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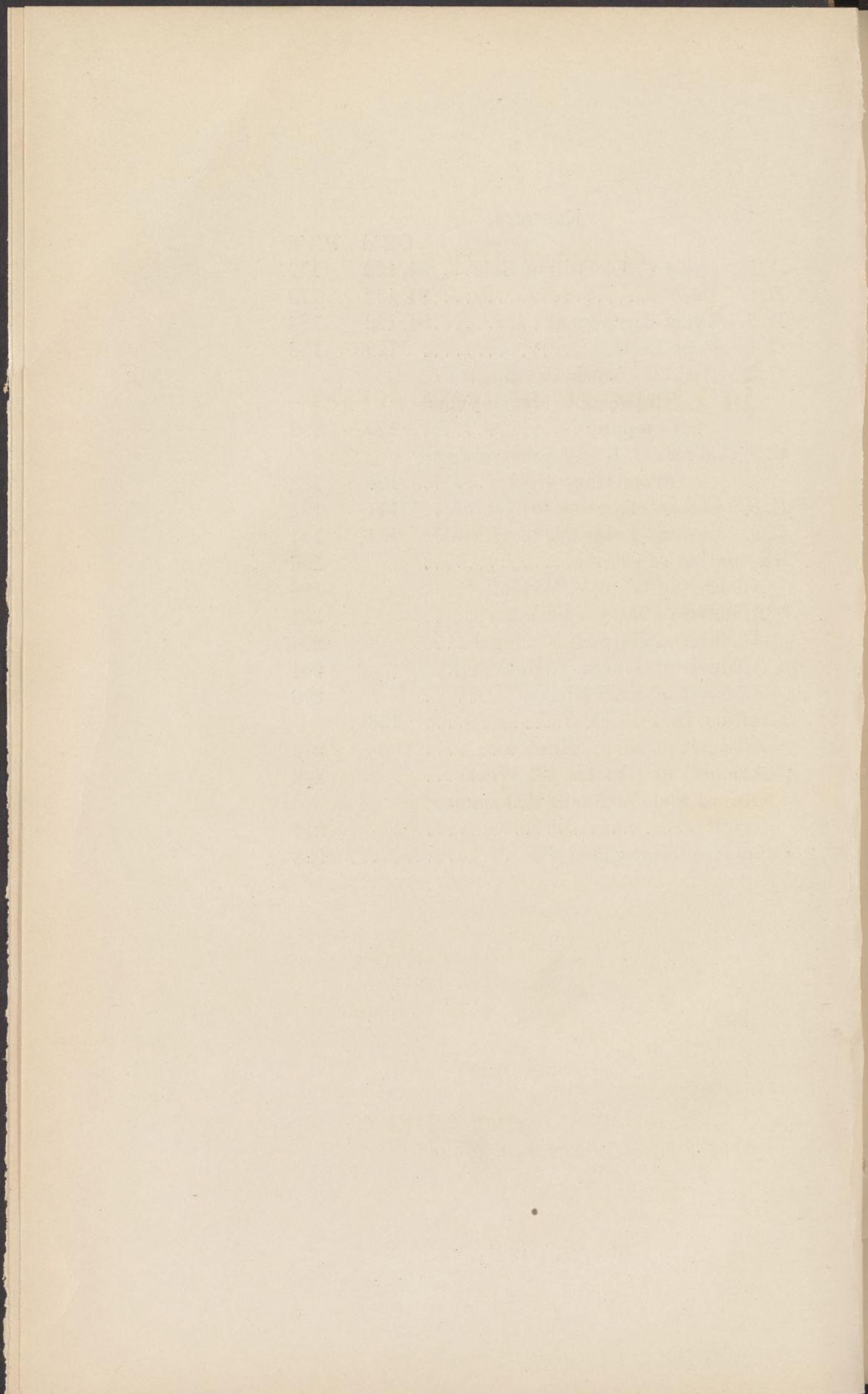
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**NOTICE OF APPEAL.**

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.*

20

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,  
Solicitor for and of Counsel  
with Complainants.

30

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

OTTO A. STIEFEL,  
Of Counsel with Complainants.

40

**New Jersey State Library**

**PETITION OF APPEAL.**

Filed February 25, 1928.

**New Jersey Court of Errors and Appeals**

10

*Between*

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

*and*

20

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.*

*On Bill.*

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

40

*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

*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,"

*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."

*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.  
40

*Petition of Appeal.*

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

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. 10

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.: 20

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.*

20

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,

30

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

40

*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: 10

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 20

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 Ulicsnik, 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 Ulicsnik, be and the same is hereby set aside as null and void and of no 40

*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 Town-  
ship 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 cor-  
poration and its affairs are managed by trustees.  
Said corporation, at all times hereinafter men-  
tioned, 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 in-  
debted to and liable to said Union Cemetery  
Association for and on account of moneys re-  
ceived by said Otto G. Horster, theretofore, for  
the use of said Association, as well as for in-  
terest 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 Riestler (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

40

*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
10	“ Mary Ulicsnik .....	9,500.00
	“ 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  
20 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  
30 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  
40 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

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. 20

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. 30

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- 40

*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.

10

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:

20

“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.’ ”

30

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

40

“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. 20 30

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. 40

*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 Uliesnik, 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.

*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

*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. Gummere, 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 appraisalment 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 40

*Bill of Complaint.*

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.

(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. 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.

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.

10 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  
20 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  
30 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.

40 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. 10

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. 20

**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. 30

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 40

*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.

30

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.

40

*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

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.

40

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

**Exhibit D.**

Hollywood Cemetery, December 15, 1925

In consideration of one dollar I hereby assign  
to Louis Kempf all my right title and interest in  
10 all bonds (standing in my name), of the Stuyve-  
sant Development Co. which bonds are now held  
by a Committee one of whom is Mr. Young, Presi-  
dent 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.

20

**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

30

No.    Due                                      Otto G. Horster.

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*Bill of Complaint—Exhibit F.*

**Exhibit F.**

NEW JERSEY SUPREME COURT.

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

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, 20

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. 30

WILLIAM S. GUMMERE,  
C. J.

A True Copy,  
Edward J. Kelleher,  
Clerk.

*Bill of Complaint—Affidavit of Otto A. Stiefel.*

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

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

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 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. 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 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 40

*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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30

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**ORDER.**

Filed January 7, 1927.

## IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>MARY ULICSNIK and others, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>CHARLES E. DALRYMPLE and others, <i>Defendants.</i></p>	}	<p>10</p> <p><i>On Bill.</i></p> <p><i>Order.</i></p>
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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,

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,

*Order.*

10 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.

20 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.

30 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,

Respectfully advised,

ALONZO CHURCH,  
V.-C.

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.*

10

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:

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30

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*Order.*

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.

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,

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.

10 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 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.

20 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 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.

30 9. As to paragraph 25, these defendants deny 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.

40 11. These defendants admit paragraph 27 of 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. 30 40

*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. 10

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. 20

*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: 30

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 40

*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.

*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 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. 20

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 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. 30

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.

(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.

20 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. 30

15. Said Charles E. Dalrymple, the duly appointed auditor in said attachment suit, has de- 40

*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 Kreamer..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 Me-

*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  
20     G. Horster to Louis Kempf.

