon as the parties that were represented at this conference agreed among themselves as to who should get it, he, Vickers, would turn it over to that agreed party.

20 Q And he wanted to get rid of it, you said before? A And he was very anxious to get rid of it.

The Court: Anxious to get rid of \$10,000?

The Witness: Yes, sir.

The Court: It was only a check.

30 The Witness: That check—I remember, your Honor please, he made a remark, Colonel Vickers, he said, "It is a most unusual situation." He said, "I have \$10,000 and I want to get rid of it and nobody will take it."

Q That check was payable to the order of Otto G. Horster? A That is my recollection; yes.

40 Q And Otto G. Horster was in an adjoining room during this conference? A Mr. Horster was in an adjoining room where I had him there in case he should be needed.

Norbury C. Murray, direct.

Q And hadn't you stated at that meeting that of course Horster would endorse the check? A Yes. I might add that I had Mr. Horster down to be on hand, anticipating that there might be some documents that would have to be signed, and I wanted him to sign it personally rather than for me to sign it as attorney. 10

Q Mr. Murray, I show you what purports to be stock certificates for seven and three shares of stock, respectively, of Stuyvesant Development Company, and apparently signed by Otto G. Horster, whose signature is witnessed by you. Will you tell us whether those signatures, those scrawls, are your signatures?

The Court: Strike that out.

A The signature is—the signatures are of Mr. Horster and the writing at the left is mine. 20

Mr. Stiefel: I offer these.

(Stock certificates marked Exhibits C. 2 and C. 3.)

Mr. Stiefel: By consent they are marked in evidence.

Q Now, Mr. Murray, do you recall, after the trust agreement was prepared, sending out notices to certain parties, notifying them of the assignment of transfer? A I do. 30

Q I show you what appear to be copies of four letters sent out by your firm. Will you look at them and tell us whether those are copies of notices sent out by you? A Yes; they are.

Mr. Stiefel: By stipulation they will be marked instead of the originals. If necessary, the originals will be produced.

(Four papers marked Exhibit C. 4.) 40

Norbury C. Murray, cross.

10 Mr. Stiefel: Before Mr. Murray leaves the stand, I will not at this time put in the mortgages which were not genuine, which are the basis of the claims of my clients, which are mortgages of the same kind as are the basis of claims of certain clients of Mr. Vanderbilt. Mr. Massey, if necessary, we will deal with that when we come to the figures. That is understood.

The Court: Is that all?

Mr. Stiefel: I think that is all, Mr. Murray.

Cross examination by Mr. Massey.

20 Q Mr. Murray, at that conference, did anyone ask Mr. Horster as to whether these were all the creditors he owed money to or not? A Mr. Horster was not in the room where the conference took place and no questions were asked of him at that time.

Q Well, did you, prior to that time, ask, when the arrangements were being made? A Yes.

Q And what was his answer to your inquiry?

30 The Witness: Now, if your Honor please, I am perfectly willing to answer the question. I don't know just what the situation with regard to privileged communication is. I am perfectly willing to answer the question if it is proper, if you think so.

The Court: Well, it is up to you, of course, if you want to plead privilege. I don't know.

40 Q Did he say whether or not there were any others present? A At the time prior to the

Norbury C. Murray, cross.

conference, I had asked Mr. Horster whether that was all of the creditors, namely, those named in those assignments, and, at the time the payments were made and at the time of the—at the time the assignments were made, they were all of the creditors that I knew of. In the March conference I am not sure whether I had then heard 10 of the Minchin claim or whether I did not hear of that until later, but my recollection is I did not hear of it until later.

The Court: Well, the question is, did Mr. Horster tell you that these were all the creditors?

The Witness: At the time—at the exact time of that March conference?

Mr. Massey: Prior to the assignment. 20

The Witness: Yes, yes.

The Court: He did tell you they were all the creditors?

The Witness: Yes.

The Court: All right.

Q Now, Mr. Murray, you mentioned sixteen bonds. A Yes.

Q Where did you say they were? A Prior 30 to the assignment—prior to the assignment to these trustees and prior to the time when I had gotten into the case, Mr. Horster had already delivered to Judge Stickel sixteen bonds which he owned personally.

Q What kind of bonds? A They were bonds. They were referred to as cemetery bonds. Who issued them or what the technical definition of them was I never did know, but they were always referred to as cemetery bonds. 40

Norbury C. Murray, re-direct.

Q Do you know of what cemetery? A Well, the cemetery—the same cemetery to whom this assignment was made, whatever the name of that was.

10 Q Do you know the denominations of those bonds? A My recollection is that they were five-hundred-dollar bonds.

Q You are not certain? A Well, I am quite certain. In fact, I never saw the bonds themselves.

The Court: Is that all?

Mr. Massey: That is all.

The Court: That is all, Mr. Murray.

Re-direct examination by Mr. Stiefel.

20 Q Just one question, Mr. Murray. I notice the deed refers to the premises of property conveyed to Mr. and Mrs. Horster. Was it your understanding at the time that Mr. and Mrs. Horster still held title to the property as husband and wife? A At the time that the deed was given?

Q Yes. A Yes.

30 The Court: Do you want Mr. Murray any more?

Mr. Stiefel: No, your Honor. I think that will do.

Mr. Murray: I will be down at the office if you need me.

Mr. Stiefel: I will ask you to take the stand, Mr. Contrell.

John Contrell, Jr., direct.

JOHN CONTRELL, JR., sworn for the complainant.

Direct examination by Mr. Stiefel.

Q Mr. Contrell, you represent one of the parties to this suit, do you not? A George K. 10 Rockwell.

Q And you were present, I believe, at the time that the trust agreement, deed and bill of sale were delivered, were you not? A I was.

Q And participated in the conference on that occasion in Mr. Murray's office? A I did.

Q Were you present at the other conference in March, 1926, when the ten-thousand-dollar check was under consideration or was before the conference? A I was. 20

Q Do you remember Colonel Vickers being there? A I do.

Q Do you remember anything being said toward the close of that conference about that check being certified? A I do.

Q Who said something about that, if you recall? A Why, I think that was the general consensus of all present, as I recollect it. I think you yourself brought up that phase and that was the consensus of all there, because nobody could 30 agree upon who was to be the holder of it.

Q And what was to be done with the check?

The Court: We want to know what was said; not what was the consensus of opinion.

Q Do you remember what I said about that check being certified? A Well, if I may go a little ahead of that question. The conference was called for the purpose of—(interrupted). 40

John Contrell, Jr., direct.

The Court: What we want to know is what was said about the certification of the check. That was what Mr. Stiefel asked.

10 The Witness: Colonel Vickers was to have that check endorsed and held or, certified and held until the parties there could agree upon somebody as a holder of it, so the Colonel could get rid of it and take a receipt from everybody in question.

Q At that time it was not certified? A It was not.

Q Just think a moment, Mr. Contrell. Don't you recall my speaking or saying to the Colonel —(interrupted)

20 The Court: Now, wait a minute. Do not—
Mr. Stiefel: All right.

The Court: Ask him what you did say, if you want to.

Mr. Stiefel: Yes.

The Court: What did Mr. Stiefel say at that time?

30 Q About the certification of the check and the purpose of the certification, if you recall. A He was asked to have the check certified.

Q Did he say he would? A And he agreed. Do you want anything else? And the check was to be held until a trustee could be agreed upon to take it from him and give him the receipt he demanded.

Mr. Stiefel: That is all.

The Court: Any questions?

40 Mr. Massey: No questions.

Howard Kirk, direct.

The Court: That is all, Mr. Contrell.

Mr. Stiefel: Mr. Kirk, will you please take the stand?

HOWARD KIRK, sworn for the complainant. 10

Direct examination by Mr. Stiefel.

Q Mr. Kirk, you are a counsellor at law? A I am.

Q And in December, 1925, represented the Union Cemetery Association in a transaction? A I did.

Q That transaction, I believe, was with Otto G. Horster? A Yes, sir. 20

Q And was there delivered to you any document or documents on or about December 15, 1926? A Yes.

Q I understood that two of the documents were stock certificates which are already in evidence. Have you any other documents with you, delivered to you at that time? A (Witness produces papers.) On December 15th there was an assignment made of any interest in any bond standing in Otto Horster's name, to the Stuyvesant Development Company. The bonds are held by a committee, one of whom was Mr. Young of Hoboken, of the First National Bank there. 30

Mr. Stiefel: Suppose we have that marked in evidence, if you will consent, Mr. Massey.

The Witness: On December the—(interrupted).

Mr. Stiefel: Just a moment. Let this be marked. 40

Howard Kirk, direct.

(Paper marked Exhibit C. 5.)

The Witness: On December the 15th a paper was signed, an assignment by Mr. Horster, agreeing to assign the stock of the Stuyvesant Development Company, which stock was duly assigned on the next day.

10

Q In other words, that agreement preceded the actual assignment? A Yes; by one day.

Q By one day.

Mr. Stiefel: I ask that that be marked.

(Paper marked Exhibit C. 6.)

The Witness: And he signed a promissory note.

20 Q This promissory note which I have in my hand? A How much is it, thirty-five?

Q Thirty-five. A Thirty-five thousand.

(Paper marked Exhibit C. 7.)

Q By the way, while you are on the stand, Mr. Kirk, do you know why the amount of that note was fixed at \$35,000 at that time? A I had a conference with Mr. D. Frederick Burnett the day before and we went over the matters and we 30 figured the indebtedness was close to that amount considering interest on mortgages; it would be well to make some flat sum.

Q But that was not to be conclusive at all? A No.

Q It was to be determined later? A Yes, sir.

Q What did Mr. Burnett have to do with this matter? A Mr. Burnett was a personal friend of Mr. Horster and also a personal friend of 40 Mr. Kempf's.

Howard Kirk, cross.

Q And he is a counsellor-at-law, a partner of Mr. Murray who has been on the stand here? A Yes.

Q And he represented Mr. Horster in the transaction in the same way as you represented the Union Cemetery Association? A Yes.

10

Mr. Stiefel: That is all.

Cross examination by Mr. Massey.

Q Mr. Kirk, at the conference on December 14th, when it was agreed that these assignments would be made to Louis Kempf, was there any agreement made as to the form in which the assignment was to be made, whether it would be a trust assignment or straight assignment? A 20 I better look and see. Why, if this— Do you mean at the conference with Mr. Horster?

Q Yes. A It was put right in here "Assignment to Louis Kempf." Mr. Horster signed that.

Q Was there anything said as to why no record was made of the trust? A Yes.

Q What was said? A I told Mr. Horster that Mr. Burnett and I decided it would be wise 30 to have a flat assignment made to Mr. Kempf, with the understanding that he was to hold it as trustee with the Union Cemetery. Mr. Burnett and I did not know whether anybody else was involved and we thought it would be wisest to make it to one of the directors.

Q Was there any arrangement as to the delivery of the bonds that were mentioned? A No. Mr. Horster seemed a little doubtful about them and I don't think we ever got the bonds. 40

Hugo B. Woerner, direct.

Q And as to the delivery of the stock? A That was mentioned and he was going to have that the next morning in his office.

Q Was there any agreement—

The Court: Did he have it?

10 The Witness: Yes, sir; it was delivered.

The Court: All right.

Mr. Massey: That is all.

Re-direct examination by Mr. Stiefel.

Q The bonds you never got; you never saw them? A No.

Q And you dropped that end of it? A (Witness nods yes.)

20

The Court: That is all.

Mr. Stiefel: I will call Mr. Woerner.

HUGO B. WOERNER, sworn for the complainant.

Direct examination by Mr. Stiefel.

30 Q Mr. Woerner, you were one of the three attorneys who represented the trustees in that trust agreement that is in evidence in this case?

A I was, yes.

Q And are still? A Yes.

Q And you were present at the conference at which that trust agreement was delivered? A I was.

40 Q And at a subsequent conference when a ten thousand dollar check was shown by Colonel Vickers? A I don't recall seeing the check

Hugo B. Woerner, direct.

which was specified and—the meeting was held on March 11, 1926.

Q Where? A At Mr. Murray's office.

Q Have you a record there in your hand of that prior conversation? A I had a telephone conversation with Colonel Vickers on March 5, 1926, and made a memorandum which is before you on the desk there. 10

Q Looking at that memorandum to refresh your recollection, will you tell us what was said? A Why, I called up the Colonel, Colonel Vickers—I had found—I had heard there was a ten thousand dollar check—and he said he had such a check to the order of Otto G. Horster, but he wouldn't deliver it to him until he had called a meeting and found out to whom it belonged. He said he was perfectly familiar with our assignment, that is, to the trustees Ulicsnik and— 20

Q Rockwell? A —Rockwell, subject to a prior assignment of Mr. Howard Kirk's client. He said he had been in touch with Mr. Murray.

Q You were present at the conference on March 11th? A I was, yes.

Q Do you remember anything being said about that check being certified and Colonel Vickers holding it? A I don't recall about the certification. I know Colonel Vickers said he had the check for ten thousand dollars and he was very anxious to get rid of it and I told him that as far as I was concerned, my clients were not going to get anything out of it, I wouldn't agree to anything, as I recall it. I left before the meeting was over. 30

Q You left before the meeting was over? A Yes, sir. I took the position that if the cemetery was entitled to the check, let them turn it over. 40

Hugo B. Woerner, cross.

Q He wanted to turn it over to somebody there, did he? A He wanted everybody to agree who should get that check; otherwise he would not turn it over. He also wanted different ones of us to act as trustees for the holding of the check until the parties had agreed.

10 Q As trustee for the parties concerned and represented in that room? A Yes.

Q Not for anybody else? A Oh, no.

Q Nobody else was talked about at that conference, was there? A There was not.

Mr. Stiefel: That is all.

Cross examination by Mr. Massey.

20 Q Mr. Woerner, there were no other creditors known about at that conference; is that right? A In March, I wouldn't be certain about that.

Q In the December conference when the assignments were made? A They were not at that time.

Q You were present then? A Oh, yes.

Mr. Massey: That is all.

30 Mr. Stiefel: Now, Mr. Massey, I have here the original letter of Lehlbach, of which copy is already marked. Mr. Lehlbach, will you let me have Horster's letter the original of which you gave me a copy?

The Court: If the copies are all right, suppose you—

Mr. Stiefel: We will let the copies stand.

The Court: Let the copies stand because if they are lost you will still have the original.

40

Stipulation.

Mr. Lehlbach: I have no objection to giving him the original.

Mr. Stiefel: Let the copies be marked anew as exhibits.

(Papers marked Exhibits C. 8 and C. 9, October 27, 1927.)

Mr. Stiefel: Now, if there be no objection, I will read into the record the stipulation between Mr. Vanderbilt and myself, and with the understanding that everybody else agrees to it: "Union Cemetery Association as a body corporate organized under the laws of the State of New Jersey—"

10

The Court: Why can't you let Mr. Salmon copy it just as it is?

Mr. Stiefel: It is simply of the formal fact regarding the incorporation of the two companies and the production of notices which are already in evidence, if there is no objection.

20

(The stipulation reads as follows: "Between Mary Ulicsnik, *et als.*, complainants, and Charles E. Dalrymple, *et als.*, defendants. On bill, etc., stipulation. It is stipulated and agreed by and between complainants, on the one hand, and the defendants Ella Minchin and Mary E. Riley, on the other hand (through their respective solicitors); 1. Union Cemetery Association as a body corporate organized under the laws of the State of New Jersey.

30

2. Otto G. Horster, on December 15, 1925, was the record owner of one-third of the capital stock of Stuyvesant Development Company, a New Jersey corporation, then issued and outstanding.

40

Stipulation.

3. Subject to the production of the original documents, there may be used at the hearing in the above-entitled cause copies of notices in writing sent out by Norbury Murray on or about January 4, 1925, to Howard F. Kirk, George T. Vickers and Rufus Besson, referring to an assignment made by Otto G. Horster to George K. Rockwell, Carl Kniep and Mary Ulicsnik.

4. In January, 1926, and for a long time thereafter, George T. Vickers, John J. Fallon and Otto G. Horster constituted the Board of Directors of Stuyvesant Development Company; George T. Vickers being its president, John J. Fallon being its treasurer and Otto G. Horster, being its secretary. (Signed) Arthur T. Vanderbilt, solicitor of Ellen Minchin and Mary E. Riley."

The Court: Mr. Stiefel, anything else?

Mr. Stiefel: Well, except to prove the rest in the manner indicated, the amount of the deeds secured, I see no reason why I should offer any further proof at this time.

The Court: Have you any proof, Mr. Massey?

Mr. Massey: Mr. Louis Kempf.

The Court: Why don't you call Colonel Vickers and let him get away?

Mr. Massey: All right.

George T. Vickers, direct.

GEORGE T. VICKERS, sworn.

Direct examination by Mr. Massey.

Q Mr. Vickers, you are the president of the Stuyvesant Development Company? A Yes, sir.

Q And you were the president of the Stuyvesant Development Company in December, 1925, and during 1926? A Yes, sir.

Q And do you recall the conference at Mr. Murray's office at which it was said you were present? A Yes, sir.

Q Concerning the demands made by Mr. Horster? A Yes, sir.

Q Was there more than one conference that you attended at that time? A I think not. At Mr. Murray's office you mean?

Q One conference when a certain check was under discussion was the one conference that you attended? A Yes, sir.

Q Mr. Vickers, at that conference what arrangement was made as to what you should do with the check? A There was no arrangement made. I agreed that I would have the check certified. I never agreed that it should be endorsed by Mr. Horster, because that I could not have done. That was contrary to my instructions. The check was given to me by the treasurer with the instruction—by Mr. Fallon, the Vice-Chancellor, with instructions not to deliver it to Mr. Horster or anyone else unless I received releases from those who claimed to have liens upon the property of Mr. Horster through certain notices that had been sent, one of which were sent to me by Mr. Kirk's company and the other, I think, served on the bank and bond holders. I did not get direct notice of that personally, but I knew of it.

George T. Vickers, direct.

Q In your actions on that day you represented the Stuyvesant Development Company?

A I did.

Q Now, subsequent to that do you remember receiving a writ of attachment? A On March 22nd at one-six P. M., the Deputy Sheriff served on me a writ of attachment dated the 20th day of March, 1926.

Q In the case of Ellen Minchin— A Against Otto G. Horster.

Q In what court? A Supreme Court of New Jersey.

Q Supreme Court of New Jersey. What was the formality gone through at that time as to the attaching? What did the officer attach? A Well, the officer said I had \$10,000 and I thanked him for the compliment and said I didn't have it and I informed him he didn't know what he was talking about. Then I found out it was property supposed to belong to Otto Horster, and I said that all I had was a check drawn to his order for \$10,000. I had that and he attached that, formally said, "I attach that in your hands."

Q And subsequently to that that do you remember any other transaction concerning that check, concerning a stock dividend due to Mr. Horster from the Stuyvesant Development Company? A I received—yes, sir; I received notice from Mr. Dalrymple that he was the auditor. He demanded the check in my hands and I refused to deliver it, explaining to him why, and suggested to him that he rule me into court and direct me by an order of the Court that it be delivered, but he could not find any authority for that and finally—and told me that he would be obliged to take the next statutory step to make written

George T. Vickers, direct.

demand and that if I then refused, to follow it by a warrant in attachment for contempt of court. I said, "You will have to take those steps before I will deliver it." So he then served on me a formal notice. I delivered the check and received a receipt from Mr. Dalrymple as auditor, that it was turned over to him as auditor on that demand.

Q What did that check represent, Mr. Vickers? A It represented a dividend declared by the Stuyvesant Development Company.

Mr. Stiefel: Will you give us the date, Colonel?

The Witness: I don't know the date of the dividend, Mr. Stiefel. It was—I would say it was early in the—I think in January—as near as I can—(interrupted).

Mr. Stiefel: January, 1926?

The Witness: 1926? Wait a minute. I am not certain about that now. May I refresh my memory?

Mr. Stiefel: Yes.

The Witness: 1926 is right.

Q The dividend on whose stock? A On the stock of the stockholders of the Stuyvesant Development Company. The particular check referred to the stock interest of Otto G. Horster, so far as the books of the company showed that stock interest.

Q You say that the stock was in his name on the books of the company? A It was.

Q Do you know whether or not it still is in his name on the books of the company? A I know it is in his name because I have never signed any

George T. Vickers, cross.

certificate and I would have to sign a certificate issued to replace it and there has never been any demand for its transfer.

Mr. Massey: That is all.

10 *Cross examination by Mr. Stiefel.*

Q Colonel, have you got the letter of John J. Fallon, treasurer of the Stuyvesant Development Company, transmitting to you that check with instructions? A I have not as treasurer. I mean, it is not signed as treasurer.

Q He was, in point of fact, the treasurer of the company? A He was treasurer, yes.

Q And he transmitted to you that check?

20 A Yes.

Q And it was signed by him? A The letter—

Q The check? A Oh, yes, the check was signed by him, yes, sir.

Q In order that you may keep your record, I will refer to the pertinent part of that record—

The Court: Is this supposed to be instructions from the treasurer of the company to the president?

30 Mr. Stiefel: The check was sent—

The Witness: I was acting both as president and as attorney.

The Court: All right; go on.

Mr. Massey: I object to that.

Mr. Stiefel: I will have the letter marked then.

The Court: What do you want to prove?

40 Mr. Stiefel: I want to show that Colonel Vickers received that check with full knowl-

George T. Vickers, cross.

edge on the part of the corporation of the assignment and that he was not to deliver it to Otto Horster because of the assignment. He has testified there was no transfer of the stock, at the time the check was issued, representing a dividend declared; in January the company knew that the stock had been assigned and therefore transmitted it to the attorney of the company, to wit, Colonel Vickers in order to deliver to the proper parties. This was prior to the conference of March 11th. 10

The Court: You do not have to put the letter in. Ask the Colonel whether he knew it or not.

Mr. Stiefel: Well, of course, the letter shows it so plainly. 20

The Court: Ask him.

Q Colonel, looking at that letter, will you say whether on the receipt of that letter, you knew of the assignment of the capital stock of Otto G. Horster to Mr. Kempf and to the trustees in this suit, Ulicsnik, Rockwell and Knep? A I knew of it through a letter from Mr. Kirk to Mr. Fallon, transmitted by Mr. Fallon to me, which letter is dated December 17, 1925, and was later on transmitted to me by Mr. Fallon. 30

Q And you also had a letter from Mr. Murray? A I think not. That is my recollection that I did not get any direct notice. I won't say that I did not, but when I was asked to come here I looked in my files—(interrupted).

Q Will you look at that letter of Mr. Fallon's and see whether you cannot find in it this sentence: "You are aware several parties, Kirk, 40

George T. Vickers, cross.

10 Murray and others, have by letters addressed to me, to you and to Rufus W. Besson claimed that Otto Horster has assigned to them the capital stock." Just look at that and see if that doesn't refresh your memory? A It is here, but I say that I didn't know that, but I won't say I received the letter myself because it would—I think the letter was addressed to Mr. Fallon and to the Stuyvesant Development Company. I knew it; there is no question about that.

Q And after the conference of March 11th you transmitted the check to the First National Bank of Hoboken to be certified? A I did.

20 Q In fact, that was done on March 12th, the following day, wasn't it, Colonel? A As appears by a copy of letter of mine, dated March 12, 1926, to the First National Bank of Hoboken, that is the fact.

30 Q Doesn't there occur in that letter the following sentence, "In order to protect the Stuyvesant Development Company and also the committee of bond holders who acted in the matter of the sale of the bond, I am holding this check, with Mr. Horster's consent, until I can get proper authority from the trustees to turn the check over to the proper parties." Now— A That is right.

40 Q Now, when the officer came with the attachment he told you that he attached ten thousand dollars. Is that what he said? A No. He said I had \$10,000. I didn't know what he was talking about. And he said there was a man to be here to deliver \$10,000 to me. There was some mix-up about it and I eventually had to telephone from my office to the sheriff's office to get the particulars, because, if there was a man

George T. Vickers, cross.

around there to deliver \$10,000, I wanted to know about it and stay around until he did.

Q And then eventually you found out it was a \$10,000 check he was aiming at? A I assumed it was so and told him that was all I had in attachment.

10 Q And did you tell him about the prior notices and assignments? A No, sir.

Q You did not mention that? A I did not.

Q This dividend was part of the moneys which came into the hands of the Stuyvesant Development Company about January, 1926, was it not? A I would say it was prior to that.

Q A little prior to that? A It was money that resulted from the sale of some bonds of the Union Cemetery Association.

20 Q Yes, but it was just about that time you got over about, say—over \$30,000 from the sale and at once distributed it amongst the stockholders? A I can't give you the day of distribution any closer than I have. That was what was done.

30 Q You recall, Colonel, the check is dated about March five? A Mr. Fallon's letter to me is dated March five, and I think that is about the date of the check.

Q And the moneys had come in a little while before? A I would say in December prior thereto, but I am not certain about that. It may have been—

Q But in January you declared the dividend? A Right.

40 Q The dividend consisted of \$10,000 to be paid to you as holder of one-third of the stock, \$10,000 to Mr. Fallon as holder of one-third, and \$10,000 to Mr. Horster or his assigns? A That is cor-

George T. Vickers, cross.

rect. When you say "or his assigns" that was no part of the dividend resolution.

Q No, no. That is all for the present.

Cross examination by Mr. Woerner.

10 Q Colonel Vickers, did the constable take physical possession of the check when he was there? A No. I exhibited it to him.

Q Yes. A And I wouldn't let him take it.

Q And what did he say? A He said, "I attach it." I don't remember his exact words. "I attach it in your hands." "Attach" I knew what that meant. Until I got some order I would keep it if I could.

20 Q But he did not take the check into his physical possession? A He may have had it in his hands, but he didn't take it away with him. I don't know whether—I handed it to him to read. I knew he wouldn't—(interrupted).

Q Can you give us the date you turned the check over to Mr. Dalrymple, the auditor?

Mr. Dalrymple: November the 9th.

30 A November 9th I think is correct. November 9, 1926.

Q And there was not any court order for that, was there? A Well, Mr. Dalrymple came with a certified copy of his appointment, a certified copy of the judgment in the case and a written demand that I do it and a warning that, if I did not, he would cite me in contempt of court and get a warrant on it.

40 Q But there was no order of the Court? A What do you mean by "order of the Court"?

George T. Vickers, cross.

Q Scire facias. A No. There was a final judgment, which was exhibited to me, a certified copy and—

The Court: Habeas corpus?

A —demand by the auditor in writing under the 10 statute.

Mr. Woerner: That is all.

The Court: Colonel, you say that you knew of these assignments. Did you have any knowledge other than what you believed from the letter of Mr. Fallon to you?

The Witness: Yes, your Honor; I had a letter from Mr. Kirk, which I have here, dated December 25—17th, 1925—

20 The Court: And that notifies you of the assignment to him?

The Witness: "This is to notify you that Otto G. Horster has assigned ten shares of stock of the said company to Louis Kempf, being certificates number 3 for three shares and certificate number six for seven shares in said company. Said shares are now held by Louis Kempf. Kindly take notice of same. Yours truly, H. F. Kirk." 30

The Court: Was that the only formal notice you got?

The Witness: That is all I got as far as Mr.—

The Court: As far as any of you got?

The Witness: Your Honor, I wouldn't say I didn't get a letter from Mr. Murray. My recollection is that I found out through Mr. Fallon that notice had been given to the Stuyvesant Development Company at its 40

George T. Vickers, re-direct.

address which was Mr. Fallon's office. I wouldn't say that I didn't receive a letter, but I knew of it, knew some way.

The Court: That is all.

Mr. Stiefel: I can elucidate this a little further.

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Examined by Mr. Stiefel.

Q Colonel, do you remember making an affidavit to be used before the Chief Justice and furnishing me with a copy? A Yes.

Q Will you look at paragraph 7 of that affidavit and see if that doesn't refresh your recollection? A Paragraph seven is it? This is not paragraphed.

20 Q (Handing witness paper.) You haven't got the right affidavit, have you? A I have now, yes.

Q All right. A That is the letter that I have just read.

Q All right. Now look at this exhibit—part of an exhibit in this case here, addressed to you. Don't you recall receiving the original of that on or about January four from Mr. Murray? A I think I did. This refreshes my recollection. I haven't any doubt I received it.

30

The Court: All right. That is all.

Mr. Stiefel: That is all.

The Court: Anything further?

Examined by Mr. Massey.

Q Mr. Vickers, do you know what the value of the Stuyvesant Development Company stock is or has been, between the time of these assignments and the present time? A Why, I have

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George T. Vickers, re-direct.

some very definite ideas about it. I don't know as I would want to, under oath, say that I have knowledge. I know that there are certain arrangements which make the stocks very valuable. Now, whether they will be carried out or not I don't know. Mr. Stiefel can probably tell you as much as I can.

10

Q Mr. Vickers, is the value of the stock depending upon a contingency which may or may not happen? A I would say very much so.

Mr. Stiefel: Perhaps a stipulation between us there will cover the whole ground. This stock—will you put this down and, if it is agreeable, it will stand as a stipulation—this stock, if certain expectations of the Stuyvesant Development Company, arising because of some unwritten contracts between Stuyvesant Development Company and some of the bond holders, materialize, may have a value of approximately fifty thousand dollars. In addition to that the Stuyvesant Development Company has the right to expect that the Union Cemetery Association will at some point recognize its equities in the suit being heard by Vice-Chancellor Backes and in that way may gain some moneys, but the exact amount of these moneys cannot be appraised at this time; and the value of the stock will really only be ascertainable when that cemetery suit comes to a close or thereabouts. Isn't that right?

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The Witness: Fifty thousand dollars? You mean one hundred and fifty thousand?

Q One hundred and fifty thousand being all and fifty thousand for Horster's share. A One

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George T. Vickers, re-direct.

third, whatever it is, of one hundred and fifty thousand.

The Court: Yes. That is fifty thousand for Horster's share.

10 Q But, at this time perhaps I can help out the matter. At this time, Colonel, you wouldn't say the stock has a market value? You couldn't sell the stock and get its fair value in open market? A Open market? I am not ready to swear on that point.

The Court: No. That is too speculative.
The Witness: Yes.

20 Q But the corporation has no business interests outside of the Union Cemetery Association? It doesn't do any business outside of that, does it, or hasn't done any? A Except in connection with the Hollywood Mausoleum.

Q In connection with the Hollywood Mausoleum, and the Hollywood Mausoleum was, or is it be to erected on the cemetery— A Yes.

30 Q It is identified, then, with the Cemetery Association? A So far as its active business at the present time is concerned.

Mr. Stiefel: Does that cover the ground?

Mr. Massey: Yes. Mr. Dalrymple.

Charles Dalrymple, direct.

CHARLES DALRYMPLE, sworn for the defendant.

Direct examination by Mr. Massey.

Q Mr. Dalrymple, you are a counsellor-at-law of the State of New Jersey? A Yes, sir. 10

Q And you were appointed auditor in the attachment suit of Ellen Minchin against Otto G. Horster in the New Jersey Supreme Court?

Mr. Stiefel: I object.

A Yes, sir; by the Chief Justice.

Mr. Stiefel: Just one minute. I object, because the order of appointment should be produced, because I challenge the validity of the appointment for reasons set forth in the bill of complaint and say I don't think the witness ought to testify to it. A copy of the order, by the way, I have one here and it ought to go in. 20

The Witness: All right. Here it is.

(Discussion.)

The Court: Let it be marked.

Mr. Massey: We have three orders, three copies of orders filed together and certified. 30

The Witness: Here is an order.

Mr. Massey: The first order is an order of Isidor Kalisch, Supreme Court Commissioner, ordering that a writ of attachment issue. This order is dated March 19, 1926. The second order is an order for substitution of attorneys, substituting Arthur T. Vanderbilt in place of Charles W. Weeks as attorney for the plaintiff, Ellen Minchin; 40

Charles Dalrymple, direct.

that order entered June 7, 1926, made by Chief Justice Gummere, and an order entered on the same date for publication and appointing Charles G. Dalrymple auditor to adjust and ascertain the amount due to the plaintiff and each of the applying creditors.

10 The Court: Let it be marked as one exhibit.

(Papers marked Exhibit D. 1.)

Mr. Massey: I offer in evidence, at the same time, writ of attachment issued out of the New Jersey Supreme Court, dated March 20, 1926, in the suit of Ellen Minchin against Otto G. Horster, directed to the Sheriff of Essex County, and the sheriff's return showing certain real and personal property attached.

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(Paper marked Exhibit D. 4.)

Mr. Massey: And a writ of attachment in the same case, dated the same date, directed to the Sheriff of Hudson County and the return of the sheriff annexed thereto, showing certain personal properties attached, showing rights and credits attached.

(Paper marked Exhibit D. 5.)

30 Mr. Massey: And also a certified copy of a rule for judgment in confirming the auditor's report in the same case, made by Chief Justice Gummere and entered November 3, 1926, giving judgment for Ellen Minchin in the sum of \$4,692.50, and judgment for the applying creditor, Mary E. Riley, in the sum of \$9,745.22, and for the applying creditor, Margaret McLaughlin, in the sum of \$3,055.

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(Paper marked Exhibit D. 6.)

Charles Dalrymple, direct.

Mr. Massey: Counsel have agreed on a statement received from the clerk of the Supreme Court, informal statement, that the costs in this attachment suit in the New Jersey Supreme Court for Ellen Minchin as passed, are the sum of \$137.36, the cost of Mary E. Riley, \$9.10 and the cost of Margaret McLaughlin, \$9.10.

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Q Mr. Dalrymple, you are the auditor named in the order of the Court just placed in evidence— A Yes, sir.

Q —in the attachment suit, and you heard the evidence in the case and reported to the Court so its judgment might be entered? A Yes. I took evidence on two different occasions in this suit.

20

Q And, after the entry of judgment, did you receive a certified copy? A I did.

Q And, after your receiving the certified copy of the entry of judgment, what steps did you take against the ten thousand dollar check and against the dividend of the Stuyvesant Development Company, which was due to Mr. Horster? A Well, I went to Jersey City on the afternoon of November 9, 1926, to see Colonel Vickers, in whose possession the check was at the time of the assignment, and I took with me the certified copy of my appointment by the Chief Justice, certified copy of the judgment, and called at Colonel Vickers' office and showed it to him and told him I was the auditor. And the next step in the proceedings was to collect the rights and credits which had been attached and that I wanted the check. I also served on him, at that time, a demand under the attachment act demanding the check or any other rights or credits of Otto G.

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Charles Dalrymple, direct.

Horster which he had, and the Colonel and I got out the Attachment Act and we went over the procedure and finally he turned the check over to me and I gave him a receipt for it.

10 Q Did you demand everything due from the Stuyvesant Development Company to Mr. Horster? A At that time we demanded only the check.

Q Did you ever make a demand for anything due from the Stuyvesant Development Company? A No; my demand was for all rights and credits of Otto G. Horster, but there was no demand, I don't believe, in it for the Stuyvesant Development Company.

The Court: Is that all?

20 Q Was there anything said, at the time you were making this demand, as to from whom the credits were running to Mr. Horster?

Mr. Woerner: I object. That would be hearsay.

The Court: I will allow it.

A From whom what, Mr. Massey?

30 Q As to whom the credits were running, were due and owing. A No; there was not.

Q Now, as to the collection of stamps in the Fidelity Trust Company, what steps did you take? A I received a letter from Hood, Lafferty & Campbell, counsel of the Fidelity Trust Company, requesting me to call and see them, stating that they had been informed by the clerk of the Supreme Court that I had been appointed auditor for the assets of Otto G. Horster, that 40 they had a note over there in the sum of \$3,000

Charles Dalrymple, direct.

and a stamp collection which was valued by him at about \$12,000 and they desired to sell the stamp collection, but they couldn't do so unless they had my consent; so I went to Mr. Lafferty—that was in October, 1926—and Mr. Lafferty was in the same building I am in and I called to see him. We went over to the bank and had a talk 10 with Mr. Imhoff. We got out the stamps from the vault, went over them, and in the first part of November 1926, we arranged for a stamp expert to come over and look them over and place a valuation on them. I told him I didn't feel that we could sell them unless we found out what the value was, so, I think it was the 3rd or 4th of November, Mr. Imhoff, Mr. Lafferty, Mr. Percy G. Dunn, a stamp expert from New York City, and myself spent about two and a half 20 hours or three hours in a vault of the Fidelity Trust Company going over this stamp collection, and then Mr. Lafferty and myself entered into a stipulation with the Fidelity Trust Company, consented to by Mr. Imhoff, whereby they were to sell sufficient of the stamps to cover their notes and that, if they sold any more, they were to hold the money in trust for me as auditor and to be turned over on demand.

30

The Court: And that was done.

The Witness: And that was done. Mr. Imhoff signed a written consent to it.

The Court: We have already had that testimony once.

Q Now, Mr. Dalrymple, under your statutory authority as an auditor, did you take any steps against any other rights and credits to discover them or to collect them, take them into your pos- 40

Charles Dalrymple, cross.

session? A Yes. As auditor I took about seventy-five or eighty pages of testimony from Mr. Horster and members of his family, and then went over that and went over to his office to see if there was anything further that could be taken into possession. I found out from his
10 testimony he had an automobile, and I located that in East Orange, attached that, sold it, subject to garage liens for storage of it, and received seventy-five dollars over and above the liens.

Q Now, was the automobile sold by you or by the holder of the garage lien? A It was sold by the holder of the garage lien with my consent, the same constable got half of that.

Q And the balance was turned over to you?
20 A Seventy-five dollars was the balance. It was a Studebaker touring car about seven years old and—(interrupted).

The Court: Well, never mind that.

Q Did you discover any other claims that he had? A Not that I—

Q Rights or credits? A Well, we discovered furniture, his office furniture, which had already
30 been attached by the landlord, and we consented that that would—that their lien was prior to ours, the furniture being of very little value.

Mr. Massey: That is all.

The Witness: I don't recall—

Cross examination by Mr. Stiefel.

Q In your talk with Colonel Vickers on the
40 day the check was surrendered to you, you dis-

Charles Dalrymple, cross.

cussed the question of prior rights of the attaching creditor and the assignee, didn't you? A No, sir.

Q Well, you knew, of course, of the assignments? A No, sir.

Q You didn't know of the assignments? A
No. I didn't know anything about the assignment. 10

Q You don't know anything about that. The assignment, had you talked to Mr. Massey about it? A No, no. I hadn't talked to Mr. Massey anything about the assignments.

Q You personally had no knowledge at that time? A I hadn't, no.

Q Of anything that Mr. Massey knew about the matter? A All I knew was the conversation with Mr. Massey. What happened, Mr. Stiefel, was this: After the judgment was entered, Mr. Massey turned over to me copies of the different attachments that were levied by the different sheriffs on the property for the purposes of getting them together in order to make a report and sell them and there was nothing, in fact, to know, as far as I was concerned, about the assignment. 20

The Court: Well, you say you didn't
know anything about it? 30

The Witness: No, sir; I did not.

The Court: Well, that is what Mr. Stiefel wants to know.

Q And Colonel Vickers didn't tell you anything about it? A No; he didn't say anything to me about it at the time.

Q You knew that the Fidelity would not turn the money over to you because of claims of
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Louis Kempf, direct.

Ulicsnik, Rockwell and Kniep? You knew that, didn't you? A No, sir.

Q You didn't know that? A No, sir.

Q You didn't know why you didn't get the money, did you? A Mr. Imhoff agreed to turn the money over to me as soon as the stamps were sold, so they had money to pay off his note.

Q But he wouldn't do it when it came to the point, would he? A After the stamps were sold, he told me he had received a call from you about some assignment and he thought he better let the matter wait until it had been adjudicated, but not before.

Q So you didn't know why Colonel Vickers was so reluctant to turn the check over to you?

A The Colonel wasn't reluctant to turn it over to me. He said he was glad to be rid of it.

Q Oh. A He had so much trouble about it.

The Court: That seems to be the only undisputed fact in the case. Is that all?

Mr. Stiefel: That is all.

LOUIS KEMPF, sworn for the defendant.

Direct examination by Mr. Massey.

Q Are you the party whose name is in the assignment from Mr. Horster, assignment of stock and bonds? A I am.

Q And were you present at any of the conferences during the making of those assignments? A I was not.

Q When did you first know of the making of the assignment? A When did I first know?

Louis Kempf, direct.

Q Yes. A Why, Mr. Kirk called me up on the telephone—I can't give you the date, but I presume it was right after the conference took place—and he told me that the papers had been signed and were in his office ready for me to take possession of.

Q Did you know that such papers were going to be signed, before they were signed? A I don't remember whether I did or not. My—I was trying to recall that today, but I am not sure whether I knew beforehand that they were to be signed.

Q Well, did you consent to be the taker and the holder of these— A I beg pardon?

Q Did you consent to be the taker and the holder of these securities? A I am sorry, I didn't hear that.

Q Did you consent to be the taker and the holder of these securities? A Yes. I made no—at least I did—yes the answer to that is right.

Q Did you consent before they were made, or after they were made? A Well, after they—

Q The assignments? You knew, didn't you, that no money was paid at the time the assignments were made? A No; I was not present at the time the assignments were made, so I didn't know.

The Court: Did Mr. Kirk represent you at the conference?

The Witness: No, sir; he did not. Mr. Lehlbach was my personal attorney in the matter.

Q Do you know what the assignments were given for? A Yes, sir.

Louis Kempf, direct.

Q What were they given for? A Why, as security for the trustees of the cemetery as against the claims they had against Mr. Horster.

Q Were they past due claims? A Why, they are claims that I knew of in my capacity as auditor for the cemetery at the time.

10 Q Were they past due at the time? A Yes; they were past due claims.

Q Do you have any personal interest in these securities? A No; I have not; simply as trustee for—as trustee for the—I am holding for the benefit of the trustees of the cemetery.

20 Q Well, now, did you have any conversations as to whether you would take an absolute title to these securities or title as trustee? A No; I am very positive I did not. The thing was explained to me at the time that there was some legal reason why the assignment was made to me as an individual instead of under the title of trustee, but the understanding was never any different than it was for the benefit of the trustees of the cemetery.

Q Was there ever any stipulation made as to what your duty was in reference to those securities? A No; there was no stipulation made that I recall.

30 Q Well, when you consented to take possession of them—take title to them, what did you intend to do with them? A Well, I intended simply to hold them until some time when a settlement was made between the attorneys, and then turn them over to the trustees.

40 Q Now, whose instructions did you expect to take with reference to the disposal of those securities? A Why, I would expect to take my personal attorney's instructions in the matter. That was the reason, because of the large amount

Louis Kempf, cross.

of responsibility involved. That is the reason I asked Mr. Lehlbach to act as my personal attorney in the matter, in order that I might not make some mistake that would be to the detriment of the trustees of the cemetery, of whom at the time I happened to be one.

Q Do you know what parties you were obligated to in reference to the securities, besides the trustees of the cemetery? 10

Mr. Stiefel: Your Honor please, I don't think Mr. Kempf should testify as an expert on law. The assignment was made to him and he accepted.

The Court: I will allow him to explain what his ideas of his duties were.

The Witness: May I ask for the question? 20

Q Did you expect to be responsible to anybody besides the trustees of the Cemetery Association in reference to these securities? A Well, I would have expected to be responsible, at the time, to Mr. Horster for whatever residue was left over. I should have assumed that would be necessary for me to return to him—

Q But under any other circumstances to anybody else? A Why, no, not that I knew of at the time. 30

Cross examination by Mr. Stiefel.

Q Mr. Kempf, you were a trustee, at that time, of Union Cemetery? A I was.

Q And its auditor? A And its auditor.

Q And after the assignment was made, you saw Fred Lehlbach, your counsel? A I did. 40

Louis Kempf, cross.

Q And you turned over to him, didn't you, the letter of February 19th, which is in evidence in this case, addressed to you by Horster? A May I see the letter? Yes; I turned that over to him to answer. I was ill at the time. I recall that.

10

Mr. Stiefel: The letter shown the witness is the letter of February 19th, 1926, of Otto G. Horster, addressed to Louis A. Kempf.

The Court: It is in evidence?

Mr. Stiefel: A copy of which has been marked in evidence as an exhibit in the cause.

That is all.

Mr. Lehlbach: I imagine, Mr. Kempf can go now?

20

The Court: Yes.

Anything else?

Mr. Massey: I would like to put in one letter. Mr. Stiefel can identify it.

Mr. Stiefel: I must object to an opinion of Vice-Chancellor Fallon on that. That is all it is, simply a legal opinion of Mr. Fallon, which, as a matter of fact, was repudiated by the Chief Justice.

30

Mr. Massey: This letter would be offered for the purpose of showing that Mr. Fallon, who was an officer of the Stuyvesant Development Company, at his office had been called upon by Mr. Dalrymple, and had given him this letter to take to the bank with the check to help him get cash.

The Court: Very well, I will admit it.

Mr. Stiefel: Subject to my objection?

The Court: Oh, yes. You objected. I will admit it over the objection.

40

Ellen Minchin, direct.

Mr. Massey: It will be testified that Mr. Dalrymple received this letter from Mr. Fallon.

The Court: Yes.

Mr. Massey: To use in getting the check cashed at the bank, and at the time took it to the bank with the check, when he took it to get it cashed.

10

(Paper marked Exhibit C. 7.)

The Court: I have not read the letter. It may be of no value, and, if it strikes me as being of no value, I won't consider it.

Anything else?

Mr. Massey: Mrs. Minchin.

The Court: Is that your last witness?

Mr. Massey: Yes, sir.

20

The Court: All right.

Mr. Massey: Mrs. Minchin.

ELLEN MINCHIN, sworn for the defendant.

Direct examination by Mr. Massey.

Q Mrs. Minchin, the last installment of the money which Mr. Horster obtained from you was when, was obtained when?

30

The Court: Come up here. She can't hear you.