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 Kempt, 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.

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

20

30

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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.

10

On Bill, &c.

Affidavits.

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

20

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.

30

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

40

*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.

40

*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. 10

REYNOLDS C. MASSEY.

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

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

CHARLES E. DALRYMPLE, of full age, being duly sworn according to law, on his oath deposes and says: 20

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. 30

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 40

*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 Uliesnik 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

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. 20

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 30  
me this day of ,  
1927.

## ORDER TO SHOW CAUSE.

Filed May 21, 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, &amp;c.</i> } <i>Order to</i> } <i>Show Cause.</i>
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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	<p style="margin: 0;"><i>Between</i></p> <p style="margin: 0; text-align: center;">MARY ULICSNIK, <i>et als.</i>, <i>Complainants,</i></p> <p style="margin: 0; text-align: center;"><i>and</i></p> <p style="margin: 0; text-align: center;">CHARLES E. DALRYMPLE, <i>et als.</i>, <i>Defendants.</i></p>	<p style="margin: 0;"><i>On Bill, &amp;c.</i></p> <p style="margin: 0;"><i>Replication</i></p> <p style="margin: 0;"><i>and Answer</i></p> <p style="margin: 0;"><i>to Counter-</i></p> <p style="margin: 0;"><i>claim.</i></p>
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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:

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  
30 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 Hörster 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.

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

*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, }  
COUNTY OF ESSEX. } ss.

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 for the year 1926, sets forth that the tax is  
30 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 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 settlement 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 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

*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  
 10 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.

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OTTO A. STIEFEL.

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

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

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*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 property. 10

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 Ulicsnik 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 due, insurance premiums past due or to become due or charges for or in connection with the upkeep of said premises. 20

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 actions. 30

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. 40

*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 Kniep, Louis Kempf, Anna Kraemer, Karl Kniep 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.*

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*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	<p><i>Between</i></p> <p style="text-align: center;">MARY ULICSNIK, <i>et als.</i>, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">CHARLES E. DALRYMPLE, <i>et als.</i>, <i>Defendants.</i></p>	<p><i>On Bill, &amp;c.</i></p> <p><i>Answer to</i></p> <p><i>Counter-</i></p> <p><i>claim.</i></p>
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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.

HUGO WOERNER,  
Solicitor of Defendants Clara Seider,  
Martha Shaw, Minna Dorer, Rein-  
hold 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.

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*Between*

MARY ULICSNIK, *et als.*,  
Complainants,

*and*

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

*On Bill, &c.*

*Answer of  
Louis A.  
Kempf to  
Counter-  
Claim of  
Defendants  
Ellen Minchin  
and Mary E.  
Riley.*

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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:

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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, 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  
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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

*Answer to Counter-claim.*

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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**ANSWER OF JOHN GRABACH TO  
COUNTER-CLAIM.**

IN CHANCERY OF NEW JERSEY.

<p style="margin: 0;"><i>Between</i></p> <p style="margin: 0; padding-left: 40px;">MARY ULICSNIK, <i>et als.</i>, <i>Complainants,</i></p> <p style="margin: 0; text-align: center;"><i>and</i></p> <p style="margin: 0; padding-left: 40px;">CHARLES E. DALRYMPLE, <i>et als.</i>, <i>Defendants.</i></p>	<p style="font-size: 4em; line-height: 1; margin: 0;">}</p>	<p style="margin: 0;"><i>On Bill, &amp;c.</i> 10</p> <p style="margin: 0;"><i>Answer of Defendant John Gra- bach to Counter- claim of Ellen Min- chin and Mary E. Riley.</i> 20</p>
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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 40

*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.

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**REPLICATION.**

IN CHANCERY OF NEW JERSEY.

10	<p style="margin: 0;"><i>Between</i></p> <p style="margin: 0;">MARY ULICSNIK, <i>et als.</i>,</p> <p style="margin: 0; text-align: center;"><i>Complainants,</i></p> <p style="margin: 0; text-align: center;"><i>and</i></p> <p style="margin: 0;">CHARLES E. DALRYMPLE, <i>et als.</i>,</p> <p style="margin: 0; text-align: center;"><i>Defendants.</i></p>	<p style="margin: 0;">} <i>On Bill, &amp;c.</i></p> <p style="margin: 0;">} <i>Replication.</i></p>
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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.

<i>Between</i>		
	MARY ULICSNIK, <i>et als.</i> ,	10
	<i>Complainants,</i>	<i>On Bill, etc.</i>
	<i>and</i>	<i>Decree Pro</i>
	CHARLES E. DALRYMPLE,	<i>Confesso.</i>
	<i>et als.</i> ,	
	<i>Defendants.</i>	

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

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*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-  
20 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.

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E. R. WALKER,

C.

Filed September 3, 1927.

**REPLICATION TO ANSWER OF  
LOUIS A. KEMPF.**

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p style="text-align: center;">MARY ULICSNIK, <i>et als.</i>, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">CHARLES E. DALRYMPLE, <i>et als.</i>, <i>Defendants.</i></p>	}	<p><i>On Bill, etc.</i></p> <p><i>Replication to Answer of Louis A. Kempf.</i></p>	10
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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>	<p style="text-align: center;">MARY ULICSNIK, <i>et als.</i>, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">CHARLES E. DALRYMPLE, <i>et als.</i>, Defendants.</p>	<p><i>On Bill, etc.</i></p> <p><i>Replication of Defend- ants Ellen Minchin and Mary E. Riley to An- swer of De- fendant John Grabach.</i></p>
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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.

*Between*

MARY ULICSNIK, *et als.*,  
Complainants,

*and*

CHARLES E. DALRYMPLE,  
*et als.*,

Defendants.

*On Bill, etc.*

*Replication.*

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The replication of the defendants Ellen Minchin and Mary E. Riley to the answer of the defendants, Martha Shaw, Minna Dorrer, Rinhold Kniep, Louis Kniep, Anna Kraemer and Carl Kniep, Jr., says that:

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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.

<hr/>		
	<i>Between</i>	
10	MARY ULICSNIK, <i>et als.</i> , Complainants,	} <i>On Bill, etc.</i> <i>Deposition of</i> <i>Otto G.</i> <i>Horster.</i>
	<i>and</i>	
	CHARLES E. DALRYMPLE, <i>et als.</i> ,	
	Defendants.	
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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

40 (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. 10

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? 20

Q Bonds of the Stuyvesant Development Company, 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. 30

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. 40

*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 \$22,000. 10

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.

10 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.

20 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.

30 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.

40 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 **10**  
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. **20**

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? **30**

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. **40**

*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.

10 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

30 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

40 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. 10

Mr. Woermer: 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? 20  
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. 30

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. 40

*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.

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. 10

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.

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. 20

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

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

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

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 Vicker's, the George T. Vickers' notes. I think I delivered the contract for that oil stock.

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

*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 you owe Carl Kneip \$9,000? A Yes, sir. 30

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.

20 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?

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

30 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 every-  
body 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 pay-  
ment on February 26th of the following year. I was to have my money and I expected to be able  
40 to pay everything that I owed.

*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.

10 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?

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.

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

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.

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

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.  
40 Ulicsnik and told her—she is the only one that I

*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? A Two years practically. 20

*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 reduced 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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30

40

*Opening.*

**TESTIMONY.**

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	}
10	MARY ULICSNIK, <i>et als.</i> , Complainants,	
	<i>and</i>	
	CHARLES E. DALYRMPLE, <i>et als.</i> , 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 Ulicsnik 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 represent 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, which I will describe in a minute. 10

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, one of the trustees of that association, on behalf of the association, of all his rights, title and interest in certain stock certificates and the stock represented thereby, namely, the stock of the Stuyvesant Development Company. 20

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. About 1915 or 1912 there was formed the Stuyvesant 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 carrying along the Union Cemetery Association and contracts, alleged contracts were made between the Union Cemetery Association and the Development Company. Things went along for years, 30  
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.  
20 It is a stock, in fact, which has a value, if any, 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 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.

10

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, 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.

20

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.

30

40

*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  
20 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.  
30 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  
40

*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. 10

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. 20

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?" 30

"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, 40

*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.

20

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.

30

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

40

*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. 10

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. 20

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. 30

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- 40

*Opening.*

tachment 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?

20

A Why, it was on this attachment which I have here. That is dated March 20, 1926.

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- 30 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 recolle-

*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, misled, 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.

Q But did he make any statement that the  
20 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* 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. 10

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, 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. 30 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.

Q Yes. Do you recall any talk that, if the parties could not agree, it might be possible to  
10 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.

Q And he wanted to get rid of it, you said  
20 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.

The Witness: That check—I remember, your Honor please, he made a remark, Colonel Vickers, he said, “It is a most unusual  
30 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.

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  
40 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 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. 10

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 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. 30

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?

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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.)

30 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 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.

40 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 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 I better look and see. Why, if this— Do you mean at the conference with Mr. Horster? 20

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 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. 30

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.

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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.

Q And at a subsequent conference when a ten thousand dollar check was shown by Colonel  
40 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.

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*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—"

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.

(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.

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.

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*Stipulation.*

10 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.

20 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?

30 Mr. Massey: Mr. Louis Kempf.

The Court: Why don't you call Colonel Vickers and let him get away?

Mr. Massey: All right.

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*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. 10

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? 20

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. 30 40

*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  
10 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  
20 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  
30 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  
40 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. 10

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). 20

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. 30

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 40

*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, Uliesnik, Rockwell and Kniep? 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.*

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.

10 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.

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.

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.

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.

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-

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*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 statute. 10

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.

10 Mr. Stiefel: I can elucidate this a little further.

*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.

30 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.

The Court: All right. That is all.

Mr. Stiefel: That is all.

The Court: Anything further?

*Examined by Mr. Massey.*

40 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

*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.

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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 to be 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.

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*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.

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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.)

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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. 10-

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. 30 40

*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 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 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.

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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-

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*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 40

*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  
10 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  
20 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.

---

30 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  
40 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. 10

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. 20

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. 30

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. 40

*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.

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  
20 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.

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.  
40 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?

40

The Court: Oh, yes. You objected. I will admit it over the objection.

*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 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 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.

40

*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—

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 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 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.*

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 attack of appendicitis and our conferences had been perceding some time before I went to the country, I think. 10

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 summer of the year, Mr. Massey. 20

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 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. 30

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.

10 Q But your conference with Mr. Dalrymple was long before that, you say? A Not with 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.

20 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 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.

30 The Court: Say that "he had turned over the check." Do not say "contrary to 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.

40 Mr. Myers: Your Honor please, representing Mrs. Margaret McLaughlin, I presume it can be stipulated that she made a 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 kind of a title. 10

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 and let me have the testimony. 20

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 a week. 30

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. ROCK-  
 WELL, KARL KNIEP 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 Ulicsник, and their survivors or survivor,  
 their administrators, executors, successors and  
 assigns, forever, all that certain personal prop-  
 erty and choses in action owned by me, de-  
 scribed 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 whereso-  
 ever the same may be situate, whether cognate  
 or akin to the above specifically described prop-  
 erty 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  
GEORGE T. ROCKWELL, KARL  
KNIEP and MARY ULICSNIK,

30

---

Dated:—December 22nd, 1925.

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*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 30  
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 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 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: 10

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: 20

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 claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever. 30

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 40

*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 ap-  
peared 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,  
20 and thereupon they acknowledged that, they  
signed, sealed and delivered the same as their  
voluntary act and deed, for the uses and pur-  
poses 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  
30 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 Re-  
corded 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 10

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:— 20

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 30 40

*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.
- 20

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	

40

*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 prop-  
erty 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 trust-  
tees or their attorneys.

We advise you of this because we understand  
that you are one of, or are acting for a Com-  
mittee which has charge of the sale of the Union  
Cemetery Association bonds, in which Mr. Hor-  
ster 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.

10

F—

**Exhibit C. 4, page 2.**

#6644.

January 4, 1925.

Mr. Fred G. Stickel,  
Prudential Building,  
Newark, N. J.

20

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 Trustees or their attorneys.

30

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—

40

*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:—

20 This is to advise you as attorney for and an  
officer and/or director of Stuyvesant Develop-  
ment 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 Develop-  
ment Company, and in and to all of its stock  
and assets. Consequently, any funds, money or  
assets which the Stuyvesant Development Com-  
pany would have otherwise paid or delivered to  
Mr. Horster, should be paid and delivered to said  
three Trustees or their attorneys.

30 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.

*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.

F—

40

*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:—

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:

30

The Stuyvesant Development Co.  
received for its Union Cem.  
bonds .....\$ 35,290.00

40

*Exhibit C. 8.*

The Stuyvesant is to receive net cash for its stock.....	112,500.00	
Union Cemetery is in- debted 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
<hr/>		
H o l l y w o o d Mausoleum Assoc. owes Stuyves- ant D. Co. (approx).....	32,000.00	
<hr/>		
	298,873.13	
<hr/>		
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	
<hr/>		
	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	
<hr/>		
	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 corpora- tion 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  
 10 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.

30 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  
 40

*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

## STIPULATION.

62/696.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>MARY ULICSNIK, and others, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>CHARLES E. DALRYMPLE, and others, <i>Defendants.</i></p>	<p><i>On Bill.</i></p> <p><i>Stipulation.</i></p>
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20 It is hereby stipulated and agreed between the complainants, through their solicitor Otto A. Stiefel, the defendants Clara Sider, Martha Shaw, and others, through their solicitor Hugo Woerner, the defendants, Ellen Minchin and Mary E. Riley, through their solicitor Arthur T. Vanderbilt, the defendant John Grabach, through his solicitor Arthur W. Werthmann, the defendant Charles E. Dalrymple, *pro se*, and the defendant Margaret McLaughlin, through her solicitor Charles M. Myers, as follows:

30 (1) Pursuant to understanding reached and expressed in open court upon the hearing in the above-entitled cause, it is hereby stipulated and agreed that the complainants as well as the defendants, John Grabach and the heirs and representatives of Karl Kniep, may prove their respective claims by affidavits which shall be submitted to Vice-Chancellor Church in company

*Stipulation.*

with the briefs to be filed pursuant to his instructions.