Q The last money which Mr. Horster obtained from you was obtained when? A On the 26th of January I drew \$1,500—(interrupted).

Q What year? A 1926.

40

Ellen Minchin, direct.

Q And how much money? A Fifteen hundred dollars.

Mr. Stiefel: How much?

Mr. Massey: Fifteen hundred.

10 Q The sum that he owed you before that time was how much? A Three thousand.

Q And when was that obtained from you? A Well, I think it is in the mortgage.

Q About how long before— A Oh, I think over six years. I am not sure. I didn't figure the three thousand together and fifteen hundred, and then he came back and asked me—told me that the property I had put the fifteen hundred dollar mortgage on he wanted—they wanted
20 money to renovate it and I gave it to him and I wanted him—after that I wanted him to collect it for me and he said, no, it was better off and I was getting six percent. on it, which he paid six percent. regularly, up to November, 1925, I think it was, the last time I got any interest.

Q Now, Mrs. Minchin, on January twenty-sixth when you gave him this last fifteen hundred dollars, did you know that he was out of business?

A I did not. It was— He sent his son to me
30 on the pretense that he had cemetery bonds to sell, and I told him I would loan the money, not thinking that he was out of business or that he was in bankruptcy. I said I didn't want to buy any bonds, that I would loan his father the money on a note if he wanted it for anything of the cemetery. I had such confidence in the man that I would really give the last dollar. I thought there was nobody any honester than him. And he said, no, that on the twentieth of May
40 I would get dollar for dollar. Well, that was a

Ellen Minchin, direct.

big inducement, three thousand dollars, so I said, "Well, all right; I will go down tomorrow and I will draw it." Then three weeks—very near three weeks, if I can remember rightly, his son, Charlotte, came up with the little paper and I was on duty and I hadn't my glasses, but I could see that it was not properly drawn out, so I said, "Charlotte, it isn't worth the paper it is written on." I said, "I want the bonds." He said, "Well, my father is keeping the bonds," and I says, "Why, I paid for them." And I said, "I will have to see your father," I said, "I must see your father," I think I says, "There is something funny now, I am going to see your father."
10

Q All right. Now, Mrs. Minchin, did you know that there was anything wrong before that time? A Not a thing.
20

Q In reference to Mr. Horster's affairs? A Not a thing. That was the first I knew there was anything wrong. I went to see his father, I think, about a week or two after, and a gentleman connected with him, or in the office with him—told me, wanted to know if I had loaned him money. I said, "Why, yes; he has got forty-five hundred of mine."

Q Did you see Mr. Horster? A No, I didn't see Mr. Horster.
30

Q Did you go to his office? A I went to his office and they said he was to his office and I went directly down to the office and he was not there.

Q Was anybody there? A Well, Mr. Weeks came in after.

Q Was the office open? A The office was open, with everything thrown around, the papers, and I picked up the papers, a letter of mine, which he said he had not ever received.
40

Ellen Minchin, cross.

Q Did you know of any transfers of his property that he had made to his other creditors, before that time? A What?

Q Did you know of any transfers of his property he had made to his other creditors, before that time? A No; I didn't know. I had most
10 explicit confidence in the man and family.

Mr. Massey: That is all.

The Court: That is all.

The Witness: Thank you.

The Court: Any questions?

Cross examination by Mr. Stiefel.

Q This money, this fifteen hundred dollars
20 you handed over to Charette Horster, Mr. Horster's son? A Yes, but Mr. Horster acknowledged that he received it in the course of inquiry, in that gentleman's office over there. He said he paid his debts with it.

Q And your conversations, before you handed over the fifteen hundred dollars, were with Charette? A With Charette from his father; he represented his father entirely.

Q Yes. A Because he was always with his
30 father in the business and everything.

The Court: Is that all?

Q You don't remember the exact date, madam? A When I handed over that fifteen hundred? Why certainly. The twenty-sixth of January.

Mr. Stiefel: 1926.

Mr. Massey: We took on stipulation, the
40 testimony of Mr. Horster about two weeks

Otto A. Stiefel, direct.

ago, and I would like to submit the record of it. I understand the objections that were made are not urged here.

Mr. Woerner: I withdraw my objection.

The Court: All right.

Mr. Massey: And the one item, one
10 point in that testimony that I desire to call to the attention of the Court is the fact that Mr. Horster testified that the reservation of this assignment, general assignment of all this property, five hundred dollars, his bank account was all due and owing to the bank in which it was deposited at that time. And he also testified that the only household goods and personal effects that he had
20 were those that were in their six-room apartment that had been there for twenty-five years and were of little or no value.

The Court: All right.

Mr. Lehlbach: May I just add this on the end of what was just said: that that does not apply, of course, to the assignment of Mr. Kempf. I think he is speaking now of the other assignment.

Mr. Woerner: Is that your case?

The Court: What else is there? 30

Mr. Woerner: I will call Mr. Stiefel.

OTTO A. STIEFEL, sworn for the defendant.

Direct examination by Mr. Woerner.

Q Mr. Stiefel, you are a counsellor-at-law?

A I am.

Otto A. Stiefel, cross.

Q Did you have any conversation with Mr. Massey, the attorney of the auditor, with relation to the letter involved in this case? A I did. Early—

10 Q Do you recall the date? A Early in the year 1926, when I learned, in a way that I cannot recall now, that there had been issued an attachment, and found that Mr. Vanderbilt's office, and particularly Mr. Massey, was interested in the matter, Mr. Massey and I had several conferences in which I told him all about the assignments, showed him the trust agreement, the bill of sale and whatever other documents he wanted to see, explained to him our position and the notices that had been given and told him the whole story and answered all
20 questions put to me by him in that regard.

Q Did you show him the assignment to Mr. Kempf? A I couldn't show him the assignment to Mr. Kempf. I told him about that, but I showed him the trust agreement, the bill of sale to Ulicsnik, Kniep and Rockwell, the deed to the property, told him about the notices that had been sent out and the conferences in Mr. Murray's office and fully informed him with regard to the transaction. This was early in
30 1926. I furthermore expressed the hope on several occasions that a way might be found to settle the matter, or some suitable legal means might be found to settle it, and we had quite a number of conferences in that regard.

Mr. Woerner: That is all.

Cross examination by Mr. Massey.

40 Q Mr. Stiefel, do you know whether that was before or after he was appointed auditor in this

Otto A. Stiefel, cross.

attachment suit? A Tell me the date of the appointment of the auditor.

Q June 7, 1926. A I can't be sure—yes, because I went to the country in July, 1926, and our conferences were held up on that account, and when I came back I found out you had an
10 attack of appendicitis and our conferences had been perceding some time before I went to the country, I think.

Q Don't you recall that was in November, 1926? It was in November, 1926. A No. We had met before the summer, Mr. Massey, before I went on my vacation, and, when I got back from my vacation or some time after, I found out that you had appendicitis, I think.

Q That was in November, 1926? A Oh, no. We had been in conference in the spring or early
20 summer of the year, Mr. Massey.

Q You say this was before he was appointed auditor? A My opinion now is that it was before he was appointed auditor, yes; that it was some time in the month of April or May, at an early stage, because I realized then that the attachment tied up everything so that we would have to untangle the snarl in court or by agreement, and I remember promising you that I would try to get Mr. Hugo Woerner to swing
30 into line and let your clients come in under the trust agreement, and I called up Mr. Myers and spoke to him about the matter, too.

Q But, Mr. Stiefel, you know that was about the time I was in the hospital? A No; when I got—I know that you were in the hospital and that matters were held up, I think it was in the fall of the year, on account of your being in the hospital, but long before that, before I went to the country I spoke to you about it on several
40

Otto A. Stiefel, cross.

occasions; also, I spoke to Mr. Myers about it; and one of these ladies called at my office, perhaps two of them called at my office, sent there by Mrs. Horster.

Q But your conference with Mr. Dalrymple was long before that, you say? A Not with
10 Mr. Dalrymple; with you.

Q The conference with Mr. Dalrymple was about the time that I was in the hospital; is that right? A I had no conference with Mr. Dalrymple until about the time of the check. My conferences I have spoke of were with you, Mr. Massey.

Q I am trying to fix the time of your conference with Mr. Dalrymple? A My first conference with Mr. Dalrymple, as far as I can
20 remember, was about the time that I heard that Colonel Vickers had, contrary to agreement, turned over the check to Mr. Dalrymple.

The Court: Well, strike that out.

Q That was after the judgment.

The Court: Say that "he had turned over the check." Do not say "contrary to
30 agreement."

Mr. Massey: That is all.

The Witness: But my—(interrupted).

The Court: That is all, that is all.

Mr. Massey: That is all.

The Court: That is all.

Mr. Myers: Your Honor please, representing Mrs. Margaret McLaughlin, I presume it can be stipulated that she made a
40 loan to Mr. Horster on June the 10th, 1925,

Colloquy.

in the sum of three thousand dollars, and received for it a bond and mortgage.

Mr. Stiefel: All right.

Mr. Myers: Which has not yet been paid.

Mr. Lehlbach: I also might say that I understood that that evidence would be introduced. Well, of course, we have the same
10 kind of a title.

The Court: Is there anything else now?

Mr. Stiefel: Nothing but that letter to the Fidelity, and I will give a copy of that to Mr.—(interrupted).

The Court: The testimony should be written out and Mr. Stiefel says that counsel can agree as to these matters of figures, and, if not, why, you can come to me in chambers
20 and let me have the testimony.

After counsel receive the testimony, how long do you want for your memorandum?

Mr. Stiefel: Why—

The Court: You can exchange briefs within a certain number of weeks and then any party can file an answering brief within one week from that time. How long do you want, three weeks?

Mr. Massey: I will have my brief within
30 a week.

Mr. Stiefel: You mean, from now?

The Court: Oh, no; from the time you get the testimony.

Mr. Stiefel: All right. I will say I will have my brief within a week from the time we get the testimony.

Mr. Woerner: I would like to have a week.

Colloquy.

The Court: Is that satisfactory to everybody, within a week?

10 Mr. Contrell: In my testimony I used the word "endorsed" on that check, when I was testifying to what became of it and I thought I so worded it when I meant Colonel Vickers was to have it certified.

The Court: You corrected yourself on the stand.

Mr. Contrell: I want the word "endorsed" stricken out.

20

30

40

*Exhibit D. 1. (Also Exhibit C. 1.)***Exhibit D. 1. (Also Exhibit C. 1.)**

KNOW ALL MEN BY THESE PRESENTS, that I, OTTO G. HORSTER, for myself, my heirs, executors, administrators, and assigns, for and in consideration of the sum of One (\$1.) 10 Dollar and other good and valuable consideration, to me in hand paid by GEORGE T. ROCKWELL, KARL KNIIEP and MARY ULICSNIK, have and by these presents do, hereby grant, bargain, sell, assign, transfer and set over unto the said George T. Rockwell, Karl Kniep and Mary Ulicsnik, and their survivors or survivor, their administrators, executors, successors and assigns, forever, all that certain personal property and choses in action owned by me, described as follows:— 20

1. All of my right, title and interest in and to my shares of the capital stock of Stuyvesant Development Company, and in and to all and singular the assets of said company.

2. All my right, title and interest in and to certain bonds of Union Cemetery Association which I *won* or in which I have an interest.

3. All my right, title and interest in and to my collection of postage stamps. 30

4. All my right, title and interest in and to my "Title searching plant."

5. Except as hereinafter reserved, all monies whatsoever, due or to grow due to me.

6. All of my property, real and personal, of whatsoever the same may consist and wheresoever the same may be situate, whether cognate or akin to the above specifically described property or not, and I hereby agree to do whatever is necessary or proper to enable the transferees 40

Exhibit D. 1. (Also Exhibit C. 1.)

herein named to obtain possession of, and the proper evidence of title to, the property hereby conveyed and/or transferred, excepting and reserving from the effect of this instrument, however, all of my household furniture and also to the extent of \$500., my bank balance.

10 TO HAVE AND TO HOLD the same unto the said GEORGE T. ROCKWELL, KARL KNIEP and MARY ULICSNIK, their heirs, executors, administrators and assigns forever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this twenty-second day of December, Nineteen Hundred and Twenty-five.

OTTO G. HORSTER (L. S.)

20 Signed, Sealed and delivered
in the presence of:

NORBURY MURRAY

BILL OF SALE.

OTTO G. HORSTER,

TO

30 GEORGE T. ROCKWELL, KARL
KNIEP and MARY ULICSNIK,

Dated:—December 22nd, 1925.

Exhibit D. 2.

Exhibit D. 2.

N. J. WARRANTY DEED—151

THIS INDENTURE.

Made the twenty-second day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-five, 10

BETWEEN

OTTO G. HORSTER AND HELEN C. HORSTER, his wife, of the City of East Orange, in the County of Essex and State of New Jersey, party of the first part;

AND

GEORGE T. ROCKWELL, KARL KNIEP and MARY ULICSNIK, as joint tenants and not as tenants in common, 20
of the City of Newark, in the County of Essex and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of One (\$1.00) Dollar and other good and valuable consideration, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents to give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to their heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly 30
40

Exhibit D. 2.

described, situate, lying and being in the City of East Orange in the County of Essex and State of New Jersey,

10 BEGINNING in the easterly line of Steuben Street, formerly called South 18th Street, at a point distant southwesterly five hundred ten feet and ninety-six one-hundredths of a foot from the intersection of the easterly line of Steuben Street with the southerly line of Ninth Avenue; running thence along Steuben Street southwest-
erly twenty-five feet; thence southeasterly at right angles to Steuben Street one hundred feet; thence northeasterly prallel with Steuben Street, twenty-five feet; thence northwesterly on a straight line to the place of BEGINNING.

20 Being the same premises conveyed to the parties of the first part by Millie T. Kelleher, unmarried, by deed dated July 10, 1908 and recorded in Book T 43 of Deeds for Essex County pages 465, etc.

TOGETHER with all and singular, the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

30 ALSO, all the estate, right, title, interest property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit, and behoof of the said party of the second part, their heirs and assigns forever:

40 AND the said Otto G. Horster and Helen C. Horster, his wife, do for themselves, their heirs, executors and administrators covenant and agree

Exhibit D. 2.

to and with the said party of the second part, their heirs and assigns, that they the said Otto G. Horster and Helen C. Horster, his wife, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the 10 said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

20 AND ALSO that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

AND ALSO, that they, the said Otto G. Horster and Helen C. Horster, his wife, will WARRANT, secure, and forever defend the said land and premises unto the said George T. Rockwell, Karl Kniep and Mary Ulicsnik, as aforesaid their heirs and assigns, forever, against the lawful 30 claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

OTTO G. HORSTER (L. S.)

HELEN C. HORSTER (L. S.)

HELEN C. HORSTER

OTTO G. HORSTER

Exhibit D. 2.

Signed, Sealed and Delivered
in the presence of

NORBURY MURRAY,
NORBURY MURRAY,

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

BE IT REMEMBERED, That on this 22nd and 31st days of December, in the year of our Lord One Thousand Nine Hundred and Twenty-five, before me, the subscriber, personally appeared OTTO G. HORSTER and HELEN C. HORSTER, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said HELEN C. HORSTER, wife as aforesaid, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

NORBURY MURRAY,
A. Master in Chancery of New Jersey.

Received in the Register's Office of the County of Essex, N. J. on the 4th day of January A. D. 1926, at 2:05 o'clock, in the afternoon, and Recorded in Book T. 73 of DEEDS for said County, on pages 122-123

40 HOWARD S. DODD,
Register.

*Exhibit D. 3.***Exhibit D. 3.**

WHEREAS, by a certain deed of conveyance bearing even date herewith, made by Otto G. Horster and Helen C. Horster, his wife, to the undersigned, there was conveyed to the undersigned, certain real estate on Steuben Street, East Orange, N. J.; and

WHEREAS, by bill of sale bearing even date herewith, there was sold and transferred to the undersigned by the said Otto G. Horster, certain personal property; and

WHEREAS, said conveyance and transfer were made to us only for and upon the uses, purposes and trusts hereinafter mentioned.

WE DO NOW HEREBY DECLARE, that we hold said real and personal property only upon the uses and trusts and for the purposes following, to wit:—

1. As security for the payment of all and singular the debts and liabilities listed in the certain schedule hereunto annexed and marked "Exhibit A" (without preference as to any of said debts or liabilities) together with interest and costs; and out of the proceeds of the trust estate to pay and satisfy (without preference, as aforesaid) said debts and liabilities, if the proceeds be sufficient for that purpose; and if insufficient, to distribute the proceeds pro rata among the owners and/or holders of said debts and/or liabilities, after deduction of the expenses of administering the trust estate and executing the trusts. In the event that creditors other than those named in said Exhibit A, or in the event that debts or liabilities beyond those mentioned in said Exhibit A, shall, under the power hereinafter given and provided for, be admitted

Exhibit D. 3.

to the benefit of this trust agreement, then those admitted shall come within the purview of the foregoing as fully as if the debts and/or liabilities thus admitted had been enumeration in such schedule in the first place.

10 2. As security for the payment of any other indebtedness of said Otto G. Horster, which the undersigned, as Trustees (or a majority of them) may determine and declare are or should be entitled to participate in the distribution of the proceeds of the real and personal property which, as aforesaid, has been conveyed, transferred or assigned, or will hereafter be conveyed, transferred or assigned to such Trustees; it being distinctly understood and hereby provided, that
20 such Trustees (or a majority of them, as aforesaid) are hereby given full right and power to declare that any creditor or creditors other than those enumerated in the schedule hereto annexed, shall be entitled to the benefit of this trust agreement, and to participate in the proceeds of the trust estate, to the same extent as the creditors mentioned in such schedule and /or the indebtedness in said schedule described; and such Trustees (or a majority of them) shall have full power and absolute discretion in that regard.

30 3. The undersigned Trustees (or a majority of them) have full right and power to sell, convey, mortgage, pledge or otherwise dispose of or encumber at public or private sale or sales any and/or all of the real and/or personal property at any time or times during the life of this agreement, and at such price or prices and on such term or terms as to said Trustees (or a majority of them) shall appear best or most advisable; and in this regard they shall have and may exercise full discretion, free from any control, let
40

Exhibit D. 3.

or hindrance of the said Otto G. Horster and Helen C. Horster or either of them, and may execute and deliver any and all instruments suitable or proper in that behalf.

4. To collect the rents, issues, profits, dividends and interests upon the corpus of the trust estate, and to apply the same in aid of the purposes of the trust and in the same form and manner as the corpus of the trust; it being distinctly understood that the Trustees aforesaid (or a majority of them) shall have full right and power to permit the said Helen C. Horster and Otto G. Horster to occupy and use (rent free) the portion of the premises on Steuben Street now actually occupied by them, for as long as said Trustees (or a majority of them) may, in their absolute discretion, deem fit or advisable. 10
20

5. The undersigned may at any time, without the consent of or notice to any of the parties hereto, or to anyone benefited or to be benefited hereby, apply to any court having jurisdiction for relief; and included within the meaning of the expression "relief" shall be the right to resign and to have substituted for the Trustee or Trustees desiring such relief, another person or persons to be designated by such court having jurisdiction. 30

6. After the Trustees (or a majority of them) shall have paid and satisfied all and singular the debts and liabilities secured or to be secured as hereinabove set forth, together with lawful interest thereon, and all expenses in connection with the administration of the trust, if there should remain in their hands any part of the trust estate, undisposed of, or any part of the proceeds of said trust estate, undisposed of, such Trustees (or a majority of them) shall 40

Exhibit D. 3.

transfer and reassign unto said Otto G. Horster and Helen C. Horster, the remainder of said estate in their hands or possession, after first deducting therefrom a reasonable sum to compensate such Trustees for their services, work and labor in administering the trust.

10 7. It is further understood and agreed that the Trustees (or a majority of them) may in their absolute discretion, permit the said Otto G. Horster or his employees to continue to use his "title searching plant" mentioned in the Bill of Sale, for the uses and purposes of said Otto G. Horster, pending developments; the said Trustees (or a majority of them) may at any time, without notice, bring to an end such use of said plant, and take possession thereof for the purpose of disposing of the same or any other purpose whatsoever within the purview of this agreement.

It is understood and agreed that the undersigned shall not be personally liable to anyone for any non-feasance, malfeasance or negligence in the administration of this trust, nor for any act or omission whatsoever, unless such act or omission amounts to actual wilful fraud on the part of the undersigned.

30 IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals this 22 day of December, 1925.

MARY ULICSNIK (L. S.)
KARL KNIEP (L. S.)
GEORGE T. ROCKWELL (L. S.)

Exhibit D. 3.

Signed, sealed and delivered
in the presence of:

M. U. & G. T. R.
Norbury Murray
as to Karl Kniep
Hugo Woerner

10

The terms of the foregoing trust are hereby consented to and accepted by the undersigned, as representing the exact terms on which the afore-said conveyance and transfer were made.

HELEN C. HORSTER
OTTO G. HORSTER
HELEN C. HORSTER
OTTO G. HORSTER

20

Norbury Murray
Norbury Murray

EXHIBIT A.

SCHEDULE OF LIABILITIES.

Karl Kniep	\$ 9,000.00	
Karl Reister and/or wife—between		
\$6,000. and.....	9,000.00	
M. Ulicsnik	10,800.00	30
Nagel	500.00	
Grabach	450.00	
GEORGE T. ROCKWELL	\$10,000.00	

Exhibit C. 4.

Trust Agreement.

Otto G. Horster and Helen C. Horster,
his wife,

to

10 George T. Rockwell, Karl Kniep and
Mary Ulicsnik,

Dated:—December 22, 1925.

Exhibit C. 4, page 1.

#6644.

January 4, 1925.

20 Hon. J. W. Rufus Besson,
c/o Besson, Alexander & Stevens,
1 Newark Street,
Hoboken, N. J.

Dear Sir:—

This is to advise you that Mr. Horster has made an assignment of all of his personal property to George T. Rockwell, Karl Kniep and Mary Ulicsnik as Trustees, represented by
30 Messrs. Contrell, Woerner and Stiefel, and that consequently any monies or property which would otherwise have been paid or delivered to him, should be paid and delivered to said three trustees or their attorneys.

We advise you of this because we understand that you are one of, or are acting for a Committee which has charge of the sale of the Union Cemetery Association bonds, in which Mr. Horster and the Stuyvesant Development Co. are
40 interested.

Exhibit C. 4.

Kindly acknowledge receipt hereof, so that our files may be complete. Thanking you, we remain,

Very truly yours,

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys for Otto G. Horster.

By

NORBURY C. MURRAY.

F—

Exhibit C. 4, page 2.

#6644.

January 4, 1925.

Mr. Fred G. Stickel,
Prudential Building,
Newark, N. J.

My dear Fred:—

This is to advise you that Mr. Horster has made an assignment of all of his personal property to George T. Rockwell, Karl Kniep and Mary Ulicsnik as Trustees, represented by Messrs. Contrell, Woerner and Stiefel, so that any monies or property coming into your hands, which would otherwise be paid or delivered to Mr. Horster, should be paid or delivered to said
30 Trustees or their attorneys.