Dated November 10, 1927.

OTTO A. STIEFEL,  
Solicitor of Complainants.

10

HUGO WOERNER,  
Solicitor of Defendants,  
Clara Sider, Martha Shaw,  
and others.

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

ARTHUR W. WERTHMANN,  
Solicitor of Defendant,  
John Grabach.

20

CHARLES E. DALRYMPLE,  
Solicitor *pro se*.

CHARLES M. MYERS,  
Solicitor of Defendant,  
Margaret McLaughlin.

30

40

*Affidavit of Olive V. Wetsell.*

62/696.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>MARY ULICSNIK, and others, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>CHARLES E. DALRYMPLE, and others, <i>Defendants.</i></p>	<p><i>On Bill.</i></p> <p><i>Affidavit.</i></p>
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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 hereinafter 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 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.

10

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.*

10

*On Bill.**Affidavit.*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.  
10

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
30	In re: proposed loan to "Fredericka Sieber." Date, May 15th, 1925, Horster paid interest on this sum to November 15, 1925, from which 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.*

10

*On Bill.*

*Affidavit.*

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.

40

*Affidavit of George T. Rockwell.*

62/596.

IN CHANCERY OF NEW JERSEY.

	<p style="text-align: center;"><i>Between</i></p>	
10	<p style="text-align: center;">MARY ULICSNIK, and others, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">CHARLES E. DALRYMPLE, and others,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}
		<p style="text-align: center;"><i>On Bill.</i></p> <p style="text-align: center;"><i>Affidavit.</i></p>

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.

30 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 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.

40 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 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.

	20
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
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

*Affidavit of Karl Riester.*

62/696.

## IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	}	
10	MARY ULICSNIK, and others, <i>Complainants,</i>		<i>On Bill.</i>
	<i>and</i>		
	CHARLES E. DALRYMPLE, and others,		<i>Affidavit.</i>
	<i>Defendants.</i>		

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  
 30 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  
 40 hereof; also in said tabulation are shown the

*Affidavit of Karl Riester.*

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	20
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	
	<hr/>	
	\$9,000.00	

*Exhibits D. 1 to D. 5.***Exhibits D. 1 to D. 5.**

## NEW JERSEY SUPREME COURT.

10	ELLEN MINCHIN,  <div style="text-align: center;"><i>vs.</i></div> OTTO G. HORSTER,  	Plaintiff,  <i>vs.</i>  Defendant.	} <i>In Attach-</i> <i>ment.</i>  <i>Affidavit.</i>
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STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } *ss.*

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 ex-  
 ecuted 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-

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*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. 10

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. 20

ELLEN MINCHIN.

Subscribed and sworn to before me  
this 19th day of March, 1926.

Edna L. Chamberlain,  
Notary Public of New Jersey.

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*Exhibits D. 1 to D. 5.*

NEW JERSEY SUPREME COURT.

10	ELLEN MINCHIN,  vs.  OTTO G. HORSTER,	} <i>Plaintiff,</i>  <i>Defendant.</i>	} <i>In Attach-</i> <i>ment.</i>  <i>Affidavit.</i>
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STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.

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.

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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.

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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

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*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.

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Henry J. Sorenson,  
An Attorney at Law of New Jersey.

NEW JERSEY SUPREME COURT.

20	ELLEN MINCHIN,  <div style="text-align: center;"><i>vs.</i></div> OTTO G. HORSTER,  	<i>Plaintiff,</i>   <i>Defendant.</i>	} <i>In Attach-</i> <i>ment.</i>  <i>Order.</i>
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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 re-  
 10 turn 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  
 20 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.

30 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  
 40 Joseph Barry, declared that I attached the

*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. 30

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 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 “

*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 " *Arues* Bill & Notes
- 1 " Prouts Law Forme
- 10 1 " Chase Blackstone
- 1 " " Commentares
- 6 " Jacobs Law Dictionary
- 2 " Rapalje & Lawrence's 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 *Plottings*
- 1 Volume lecture on laws of Scotland
- 1 Copy Newark City Charter
- 1 Volume *Clececalis*
- 1 Life Wm. Blackstone
- 1 Volume forms Federal Procedure
- 2 Vol. *Cleyltis* 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	10
1	" <i>Cokes</i> Report	
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	<p><i>Between</i></p> <p>ELLEN MINCHIN,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>and</i></p> <p>OTTO G. HORSTER,</p> <p style="text-align: right;"><i>Defendant.</i></p>	<p style="font-size: 3em;">}</p> <p><i>Returnable</i> <i>April 10,</i> <i>A. D. 1926.</i></p> <p><i>Charles W.</i> <i>Weeks,</i> <i>Attorney.</i></p>
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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:

20 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.

30 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.

40 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, 10  
Special Deputy.

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 20  
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 30  
execute 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.

CHARLES W. WEEKS,  
Attorney.

EDWARD J. KELLEHER,  
Clerk.

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*Exhibits D. 1 to D. 5.*

NEW JERSEY SUPREME COURT.

10	<p>Essex County Ellen Michin <i>vs.</i> Otto G. Horster</p>	}	<p><i>Action at Law.  In Attach- ment.</i></p>
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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 Werkheiser 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,  <div style="text-align: center;"><i>vs.</i></div> OTTO G. HORSTER,	} <i>Plaintiff,</i>  } <i>Defendant.</i>	} <i>Action at Law.</i> } <i>Order of Publication Appointing an Auditor.</i>
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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,

20 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

30 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.

ELLEN MINCHEN,  <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> OTTO G. HORSTER,  <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>  <i>In Attachment.</i> 10  <i>Order for Substitution of Attorney.</i>
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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.     20

Let this rule be entered in the minutes.

WILLIAM S. GUMMERE,  
*C. J.*

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## OPINION.

## IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	}	<i>Opinion.</i>
10	MARY ULICSNIK, <i>et als.</i> ,		
	<i>Complainants,</i>		
	<i>and</i>		
	CHARLES E. DALRYMPLE,		
	<i>et als.</i> ,		
	<i>Defendants.</i>		

- Otto A. Stiefel for complainant, Mary Ulisnik,  
*et als.*;
- 20 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. Lehl-  
bach), 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 col-  
lecting 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 as-  
signment to Louis Kempf. This assignment pur-  
ported 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. 10

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. 20

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. 30

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, 40

*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  
 20 and Charles E. Dalrymple was appointed auditor. 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. 10

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 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. 30

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  
 10 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  
 20 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  
 30 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,  
 40 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. 10.

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. 20.

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. 30.

*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, *et als.*,  
Complainants-Appellants,

*and*

CHARLES E. DALRYMPLE, ELLEN  
MINCHIN, MARY E. RILEY, and  
MARGARET McLAUGHLIN,  
Defendants-Respondents,

*and*

CLARA SIEDER, *et als.*,  
Defendants-Appellants.

On Appeal from  
an Interlocutory  
Decree  
of the Court of  
Chancery.