Kindly acknowledge receipt hereof so that our files may be complete, and oblige,

Very truly yours,

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys for Otto G. Horster.

By

NORBURY C. MURRAY.

F—

*Exhibit C. 4.***Exhibit C. 4, page 3.**

#6644.

(COPY)

January 4, 1925.

10 Colonel George T. Vickers,
Lerner Building,
Jersey City, N. J.

Dear Sir:—

This is to advise you as attorney for and an officer and/or director of Stuyvesant Development Company, that Mr. Horster has among other things, assigned to George T. Rockwell, Karl Kniep and Mary Ulicsnik, as Trustees, represented by Messrs. Contrell, Woerner and Stiefel, all of his rights of every nature, kind and description in and to Stuyvesant Development Company, and in and to all of its stock and assets. Consequently, any funds, money or assets which the Stuyvesant Development Company would have otherwise paid or delivered to Mr. Horster, should be paid and delivered to said three Trustees or their attorneys.

Kindly acknowledge receipt hereof so that our files may be complete.

30 Thanking you, we remain,

Very truly yours,

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys for Otto G. Horster.

By

NORBURY C. MURRAY.

*Exhibit C. 4.***Exhibit C. 4, page 4.**

#6644.

(COPY)

January 4, 1925.

Mr. Howard F. Kirk,
Union Building,
Newark, N. J.

10

My dear Howard:—

This is to advise you as attorney for Mr. Kempf, Trustee of the stock of Stuyvesant Development Co., turned over to him by Mr. Horster, and also to advise you, as attorney of the Union Cemetery Association, that Mr. Horster has among other things, assigned all of his personal property and choses in action, to three trustees, to wit, George T. Rockwell, Karl Kniep and Mary Ulicsnik, who are represented by Messrs. Contrell, Woerner and Stiefel. This assignment, of course, carries with it Mr. Horster's equity in the security which was turned over by him to Mr. Kempf and/or the Cemetery Association, and consequently any surplus remaining after the Cemetery Association's claims are satisfied, should be paid to the said Trustees or their attorneys, and not to Mr. Horster or any other person.

20

30

Kindly acknowledge receipt hereof so that our files may be complete.

Very truly yours,

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys for Otto G. Horster.

By

NORBURY C. MURRAY.

Exhibits C. 2, C. 3, C. 5 to C. 8.

Exhibits C. 2 and C. 3.

Stock certificates of Stuyvesant Development Co. copies of which are attached to bill of complaint and are printed hereinbefore as part thereof.

10

Exhibits C. 5, C. 6 and C. 7.

Assignments and promissory note, copies of which are attached to bill of complaint and are printed hereinbefore as part thereof.

20

Exhibit C. 8.

Louis A. Kempf, Esq.,
725 Clifton Ave.,
Newark, N. J.

Dear Louis:—

30

As I have assigned my stock in the Stuyvesant Development Company to you as Trustee for the satisfaction of my indebtedness to the Union Cemetery Association, I feel that you should have full knowledge of its value before you either sell, assign or cancel these shares. In fact I do not want them disposed of in any way until my interests are fully protected. Mr. Norbury Murray is familiar with the value of the stock and will gladly advise you further in the matter. Following is an approximate statement:

40

The Stuyvesant Development Co.
received for its Union Cem.
bonds\$ 35,290.00

Exhibit C. 8.

The Stuyvesant is to receive net cash for its stock.....	112,500.00	
Union Cemetery is indebted to Stuyvesant D. Co. for ground sold prior to Oct. 26, 1925 (approx)	\$130,000.00	10
Union Cemetery paid for Stuyvesant D. Co.....	10,916.87	119,083.13
Hollywood Mausoleum Assoc. owes Stuyvesant D. Co. (approx).....	32,000.00	
		298,873.13

Of this sum I am entitled to one-third, viz	99,624.38	20
Against this I owe one-fourth of the Mausoleum Co. indebtedness to the Stuyvesant D. Co. (as do Vickers, Fallon & Wentz each).....	8,000.00	
		91,624.38

Stuyvesant D. Co. owes me for money advanced to the Hollywood Mausoleum Association (approx).....	21,000.00	30
Plus one-third of the money paid by Union Cemetery Assoc. for Stuyvesant D. Co. (\$10,916.87).....	3,638.75	
		116,263.13

In addition to the foregoing the Stuyvesant Development Co. sold some land to the R. R. Co. and some plots in the cemetery, against which are payments or indebtedness for corporation taxes.

40

Exhibit C. 9.

You must consider that at the present time the Cemetery Assoc. is not in a position to pay more than one-fourth of its indebtedness (\$119,083.13) to the Stuyvesant Development Co. and some arrangement should be made to secure the balance to the present owners of the stock before it is turned over to anyone. The foregoing settlement will still leave me the owner of one-fourth of the Hollywood Mausoleum Assoc.

Yours truly,

(Signed) OTTO G. HORSTER

Exhibit C. 9.

20

February 23, 1926.

Otto G. Horster, Esq.,
671 Broad Street,
Newark, N. J.

Dear Otto:—

Your letter of February 19, 1926, addressed to Louis A. Kempf, has been handed to me for answer for the reason that he is confined to his bed with an attack of influenza.

I am not familiar with the detail of the matters discussed in the letter and so will not comment on the figures therein stated, except to say that I hope that you may not be over-optimistic on the valuation placed by you on your holdings in the Stuyvesant Development Company.

So far as the general subject matter is concerned, this trusteeship has been thrust upon Louis without his desire. If his trusteeship is to continue, his first duty is to conserve the property, the title to which has been placed in him for

Exhibit C. 9.

the Cemetery Association, because that is the reason and the only reason the property was transferred to him.

I take your letter was probably intended as a notice to him that you place a certain valuation on your holdings therein mentioned and that you desire notice of any transfer of the property by Louis. On the other hand, you no doubt have in mind that the Cemetery Association is entitled to payment from you and that the mere transfer of this property to Louis is not a satisfaction of this claim. The Cemetery Association has just the same right now to enforce its claim as it had before so far as I know, and unless you yourself take some active means of satisfying the claim and thus becoming equitably entitled to a return of the security, you cannot complain if in the course of time the security itself is disposed of and the claim satisfied so far as it may be in that manner.

In other words, without assuming an unfriendly attitude, I think you should also be on your notice that if the Cemetery Association insists on a liquidation of this security, it is your duty either to pay the claim or to actively adopt some means by which the security will not be disposed of for less than what you think its value might be to yourself or to some one who might wait indefinitely for a disposition of it.

Yours very truly,

(Signed) Frederick A. Lehlbach

FAL/S

Affidavit of Olive V. Wetsell.

62/696.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARY ULICSNIK, and others, <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, and others, <i>Defendants.</i>	}	<i>On Bill.</i> <i>Affidavit.</i>
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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

20 OLIVE V. WETSELL, being duly sworn according to law, on her oath says:

1. I am the assistant secretary of Union Cemetery Association, one of the complainants in the above entitled suit, and as such, am in charge of the books of account of said association, and am familiar with the matters herein after stated.

30 2. On May 22, 1924, said association entrusted to Otto G. Horster \$5,500.00, to be invested by him on behalf of said association in a certain bond and mortgage, namely, the bond and mortgage of a certain Claridge Construction Company; on May 29, 1925, said association entrusted to Otto G. Horster \$3,000.00, to be invested by him on behalf of said association in a certain bond and mortgage, namely, the bond and mortgage of a certain Sieber; on October 24, 1925, said association entrusted to Otto G. Horster
40 \$2,500.00, to be invested by him on behalf of said

Affidavit of Olive V. Wetsell.

association in a certain bond and mortgage, namely, the bond and mortgage of a certain Anna O'Connell; on December 1, 1925, said association entrusted to Otto G. Horster \$1,500.00, to be invested by him on behalf of said association in a certain bond and mortgage, namely, the
10 bond and mortgage of a certain Margaret Farrell; on March 12, 1925, said association entrusted to Otto G. Horster \$6,000.00, to be invested by him on behalf of said association in a certain bond and mortgage, namely, the bond and mortgage of a certain Gabriel Iannone; on April 3, 1925, said association entrusted to Otto G. Horster \$4,000.00, to be invested by him on behalf of said association in a certain bond and mortgage, namely, the bond and mortgage of a certain Lewis.
20

3. Said Otto G. Horster, however, used all the sums aforesaid for his own uses and purposes. No part of said sums have been repaid by him to Union Cemetery Association, but he paid to said association, ostensibly on behalf of Claridge Construction Company, three installments of interest, aggregating \$525.00, which installments satisfied interest accrued on the first mentioned amount, \$5,500.00, up to and including October 30, 1925.
30

4. There remains due to said Union Cemetery Association \$22,500.00, the principal sums entrusted to said Otto G. Horster, as aforesaid, and in addition thereto interest as shown in the following tabulation, namely:

On \$5,500 from October 30, 1925, at 6%,	
On \$3,000.00 from May 29, 1925, at 6%,	
On \$2,500.00 from October 24, 1925, at 6%,	
On \$1,500.00 from December 1, 1925, at 6%,	40

Affidavit of Olive V. Wetsell.

On \$6,000.00 from March 12, 1925, at 6%,

On \$4,000.00 from April 3, 1925, at 6%.

5. No part of said \$22,500.00, and no part of said interest, due as aforesaid, has been paid to said association.

10

OLIVE V. WETSELL.

Sworn and subscribed to before me
this 4th day of November, 1927.

A. G. KRESS,
Notary Public of New Jersey.

20

30

40

Affidavit of Mary Ulicsnik.

62/696.

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK, and others,
Complainants,

and

CHARLES E. DALRYMPLE, and
others,
Defendants.

On Bill.
Affidavit.

10

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

MARY ULICSNIK, being duly sworn according to law, on her oath says: 20

1. I am one of the complainants in the above entitled suit.

2. On December 22, 1925, at the time of the execution of the trust agreement in the bill of complaint in said suit mentioned and described, Otto G. Horster was indebted to me in the sum of Nine Thousand Five Hundred Dollars, besides lawful interest thereon; said indebtedness arose out of moneys theretofore entrusted by me to Otto G. Horster for investment on my behalf in bonds and mortgages, which moneys said Otto G. Horster did not invest, but applied to his own uses and purposes. 30

3. The approximate dates upon which the respective parcels of said moneys were so entrusted to Otto G. Horster are shown in the tabulation hereto annexed and made a part hereof; also in said tabulation are shown the 40

Affidavit of Mary Ulicsnik.

respective dates from which interest begins to run on said parcels.

4. No part of the indebtedness aforesaid has been paid and the whole of the same remains due and owing, together with lawful interest thereon.

MARY ULICSNICK.

Sworn and subscribed to before me this 4th day of Nov., 1927.

HUGO BARTH,
Notary Public of New Jersey.

STATEMENT.

- 20 In re: proposed loan to "Henry C. Pfass and Elizabeth, his wife." Date, March 28th, 1923, Horster paid interest on this sum to September 28, 1925, from which date no interest has been paid \$3,500.00
- In re: proposed loan to "Fredericka Sieber." Date, May 15th, 1925, Horster paid interest on this sum to November 15, 1925, from which
- 30 date no interest has been paid \$3,500.00
- In re: proposed loan to "Henry Post and Clara Post, his wife." Date, May 20th, 1925, Horster paid interest on this sum to November 20, 1925, from which date no interest has been paid \$2,500.00

Affidavit of Herman F. Nagel.

62/696.

IN CHANCERY OF NEW JERSEY.

Between

MARY ULICSNIK, and others,
Complainants,

and

CHARLES E. DALRYMPLE, and
others,

Defendants.

On Bill.

Affidavit.

10

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

HERMAN F. NAGEL, being duly sworn according to law, on his oath says: 20

That on or about the 31st day of October, 1923, I entrusted to Otto G. Horster Two Thousand (\$2,000.00) Dollars for investment on my behalf in a bond and mortgage. This money, however, he devoted to his own uses and purposes; between the date above mentioned and December 22nd, 1925, he repaid to me the greater part of said sum, but on said date there remained due to me Five Hundred (\$500.00) Dollars, parcel of said money. The whole of said amount of \$500.00, together with lawful interest thereon from said date, still remains due and owing. 30

HERMAN F. NAGEL.

Sworn and subscribed to before me this 4th day of November, 1927.

SAMUEL D. WILLIAMS,

Master in Chancery of New Jersey.

Affidavit of George T. Rockwell.

62/596.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARY ULICSNIK, and others, <i>Complainants,</i> <i>and</i> CHARLES E. DALRYMPLE, and others, <i>Defendants.</i>	}	<i>On Bill.</i> <i>Affidavit.</i>
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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

20 GEORGE T. ROCKWELL, being duly sworn according to law, on his oath says:

1. I am one of the complainants in the above-entitled suit.

2. On December 22nd, 1925, at the time of the execution of the trust agreement in the bill of complaint in said suit mentioned and described, Otto G. Horster was indebted to me in the sum of Ten Thousand Dollars, besides
30 lawful interest thereon, said indebtedness arose out of the moneys theretofore entrusted by me to Otto G. Horster for investment on my behalf in bonds and mortgages, which moneys said Otto G. Horster did not invest, but applied to his own uses and purposes.

3. The approximate dates upon which the respective parcels of said moneys were so entrusted to Otto G. Horster are shown in the tabulation hereto annexed and made a part
40 hereof also in said tabulation are shown the re-

Affidavit of George T. Rockwell.

spective dates from which interest begins to run on said parcels.

4. No part of the indebtedness aforesaid has been paid and the whole of the sum remains due and owing, together with lawful interest thereon.

GEORGE T. ROCKWELL. 10

Sworn and subscribed to
before me this 16th day
of November, 1927.

JOHN CONTRELL,
A Master in Chancery of New Jersey.

STATEMENT.

In re: proposed loan to "Eric Schnaphagen and Ilona, his wife." Date, Dec. 11, 1920. Horster paid interest on this sum to March 1, 1925, from which date no interest has been paid	\$5,000.00	20
In re: proposed loan to "Henry Trube and Elizabeth, his wife." Date, Nov. 15, 1920. Horster paid interest on this sum to Feb. 15, 1925 from which date no interest has been paid	\$5,000.00	30

IN CHANCERY OF NEW JERSEY.

Between

10 MARY ULICSNIK, and others,
Complainants,

and

CHARLES E. DALRYMPLE, and
others,

Defendants.

On Bill.
Affidavit.

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

20 KARL RIESTER, being duly sworn according to law, on his oath says:

1. I am one of the complainants in the above-entitled suit.

2. On December 22nd, 1925, at the time of the execution of the trust agreement in the bill of complaint in said suit mentioned and described, Otto G. Horster was indebted to me in the sum of Nine Thousand Dollars besides lawful interest thereon; said indebtedness arose out of moneys theretofore entrusted by me to Otto G. Horster for investment on my behalf in bonds and mortgages, which moneys said Otto G. Horster did not invest, but applied to his own uses and purposes.

3. The approximate dates upon which the respective parcels of said moneys were so entrusted to Otto G. Horster are shown in the tabulation hereto annexed and made a part hereof; also in said tabulation are shown the

respective dates from which interest begins to run on said parcels.

4. No part of the indebtedness aforesaid has been paid and the whole of the same remains due and owing, together with lawful interest thereon.

KARL RIESTER. 10

Sworn and subscribed to
before me this 3rd day
of Nov., 1927.

ISADORE H. COLTON,
A Master in Chancery of New Jersey.

STATEMENT.

In re: proposed loan to "Henry C. Pfass and Elizabeth, his wife." Date, September 1st, 1922, Horster paid interest on this sum to September 1st, 1925, from which date no interest has been paid \$3,500.00

In re: proposed loan to "Elmer E. Wade." Date, December 26th, 1923, Horster paid interest on this sum to June 26th, 1925, from which date no interest has been paid \$2,500.00 30

In re: proposed loan to "Fredericka Sieber." Date, September 1st, 1925, Horster paid no interest on this sum from which date no interest has been paid	\$3,000.00
	\$9,000.00

Exhibits D. 1 to D. 5.

Exhibits D. 1 to D. 5.

NEW JERSEY SUPREME COURT.

10	ELLEN MINCHIN, <i>vs.</i> OTTO G. HORSTER,	Plaintiff, Defendant.	In Attach- ment. Affidavit.
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STATE OF NEW JERSEY, } ss.
 COUNTY OF ESSEX.

20 ELLEN MINCHIN, being duly sworn on her oath according to law deposes and says: I have known the defendant Otto G. Horster for the past eight years, and on or about the 16th day of May, 1919, said Otto G. Horster was acting as my attorney and suggested that I loan the Vincent Realty Company, a corporation of the State of New Jersey, \$1500.00 to be secured by a bond, and mortgage upon real estate situated in the City of Newark, and on the 16th day of May 1919, I delivered to my said attorney the sum of \$1500.00 and he delivered to me a bond
 30 dated May 15th, 1919, which purports to be executed by the Vincent Realty Company by John Vincent, President and attested by Daniel J. Crique, and acknowledged by the said Daniel J. Crique before the said attorney Otto G. Horster. The said mortgage on its face bears the legend that it was received and recorded in the Register's office of the County of Essex on the 16th day of May, 1919 at 1:30 O'clock in the afternoon and recorded in Book H. 40 of Mort-
 40 gages for said County on pages 256-257, which

Exhibits D. 1 to D. 5.

legend or certificate purports to be signed by Walter A. Evans, Register.

Shortly before the 28th day of July, 1921, my attorney suggested and recommended and finally prevailed upon me to loan an additional sum of \$1500.00 to the Vincent Realty Company to be secured by a bond and mortgage upon the same property as hereinabove referred to, and pursuant to his suggestion and request, I delivered to him on the 28th day of July, 1921, the sum of \$1500.00 and he thereupon delivered to me a bond which purports to be executed by the Vincent Realty Company by John Vincent, president, and Daniel J. Crique, secretary, Since that time I have repeatedly requested of Mr. Horster that he deliver to me the mortgage which he told me had been given as security for the bond last mentioned, but this up to the present time he has failed and refused to do. The interest on both of these loans has been paid from time to time down to and including the interest due on November 15th, 1925, by the said Otto G. Horster.

On the evening of January 25th, 1926, the said Otto G. Horster sent his son Charett Horster to me with the message that he had certain bonds of the Union Cemetery Association which were a desirable and profitable investment, and requested that I buy \$3,000.00 of the par value of the bonds, the purchase price to be \$1,500.00, which after some discussion with the said Charett Horster, I finally agreed to do, and on the following day I met the said Charett Horster at the Howard Savings Institution in the City of Newark and drew \$1,500.00 from my account in the said bank and delivered the same to the said Charett Horster to be by him delivered to his father in exchange for the bonds previously men-
 40

Exhibits D. 1 to D. 5.

tioned. About two weeks after delivering the money to the said Charett Horster, he came to my residence at the Essex County Hospital and handed me a piece of paper which purports to be a demand note payable to my order in the sum of \$3,000.00 and signed by the said Otto G. Horster. I asked him what this note was for and he replied that it was a receipt for the \$1,500.00 that I had given him for the bonds and I told him that I did not want the note but I wanted the bonds he replied: "Well, my father has those and he will keep them," and I replied: "Well, I want to see your father about those bonds and many other things pertaining to my business," and he then promised to bring his father up the following Monday. I waited until the day appointed for the said Otto G. Horster to come to see me and he did not appear, and some few days later after I called him up and he made an appointment to meet me at his office within an hour. I went to his office and he failed to appear. Up to this time I had always place absolute and implicit confidence in the said Otto G. Horster and relied entirely upon his advice in all my affairs which were brought to his attention because he had been a friend and adviser of my husband during his life and for a long period of time, and I had no reason to suspect that the transaction detailed above were not bona fide. After he failed to keep the appointment with me at his office, I heard some rumors about other people's dealings with the said attorney which caused me to make inquiry to ascertain who the officers of the Vincent Realty Company were and I was unable to learn of their names or whereabouts. Following this I had a search made to ascertain if the mortgages

Exhibits D. 1 to D. 5.

were actually on record in the Register's office. This search disclosed that there were no mortgages on record in the said Register's office from the Vincent Realty Company to myself. Through my attorney I have made demand upon the said Otto G. Horster for the delivery of the bonds of the Union Cemetery Association, and through my attorney I have also made demand for the return of the purchase price of the said bonds and for repayment of the principal of the two loans above mentioned, together with interest and this he refused to do.

The said Otto G. Horster is indebted to me in the sum of \$4,500.00 together with interest on \$3,000.00 from November 15th, 1925 and interest on \$1,500.00 thereof from January 26th, 1926 to the date hereof, all of which is still owing and unpaid.

ELLEN MINCHIN.

Subscribed and sworn to before me
this 19th day of March, 1926.

Edna L. Chamberlain,
Notary Public of New Jersey.

Exhibits D. 1 to D. 5.

NEW JERSEY SUPREME COURT.

10	ELLEN MINCHIN,	} <i>Plaintiff,</i>	} <i>In Attach-</i>
	<i>vs.</i>		} <i>ment.</i>
20	OTTO G. HORSTER,	} <i>Defendant.</i>	} <i>Affidavit.</i>

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

CHARLES W. WEEKS, of full age being duly sworn according to law upon his oath, deposes and says: I am a practicing attorney and counsellor at law and as such was consulted by Ellen Minchin on the 13th day of March, 1926, with relation to certain transactions involving two bonds and a mortgage and the purchase of \$3,000.00 of the par value of the bonds of the Union Cemetery Association, which had transpired between the said Ellen Minchin and one Otto G. Horster. I caused an examination to be made of the records of the Register's office of the County of Essex to ascertain whether the mortgages from the Vincent Realty Company to the said Ellen Minchin were on record and received a report that there was no such mortgage on record. I also caused inquiry to be made at the office of the Secretary of State to ascertain the name and address of the registered agent of the said Vincent Realty Company and was informed that John V. Hanrahan, 11 Clinton Street, Newark, N. J., was the registered agent. On Monday morning, March 15th, I got in touch with Mr. Hanrahan and asked him the names of the

Exhibits D. 1 to D. 5.

officers of the company and he informed me that Daniel Crecca was the president and John V. Hanrahan was the secretary and treasurer and that these officers have continued since the formation of the company sometime before the execution of the mortgage involved down to the present date as officers of the said company.

On Monday, March 15th, I got in touch with Mr. Horster over the phone and demanded of him the delivery of the Union Cemetery Association bonds which Mrs Minchin claimed to have purchased from him and he said that he did not have the bonds to deliver. I then asked him for the return of the money and he said that he did not have the money to return. I then suggested that he come into my office that afternoon to make whatever explanation he had for his conduct in the affairs of Mrs Minchin and he accordingly came to my office that afternoon and I showed him the mortgage and the certificate on the face of it and the bonds referred to in the affidavit of Mrs Minchin and he admitted that they were forgeries and that he had forged the signatures of the mortgagor to the mortgage and both bonds. I thereupon demanded of him the repayment of the moneys entrusted to him by Mrs. Minchin and he refused to do so, stating that he was without funds.

I have examined the seals on the respective instruments above referred to and they are not the seals of the mortgagor named in the instrument but the seals of other and different companies.

I have caused inquiries to be made as to the existence of property both real and personal of the said Otto G. Horster in this state and am informed and believe that he has assests from

Exhibits D. 1 to D. 5.

which the debt due the said Ellen Minchin can be made.

CHARLES W. WEEKS.

Subscribed and sworn to before me
this 19th day of March, 1926.

10

Henry J. Sorenson,
An Attorney at Law of New Jersey.

NEW JERSEY SUPREME COURT.

20

ELLEN MINCHIN,

Plaintiff,

vs.

OTTO G. HORSTER,

Defendant.

*In Attach-
ment.*

Order.

30

I, ISIDOR KALISCH, a Supreme Court Commissioner of the State of New Jersey, on reading the affidavits of Ellen Minchin and Charles W. Weeks and having considered the same, do adjudge and decide by the affidavits and an examination of the mortgage and bonds referred to in said affidavits that it is proved to my satisfaction that the said Ellen Minchin, the above named plaintiff, has a cause of action which arose in this state. The nature of the cause of action and the particulars thereof are as follows:

40

On or about the 15th day of May, 1919, the defendant Otto G. Horster, fraudulently induced the plaintiff to deliver to him the sum of \$1500.00 on the representation that the said money was

Exhibits D. 1 to D. 5.

to be loaned to the Vincent Realty Company, a corporation of the State of New Jersey, upon the security of a bond and mortgage upon real estate owned by the said company located in the City of Newark.

After receiving the moneys aforesaid, the defendant forged the names of the officers of the alleged mortgagor upon the bond and mortgage and the name of the Register on the certificate of registration on the face of the mortgage, and delivered the same to the plaintiff, and thereafter from time to time paid the interest upon the said mortgage down to and including November 15th, 1925.

10

On or about the 28th day of July, 1921, the defendant Otto G. Horster fraudulently induced the plaintiff to deliver to him the sum of \$1500.00 upon the representation that the said moneys were to be loaned to the Vincent Realty Company aforesaid upon the security of a bond and mortgage upon real estate in the city of Newark,

20

Thereafter, the defendant forged the names of the officers of the alleged mortgagor to the bond and delivered the same to the plaintiff and from time to time paid the interest on said mortgage down to and including November 15th, 1925.

Plaintiff has demanded of the defendant the return of the moneys received as hereinabove set forth, but the defendant has wholly failed and refused to pay the same.

30

On or about the 25th day of January, 1926, the said defendant fraudulently induced the plaintiff to deliver to him the sum of \$1500.00 as the purchase price of \$3000.00 of the par value of certain bonds issued by the Union Cemetery Association, and the plaintiff delivered the said sum of \$1500.00 to the defendant Otto G. Hor-

40

Exhibits D. 1 to D. 5.

ster and thereafter demanded the delivery of the bonds, and the said Otto G. Horster has wholly failed and refused to deliver the said bonds and has advised the plaintiff that he is not in possession of the said bonds to make delivery; whereupon plaintiff demanded the return of the sum of \$1500.00, which the said Otto G. Horster has failed and refused to do.

And it is proved to my satisfaction that there is due the said plaintiff from the said defendant the sum of \$4500.00 together with interest thereon, and that the said defendant procured the said moneys by fraud and deceit practiced upon the plaintiff, and I do hereby award the above mentioned plaintiff a writ of attachment in the sum of Nine Thousand Dollars (\$9,000.00) against the goods and lands, rights and credits, money and effects belonging to the defendant in this state.

ISIDOR KALISCH,
Supreme Court Commissioner of
the State of New Jersey.

Dated: March 19th, 1926

NEW JERSEY SUPREME COURT.

By virtue of a writ of attachment hereto annexed, I George Leahy, a Special Deputy Sheriff of the County of Hudson, in the presence of Joseph Barry, a credible person on Monday, the 22nd day of March, A. D. 1926, executed the said writ of attachment, by going to the Office of Colonel Vickers at 999, Bergen Avenue, Jersey City (Served Copy on Colonel Vickers,) of and then and there, in the presence of the said Joseph Barry, declared that I attached the

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Exhibits D. 1 to D. 5.

rights and credits, moneys and effects, goods and chattels, lands and tenements of Otto G. Horster, the said defendant at the suit of Ellen Minchin, plaintiff.

JOHN M. HANNAN, Sheriff,
by GEORGE LEAHY, S. D. S. 10

NEW JERSEY SUPREME COURT.

ELLEN MICHIN,

vs.

OTTO G. HORSTER,

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Inventory and appraisement of the rights and credits, moneys and effects goods and chattels, lands and tenements of the defendant, made by virtue of the above stated writ on the Twenty-second day of March 1926, by George Leahy, Special Deputy Sheriff of Hudson County, and William Henry, a discreet and impartial freeholder of said county, to wit: Attached A. Certified Check, for \$10,000.00 in the possession of Colonel Vickers, at 999, Bergen Avenue, Jersey City due the defendant.

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Appraised at \$10,000.00

John M. Hannan, Sheriff,
By George Leahy, S. D. S.
William Henry, Freeholder.

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Exhibits D. 1 to D. 5.

NEW JERSEY, ss.

The State of New Jersey to the
Sheriff of the County of Hudson

(SEAL) GREETING:

We command you, that you attach
the rights and credits, moneys and
10 effects, goods and chattels, lands and tenements
of Otto G. Horster, defendant wheresoever they
may be found in your County, so that he and
appear before the New Jersey Supreme Court
to be held at Trenton, on the tenth day of April
next, to answer Ellen Minchin, plaintiff in an
action at law to the damage of the said Ellen
Minchin of the sum of nine thousand dollars as
is said. And in what manner you shall execute
20 this, our writ, make appear to us at the day
and place aforesaid; and have you then and there
this writ.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief
Justice of our said Supreme Court, at Trenton
aforesaid, the twentieth day of March, A. D.
1926.

EDWARD J. KELLEHER,
Clerk.

30 CHARLES W. WEEKS,
Attorney.

I hereby deputize George Lahey to serve the
within Writ. Witness my hand and Seal this
22 day of March 1926

JOHN M. HANNAN, Sheriff
By John M. Hannan “

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Exhibits D. 1 to D. 5.

I executed the within Writ on Monday the
22nd day of March 1926, at 1-06 o'clock in the
afternoon of that day as appears in the schedule
hereto annexed.

JOHN M. HANNAN, Sheriff,

By George Leahy, S. D. S. 10
March 31, 1926.
3:00 P. M.

Property of Defendant located at 665 Broad
St., Newark, N. J.

92 Filing cabinets and record containing search
records and Wills.

1 Set 23 Volumes Encyclopedia of Pleadings &
Practice and 3 Supplements. 20

32 Volumes Encyclopedia of law
4 Supplements

1 Set 5 Volumes Compiled Statutes

Atlantic Reporter 73 to 114

Volumes 3 @ 4 Digest

2 Bouviers Volumes

1 ——— on Pleading

63 N. J. Law Reports

73 N. J. Equity Reports

1 Volume Schoreler on Exam. administration 30

1 Perkins *clean* Pl. and Practice

7 Volumes international law (Moore)

3 ” Coke upon Littleton

1 Sears on Trust Estates

22 ” N. J. Archives

4 Vol. Kents Commentaries

1 Vol. Tiedeman on Com. Paper

1 Vol. Burnett on Private Corp.

1 ” Keener on Quasi Contracts.

4 ” Stewarts N. J. Digest 40

Exhibits D. 1 to D. 5.

	1	"	Clark's Criminal Law	
	3	"	Jarman on Wills	
	2	"	N. J. General Statutes	
	2	"	Holmes Federal Taxes	
	1	"	<i>Arues</i> Bill & Notes	
	1	"	Prouts Law Forme	
10	1	"	Chase Blackstone	
	1	"	"	Commentares
	6	"	Jacobs Law Dictionary	
	2	"	Rapalje & Lawrences Law Dictionary	
	1	"	Hoods on Index	
	1		mahogany flat top desk	
	2		Clothes Trees	
	8		Mahogany Chairs	
	1	"	Arm Chair	
	50		Assorted Law Books	
20	40		Volumes Fiction	
	5		Filing Cabinets 4 Sec. and contents	
	6		Section card index and contents	
	4	"	"	"
	1		Security Steel Cabinet and contents	
	1		Oak flat top Desk.	
	1		Typewriter desk & chair	
	1		Noiseless Typewriter	
	1		Swivel Chair	
	1		Arm Chair	
30	1-2		Section filing cabinet and contents	
	27		Maps and <i>Plottings</i>	
	1		Volume lecture on laws of Scotland	
	1		Copy Newark City Charter	
	1		Volume <i>Clececalis</i>	
	1		Life Wm. Blackstone	
	1		Volume forms Federal Procedure	
	2		Vol. <i>Cleyltis</i> Federal Pleadings	
	1	"	Strange Reports	
	1	"	N. J. Digest (McKay)	
	1	"	Honeywell Practice & Pleadings	
40	1	"	Daniels Practice & Pleadings	

Exhibits D. 1 to D. 5.

	1	"	Sheens N. J. " Act.	
	1		Vol. Andrews on Pleadings	
	1	"	Treatise on Quasi contracts	
	2	"	Harrison Chancery Practice	
	1	"	Kerr on Injunction	
	1	"	Peters Reports	
	1	"	<i>Cokes</i> Report	10
	1	"	Abbotts on conveyancis	
	1	"	The Federalist	
	2		1890 Essex Co. Atlas	
	1	1881	" " "	
	1	1906	" " "	
	1	1901	Newark " "	
	1	1904	Newark " "	
	4		Steel Cabinets and contents	
	1		Lot Work Paper	
	1		<i>Painting</i>	20

Description at 158 Steuben Street, East Orange. BEGINNING in the easterly line of Steuben Street, formerly called South 18th Street, at a point southwesterly 510 and 96/100 feet from the intersection of the Easterly line of Steuben Street with the Southerly line of Ninth Avenue; running thence along Steuben Street southwesterly 25 feet; thence southeasterly at right angles to Steuben Street 100 feet; thence Northeasterly parallel with Steuben Street 25 feet; thence Northwesterly on a straight line to the place of BEGINNING.

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Exhibits D. 1 to D. 5.

NEW JERSEY SUPREME COURT.

10	<i>Between</i> ELLEN MINCHIN, <i>and</i> OTTO G. HORSTER,	}	<i>Returnable</i> <i>April 10,</i> <i>A. D. 1926.</i> <i>Charles W.</i> <i>Weeks,</i> <i>Attorney.</i>
	<i>Plaintiff,</i> <i>Defendant.</i>		

By virtue of the above stated and hereto annexed writ to me directed, I did on the 26th and 31st days of March 1926 at the suit of the Plaintiff above named, in the presence of Michael J. A. Doyle (a credible Person), attach the rights and credits, moneys, effects, goods, chattels, lands and tenements of said Defendant, and particularly all his right, title and interest of, in and to the hereafter described:

Real Estate at # 158 Steuben St. East Orange, N. J., as per description hereunto attached March 26, 1926 at 11:30 A. M. Collection of Stamps in Fidelity Union Trust Co. as collateral security for loan of \$3000.

Writ served upon Oscar H. Merz Asst. V. President Fidelity Union Trust Co., on March 26, 1926.

Searching Plant and personal property of defendant as per inventory hereunto annexed located on 6th floor of Wiss Building, 665 Broad St., Newark, N. J. attached March 31, 1926 at 3 P. M.

No other rights or credits, moneys or effects, goods or chattels, lands or tenements of said Defendant being found in my County.

HARRY B. O'CONNELL, Sheriff,
By Oliver Werkhieser, Special Deputy

Exhibits D. 1 to D. 5.

We, the undersigned Oliver Werkhieser, Special Deputy Sheriff, and Michael J. A. Doyle, Freeholder of the County of Essex, hereby value and appraise the rights and tenements of the said Defendant at the sum of value unknown.

OLIVER WERKHIERSER,
Special Deputy. 10

MICHAEL J. A. DOYLE,
Freeholder.

NEW JERSEY, ss.

The State of New Jersey to the Sheriff of the County of Essex,

(SEAL) GREETING:

WE COMMAND You, that you attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Otto G. Horster, defendant, wheresoever they may be found in your County, so that be and appear before the New Jersey Supreme Court to be held at Trenton, on the tenth day of April next, to answer Ellen Minchin, plaintiff, in an action at law to the damage of the said Ellen Minchin of the sum of nine thousand dollars as is said. And in what manner you shall execute this, our writ, make appear to us at the day and place aforesaid; and have you then and there this writ. 20

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of our said Supreme Court, at Trenton aforesaid, the twentieth day of March, A. D. 1926. 30

CHARLES W. WEEKS,
Attorney.

EDWARD J. KELLEHER,
Clerk. 40

Exhibits D. 1 to D. 5.

NEW JERSEY SUPREME COURT.

10	Essex County Ellen Michin <i>vs.</i> Otto G. Horster	} <i>Action</i> } <i>at</i> } <i>Law.</i> } <i>In</i> } <i>Attach-</i> } <i>ment.</i>
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WRIT OF ATTACHMENT.

Returnable April 10, A. D. 1926.

CHARLES W. WEEKS,
 Attorney.

20 Affidavit for \$4,500.00 and interest and
 order for writ filed before issuing this
 Writ.

March 20, 1926.

EDWARD J. KELLEHER,
 Clerk.

Filed May 13, 1926.

EDWARD J. KELLEHER,
 Clerk.

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Served the within writ in the manner
 required by law March 26th, and 31st,
 1926, in the presence of Michael J. A.
 Doyle a credible person, as will appear
 by inventory and appraisal hereunto
 annexed.

HARRY B. O'CONNELL,
 Sheriff.

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By Oliver Werkhieser,
 Special Deputy.

Exhibits D. 1 to D. 5.

I hereby appoint and depute Oliver Werk-
 heiser to serve the within writ. Witness my
 hand and seal this 23rd day of March, 1926.

HARRY B. O'CONNELL,
 Sheriff.

By Alfred C. Walker, 10
 Under Sheriff.

Sheriff's fees \$9.52 4/19/26. (SEAL)

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Exhibits D. 1 to D. 5.

NEW JERSEY SUPREME COURT.

10	ELLEN MINCHIN, <i>vs.</i> OTTO G. HORSTER,	Plaintiff, Defendant.	Action at Law. Order of Pub- lication Ap- pointing an Auditor.
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The writ of attachment in this case having been returned served by the Sheriff of the County of Essex and the Sheriff of the County of Hudson and no appearance having been entered in said cause by the defendant,

It is on this 5th day of June, 1926, on motion of Arthur T. Vanderbilt, attorney for the plaintiff,

ORDERED that a notice of the issuing of said attachment at whose suit, against whose estate, and for what sum, and when returned, shall be published in the Newark Evening News once a week for four successive weeks; and it is

FURTHER ORDERED that Charles E. Dalrymple be appointed auditor to adjust and ascertain the amount due to the plaintiff and each of the applying creditors.

WILLIAM S. GUMMERE,
C. J.

Exhibits D. 1 to D. 5.

NEW JERSEY SUPREME COURT.

10	ELLEN MINCHEN, <i>vs.</i> OTTO G. HORSTER,	Plaintiff, Defendant.	Action at Law. In Attachment. Order for Substitution of Attorney.	10
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Application for this purpose having been made and it appearing that the attorney of record for the plaintiff consents hereto,

It is thereupon on this 5th day of June, 1926,

ORDERED that Arthur T. Vanderbilt be and hereby is substituted as attorney of record for the plaintiff herein.

Let this rule be entered in the minutes.

WILLIAM S. GUMMERE,
C. J.

OPINION.

IN CHANCERY OF NEW JERSEY.

10	Between	MARY ULICSNIK, <i>et als.</i> , Complainants,	}	Opinion.
	and	CHARLES E. DALRYMPLE, <i>et als.</i> ,		
		Defendants.		

- 20 Otto A. Stiefel for complainant, Mary Ulicsnik, *et als.*;
- Arthur T. Vanderbilt (by R. C. Massey), for Ellen Minchin, Mary E. Riley and Charles E. Dalrymple;
- Hugo Woerner for defendant, Karl Kniep estate;
- Charles M. Myers for Margaret McLaughlin, Arthur A. Worthman for John Grabach;
- Lehlbach, Johnson & Ormond (by Mr. Lehlbach), for Louis A. Kempf;
- 30 John Contrell, Jr., for George K. Rockwell, one of the trustees.
- CHURCH, V.-C.

This is a bill to restrain an auditor from collecting certain assets of one Otto G. Horster, and an answer seeking to set aside as fraudulent certain conveyances made by said Horster.

40 On December 15, 1925, Horster made an assignment to Louis Kempf. This assignment purported to convey ten shares of the Stuyvesant De-

Opinion of Vice-Chancellor.

velopment Company and certain bonds valued at \$15,000. The present whereabouts of these bonds and their value does not appear. As collateral to this assignment a demand promissory note was given to Kempf in the sum of \$35,000, for which there was no consideration, nor was there any for the assignment. It appears that Kempf orally agreed to hold the same in trust, first for the benefit of the Union Cemetery Association for its claim now said to be \$22,500 for a past due debt against Horster, and second, for the benefit of Horster as to any balance above said claim.

The certificate of stock, assignment, and note were held by Howard F. Kirk, attorney for Union Cemetery Association, and a letter was written to Stuyvesant Development Company to advise it of the assignment.

Another assignment was made on December 22, 1925, to Mary Ulicsnik and others. This purported to convey all the property of Horster excepting a bank account of \$500 and household goods. A deed to his real estate was at the same time given to the same parties. At the same time also a trust agreement in writing was entered into, which provided that the property conveyed was to be held in trust to secure the claims of six creditors therein named—excluding three named as defendants in this suit—and the claims of any other creditors which the trustees in their discretion might name.

The trust allowed Horster to occupy the premises rent free and to continue the use of his law office equipment. Upon payment of debts, the balance was to be turned back to Horster.

The testimony shows that there was no bank account of \$500, as all was owing to the bank,

Opinion of Vice-Chancellor.

and that the household goods had been in use at least twenty-five years and were practically of no value. No creditors have ever been offered the benefits of this trust.

At the time these assignments were made, Horster owed defendants in this suit as follows:
 10 Ellen Minchin \$3,000; Mary E. Riley \$9,745.22; Margaret McLaughlin \$3,055.

After these assignments Horster obtained from Ellen Minchin by fraud an additional \$1,500. Judgments were later entered for these amounts, except that of Ellen Minchin which was increased to \$4,692.50 to cover the \$1,500 fraudulently obtained subsequent to the assignments.

On March 20, 1927, Ellen Minchin caused writs of attachment to issue out of the Supreme Court and Charles E. Dalrymple was appointed auditor.
 20 He caused to be made by the Sheriff of Hudson County a levy upon a certain certified check for \$10,000, drawn by the Stuyvesant Development Company for dividends, dated March 5, 1926, and certified March 13, 1926, at the request of the maker.

The defendants Riley and McLaughlin are applying creditors who came into the attachment suit after the issuing of the writs. This
 30 Court granted a temporary restraint against the auditor and directed him to deliver the check to the clerk of this Court pending an adjudication as to the validity of the assignments above described and the settlement of the other questions raised by the bill and answer.

The first question to be decided is as to the regularity of the assignments.

The Uniform Fraudulent Conveyance Act (Cum. Sup. Compiled Statutes 44-145. Vol. 1,
 40 page 647) provides as follows: "Every convey-

Opinion of Vice-Chancellor.

ance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration."

And further page 648-44-150: "Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser.
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A. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim or
 20

B. Disregard the conveyance and attach or levy execution upon the property conveyed."

The undisputed facts show that Horster was either insolvent at the time of these assignments or became so as a result of them. The note for \$35,000 was given for a past due debt. The debt is now alleged to be \$22,500. The assignment of December 15, 1925, transferred bonds stated to be worth \$15,000 and stock on which a dividend of \$10,000 was about to be
 30 paid. This makes the value of the property transferred greatly in excess of the alleged indebtedness. Moreover, as I have said, there was no consideration: the assignment was to Louis Kempf personally and the trust agreement, if there was one, was not in writing.

Again the act concerning general assignments, Compiled Statutes, page 114, Section 1, provides: "Every conveyance or assignment made by a debtor of his entire estate in trust to an assignee
 40

Opinion of Vice-Chancellor.

or assignees for the creditors of such debtor shall be made for their equal benefit in proportion to their several demands to the net amount that shall come to the hands of said assignee for distribution, and all preferences attempted to be made in such assignment of one creditor over the other, or whereby any one creditor shall be first paid or have a greater proportion in respect of his claim than another shall be deemed fraudulent and void."

The assignment of December 22nd, conveyed the entire estate of Horster. It was a trust for certain creditors named therein and excluded other creditors unless the assignees saw fit to admit them to the benefit of the trust.

In the case of *Livermore v. McNair*, 34 New Jersey Equity, 478, at page 483, Vice-Chancellor Van Fleet said: "The plain design of the arrangement was to place the debtor's property beyond the reach of legal process, so that he might still practically own and control it for the benefit of himself and certain of his creditors, and bid defiance to his other creditors. Such a design is vicious in the eye of the law. It contravenes not only the policy of the statute regulating assignments, but the plain direction of the statute of frauds. Any arrangements a debtor may make, which has the effect to hinder, delay or defeat the disposition of his property by due course of law, is a fraud on his creditors. That he made it to prevent his property from being sacrificed, and thus intended to give protection to both his creditors and himself, affords no excuse or defense whatever. A creditor has a right to have his debtor's property applied to the discharge of his debts by due course of law, and any disposition which the debtor may attempt

Opinion of Vice-Chancellor.

to make that has the effect to defeat this right, is a fraud against the creditor."

The assignees moreover, failed to take possession of the property. They permitted Horster to remain in possession of it; they allowed him to retain the use of his residence and his law office and made no attempt to collect the dividend of \$10,000 due from the Stuyvesant Development Co.; they did not notify the Fidelity Union Trust Company, which held a valuable collection of stamps, of the assignment; and apparently permitted bonds valued in the assignment at 15,000 to vanish altogether.

It is easy to see that his creditors could not have suspected the existence of these assignments in time to bring insolvency proceedings within the four months' period for setting aside preference.

I am convinced that these assignments were made with the deliberate intent to defraud some or all of his creditors. In fact, he actually did defraud one of them after the assignment, Mrs. Minchin, to the extent of \$1,500.

I will advise a decree setting aside these assignments and the deed as palpably fraudulent.

In view of the fact that the assets are now held by several different parties: that \$15,000 worth of bonds has apparently disappeared; that the check for \$10,000 is in the Court of Chancery uncollected: that there has been no accounting as to the rentals received from the real estate; that there may be assets yet undiscovered and that search should be made for the \$15,000 worth of bonds above mentioned, I think a receiver should be immediately appointed, and this I will do.

Opinion of Vice-Chancellor.