### BRIEF FOR DEFENDANTS-RESPONDENTS ELLEN MINCHIN AND MARY E. RILEY.

#### Statement of the Case.

Complainants, on January 7, 1927, started suit in the Court of Chancery to enjoin Charles E. Dalrymple from disposing of a certain certified check, and to require the check to be delivered to an officer of that court to be disposed of according to the decree of the court. Charles E. Dalrymple is the duly appointed auditor in an attachment suit in the New Jersey Supreme Court brought by Ellen Minchin, plaintiff, against Otto G. Horster, defendant. The check in question, which he as auditor had taken into possession, is drawn by Stuyvesant Development Company, on First National Bank of Hoboken, payable to Otto G.

Horster, in the sum of \$10,000.00, dated March 5, 1926. On March 13, 1926, certification of said check by the First National Bank of Hoboken was procured at the request of the maker.

On March 20, 1927, Ellen Minchin caused writs of attachment to issue out of the Supreme Court and pursuant to one of said writs the Sheriff of Hudson County called upon George T. Vickers, President of Stuyvesant Development Company, and made levy upon the rights and credits of Otto G. Horster, and particularly upon this certified check in Mr. Vickers' hands.

After entry of judgment in the attachment suit the auditor proceeded against the property of the defendant Otto G. Horster in an endeavor to satisfy the judgment (S. C. 157). Pursuant to that purpose and on November 9, 1926, the auditor demanded and obtained this check from George T. Vickers.

Upon filing the bill of complaint in Chancery, a temporary restraint against the auditor was granted and, being ordered by that court so to do, he delivered this check to the clerk of the court to be held pending the suit. Complainants claim the check under certain written assignments made December 15, 1925, and December 22, 1925, prior to the date of the attachments. These assignments are in evidence as exhibits of the complainants.

The defendants Mary E. Riley and Margaret McLaughlin are applying creditors who came into the suit after the issuance of the writs, and they have had their judgments entered along with that of Ellen Minchin, the attaching creditor. The other defendants are beneficiaries of the assignments who failed to join as parties complainant, but whose interests are in common with the other beneficiaries of the assignments.

An answer was filed for Ellen Minchin and Mary E. Riley denying the validity of the assignments and setting up a counterclaim, which prays that the assignments be set aside as void, that the attaching creditors be decreed to have a prior lien on the certified check and on all the other property attached and levied upon *originally by the sheriff or subsequently by the auditor*. The additional specific property brought into the dispute by the counterclaim is the sum of \$5829.42, proceeds of sale of a collection of stamps belonging to Otto G. Horster in the hands of Fidelity Union Trust Company, a house and lot in East Orange valued at about \$10,000.00, ten shares of stock of the Stuyvesant Development Company standing on the corporate books in the name of Otto G. Horster, the value of which stock may be large or small but whose present value is uncertain. The attachment creditors prayed for an accounting from the assignees and that a receiver be appointed to discover, liquidate, and distribute the entire assets of Otto G. Horster, covered by the assignments.

The assignment of December 15, 1925 (S. C. 29-32), was made by Horster to one Louis Kempf and assigned the ten shares of stock of Stuyvesant Development Company, and also certain bonds valued in the assignment at \$15,000.00. The present whereabouts and value of the bonds does not appear by the evidence. Collateral to this assignment a demand promissory note was given by Horster to Kempf in the sum of \$35,000.00. Kempf gave no consideration for this assignment and note but agreed orally to hold the same in trust, first for the benefit of Union Cemetery Association to satisfy its claim of \$22,500.00 against Horster for a past due debt, and second for the benefit of Horster to the extent of any balance above the claim of Union Cemetery Association.

The certificates of stock, assignment, and note were held in safe keeping by Howard F. Kirk, attorney for the Union Cemetery Association and a letter was written to Stuyvesant Development Company advising of the assignment. No request was made to transfer the stock from the name of Horster on the books of the company. No attempt to sell or perfect title to this stock was made. And what became of the \$15,000 in bonds is still a mystery.

The assignment of December 22, 1925 (S. C. 177-187), was made to George T. Rockwell, Karl Kniep and Mary Ulicsnik, and purported to convey all the property of Otto G. Horster, excepting a bank account of \$500.00 and his household goods. A deed of the real estate was given concurrently to the same parties and at the same time a trust agreement in writing was executed whereby the property conveyed was to be held in trust to secure the claims of six creditors therein named, and the claims of any other creditors which the trustees *in their discretion* might name, to permit Horster and his wife at the discretion of the trustees to occupy the real estate free of rent and continue the use of his equipment for the practice of law, and upon liquidation and payment of debts and expenses to pay the balance to Horster.

The creditors in the attachment suit have never been offered admission to the benefit of this trust.

Horster has testified, and it is uncontradicted that his bank balance of \$500.00 was all due and owing to the bank, and that his household goods consisted of the furnishings of six rooms which had been in use for twenty-five years (S. C. 98-99).

When these assignments were made Horster owed to Ellen Minchin the sum of \$3000.00, to Mary E. Riley the sum on which her judgment was later entered for \$9745.22 and to Margaret Me-

Laughlin the sum on which her judgment was later entered for \$3055.00. After the assignments Horster obtained from Ellen Minchin by fraud the sum of \$1500.00, the balance of the sum on which her judgment was later entered for \$4692.50 (S. C. 208-210).

No notice of this general assignment was given to Fidelity Union Trust Company, the holder of the stamps, and no step was taken by any of the assignees to liquidate any of the property. The assignees were friends of Horster. The plain design of the assignments was, in addition to creating a preference, the placing of Horster's assets beyond the reach of other creditors so that they could make sale to Horster's advantage at a later date. From the nature of the agreements and the conduct of the parties before and during the litigation the Vice Chancellor found fraud in fact on the rights of the attachment creditors.

## ARGUMENT.

### POINT I.

**The assignment of December 22, 1925, is void under Section 12 of the "Fraudulent Conveyance Act", C. S. 2618 (Rev. 1877, p. 446).**

The act provides as follows:

"That every conveyance, grant, or alienation of lands, tenements, hereditaments, or goods and chattels, or of any estate or interest therein, whether made by writing or otherwise, and every judgment and execution which have been or shall be contrived in fraud, covin or collusion, with intent to hinder, delay or defraud creditors and others of their lawful actions, debts, damages or demands, shall be deemed and taken (only as against those persons, their executors, administrators

or assigns, whose actions, debts, damages or demands are or may be hindered or defeated by such covinous or fraudulent devices and practices) to be utterly void and of no effect; any feigned consideration, color or pretense to the contrary notwithstanding.”

The assignment was in the form of an absolute bill of sale and deed, conveying Horster's entire estate, accompanied by a secret trust agreement whereby the trustees in their own discretion could permit Horster to use the dwelling house and his equipment for the practice of law, free of rent, and could hold the estate in *status quo* indefinitely or distribute it as the trustees saw fit to whomsoever they might choose to recognize as creditors.

*The secrecy of the trust* is a badge of actual fraud and is one of the elements which the Vice Chancellor considered in finding fraud in fact. See *Muchmore vs. Budd*, 53 N. J. L. 369 at p. 391.

*The reservation for the benefit of the debtor* in such a trust is a badge of fraud and is another element considered by the Vice-Chancellor in finding fraud in fact. The reservation of just such a benefit to the debtor is cited by Justice Reed in delivering the majority opinion in *Muchmore vs. Budd*, 53 N. J. L. 369, at p. 390. The opinion of Justice Reed in that decision is the mainstay of the case of appellants on this appeal and it should be noted that the facts in that case show no reservation for the benefit of the debtor. Justice Reed on that point cites the United States Supreme Court decision in *Lukens vs. Aird*, 6 Wall. 78, which he quotes as follows:

“Aird being indebted and insolvent, made a conveyance of certain lots to Spring, a creditor, who agreed that Aird should have the use of the lots for one year, rent free, with a privilege, so long as Spring did not

desire to make any use of them himself or to sell them, of renting them at \$100 a year. The Supreme Court held that the conveyance was void, and that the fraud was an inference of law."

*The authority given the trustees to hold the estate in status quo indefinitely* is a badge of fraud and is another element considered by the Vice Chancellor. The fact that the deed and bill of sale showed an absolute transfer of title and that the trust agreement was separate and unrecorded put the trustees in a position to deceive the world as to the true nature of the transaction.

*The authority given the trustees to distribute the estate to the creditors named and to such others as they in their discretion might choose to recognize* is a badge of fraud and is another element considered by the Vice Chancellor. In the case of *Van Clief vs. Melville*, 79 N. J. E. 176, at pp. 179 and 180 Mr. Justice Swayze in his opinion for the Court of Errors and Appeals, in setting aside a trust mortgage of the debtor's entire property, said:

"The above recital of facts suffices to show that as to antecedent creditors the case comes within the rule of *Owen vs. Arvis*, 26 N. J. L. 22 and *National Bank of the Metropolis vs. Sprague*, 21 N. J. E. 530. Notwithstanding what Vice Chancellor Pitney said in *Siplely vs. Wass*, 49 N. J. E. 463 (at page 473), *the authority of these cases has not been at all shaken by the later decisions of Muchmore vs. Budd*, 53 N. J. L. 369 and *Clinton Bank vs. Cummins*, 39 N. J. E. 577."

At page 180 the reason for declaring the mortgage void is stated by Justice Swayze as follows:

"The mortgage shows upon its face that the provisions as to future advances were contrived to defraud creditors of their lawful actions." \* \* \*

*“These provisions are so broad as to authorize the trustees to advance money and apply it to the payment of pre-existing debts at their discretion.” \* \* \**

*“Such a provision while it may have been at the time intended only for the benefit of small creditors, was susceptible of being used for the benefit of Van Clief himself, and the effect of vesting such discretion in the trustees was to make it possible for them to substitute the first lien which the mortgage gave to the advances, for the inferior lien that favored creditors might otherwise have, merely by using the money to pay those creditors.”*

The inequity of the assignment to Ulicsnik and others is far more patent than that of the mortgage in *Van Clief vs. Melville*, just referred to. The trustees in this assignment are given the control of Horster's entire estate with the absolute discretion to sell it or hold it, as they might see fit, for an indefinite period of time; to permit the debtor to use the dwelling house and use his equipment for the practice of law for any length of time, and to pass upon the claims of other creditors paying them or rejecting them as they the trustees might see fit. This arrangement appears on the face of the written trust agreement. No one knows to this day how much would be realized from a liquidation of all the assets. This makes the arrangement all the more vicious. If there is enough in the estate to pay the attachment creditors they are entitled to have it liquidated now regardless of any priority, and a scheme to prevent its liquidation such as the present arrangement hinders, delays and defrauds the attachment creditors. This case presents a perfect example of *fraud per se* as described by the Court of Errors and Appeals.

The conduct of the trustees, the other complaining parties and the debtor in the making of the

bill of sale, deed and trust agreement and their subsequent acts, omissions, admissions and testimony in relation to the whole affair convinced the Vice Chancellor of their fraudulent intent, of their intent to protect Horster against the just claims of other creditors until such time as his assets could be sold to his, Horster's better advantage. By their arrangement they permitted Horster, who had already perpetrated numerous frauds, to continue in the practice of law and to obtain by fraud an additional \$1,500.00 from the respondent, Ellen Minchin. They permitted Horster to remain, in the eyes of the world, a reputable citizen and lawyer, possessed of property and financial standing. Not only did the trustees fail to make sale of the property assigned to satisfy their claims, but there is no evidence of any attempt at any time to do so. Their clear policy was to hold all the property in *status quo* and out of the reach of other creditors indefinitely. The trustees had access to all of Horster's property and the co-operation of the Union Cemetery Association and Horster himself, yet they made no effort to make an inventory of or discover his assets outside of those specifically named in the bill of sale, and gave no notice to Fidelity Union Trust Company of their alleged ownership of the collection of postage stamps until about a year after the bill of sale was made. The trustees appear to have done nothing whatever toward taking over the property except to collect rent from half of the two-family house and to make claim to the dividend check of Stuyvesant Development Company. No accounting has yet been made of the rents alleged to have been collected. The whole picture is one of a complete tie-up of the assets for the purpose of delaying liquidation, and the finding of the Vice Chancellor that such was the situation of fact was perfectly right and proper.

## POINT II.

The assignment of December 22, 1925, is void under the "Act Concerning General Assignments", S. C. 114, Sec. 1 (P. L. 1899, p. 146).

The act concerning general assignments provides as follows:

*"Every conveyance or assignment made by a debtor of his entire estate in trust to an assignee 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, and shall render such assignment void."*

The transaction of December 22, 1925 was an attempted conveyance and assignment of the entire estate of Otto G. Horster in trust for the creditors named therein excluding other creditors and it is clear from the contents of the bill of sale and trust agreement and the subsequent events that there was an intent to exclude the other creditors from the benefit of the assignment. To exclude them is still being attempted in this proceeding.

The bill of sale reserves to the defendant, Otto G. Horster, his household furniture, which he has testified is of little or no value, and his bank balance of \$500.00 in the Liberty Trust Company, which he testified was all due and owing to Liberty Trust Company. It is clear that the only property reserved to Otto G. Horster on December 22,

1925, was within the limit of \$200.00, the exemption allowed to any bankrupt.

Vice Chancellor Van Fleet in *Livermore vs. McNair*, 34 N. J. E., at p. 481, in describing the effect of this statute said:

“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 creditors must be created. *Tillou vs. Britton*, 4 Hal (6 N. J. E.) 120; *Fairchild vs. Hunt*, 1 McCart (14 N. J. E.) 371. Both these features appear in the transaction under consideration.”

“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 arrangement 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 to make that has the effect to defeat this right, is a fraud against the creditor.”

Such a transfer contravenes the purpose of the act concerning general assignments whether it be a sale, a pledge or a mortgage. If it affects the debtor’s whole estate and places it in trust for the benefit of certain creditors, giving preferences,

it is void under the act, whether it be in the form of a sale, pledge or mortgage. In the case of *Livermore vs. McNair* the void transaction was in the form of a mortgage and it was set aside. Chancellor Green in *Fairchild vs. Hunt*, 1 McCart (14 N. J. E.), at p. 372, said "That cannot be accomplished by indirect means which it would not be lawful to effect directly."