The receiver can then assemble the assets, and can, under the direction of the Court, decide on the validity of the claims against the estate and their priority.

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New Jersey Court of Errors and Appeals*Between*

MARY ULICSNIK, UNION CEMETERY ASSOCIATION, GEORGE T. ROCKWELL, and others,
Complainants-Appellants,

and

CHARLES E. DALRYMPLE, ELLEN MINCHIN, MARY E. RILEY, and others,
Defendants-Respondents,

and

CLARA SIEDER, MARTHA SHAW, and others,
Defendants-Appellants.

*On Appeal
from a
Decree of the
Court of
Chancery.*

**BRIEF ON BEHALF OF APPELLANTS
MARY ULICSNIK, AND OTHERS.**

The Facts.

This suit involves a contest between creditors of Otto G. Horster. The appeal brings up a Chancery decree, advised by V.-C. Church, to which decree all the litigants are parties. On the appeal there are ranged on one side, as respondents, Charles E. Dalrymple, auditor in attachment and three attachment creditors; all the other creditors of Horster are ranged on the other side, as appellants.

The *amounts* due from Horster to the appellants are not disputed; nor is it disputed that they arise from the misappropriation of moneys

entrusted to Horster for investment. There was no contest on this point, below; under stipulation between all the parties in interest (State of Case, pp. 196-197) the debts due appellants were proved by affidavit (*ib.* pp. 198-205). Tabulated, they are as follows (exclusive of interest):

Union Cemetery Ass'n	\$22,500.00
Mary Ulicsnik	9,500.00
Karl Riester and wife	9,000.00
George T. Rockwell	10,000.00
Estate of Karl Kniep	10,000.00
Herman F. Nagel	500.00
John Grabach	450.00
	\$61,950.00

With interest, the aggregate due appellants exceeds \$70,000.00.

To the attachment creditors there is due approximately \$20,000.00. They hold no security for their claims; their right to relief is predicated upon two writs of attachment issued out of the Supreme Court, bearing date March 20, 1926.

About three months prior to the issuing of those attachments Otto G. Horster and his wife had safeguarded the claims of appellants by transferring to them or their nominees for the purpose of security, all the real and practically all the personal property owned by Horster or by Horster and his wife. The latter reserved to themselves only Horster's bank account (less than \$500.00), which was applied to an indebtedness due to Horster's bank; secondly, the use of one flat in a two-family house in East Orange (owned by Horster and his wife as tenants by the entireties), for such period of time, pending developments, as certain designated trustees

might permit; third, the use by Horster of his "title searching plant" for such time as such trustees might permit.

These assignments and transfers were made and given not in satisfaction of the debts due appellants but solely by way of security. They were made and given before appellants had any notice of even the existence of the creditors who afterwards sued out or came in under the attachments. These assignments and transfers were made and given not in secret but under the direction or with the contemporaneous approval of reputable attorneys, representing various parties in interest. Amongst these attorneys are Frederick Burnett and Norbury Murray acting for Otto G. Horster and his wife; Frederick Lehlbach, Hugo Woerner, Howard Kirk and John Contrell representing creditors of Horster.

There can be no question that the assignments and transfers preceded the attachments in point of time by months; that they were made solely by way of security; that notice of the assignments, etc., was given to all persons appearing entitled to notice; that the deed to the real property was immediately recorded; that the security may never suffice to satisfy appellants' debts. There can be no question that the attachment creditors did not set up any claim in equity that the assignments or transfers were fraudulent or void as to them until about May 21, 1927, when the respondents Ellen Minchin and Mary E. Riley filed their counter-claim below, in this suit.

Nevertheless, by the decree of the court below all the security given to the appellants is declared to have been given in fraud and all the transfers and assignments involved are set aside and annulled (State of Case, p. 11, l. 10, to p. 12, l. 3).

Indeed, the learned Vice-Chancellor said at one point in his opinion:

"I am convinced that the assignments were made with the deliberate intent to defraud some or all of his creditors * * *"
(State of Case, p. 233, l. 21, *et seq.*).

In view of this statement and of the unquestioned fact, not impeached by a scintilla of evidence below, that the "assignments" were made to *creditors* of Horster holding unchallenged bona fide claims in excess of \$60,000, we are compelled to set forth the history of the "assignments" with some degree of particularity.

On December 14, 1925, the fact became known to the officers of Union Cemetery Association that Horster had misused funds of that association, entrusted to him for investment in mortgages (State of Case, p. 92, ll. 20-30). The exact amount of such indebtedness was uncertain. It was either \$22,000.00 (approximately) or \$32,000.00 (approximately). There was doubt in respect to the difference of \$10,000.00 (State of Case, p. 91, ll. 23-38). The facts in this connection were developed by *respondents* who examined Horster as a witness *in their own behalf*.

On that day, December 14, 1925, Horster had communicated with the President, Attorney and Treasurer of the Cemetery Association (Messrs. Ardrey, Kirk and Pfaff; State of Case, p. 92, l. 9, *et seq.*).

On the day following, December 15, 1925, a meeting was held in Horster's law office in Newark. The officers of the Cemetery Association above named as well as the Secretary, a Mr. Depue, and also a Mr. Wentz were present (State of Case, p. 90, ll. 30-40).

At that meeting Horster executed a promissory note and two informal documents (Exhibits C, D, E, pp. 31 and 32, State of Case). The note was payable on demand in the sum of \$35,000.00 to the order of Louis Kempf, one of the trustees and the auditor of the Cemetery Association.

The reason why the note was made payable in the sum of \$35,000.00 was explained both by Horster and by Mr. Kirk, attorney of the Cemetery Association.

Horster, examined as a witness for respondent, said:

"There was a question of whether I owed more than \$22,000.00 and in order to protect the cemetery I made the note for \$35,000.00, which was in excess, of course, of what I owed them, but to satisfy everybody that I wanted to pay what I owed" (State of Case, p. 91, ll. 15-20).

Mr. Kirk testified that he and D. Frederick Burnett, one of Horster's attorneys, had had a conference; that Burnett was a personal friend of Louis Kempf, the auditor and trustee; that Burnett and Kirk "went over the matters and we figured the indebtedness was close to" \$35,000.00 "considering interest on mortgages; it would be well to make some flat sum" (State of Case, p. 136, ll. 25-40).

Eventually it was ascertained that Horster's own idea as to the amount of his indebtedness was correct and thereafter the Cemetery Association recognized the fact as ascertained and limited its claim to the ascertained amount (\$22,500.00 besides interest).

Horster's note was only a temporary expedient and no claim is or ever has been founded upon it. Its existence was disclosed by the bill of complaint filed by Union Cemetery Associa-

tion itself (State of Case, pp. 15-32, especially p. 17, ll. 10-13; p. 32, Exhibit E). If there had been any thought of fraud on the part of Union Cemetery Association, the note would have been destroyed—not disclosed by its pleading filed in the Court of Chancery.

Kempf had been a friend of Horster. Horster trusted Kempf absolutely, as he also trusted Mr. Ardrey, President of the Cemetery Association; also he trusted the Cemetery Association not to exact "anything more * * * than they were legally entitled to" (State of Case, p. 93, ll. 17-20; p. 103, bottom; p. 104, ll. 1-15).

The informal documents (Exhibits C and D on pp. 31-32 of the State of the Case) were delivered in company with Horster's note. They purport to assign (first), all Horster's "right, title and interest in stock of Stuyvesant Development Co.;" (secondly) "all my right, title and interest in all bonds (standing in my name) of the Stuyvesant Development Co., which bonds are now held by a committee, one of whom is Mr. Young, President of Hoboken First National Bank." This assignment of bonds was accompanied by Horster's statement that "I own \$15,000.00 worth of said bonds" (State of Case, p. 32, l. 15). Both assignments ran to Kempf, as did Horster's note.

Horster "seemed a little doubtful about" the bonds (Kirk's testimony, p. 137, last two lines). Horster certainly never delivered the bonds to Kirk or to Kempf (State of Case, p. 138, ll. 15-20). The reason for the failure to deliver these bonds is plain; they already had been captured by another creditor represented by Judge Stickel; moreover, they were not really bonds issued by

Stuyvesant Development Co. but were bonds of Union Cemetery Association which had been issued to Stuyvesant Development Co. or its stockholders (State of Case, p. 126, ll. 10-14; p. 131, ll. 28-40; p. 89, ll. 35-40).

While Horster never produced the bonds, he did—on December 16th, deliver the stock certificates of Stuyvesant Development Co., properly "endorsed over" to Mr. Kempf as assignee (Exhibits A and B, State of Case, pp. 29 and 30). These certificates were delivered to Mr. Kirk, attorney of the Union Cemetery Association (State of Case, p. 135; also p. 138, ll. 9 to 12).

Horster and Kempf, both called as witnesses for respondents, by their (uncontradicted) testimony proved that the transaction above described had in view only the one object of *securing* the payment of Horster's indebtedness to the Cemetery Association.

Horster's pertinent testimony is:

"Well it was understood that if there was any more realized than the debt that I owed the cemetery that was to be returned to me or my creditors" (State of Case, p. 93, ll. 21-26).

Kempf's pertinent testimony is:

"What were they given for? A Why, as security for the trustees of the cemetery as against the claims they had against Mr. Horster" (State of Case, p. 164, ll. 1-5).

Mr. Kempf, who was not only one of the trustees of the Cemetery Association but also its auditor, deemed it advisable to seek the aid of his personal counsel, Frederick Lehlbach (State of Case, pp. 164-165).

The correspondence between Mr. Lehlbach and Horster is set forth on pages 192-195 of the State of Case. This establishes *in writing* that

Kempf held the stock as trustee for the Cemetery Association and that unless "you (Horster) yourself take some active means of satisfying the claim and thus become equitably entitled to a return of the *security*, you cannot complain, if in the course of time the *security* itself is disposed of for less than what you think its value * * *"
(State of Case, p. 195, ll. 17-30).

At the time the bill of complaint below was filed (January 7, 1927) Union Cemetery Association was satisfied that Horster was not liable to it in an amount much in excess of \$22,000.00 (State of Case, p. 15, last paragraph, and p. 16, top).

Long before the attachment creditors appeared upon the scene, Stuyvesant Development Co. had been fully notified of the assignment made by Horster to Kempf. Col. Vickers, President of that company, as well as Vice-Chancellor Fallon, its Treasurer, received notice of that assignment on or about December 17, 1925 (State of Case, p. 147, ll. 25-32).

The only security *in fact* received by Union Cemetery Association from Otto G. Horster was the ten shares of Stuyvesant Development Company stock. As this stock has no market value and is dependent upon the doubtful issue of a law suit in which the cemetery is fighting for its life (VI N. J. A. R. (#2) page 52) it certainly is slender security for a debt of \$22,500 (see stipulation, pp. 153-154). Also see uncontradicted affidavit of Otto A. Stiefel (State of Case, whole of p. 67).

The respondents in their brief below fully recognized the uncertain value of this stock. In Mr. Vanderbilt's brief below (bottom of p. 2 and top of p. 3) he himself conceded:

"the value of which stock may be large or small but whose present value is uncertain."

Notwithstanding this conceded uncertainty in value, the learned Vice-Chancellor below in his filed opinion indicated that the disparity between the value of the security and the debt was so great as to lead to the conviction of a "deliberate intent to defraud some or all of his creditors."

The simple outstanding fact is that when the attachment creditors appeared on the scene, Union Cemetery Association through its auditor Kempf and its attorney Kirk, held the certificates for the ten shares of stock of Stuyvesant Development Co. assigned by Horster, as sole security for Horster's actual indebtedness to the Cemetery Association. There was nothing secret, strange or sinister about the transaction, nothing savoring of fraud. The officers of the association participated in it; three reputable attorneys participated in it; written notice of it was given on December 17 1925, to Stuyvesant Development Co. (State of Case, p. 151, ll. 20-30).

After notice had been given to Stuyvesant Development Company, Mr. Murray called a meeting of the creditors Ulicsnik, Rockwell, Kniep, Riester, Nagel and Grabach. Their claims aggregated about \$40,000.

This meeting was held on December 22, 1925. It was attended by three attorneys representing the creditors involved.

Mr. Murray disclosed:

"that the assignment of Mr. Horster's Stuyvesant Development Company stock had already been made to the cemetery association, that sixteen bonds which he owned personally had been pledged with Judge Stickel

as security for the indebtedness of his client, that with these exceptions there was no other debt of Mr. Horster's that I knew of" (State of Case, pp. 123 bottom, and 124 top; also see p. 131, ll. 1-30; also p. 140, ll. 19-25).

Mr. Murray and the other attorneys present at the meeting dealt with one another on the assumption that Mr. Murray's knowledge as to Horster's total indebtedness was complete (State of Case, p. 124).

All that indebtedness had arisen out of the misapplication of funds entrusted to Horster for investment. Horster was not engaged in business. It was assumed that he had made a full disclosure of everything, when he gave his attorney the information respecting the six creditors named (*ib.* p. 124). No good reason why he should name six and should conceal the existence of three others was at that time apparent. *No reason has been or can be assigned why Murray should deceive his brother lawyers.*

At any rate, there is not a scintilla of evidence to show that any person present at the conference then had any notice or knowledge of the existence of the attachment creditors who appeared on the scene some three months later (March 20, 1926). Horster's evidence discloses that in December, 1925, he hoped that by February, 1926, he would be able to "clean slate" and pay everyone (State of Case, p. 105, ll. 15-40; also p. 106).

Mrs. Minchin, the plaintiff in the attachment suit, testified to her complete confidence "in the man and his family" (State of Case, p. 170, l. 10). Apparently Horster could not bear to disclose his evil deeds to the friends of the family—these friends would not be the worse off for not having known the truth, if in February he could pay in full what he owed them.

Whatever may have been Horster's reasons for his concealment, Mr. Murray did not know of the existence of Mrs. Minchin and the other attachment creditors until March, 1926. When he discovered that Horster had concealed their existence and otherwise deceived him he informed the attorneys with whom he had dealt and withdrew from the case (State of Case, p. 124, ll. 15-40).

On December 22, 1926, Mr. Murray on behalf of Mrs. Horster and Mr. Horster made the proposal to the attorneys of the creditors represented at the meeting that they should name three trustees; that Mrs. Horster and Mr. Horster should convey to these trustees the two-family dwelling on Steuben street, East Orange, occupied in part by the Horsters as a place of residence; that Mr. Horster should transfer to these trustees all his personal property except first, his "household furniture" and second, to the extent of \$500, his "bank balance"; furthermore, the Horsters were to be permitted to continue occupancy of the apartment in the Steuben street, then used by them as a residence, as long as the trustees might determine, and Horster was to be permitted to continue the use of his "title plant" pending developments, as long as the trustees permitted.

This proposal of Mr. Murray seemed so fair that it was accepted almost immediately—*especially as it insured that Mrs. Horster's interest in the Steuben street property would be made available to Mr. Horster's creditors.*

The conveyance and transfer were to be made simply *by way of security and no release of Horster's obligation was even contemplated in making the proposal.*

Accordingly, in the period December 22, 1925—December 31, 1925, the necessary instruments were drawn and executed. Copies appear on pages 177 to 187 of the State of the Case. The instruments consist of the Warranty Deed of Mrs. Horster conveying the premises on Steuben street; Horster's "bill of sale"; a trust agreement signed by Mr. and Mrs. Horster as well as by the three trustees, Ulicsnik, Kniep and Rockwell.

The deed (pp. 179-182) was recorded on January 4, 1926 (see p. 182 bottom); on the same day a suitable notice of the transfer was sent to Mr. Kirk, who held the Stuyvesant Development Company stock assigned by Horster to Kempf; a like notice was sent to Colonel Vickers, President of the Stuyvesant Development Company; a third notice was sent to Judge Stickel who had acquired Horster's cemetery bonds and a fourth notice to Judge Besson, who represented a committee that was selling the cemetery bonds (State of Case, pp. 188 to 191, inclusive).

The only other party to whom a notice might with propriety have been given was Fidelity Union Trust Co. Horster had pledged with that company for a loan of \$3,000, his collection of stamps which are named in the bill of sale given by him to the trustees (State of Case, p. 177, ll. 28-29). A stamp collection, however, is something which cannot readily be sold (Horster's collection was not sold until 1927; Case, p. 118, l. 30); the loan had just been made (December 17, 1925; *ib.*, p. 117, l. 31); certainly there was no apparent reason to be drawn from the facts then known, why a notice should have gone to Fidelity Trust Co.

The "title plant" which is mentioned in Horster's bill of sale to the trustees had been sold by him to Rosinger & Albano (State of Case, p. 96, ll. 20-30). This item disappeared from the case shortly after Rosinger & Albano learned of Horster's predicament.

The result of the transaction of December 22, 1925, was that the trustees *actually* acquired the following:

(a) title to the property of Mr. and Mrs. Horster on Steuben street, East Orange. This property is worth about \$10,000 to \$12,000. Their deed and the other proofs show the conceded fact that they were *tenants by the entirety*.

(b) all right, title and interest of Horster in his Stuyvesant Development Co. stock, subject to the prior claim of Union Cemetery Association.

(c) all right, title and interest of Horster in the cemetery bonds, which theretofore had passed into the hands of Judge Stickel, subject to the prior right of Judge Stickel's client.

(d) all right, title and interest of Horster in the stamp collection pledged with Fidelity Union Trust Co. for a loan of \$3,000.

(e) two promissory notes given by Colonel Vickers to Horster, liability on which is disputed. (These notes are in the possession of one of the attorneys for the trustees; Case, p. 70, ll. 37, 38.)

(f) "rents accruing from the premises on Steuben street, East Orange," since January, 1926 (Case, p. 66, ll. 16-20). These were collected by one of the attorneys for the trustees.

Horster and his wife at the time they gave the deed to the trustees and executed the trust agreement, did not believe that Horster was insolvent. His testimony, given as a witness examined by the attachment creditors in their own behalf, deals with that belief (State of Case, p. 105, ll. 34-35). Its sincerity is more fully disclosed by reference to Horster's letter, written to Kempf under date of February 19, 1926 (*vide*, p. 194, l. 16). That letter (printed without its date on pp. 192-194 of the State of the Case) gives the data upon which his belief was founded. In it he urged Kempf not to sacrifice his shares of Stuyvesant Development Company stock—"In fact I do not want them disposed of in any way until my interests are fully protected. Mr. Norbury Murray is familiar with the value of the stock and will gladly advise you further" (p. 192, ll. 32-6).

It is true that Mr. Lehlbach's caution to Mr. Horster (pp. 194-5) set forth in the former's response to Horster's letter, was well founded and that the Stuyvesant Development Co. stock is of most uncertain value.

Lehlbach wrote:

"I hope that you may not be over optimistic on the valuation placed by you on your holdings in the Stuyvesant Development Company" (p. 194, ll. 33-36).

Also he wrote:

"In other words, without assuming an unfriendly attitude, I think you should also be on your notice that if the cemetery association insists upon a liquidation of this security, it is your duty either to pay the claim or to actively adopt some means by which the security will not be disposed of for less than what you think its value might

be to yourself or to some one who might wait indefinitely for a disposition of it" (p. 195, ll. 22-32).

At the time Lehlbach wrote this letter, Stuyvesant Development Co. was in possession of \$32,500, \$30,000 of which it had voted to distribute amongst its three stockholders (State of Case, p. 149, ll. 20-40). It was a close corporation consisting of Messrs. Fallon, Vickers and Horster. It had no business interests outside of Union Cemetery Association and a proposed mausoleum to be erected on the cemetery grounds (*ib.*, p. 154, ll. 20-30; see also 192 bottom, and 193).

Horster's stock was entitled to \$10,000—one-third of the \$30,000 to be distributed.

No attempt at distribution was made until early in March, 1926.

In the interval all the appellants "marked time."

The first step towards payment of the quota falling to Horster's stock, was the issuance by Mr. Fallon of the Stuyvesant Development Company's check for \$10,000 to the order of Horster.

This check bears date March 5, 1926. It was sent to Col. Vickers with a notice that "* * * Kirk, Murray and others, have by letters addressed to me, to you and to Rufus W. Besson, claimed that Otto Horster has assigned to them (*sic*) the capital stock" (p. 147, last line, and p. 148 top). Kirk's notice is set forth on page 151, lines 20-30; Murray's notice is set forth on page 190. The check, as Col. Vickers relates, was accompanied by instructions "not to deliver it to Mr. Horster or anyone else unless I received releases from those who claimed to have

liens upon the property of Mr. Horster * * * (p. 143, ll. 34-36). In harmony with those instructions a meeting was held in Mr. Murray's office on March 11, 1926. Col. Vickers, Messrs. Murray, Lehlbach, Kirk, Woerner, Contrell and Stiefel attended. Colonel Vickers produced the check; there was a long discussion lasting two or three hours (p. 126, ll. 32, 33). "Mr. Lehlbach claimed it on behalf of Mr. Kempf as trustee, and Mr. Kirk claimed it on behalf—as *cestui* under that trust and Col. Vickers said he would not turn it over to any one of those interests unless all the other interests represented there would consent to it" (p. 127 top). "Mr. Woerner * * * had said throughout the conference that he would not consent to Mr. Lehlbach's client or Mr. Kirk's client getting the check, unless, he, Mr. Woerner, for his client got a part of the check or part of the proceeds and that was the reason that the check was not delivered then and there by Colonel Vickers" (p. 127 bottom).

The net result of the two hours' conference was a suggestion that Colonel Vickers have the check certified and hold it.

Mr. Murray testified:

"My recollection of it is and I am sure of this, that he '(Vickers)' said that he would have the check certified and as soon as the parties that were represented at this conference agreed among themselves as to who should get it, he, Vickers would turn it over to the agreed party" (p. 128, ll. 14-19).

Horster, during the conference had been kept in "an adjoining room" "in case he should be needed" (*ib.*, p. 128 bottom). Horster never entered the conference.

Mr. Contrell's testimony confirms Mr. Murray's recollection (p. 134).

Pursuant to the agreement reached at the conference, Colonel Vickers by letter dated March 12, 1926, transmitted the check to the bank with instructions to certify and with this information:

"In order to protect the Stuyvesant Development Company and also the committee of bondholders who acted in the matter of the sale of the bonds, I am holding this check, with Mr. Horster's consent, until I can get proper authority from the trustees to turn the check over to the proper parties" (p. 148, ll. 24-31).

The check was certified under date of March 13, 1926, and was returned to Col. Vickers, who held it until events hereinafter to be described.

The "trustees" mentioned by Colonel Vickers in his letter to the bank are the trustees, Kempf for Union Cemetery Association and Ulicsnik, Rockwell and Kniep for the other appellant-creditors. No other "trustees" are to be discovered as having any relation to the matter.

Eight days after the check was transmitted to the bank and seven days after the check was certified, the respondent Ellen Minchin sued out two writs of attachment in the Supreme Court (State of Case, p. 218; p. 223). Under these writs the Sheriffs of Hudson County and of Essex County, respectively, made return that they attached the following:

(a) All the "right, title and interest" of Horster "in and to" the premises on Steuben street, East Orange; the collection of stamps pledged with Fidelity Union Trust Co.; Hor-

ster's "searching plant" and office furniture in his law office in the Wiss Building (*ib.*, p. 222, ll. 20-35).