1. "The instrument is virtually an assignment or transfer of the grantor's property ostensibly for the payment of his debts, giving illegal preference to classes of creditors."

At page 373 Chancellor Green referring to the mortgage involved in *Fairchild vs. Hunt*, said:

"In the aspect in which the question is now presented, viewing the instrument in connection with the preceding agreement of the tenth of March, 1860, I entertain very strong doubts as to its validity. If it shall appear that the transfer in question was made while Hunt was insolvent; that it was an assignment of all of his property not included in or covered by the former transfer, and that it was in fact made to subserve the same purpose with that instrument, it will be very difficult to maintain its validity in view of the provisions of the assignment act."

Equity cares very little about mere matters of form, it endeavors to deal with the substance of affairs and to regulate its judgment according to the real purposes which have controlled parties in the various matters brought before it for relief or correction. The assignment to Ulicsnik and others was not a mortgage either in form or equitable effect. It was an absolute sale to the trustees for the benefit of the creditors named in the trust agreement and the debtor. But regardless of its form, whether it be a sale, pledge or mortgage, it violates the assignment act by seeking to accomplish the very result which the first

section of the assignment act was designed to prevent. The application of this section of the statute is not confined to an arrangement whereby the parties are expressly seeking to proceed under this act. By its very words it applies to *every conveyance or assignment* of any kind containing the elements specifically described in the first section of the act. Its application is not limited to a technical assignment for the benefit of creditors in the general form and with the general accompaniments required by the act or contemplated by the Federal Bankruptcy Act. The express purpose of Section 1 is to render void a class of conveyances which do not comply with the terms of the assignment act.

Appellants have said that this doctrine of *Livermore vs. McNair* has been overruled by the Court of Errors and Appeals in *Muchmore vs. Budd*, 53 N. J. L. 369, and that this is not a general assignment as contemplated by that act. The construction of that statute laid down by the majority in *Muchmore vs. Budd* should be adopted by any court reluctantly because to the learned minds of the Chancellor, Chief Justice Beasley, and Justices Scudder, Van Syckel and Brown, who dissented, the majority view as stated by Justice Reed seemed to contravene the only possible meaning of the very words of Section 1 of the Act. See 53 N. J. L., 397 to 411. Furthermore there is an important distinction between *Muchmore vs. Budd*, and the case now being considered. In *Muchmore vs. Budd* the transferee had no notice or knowledge that the transfer involved the debtor's entire estate, and that fact clearly had great weight in determining the decision. In the case now before the court notice that the transfer involved the debtor's entire estate appears by the very terms of the bill of sale and was clearly known by the transferees at the time.

## POINT III.

**The assignments of December 15, 1925, are fraudulent and void under Section 12 of the "Fraudulent Conveyance Act", C. S. 2618 (Rev. 1877, p. 446).**

The relevant provisions of the act have been quoted under Point I, *supra*.

The assignments to Kempf are surrounded by circumstances which clearly indicate fraud on other creditors.

Mr. Kirk, attorney for Union Cemetery Association, who holds the written assignments in Kempf's name, testified on cross-examination as follows:

"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 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." See S. C. 137.

What does this testimony mean? It means that they wanted to conceal the true status of the transactions from any other creditors who might appear, and to preserve this stock for the benefit of Horster.

Horster and Kempf were friendly. (Testimony of Horster at S. C., pp. 103-104). Horster expected to realize \$115,000.00 out of his ten shares of stock of Stuyvesant Development Company. (Testimony of Horster at S. C., pp. 105-106.) Horster further testified to the effect that he was insolvent at the time, that he owed more

money than he could take care of (S. C., p. 101). Could the Vice Chancellor lawfully draw a conclusion from this testimony that the arrangement was to protect Horster's shares of stock against the just claims of other creditors and to hinder, delay and defraud other creditors? Such a conclusion of fact is perfectly reasonable and proper and the finding of the Vice Chancellor ought not to be disturbed on this point.

#### POINT IV.

**The assignments of December 15, 1925, are fraudulent and void under the "Uniform Fraudulent Conveyance Act", P. L. 1919, p. 501, Section 4 and Section 9 (1) (b).**

Section 4 of the Act of 1919 provides as follows:

"Every conveyance 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."

Section 9 (1) (b) of the Act provides as follows:

"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, disregard the conveyance and attach or levy execution upon the property conveyed."

Horster sold, assigned and transferred to Louis Kempf the ten shares of stock which he valued

at \$115,000.00, and bonds which he valued at \$15,000.00, and the stock was delivered. It is undisputed that he was either insolvent at the time or became so as a result of that transaction. It is also undisputed that the value of the stock alone is far in excess of \$22,500, the amount of the debt.

The transaction was in the form of a conveyance and a passing of title to Kempf and could have been used as such to the embarrassment of other creditors. Mr. Kirk testified as follows: "I decided it would be wise 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" (S. C., p. 137). This was a conveyance, not a mortgage, nor a pledge, and it is fraudulent and void under the Fraudulent Conveyance Act.

#### POINT V.

**In the event that the assignments should be held valid, nevertheless the lien of the attachment as to the certified check for \$10,000.00 and the collection of postage stamps, must be given priority.**

Where two transferees of a chose in action hold transfers arising out of similar circumstances, he who gives prior notice to the garnishee, has prior right to collection of his claim. This is the policy carried out by the recording acts. This is the rule of law applied when a subsequent judgment creditor issues execution and makes his levy first. This is the rule as between two bona fide assignees of any property or fund for value, which rule is laid down in the opinion of this court in *Jenkinson vs. New York Finance Company*, 79

N. J. E. 247, at pp. 268, 269. The same rule should apply in this instance where the assignees took a right in the property by assignments for a past consideration and the attachment creditor also obtained a lien as a result of a past consideration.

Assuming that complainant's assignments were valid, then under the law they could have proceeded to take or enforce the payment of the dividend due and owing to Otto G. Horster from Stuyvesant Development Company in the sum of \$10,000.00. This they did not do, but permitted the debt to remain in its original status of an unpaid debt to Otto G. Horster, and when the attaching creditor served the president of Stuyvesant Development Company with the writ of attachment and went through the formality of attaching all of the rights and credits of Otto G. Horster and particularly attaching the check for \$10,000.00 in question, the attaching creditor by that act obtained a priority over the assignees as against that fund. The check was properly made out to Otto G. Horster because "The Uniform Stock Transfer Act," P. L. 1916, p. 399, provides as follows:

SECTION 2. "Nothing in this act shall be construed as forbidding a corporation to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends and to vote thereon as such owner."

and furthermore, the Stuyvesant Development Company had a perfect right under this act to deliver said check to Otto G. Horster personally or to such person as could prove himself a legal representative of Otto G. Horster, as against such fund. The delivery of the check to Charles E. Dalrymple, the auditor in the attachment suit was

proper and was the duty of Stuyvesant Development Company as a result of the levy under the writ of attachment and the demand made by the auditor. The auditor in attachment was the representative of Otto G. Horster, duly appointed and authorized by the Supreme Court under the attachment act to receive any and all debts due and owing to Otto G. Horster up to the amount of the judgment in attachment.