(b) The certified check for \$10,000, above mentioned, in the possession of Col Vickers (*ib.*, p. 217, ll. 28-30).

No other property is described in the respective sheriffs' returns or appraisements.

As soon as the attorney for the trustee Ulicsniuk learned of the attachment sued out by Mrs. Minchin, he put himself in touch with her attorney and sought to effect an understanding (State of Case, pp. 172 to middle of 174).

"* * * it was some time in the month of April or May, at an early stage, because I realized then that the attachment tied up everything so that we would have to untangle the snarl in court or by agreement and I remember promising you" (Mr. Massey of Mr. Vanderbilt's office) "that I would try to get Mr. Hugo Woerner to swing into line and let your clients come in under the trust agreement, and I called up Mr. Myers" (attorney for the respondent Margaret McLaughlin) "and spoke to him about the matter, too."

The testimony given in open court relating to the efforts of complainants' attorney to come to an understanding with attorneys of the attachment creditors, did not provoke any denial. The transcript of this testimony appears on pages 172-175, of the State of the Case. There being no denial, it must be accepted as true.

It shows—what is the fact—that from the Spring of 1926, until the Fall of that year, attorneys of the parties in interest conferred from time to time in the hope "that a way might be found to settle the matter or some legal

means might be found to settle it" (State of Case, p. 172, ll. 30-34). The conferences were delayed by the summer vacation and the illness of Mr. Massey, Mr. Vanderbilt's representative.

These efforts to reach an understanding were brought to an end on or about November 9, 1926, on which day Col. Vickers, *without any notice to appellants*, delivered the \$10,000 certified check to Mr. Dalrymple, the auditor in attachment; this was done not under any order or by any process of court (State of Case, p. 25, par. 27; p. 144, l. 28 to p. 145, l. 10). Col. Vickers testified that Dalrymple threatened contempt proceedings unless the check were delivered; which met the colonel's response, "You will have to take those steps before I will deliver it" (p. 145 top). While "those steps" were *not* taken, a formal demand was made and the check "was turned over to him" (Dalrymple) "as auditor on that demand" (*ib.*). After the check was "turned over" Col. Vickers still gave no notice to the appellants, and did not procure any action by his company approving the surrender. Dalrymple having obtained possession of the check, instituted proceedings as set forth in paragraph 18 of the bill of complaint (State of Case, p. 26, par. 31).

Thereupon complainants exhibited that bill of complaint duly verified and procured an order to show cause (State of Case, pp. 37-38), why the check should not be delivered into the custody of the Court of Chancery. A copy of that order was duly served but no one appeared upon the return day, to oppose, with the result that Chancery directed that the check be delivered to its clerk (State of Case, pp. 39-40).

The theory of complainant's bill of complaint was that Colonel Vickers, in surrendering the check, had been guilty of a breach of an equitable duty—the duty to adhere to the understanding reached in Mr. Murray's office on March 11, 1926—the understanding which led to the certification of the check. All during the period in which the parties were negotiating respecting settlement, appellants had relied upon that understanding and upon the assurance that the custody of the check by Col. Vickers seemed to give.

The bill of complaint was not answered by either the auditor in attachment or by the attachment creditor Margaret McLaughlin.

On May 21, 1927, the attachment creditors, Ellen Minchin and Mary E. Riley, filed an answer and counter-claim.

After a hearing Vice-Chancellor Church filed his opinion (pp. 228, *et seq.*).

GROUNDS OF APPEAL.

The errors of which complaint is made reach the whole and every substantial part of the decree (State of Case, pp. 7, 8, 9, petition of appeal).

They may be more succinctly stated as follows:

1. Horster's transfer of his shares of stock of Stuyvesant Development Co. to Louis Kempf, one of the trustees of Union Cemetery Association, on behalf of said association, as security for \$22,500 (plus interest) unquestionably due to said association, was a transfer good and valid at law and in equity. The order of the Court decreeing that such transfer is void, involves error.

2. Such transfer, preceding, as it did, the attachment suit of Ellen Minchin by more than three months, and the stock certificates having been delivered to Howard Kirk, attorney of the association, the appointment of a receiver for said stock with power to dispose of the same and to adjudicate the respective priorities of the creditors of Horster, involves error.

3. It was error to decree that the conveyance of the real property on Steuben street made by Mrs. Horster and Mr. Horster to Ulicsnik, *et al.*, as trustees was null, void and of no effect.

4. It was error to decree that the sale and transfer by Horster of his right, title and interest in Stuyvesant Development Co. stock, Union Cemetery bonds, his collection of stamps, etc., to said trustees was null, void and of no effect.

5. It was error to appoint a general receiver of Horster's property, including that conveyed or transferred or assigned to the appellants.

6. The Court should have decreed that the assignments and transfers to Kempf, Ulicsnik, Kniep and Rockwell were good and valid and gave a prior right thereto to the respective trustees for the appellant creditors and to such creditors, superior to any right or claim of the attachment creditors; it should have decreed that the amounts due to such creditors were as established by the uncontradicted proofs; it should have permitted such creditors or their trustees (as far as might be necessary to satisfy their debts) to administer the property conveyed or transferred to such trustees.

7. The Court should have dismissed the counter-claim of Ellen Minchin and Mary E. Riley and given the relief prayed for in the bill of complaint.

8. It was error to give to the counter-claimants, any relief as against these appellants.

9. It was error to give any relief to Margaret McLaughlin and the auditor Dalrymple, as against these appellants.

BRIEF OF THE ARGUMENT.

POINT I.

The right of Otto G. Horster to prefer appellants who were his bona fide creditors, as long as he exercised that right honestly is unimpeachable; this is true whether he was in failing circumstances or not.

"A debtor has the right to prefer one or more of his creditors over the others and so long as he exercises this right honestly, his acts, whether the preference be created by sale or pledge, are unimpeachable."

National Bank v. Massopust (Court of Errors and Appeals), 85 N. J. Eq. 564; 96 Atl. 1071 at page 1072, 2nd column, near bottom.

"The question is whether a debtor in failing circumstances can dispose of all his property by voluntary assignment, either absolutely or by way of pledge, for the benefit of certain creditors to the exclusion of others. This right has never been doubted by the courts of this State."

National Bank v. Massopust (Court of Errors and Appeals) *supra*.

POINT II.

In December, 1926, Horster, exercising his right honestly, by competent assignments, secured his indebtedness to Union Cemetery Association.

On December 14th, 15th and 16th, 1925, the transaction between Horster and his attorney on the one hand and representatives of Union Cemetery Association on the other hand, produced the following net results:

Ten shares of the capital stock of Stuyvesant Development Company were pledged by Horster as security for the payment of an established liability of \$22,500.00 besides interest, due from Horster to Union Cemetery Association. This debt, as shown in detail in the preceding statement of facts, was not disputed, and by stipulation between all parties in interest, was proved by affidavit (State of Case, pp. 198-199, 200; 196-197). The pledge was effected by formal assignments appearing on the backs of the stock certificates (Exhibits A and B; State of Case, pp. 29 30 and 31) executed by Horster and witnessed by his attorney Norbury Murray. The certificates were delivered to Howard Kirk, attorney of the cemetery association (State of Case, p. 135 also 138) and the assignments ran to Louis Kempf, auditor of that association and one of its trustees (State of Case, p. 165, ll. 35-40). The fact that he was a trustee does not appear upon the face of the assignment but does appear fully in the letter written by Kempf's personal attorney, Frederick Lehlbach to Horster (Exhibit C. 9, p. 194, State of the Case).

That letter shows plainly that the assignments were by way of security and not by way of payment. Neither Union Cemetery nor its attorney nor its trustee nor anybody on its behalf ever made claim to the contrary. The letter from Horster to Kempf, in evidence, shows plainly that he regarded the assignments as having been made by way of security (Exhibit C. 8, p. 192, State of the Case). This correspondence—which reflects *in writing* the understandings behind the parties—bears date before the attachments; creditors even appeared upon the scene. The letter of Lehlbach was written on February 23, 1926; that of Horster was under date of February 19, 1926 (State of Case, p. 194, l. 25); the attachments issued on March 20, 1926 (pp. 218 and 223, State of Case).

On December 17th, 1926, notice of the assignments was given to Stuyvesant Development Co. (State of Case, p. 151, ll. 20-30). The facts were fully known to the president of that company, when on March 14th, 1926, a meeting of the representatives of appellants, was held at the office of Norbury Murray, attorney of Horster (State of Case, p. 125 top, to 128 bottom).

These assignments were not made in the dark; this is shown fully in the statement of facts at the head of this brief; the president of the association, its secretary, its treasurer, its attorney, its trustee Kempf, his personal attorney, Mr. Horster's attorneys, Burnett & Murray—even a Mr. Wentz were all cognizant of it; written notice as above stated was given; also to a committee of bondholders headed by Judge Beson there was given notice on March 13th, 1926.

The stock certificates remained impounded with Mr. Kirk, attorney of the association.

Despite these facts the learned Vice-Chancellor says:

"I am convinced that the assignments were made with the deliberate intent to defraud some or all" Horster's "creditors" (State of Case, p. 233, l. 21 *et seq.*).

The learned Vice-Chancellor was not impressed with the fact that an actual and unquestioned debt of \$22,500.00 was involved. He says "the debt is now *alleged* to be \$22,500.00." It was *proven* to be \$22,500.00, by a method agreed upon in open court by all the parties in interest (pp. 196-197, State of Case), and confirmed by written stipulation.

The affidavit filed pursuant to that agreement and stipulation (pp. 198-200) sets forth the details of the indebtedness and was not challenged by the parties or by the Vice-Chancellor—to whom the same was submitted in company with the briefs.

Furthermore the Court seemed to think it "fishy" that bonds of the face value of \$15,000.00 which Horster was to assign to Kempf as additional security have disappeared. At the time of the assignment of the stock these \$15,000.00 in bonds (or their proceeds) had already passed into the possession of Judge Stickel as security for a claim of one of his clients. The proofs leave no doubt of that; neither Kirk, Kempf nor Union Cemetery Association ever saw those bonds. We have dealt fully with all the pertinent facts in the first division of this brief but again refer to passages in the record (*inter alia*; p. 137, last 2 lines; 138, ll. 15-20; 126, ll. 10-14; 131, ll. 28-40; p. 89, ll. 35-40).

The court below is also impressed with the fact that on December 15th, 1926, the day after Horster and the officers of Union Cemetery Association first discussed his misuse of cemetery funds, Horster delivered his demand note for \$35,000.00. This, however, as the proofs show, was simply given as an evidence of his purpose to meet his obligation (pending ascertainment of the true amount) and as the result of a conference between Horster's attorney and the attorney of the cemetery association, in which it was deemed best to take a demand note for a "flat" amount. The note was simply a temporary expedient and never was the basis of any claim for \$35,000.00. All of this has been fully developed in the first division of this brief.

(We again point out the pertinent passages in the record: State of Case, p. 91, ll. 15-20; p. 136, ll. 25-40). The existence of this note for \$35,000.00 is disclosed by *complainant's own bill of complaint in which complainant sets forth that only about \$22,500.00 is due. If there had been any thought of fraud on the part of Union Cemetery Association, it would not have disclosed the existence of the note; that could not aid its cause, which was founded upon a plain and admitted misuse of funds by Horster.*

POINT III.

The court below found that the value of the stocks and bonds assigned to the cemetery association was so greatly in excess of \$22,500.00 as to be fraudulent. This involves error in law and in fact.

In the first section of this brief we have dealt with the proof of the value of the stock and shown that by concession of our opponents its value was most uncertain, depended on the issue

of another lawsuit and might attain \$50,000.00; we have shown that by common understanding it had no assignable open market value.

The Court had itself indicated that, at the hearing.

"Q But at this time perhaps I can help out the matter. At this time, colonel, you wouldn't say the stock has a market value? You couldn't sell the stock and get its fair value in open market? A Open market? I am not ready to swear on that point.

The Court: No, that is too speculative.

The Witness: Yes."

(State of Case, p. 154; also see stipulation, p. 153.)

In respondent's brief below it was conceded "the value of which stock may be large or small but whose present value is uncertain."

In the face of this the learned Vice-Chancellor said in its opinion (State of Case, p. 231, ll. 31, 33):

"This makes the value of the property transferred greatly in excess of the alleged indebtedness."

Evidently what the Court had in mind was section 3 of the "Uniform Fraudulent Conveyance Act" which reads:

3. Fair consideration is given for property or obligation.

(a) When in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained (Cum. Supp. Comp. Stat., Vol. 1, p. 647).

The act does not use the Vice-Chancellor's expression, "greatly in excess." The act uses the expression "disproportionately small." What do these words mean? If an insolvent debtor mortgage his unsalable farm lands worth \$75,000.00 to secure a debt for \$25,000.00, is that mortgage void as against other creditors? Certainly the statute cannot mean that.

The words "disproportionately small" must be construed in the light of the title of the act—that is the "disproportion" must be such as to carry with it the implication of fraud.

POINT IV.

Fraud should be clearly proved. The proof in this case excludes fraud.

Assuming that the words "disproportionately small" used in the statute can have any application to the assignment of Stuyvesant Development Co. stock to Kempf, on behalf of the cemetery association, nevertheless the debatable and uncertain value of that stock precludes the certainty of inference required in the case of alleged fraud.

The stipulation as to the value of that stock reads as follows:

"Mr. Stiefel: Perhaps a stipulation between us there will cover the whole ground. This stock—will you put this down and, if it is agreeable, it will stand as a stipulation—this stock, if certain expectations of the Stuyvesant Development Company, arising because of some unwritten contracts between Stuyvesant Development Company and some of the bondholders, materialize, may have a value of approximately fifty thousand dollars. In addition to that the Stuyvesant Development Company has the right to ex-

pect that the Union Cemetery Association will at some point recognize its equities in the suit being heard by Vice-Chancellor Backes and in that way may gain some moneys, but the exact amount of these moneys cannot be appraised at this time; and the value of the stock will really only be ascertainable when that cemetery suit comes to a close or thereabouts. Isn't that right?

The Witness: Fifty thousand dollars? You mean one hundred and fifty thousand.

Q One hundred and fifty thousand being all and fifty thousand for Horster's share.
A One-third, whatever it is, of one hundred and fifty thousand.

The Court: Yes. That is fifty thousand for Horster's share."

The learned Vice-Chancellor states that Horster "transferred" to Union Cemetery Association "bonds stated to be worth \$15,000.00." He did not transfer any bonds whatsoever. He assigned,

"all *my right, title and interest* in all bonds (standing in my name) of the Stuyvesant Development Co., which bonds are now held by a committee, one of whom is Mr. Young, president of Hoboken First National Bank, and I state that I own \$15,000.00 worth of said bonds" (State of Case, p. 32 top).

There were no bonds of "Stuyvesant Development Co." That company never issued any bonds (State of Case, p. 89, ll. 20-40; p. 131, ll. 28-40). Cemetery bonds or the proceeds thereof as hereinbefore reiterated, had passed into the hands of Judge Stickel. At any rate, they never were "transferred" to the cemetery association or to Kempf (p. 138, ll. 15-30).

POINT V.

By the assignment of December 22, 1925, to Rockwell, Kniep and Ulicsnik, as trustees, there was absorbed substantially all the equity of Horster in his Stuyvesant Development Co. stock; so that the attachment creditors, who did not appear until March 20th, 1926, are precluded from alleging that the first assignment of that stock to Kempf, as trustee, involves "disproportionate" or excessive security.

Horster's Stuyvesant Development Co. stock is certainly precarious security for the \$61,950.00 aggregate of indebtedness due appellants (exclusive of interest).

The case is like that of a man who mortgages his unsalable farm lands worth \$75,000.00, first for \$25,000.00 and then for \$50,000.00 subject to the first mortgage—in both cases to secure past due indebtedness. A third creditor coming upon the scene months after the last mortgage is recorded could not be heard to complain of the first mortgage.

The excessive or "disproportionate" value of the security has disappeared in the junction of the two debts. When the third creditor appears on the scene it has ceased to be "disproportionate."

POINT VI.

The conveyance and transfers by Horster and his wife to Ulicsnik, Rockwell and Kniep as trustees, were merely by way of security for unquestionable debts then due; they are valid despite the fact that they embrace substantially all the property remaining to Horster at the time of such conveyance and transfers.

The learned Vice-Chancellor quotes the general assignment act (State of Case, pp. 231 bottom and 232 top) and apparently deems that act applicable. He then quotes *Livermore v. McNair*, 34 N. J. Eq. 478.

His opinion is silent in respect to *Muchmore v. Budd*, 53 N. J. L. 369 (Esp. 385-386) and *National Bank v. Massopust*, 85 N. J. Eq. 564.

These two cases were cited below by appellants and a large part of their argument was built upon the principles which those cases establish.

That the conveyance and transfers involved were by way of security is established by the pertinent trust agreement (State of Case, p. 183 *et seq.*).

The trustees and Horster and his wife therein agree upon the declaration that the real and personal property involved is held,

"1. As security for the payment of all and singular the debts listed in the certain schedule hereunto annexed and marked Exhibit A * * *" (*ib.* p. 183).

Reference to that schedule (at p. 187) leaves no doubt that 6 *named creditors* were the subject of the transaction.

The pertinent principles of law, we believe, were fully elucidated in the prevailing opinion,

which controlled the decision of this Court of Errors and Appeals in *Muchmore v. Budd*. We quote:

"The assignment act was not designed for the purpose of creating and regulating a new specie of instruments for the transmission of property. Its purpose was to regulate a class of transfers already well known. They were called voluntary assignments.

They were employed by persons insolvent, or who thought themselves insolvent, to distribute their property to their creditors through a trustee styled an assignee. The transfer became effective without the assent of the creditors; it conveyed to the trustee an irrevocable power to sell the property and distribute the proceeds, and it stripped the debtor of all interest whatsoever in the property.

It was an instrument *sui generis* and the act was passed to compel equality in distribution among creditors whenever the debtor chooses to adopt this particular scheme for the payment of his debts. Until he does so adopt it, he retains the power to sell, pledge or mortgage the last remnant of his property to favored creditors. *Garretson v. Brown*, 2 Dutcher 425. In the language of Justice Potts, employed in *Garretson v. Brown*; 'Until the debtor divests himself of the title to his property by assignment, his dominion over it is perfect, and he may use it for any lawful and honest purpose. The object to be gained by an assignment under the act is to get the benefit of the release which it provides.'

Preferences by means of mortgages are recognized in the assignment act itself.

The distinction between a mortgage and an assignment exists principally in the interest which the mortgagor retains in the property, namely, his equity of redemption. This can be levied upon under a common law execution, and a judgment creditor or a

purchaser can protect his rights by redemption or any other act of which the mortgagor was capable. An assignment is intended as a payment and a mortgage as security. Incidentally there is a power of sale under the latter, and there may be said to be security in the former, but the primary objects are as stated.

The equity of redemption in the one and the want of it in the other is their distinguishing feature of difference. *Burrill Ass.*, sections 6, 7.

Nor, in the third place, does the trust make the transfer any the less a mortgage. As already remarked, it is not the existence of a trust that distinguished an assignment, but of a peculiar kind of trust created by a voluntary assignment alone.

* * * *

The execution of mortgages, both real and personal, to trustees is the exertion of a legal right.

Mr. Powell discusses this class of mortgages in his authoritative work on this subject.

Any one recalling the frequent exercise of this power by railroad and other corporations, both solvent and crippled, to secure classes of bondholders and other creditors, would be surprised to learn that all these were voluntary assignments. An example of this kind of trust mortgages is afforded by the leading case of *Curtis v. Leavitt*, 15 N. Y. 143. And upon this point the following cases are pertinent: *Wilson, et al. v. Russell, et al.*, 13 Md. 494; *Woodruff v. Robb*, 19 Ohio 212; *Bagg v. Jerome*, 7 Mich. 145 (53 N. J. Eq. at 385-387)."

Livermore v. McNair, the only case cited by the learned Vice-Chancellor below, follows *Bank of Metropolis v. Sprague*, 21 N. J. Eq. 539 (decided in this Court of Errors and Appeals).

Perhaps, no better statement of the distinguishing principle of that case may be found than that which appears in the opinion of Stevens, Vice-Chancellor, deciding *Regina Music Box Co. v. Otto* (65 N. J. Eq. at 594).

"In the case of *National Bank of Metropolis v. Sprague* the mortgage was made to trustees without any purpose of securing any particular creditor, but after it was executed the bonds were left in the hands of the mortgagors for distribution among those creditors or for such distribution as they might choose to make of them, and they were held in the air, so to speak, and used as a club with which to compel creditors to take them."

The case in hand, we respectfully submit, is not like *Bank v. Sprague* or *Livermore v. McNair*, but is governed by the principles of *Muchmore v. Budd* and *National Bank v. Massopust*.

In the latter case the Court, quoting the late Chief Justice Depue, said:

"The question is whether a debtor in failing circumstances can dispose of all his property by voluntary assignment, either absolutely or by way of pledge, for the benefit of certain creditors to the exclusion of others. This right has never been doubted by the courts of this State."

The conveyance and transfers made by Horster and his wife were by way of *pledge* for the benefit of certain creditors; they didn't make nor contemplate a general assignment, the effect of which would be to *release* the debts of Horster (*Muchmore v. Budd*).

POINT VII.

There was no express intent on the part of appellants to exclude the attachment creditors. Appellants indeed were expressly informed that they were the only remaining creditors of Horster. They acted without knowledge of the existence of the attachment creditors.

The learned Vice-Chancellor believed that the transactions under consideration were made "with the deliberate intent to defraud some or all of the creditors." How this is to be spelled out of the proofs we do not know. That seven creditors whose claims aggregate over \$60,000.00, together with their five attorneys, were parties to such a deliberate intent, we submit, is something that requires strong proof. Obviously, what these creditors really desired and obtained was *security for their claims*; that security was given—the last of it in the belief that the creditors involved were the only remaining creditors of Horster (State of Case, pp. 123 and 124). The court below ignored Horster's testimony which makes plain how and why he believed that the attachment creditors would be paid—how, in fact, he believed *all* his debts would be paid. This has been fully elucidated in our general statement of facts.

Horster was examined by the attaching creditor as a witness on her behalf and testified fully and without any reservation. The attaching creditor was a friend of his family and as heretofore shown, Horster probably could not bear to disclose his delinquency to her and expected that payment would obviate the necessity of confession.

Whatever may be the exact ^{fact} ~~fact~~ in this regard, we respectfully submit the charge of a deliberate intent to defraud "some or all of the creditors" cannot be laid at the door of appellants.

POINT VIII.

The appellants took possession of the stock certificates of Stuyvesant Development Co.; the deed to the Steuben street property was recorded; the rents accruing therefrom were collected on behalf of the trustees Ulicsnik, Rockwell and Kniep; notices were sent to all parties apparently entitled to notice. The finding below, "The assignees, moreover, failed to take possession of the property" involves error in fact.

Proof as to possession by the attorney of the cemetery association to whom were delivered the stock certificates (p. 135, ll. 10-30; the papers were produced in open court, under the eyes of the Vice-Chancellor, by that attorney).

Proof as to recording of deed (foot of p. 182, ll. 35-40).

Proof as to collection of rents (p. 66, ll. 15-35). Upon the basis of this the Court itself made an order continuing the right of the trustees to collect rent, but enjoined a sale of the property (pp. 69-71; especially 71, ll. 11-21).

Proof as to possession of Colonel Vickers' notes (court's own order; p. 71, ll. 25-30).

Proof of notices (pp. 188 to 191 inclusive; p. 147, ll. 24-32; *ib.* l. 38 to p. 148, l. 14; p. 151, ll. 20-30).

The check for \$10,000.00 dated March 5th, 1926, was left in Colonel Vickers' possession to be certified and held by him for the benefit of such of the appellants as might prove to be entitled thereto. This has been fully elucidated. They could not anticipate the subsequent surrender of the check by Col. Vickers, in whose hands they thought it safe.

Appellants could not take possession of Horster's stamp collection; that was held by a perfectly responsible party, Fidelity Union Trust Co.; they could not take possession of the "bonds"; those bonds or the proceeds had been captured by Judge Stickel; Rosinger & Albano had purchased Horster's "title plant."

We respectfully submit the finding below: "The assignees, moreover, failed to take possession of the property" involves error in fact.

The attachment creditors made no attempt to attach either Horster's shares of stock in Stuyvesant Development Co., or the "bonds." They did attach his office furniture but gained nothing by that attachment for he did not own that furniture; and they "attached" his interest in his real property after it was conveyed. That property was owned by Mr. and Mrs. Horster as tenants by the entireties (*supra*).

The testimony is distinct that Mrs. Minchin—the attaching creditor—had acted upon the basis of her "explicit confidence in the man and his family" (p. 170, l. 10). Further, Mrs. Minchin testified:

"I had such confidence in the man that I would really give the last dollar. I thought there was nobody honester than him" (p. 168, ll. 36-38).

Mrs. Minchin really made it "explicit," as she says, that neither the assignments nor her knowledge or lack of knowledge of them were the basis of her dealings with Horster. "Confidence in the man" led her to entrust her money to Horster.

Nevertheless, the learned Vice-Chancellor said:

"I am convinced that these assignments were made with the deliberate intent to defraud some or all of his creditors. *In fact*

he actually did defraud one of them after the assignment, Mrs. Minchin, to the extent of \$1,500.00. I will advise a decree setting aside these assignments and the deed as palpably fraudulent" (p. 233, ll. 22-28; italics our own).

The learned Vice-Chancellor seems to have connected the subsequent fraud upon Mrs. Minchin (whose possibility grew out of her supreme confidence in Horster), with a perfectly proper prior transfer to secure creditors, affecting property which Mrs. Minchin only discovered by the subsequent investigation of her attorney (p. 213 bottom and 214 top).

POINT IX.

"Furthermore, it is obvious that in many cases the natural result of a preference of one creditor over another will be to hinder delay and oftentimes defeat the collection of a claim of a creditor left out." (*National Bank v. Massopust, supra.*)

POINT X.

The trust agreement (paragraph 6) between Ulicsnik, Rockwell and Kniep on the one hand and Mr. and Mrs. Horster on the other hand expressly provides for the return to Mr. and Mrs. Horster, of such part of the trust estate as might not be required to satisfy the debts secured. By virtue of this provision it again establishes that the property conveyed and assigned was by way of pledge within the rules of *Muchmore v. Budd* (State of Case, p. 185, l. 30, *et seq.*).

POINT XI.

Mrs. Horster voluntarily joined in the conveyance of the Steuben street premises, as security for her husband's debt. This entitled her to the reasonable concession that she and her husband might continue to occupy their flat as long as the trustees saw fit.

The premises on Steuben street as heretofore stated were owned by Mr. and Mrs. Horster as tenants by the entireties.

"Being the same premises conveyed to the parties of the first part by Millie T. Kelleher, unmarried * * *" (State of Case, p. 180, l. 19, *et seq.*; also see State of Case, p. 103, ll. 34-38; p. 132, ll. 20-30).

There was no contest on that point. Mr. and Mrs. Horster occupied one flat in the two-family house involved (p. 99, ll. 10-20).

The creditors of Mr. Horster could not compel Mrs. Horster to convey her interest in the premises; she had a right to continue to occupy the one flat in question without their consent.

Being entitled to occupy that flat as long as she lived, she certainly was entitled upon voluntary conveyance to reserve the right to continue that occupancy as long as the trustees "may, in their absolute discretion, deem fit and advisable" (State of Case, p. 185, ll. 7-20).

POINT XII.

The continued use by Otto G. Horster of his "title plant" pending developments, was perfectly proper.

That use could be brought to an end without notice (State of Case, p. 186, ll. 10-22). Mr. Horster, in December, 1925, was suffering from the effects of a stroke. For the two years prior to the time his deposition was taken he had been bedridden (not continuously, but most of the time; State of Case, p. 103, ll. 25-32). The deposition was taken in October, 1927, (*ib.* p. 88; he was stricken about October, 1925).

With this bedridden husband on her hands, was Mrs. Horster not entitled to exact that "pending developments" he might have the use of his title plant—which he did not own—as a means of support.

To employ the language of the penultimate paragraph of the opinion in *National Bank v. Massopust*, "*we think it was the most natural thing*" for Mrs. Horster and the trustees to have agreed upon her husband's use "pending developments" of the customary means of his support.

POINT XIII.

Even if Horster's wife had not joined in the conveyance of her interest in the real property the use by Horster and his wife of one flat there and the use by him of his "title plant" would not necessarily be fraudulent as against creditors (*Muchmore v. Budd*, 53 N. J. L. at 390, *et seq.*).

But in the case in hand the creditors were bound to accept the reasonable terms imposed or else, perhaps, lose the benefit of Mrs. Horster's

joinder in the deed. The concession made was so insignificant as to repel any thought except that of bona fides.

POINT XIV.

The attachment creditors cannot complain of the slight concessions above-mentioned in view of the large enhancement of the security resulting from the joinder by Mrs. Horster with her husband in executing the deed conveying the Steuben street property.

POINT XV.

Since the conveyance, transfers and assignments to appellants precede by several months the issuance of the attachments, the appellants have the better right to the property conveyed, transferred and assigned by way of pledge or security.

All the debts were past due debts. None of the parties are in the position of an innocent purchaser for value without notice.

"Prior in time, prior in equity" is a doctrine peculiarly applicable to transfers, conveyances and assignments which precede attachments.

Flostroy v. Wm. B. Corby Coal Co., 80 N. J. Eq. 547 (Court of Errors affirming on opinion of V. C. Stevens). *Brink v. Flannigan*, 87 N. J. Eq. 639; *Vail v. Diamond*, 95 N. J. Eq. 97.

Indeed the opinion in *Brink v. Flannigan* goes so far as to hold:

"A judgment in attachment under the act of 1901 (1 Comp. Stat. 1910, p. 132) is ineffective as a lien against land conveyed *bona fide* by unrecorded deed made and delivered prior to the issue of the writ of attachment."

The attachments in the case *sub judice* were "under the act of 1901."

POINT XVI.

The attaching creditors can derive no benefit from any possible lack of notice to Fidelity Union Trust Co. (*Flostroy v. Corby Co.*, 80 N. J. Eq. 547).

The case might be different if, instead of being attaching creditors, the parties involved were *bona fide* purchasers for a present consideration.

POINT XVII.

The ten thousand dollar check dated March 5, 1926, should follow the assignment of Stuyvesant Development Co. stock.

14 *Corpus Juris*, page 822, title corporations, see 1243;

St. Louis National Bank v. Trust Co., 227 Fed. Rep. 526;

Gaty v. Holliday, 8 Mo. App. 118;

Meredith v. Savings Bank v. Marshal, 68 N. H. 417; 44 Atl. Rep. 526;

Thompson on Corporations, 2nd Ed., Vol. 4, Sec. 4238;

Cook on Corporations, 7th Ed., Vol. 2, Sec. 468.

POINT XVIII.

The counter-claim of respondents Minchin and Riley does not set up that the conveyance and transfers to the trustees Ulicsnik, Kniep and Rockwell were fraudulent. The determination below that such conveyance and transfers were fraudulent and therefore void, went beyond the issues in the cause.

The pertinent allegations in the counter-claim of the respondents Minchin and Riley are set forth in paragraphs 11 and 12 thereof; they are printed on page 48 (from l. 20) and page 49 (to l. 20) of the State of the Case.

The word "fraud" is not used nor is it implied by an averment in that counter-claim.

Neither the auditor in attachment nor the third attachment creditor (Mrs. McLaughlin) filed a counter-claim or other pleading.

The determination and decree of the court below, we submit, went beyond the issues raised by the pleadings and affected by the proofs.

POINT XIX.

The decree below should be reversed and the caused remitted to Chancery with instructions to enter a decree pursuant to the prayer in complainant's bill of complaint; also to dismiss the counter-claim of the respondents Minchin and Riley; and by such decree costs and adequate counsel fees should be awarded to the appellants; also costs and adequate counsel fees should be awarded to appellants in this court.

Respectfully submitted,

OTTO A. STIEFEL,
Of Counsel with Appellants.

Fredrick A. Hehlbach
of Counsel.

New Jersey Court of Errors and Appeals

Between

MARY ULICSNIK, *et als.*,
Complainants-Appellants,

and

CHARLES E. DALRYMPLE, *et als.*,
Defendants-Respondents.

and

CLARA SIEDER, *et als.*,
Defendants-Appellants.

} On Bill.

BRIEF FOR DEFENDANTS-APPELLANTS, CLARA SIEDER, *et als.*

Statement of Facts.

On December 16, 1925, Otto G. Horster assigned 10 shares of stock of the Stuyvesant Development Co., owned by him, to Louis G. Kempf by endorsement and delivery of two certificates of stock issued in the name of Mr. Horster. This stock was assigned to secure a past debt due from Mr. Horster to the Union Cemetery Company, of which Mr. Kempf was a trustee.

On December 22, 1925, said Otto G. Horster assigned all his personal property, with certain exceptions, and conveyed a parcel of real estate on Stueben Street, East Orange, to George T. Rockwell, Karl Kniep and Mary Ulicsnik to secure to them and other named creditors the amounts of money owing to them by Mr. Horster. The deed

was duly recorded on Jan. 4, 1926. The written declaration of trust of even date with the deed, states the names of the creditors and the amounts due them.

On March 20, 1926, an attachment was issued out of the Supreme Court by Ellen Minchin against said Otto G. Horster. The defendant, Charles E. Dalrymple, was appointed auditor in said attachment proceedings. Mary E. Riley and Margaret McLaughlin became parties to said attachment suit by application as creditors of Mr. Horster.

The property involved in this litigation is:

1. A two family house, No. 158 Steuben St., East Orange.

2. Ten shares of the capital stock of the Stuyvesant Development Co.

3. A check of \$10,000. drawn on the First National Bank of Hoboken by Stuyvesant Development Co., to the order of Otto G. Horster, dated Mar. 5, 1926, being a dividend declared by said Stuyvesant Development Co., due to Mr. Horster.

4. The sum of \$5829.42 in the hands of the Fidelity Union Trust Co., being the balance of the proceeds of the sale of a stamp collection pledged by Mr. Horster to said bank to secure a note discounted by him, after payment of the said note.

The attaching creditors claim priority over the assignment to Louis G. Kempf and over bill of sale and deed to Messrs. Rockwell, Kniep and Ulicsnik.

POINT I.

The attaching creditors claim that the bill of sale, conveyance, and declaration of trust constitute an assignment for the benefit of creditors and that it is void under the statute because it prefers certain creditors over others.

"The purpose of a mortgage or deed of trust is to secure a particular debt; the purpose of an assignment is to pay all the debts of the grantor. In the former, only a defeasible title passes, and the property reverts to the grantor on the happening of certain stipulated conditions; in the latter, the entire indefeasible title goes out of the grantor, and the property is absolutely vested in the assignee." "Whether or not a disposition of property is to be regarded as an assignment for the benefit of creditors, or as a mortgage, is to be determined from the intention of the parties." "On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property."

5 C. J. 1038, section 5.

It is important to note that after the debts of the creditors, their expenses, and fees are paid, the proceeds of the trust estate undisposed of, shall be by the said trustees transferred and re-assigned unto Otto G. Horster and Helen C. Horster, his wife. It only secures six of the creditors

of Mr. Horster named in the trust agreement.

The case of *Muchmore vs. Budd*, 53 N. J. L. 369 is cited to support the above quotation from *Corpus Juris*, and supports the principles there laid down.

This Court in that case first discusses the intention of the parties. It said "It is apparent that the parties to it had not the faintest suspicion that Cunningham was making a statutory assignment. There were no words employed in the negotiations which were appropriate to or suggestive of an assignment. There was no list of creditors nor inventory of property, nor was there any talk of these accompaniments of a statutory assignment. No bond of Somerville as assignee; no record of any papers; no proceedings in the Orphans' Court; no notices; no distribution of dividends under judicial supervision; no filing of claims; no discharge of any claim or account of dividend received; none of these features of a statutory assignment appears, at any moment, to have been contemplated." pp. 384. The court then takes up the test of whether it is a security or an outright transfer to pay debts and held it was the former.

In that case Cunningham made an absolute written bill of sale of all his property, except wearing apparel, to one Somerville, who was the Secretary of a corporation, the principal creditor of Cunningham. The bill of sale was accompanied by a parol agreement that Somerville should sell the goods, and out of the proceeds should first reimburse his principal, the corporation, for advances made by it, then pay the debt of the company and the debts of three other creditors, pro rata, and return any surplus to Cunningham. The latter person reserved the right to redeem, upon paying the amount of said advances and

debts before the sale of the property by Somerville. There was no surplus. There were other creditors.

Held:

1. That this transfer was not an assignment for the benefit of creditors within the meaning of the act.

2. That it was a mortgage.

3. That the parol reservation accompanying the written bill of sale was a badge of fraud, but not conclusive evidence of fraud.

4. That the reservation of the surplus by the vendor is not proof of fraud, *per se*.

The reasoning of the court in that case applies to the facts of our case with striking force. There certainly was no intention of creating an assignment for the benefit of creditors, or the five or six lawyers present would have seen that the papers executed would have complied with the statute. None of the statutory steps was taken such as are referred to in the opinion in the cited cases.

The statute governing assignments for the benefit of creditors (1 C. S. 114) requires a conveyance or assignment by a debtor "of his entire estate" for the equal benefit of all his creditors. Here the debtor reserved "all his household furniture and also to the extent of \$500. my bank balance". The transfer was not made for the equal benefit of all his creditors, but only for those named in the declaration of trust and such others as the trustees, or a majority of them, might see fit to admit as creditors.

We contend that the case of *Livermore vs. McNair*, 34 N. J. E. 478, cited by the court below, so far as it adjudicates what constitutes an assignment for the benefit of creditors has been overruled by this court in the case of *Muchmore vs. Budd*, *supra*.

Vice-Chancellor Fleet in the *Livermore vs. McNair* case, in discussing what are assignments for the benefit of creditors, says: "The affair that this statute was intended to regulate is marked by two distinctive features: the transfer must embrace substantially the debtor's whole estate, and a trust for his creditors must be created", page 481, last paragraph.

Justice Reed speaking for this Court in the *Muchmore vs. Budd* case says, "But it is insisted that the first section of the act (concerning assignments for the benefit of creditors) includes every conveyance of property to a trustee for the benefit of a creditor or creditors. It is admitted that a debtor may sell, pledge or mortgage his property directly to one or more creditors, but it is insisted that the moment he does this not directly, but to another person for the use of such creditors, the statute seizes upon the transaction. The test thus applied is, does a trust arise? If so, it is an assignment.

I am unable to yield my assent to this view", page 384, paragraphs 3 and 4.

Mr. Joseph Coult who was the successful counsel in both of the above cited cases, in his brief in the *Muchmore vs. Budd*, case, at page 380, last paragraph accurately analyzes the first cited case, he says: "The most recent case is *Livermore vs. McNair*, 7 Stew. Eq. 478, in which Vice Chancellor Fleet carried the doctrine much further than any judge has ever done. The cases cited by him at the foot of page 481, do not support the conclusions he draws from them. The case was properly decided on the ground that the defendants were guilty of actual fraud on creditors. The other ground stated by the Vice-Chancellor were not warranted by the facts."

If the principles contended for by the attach-

ment creditors were sound, a debtor cannot prefer one creditor over another.

POINT II.

The bill of sale, deed and declaration of trust are not void under the Uniform Fraudulent Conveyance Act.

The court below also held that the bill of sale, deed, and declaration of trust were void under section 4 of the Uniform Fraudulent Conveyance Act. That section declaring conveyances fraudulent as to creditors, without regard to actual ^{intent} interest, where a person is thereby rendered insolvent, expressly states that this is so, "if the conveyance is made or the obligation is incurred without a fair consideration."

Section 3 of that act (Cum. Sup. to Compiled Statutes 44-144, Vol. 1, page 647) defines a fair consideration as follows:

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

The bill of sale, deed and trust agreement were certainly received in good faith to secure antecedent debts due to the creditors named in the declaration of trust. The amounts secured are not disproportionately small as compared with the value of the property obtained. The claims secured by said trust arrangement amount to \$39,750. Case, page 187, line 22. The two family house is worth about \$12,000. Case p. 99, line 13, the ten shares of stock of the Stuyvesant Development Co.

have no market value. Case p. 153, line 10. There is a dividend due Otto G. Horster from the Stuyvesant Development Co. of \$10,000. and there is in the possession of the Fidelity Union Trust Co., the sum of \$5829.42 due to Mr. Horster. Case, page 118, line 1. The \$15,000. of bonds spoken of by the court below have never been found and we do not believe they exist. We have, therefore, \$27,829.42, omitting the \$15,000. bonds, to secure debts amounting to \$39,750. It is also to be remembered that the \$10,000.00 dividend and the \$15,000. bonds are subject to the prior claim of the Union Cemetary Co. of \$22,000. by the prior assignment of the stock and bonds to Louis G. Kempf as its trustee.

This court in the case of the First National Bank vs. Money, 98 N. J. E. 137, held that it is a well settled rule in this state that a debtor has a right to prefer one or more of his creditors over others; and that a past indebtedness is a good consideration. This case was decided six years after the enactment of the uniform fraudulent conveyance act.

POINT III.

There was no actual fraud in the execution of the bill of sale, deed and declaration of trust.

There is no evidence of any kind to show that Otto G. Horster or the creditors named in the declaration of trust were guilty of actual fraud, nor is there, I think, any such claim made. The fraud is alleged to arise from the transaction itself. We have already pointed out that it is not fraudulent for a debtor to prefer one or more creditors over others. It is true that the creditors named in the

declaration of trust attempted to secure payment of their claims prior to any other creditors of Mr. Horster, and this they had a perfect right to do. The transaction was open and above board. The deed was duly recorded and notice of the bill of sale and declaration of trust was given to the persons entitled thereto.

POINT IV.

Attachment does not affect rights acquired previous to its issuance.

"By the act, Nixon's Digest, sec. 7 and 8, (1 C. S. 137, sec. 7 and 8), the attachment only binds the property and estate of the defendant in attachment, and cannot affect the estate of other persons therein acquired previous to the issuing of the attachment".

Campion vs. Kille, 15 N. J. Eq. 476, at page 478.

Vail vs. Diamond, 95 N. J. E. 97.

Busath vs. Prival, 84 N. J. E. 599.

Brink vs. Flanagan, 87 N. J. E. 630.

In these cases, an unrecorded mortgage; an unrecorded deed; previous equitable interest of third parties (right to specific performance); an unrecorded deed, were each held prior to a subsequent attachment.

The case of Flostroy vs. Corby Coal Co., 80 N. J. E. 547, by this court, also supports the principal above laid down and is especially pertinent as to the 10 shares of stock of the Stuyvesant Development Co. It is held that a transfer of corporate stock in satisfaction of a debt due from the stock-

holder has priority over a subsequent attaching creditor, though notice of the transfer was not given until after execution sale under the attachment.

POINT V.

Failure to take possession of personal property does not affect rights of cestuis under trust agreement, it being merely a chose in action.

Bailment: Where property sold is in the possession of a third person, holding it as bailee for the vendor, an actual delivery is not necessary, but it is sufficient that the bailee be notified of the sale, and thereafter the purchaser is his bailor. 27 C. J. 587.

Intangible property: The rule that possession must accompany the title does not apply to a sale or assignment of intangible property such as a debt which may be assigned by transfer and notice to the debtor, or to the assignment of the benefit of an executory contract. 27 C. J. 589.

In our case, the shares of stock in the Stuyvesant Development Co., had been previously assigned to Louis G. Kempf; the check of \$10,000. of the said company represented a dividend; and the stamp collection had been pledged to the Fidelity Union Trust Co., as security for a loan. Clearly in each of these cases the right of Otto G. Horster was merely a chose in action. The trustees could not have taken lawful physical possession of these chattels because they were already in the actual possession of prior lienors.

The attaching creditors cannot complain because they did not take actual possession of the personal property under their writ. They are in

no better position than we are, not even as good.

In attaching personal property the Sheriff must seize it and take it into his possession; and in attaching rights and credits he must go to garnisher and give him notice of the attachment.

Tomlinson vs. Stiles, 29 N. J. L. 426.

POINT VI.

Attaching creditors acquired no lien on the shares of stock in the Stuyvesant Development Co.

Serving execution at office of corporation without manuecaption of stock, or its surrender, or injunction against transfer by holder, held not sufficient to pass title at execution sale.

Wallack vs. Stein, 133 A. 81, Aff. 136, A. 209, rehearing denied, 133 A. 396. (Not yet officially reported.)

These defendants claim that because of the reasons herein advanced the claims of the attaching creditors are subsequent to the lien of the creditors under the bill of sale, deed and declaration of trust.

POINT VII.

A receiver should not have been appointed to liquidate the assets and make distribution.

We fail to see any theory upon which the defendants in attachment are entitled to ask for a receiver. The issue in this case is whether the trustees are entitled to the property covered by their bill of sale and deed, or whether the auditor or the creditors in the attachment suit is entitled to them in virtue of the attachment proceedings. If the auditor is held to have a prior claim on them they have ample power to take possession and sell them and distribute the proceeds among the attaching creditors. If the trustees are held to have a prior lien on the assets they have the right to sell them when the thing is most advantageous for the cestuis represented by them. Whoever succeeds in this suit has the right to take and dispose of the property involved in this suit free from any supervision or interference by the court below. There is no need for a receiver.

Respectfully submitted,

HUGO WOERNER,

Solicitor of Clara Sieder, Martha Shaw, Minna Dover, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep, and Ludwig Lauerhaus, Defendants-Appellants.