When the check was certified and held with the consent of Mr. Horster and the consent of the other creditors, the assignees, such certification and holding was with the intent to transfer the fund on deposit in the bank to the credit of Mr. Horster in payment of the dividend on his stock, and the effect of such act was to create the relation of debtor and creditor between the bank and Mr. Horster. The bank by virtue of the certification under the given circumstances became a garnishee of Mr. Horster, and when the auditor made demand on the bank for payment and presented the check, such act amounted to an impounding of the debt for the benefit of the attachment judgment creditors.

The Act concerning certified checks, P. L. 1925, p. 333, provides:

“1. No bank or trust company shall stop payment of any check certified by such bank or trust company at the request of the drawer; and the certification of any check at the request of the drawer shall be of the same effect as if said check had been certified at the request of the holder thereof.

“2. This act shall take effect immediately. Approved March 13, 1925.”

The attachment act gives the auditor specific power to impound any evidence of indebtedness to the defendant which he can find and to collect

the debt or bring suit thereon. The delivery of the check to the auditor placed a lien on the chose in action against the bank.

Likewise the claim to the equitable interest of Otto G. Horster in the collection of postage stamps by the attaching creditor must be recognized as prior because the levy was made, the judgment entered and proceedings were under way for the sale of the stamps and the payment of the attachment creditors before any notice of the assignment was received by Fidelity Union Trust Company. If the notice had come a few days later, the transaction would have been completed and the attachment creditors would have received the money and in such case it could not be contended that the assignees would have had any right against the bank or the specific fund.

## POINT VI.

### **The attachment creditors have prior rights in the property involved.**

The attachment judgment creditors, who are respondents, claim a valid and subsisting first lien on the real estate, on the \$10,000 certified check, and the proceeds thereof, and on the fund of \$5,829.42 held by the Fidelity Union Trust Company, to the extent of their judgments entered in the Supreme Court. They also claim that in the event the judgment cannot be satisfied in full from these specific items of property, the judgment is a lien on all other property of the judgment debtor which has been discovered and brought into this proceeding, particular reference being made to the ten shares of stock in the Stuyvesant Development Company.

The deed was a part of the general assignment made on December 22, 1925, and this conveyance

placed the real estate in the corpus of the estate of Otto G. Horster for the benefit of him or his creditors. This deed is void in toto as to the attachment creditors and also as to Mrs. Horster. The attachment of this real estate in the hands of the trustees, and of the check and stamps in the hands of the garnishees is a proper proceeding for relief of other creditors.

### POINT VII.

**It was lawful and proper for the Vice-Chancellor to appoint a receiver to liquidate the assets in dispute and make distribution to the creditors.**

There is urgent need for a receiver to preserve the interest of all parties who may be decreed to have any interest in the distribution. Someone had to be appointed to endorse and cash the \$10,000.00 check then in the hands of the clerk of the Court of Chancery. The real estate must be sold. The interest of all creditors must be represented in the person chosen to hold and dispose of the ten shares of the stock of Stuyvesant Development Company. There are other evidences of indebtedness or choses in action held by Horster, and mentioned in his testimony which should be collected if possible. A promissory note and book accounts are mentioned. There should be an investigation on behalf of all the creditors to discover further assets of Horster. It has been two years since the assignments were made and there is no evidence of any step on the part of the assignees to do any of these things. On the contrary it is clear from the testimony that the assignees were mere figureheads having no control whatever of the property named in the assignments, but that the shares of stock were in

the possession and under the control of Howard F. Kirk, attorney for Union Cemetery Association, and the balance of the property particularly the real estate and choses in action were in the possession and under the control of Otto A. Stiefel, attorney of two of the creditors. Mr. Stiefel says that he has personally collected the rents for the past two years on the real estate, but he has not informed the Court what the proceeds from rent amount to. When the Court entered a restraining order *pendente lite* Mr. Stiefel made particular request and had it recited in the order that he personally as attorney for Mary Ulicsnik and George T. Rockwell might continue to manage the real estate and to bring suit on the choses in action, but he has not informed the Court what he has done and what assets he has in hand as a result of this privilege. It would be clearly improper to permit these attorneys, both of whom represent special interests, to continue to control and eventually attend to the liquidation of these assets. It would be unfair to the other creditors regardless of priorities.

Injunction and appointment of a receiver is a usual form of relief on a creditors bill such as the counterclaim in this case. It has been a frequent form of equitable relief granted regardless of the statute on general equitable grounds and under special statutes in this state since 1845.

The case of *Fuller vs. Taylor*, 9 N. J. E. 301, shows an early instance where such relief was granted.

In 1857 the Court of Errors and Appeals reversed a decision of the Chancellor who denied such relief. *Long Dock Company v. Mallery*, 12 N. J. E. 431. Reading from pages 444-448 of the opinion in that case, we find a dispute as to priority between a chattel mortgagee and attaching creditors much similar to the controversy now before the Court.

In the case of *Whitney v. Robbins*, 17 N. J. E. 360, the opinion of this Court at page 364 lays down the law on the question here involved as follows:

“The relief provided for by these acts is, the discovery of property, preventing its payment to the defendant or transfer to a stranger, having a receiver to collect and sell it, to whom the court can compel the defendant to convey it, and the application of it to pay the debt of the complainant.”

“The appointment of a receiver must depend upon the fact whether any chose in action or property, held in trust for the debtor, has been discovered by the answers, examination, or evidence. This is clearly the intention of the act.”

A statute similar to the law of 1845 is now in force, providing the relief of injunction and receiver. (1 Compiled Statutes, pages 435-437.) These statutes are declaratory of the law which was already in force in courts of equity in England. See also *Harned v. Rowland*, 74 N. J. E. 264.

In *Clark on The Law of Receivers*, one of the leading authorities, section 87 and following, we find the following statements as to grounds for appointment of a receiver:

“Courts of Equity will, under creditors' bills and other proper equitable proceedings take hold of equitable interests in property, administer the property and apply such equitable interests in property to the payment of the plaintiff's claim. In order to do this, a receiver will be frequently appointed to act as an officer of the court in transferring these equitable interests to the claimant or in selling the equitable interest, and under orders of the court, paying over the proceeds to the plaintiff and others.”

“A Court with Chancery powers aids judgment creditors in collecting the judgment when it cannot be collected by issuing ordinary execution and other legal methods and by appointing a receiver of the property of the judgment debtor or his interest in the property.”

“A receiver may be appointed by a Court of Equity to receive the property of a judgment debtor and apply it to the plaintiff's claim after plaintiff's remedies at law have failed.”

The attaching creditors have an equitable interest in all the property involved in this litigation regardless of whether or not that interest shall be declared to be prior to that of the assignees. It therefore becomes the duty of the Court to preserve the property and see that it is properly administered, and the Vice-Chancellor's action in this respect was entirely proper.

## CONCLUSION.

**For the reasons urged in the foregoing argument, the decree of the Court of Chancery should be affirmed, with counsel fees and costs.**

Respectfully submitted,

ARTHUR T. VANDERBILT,  
Solicitor for and of Counsel  
with Defendants-Respondents,  
Ellen Minchin and Mary E. Riley.

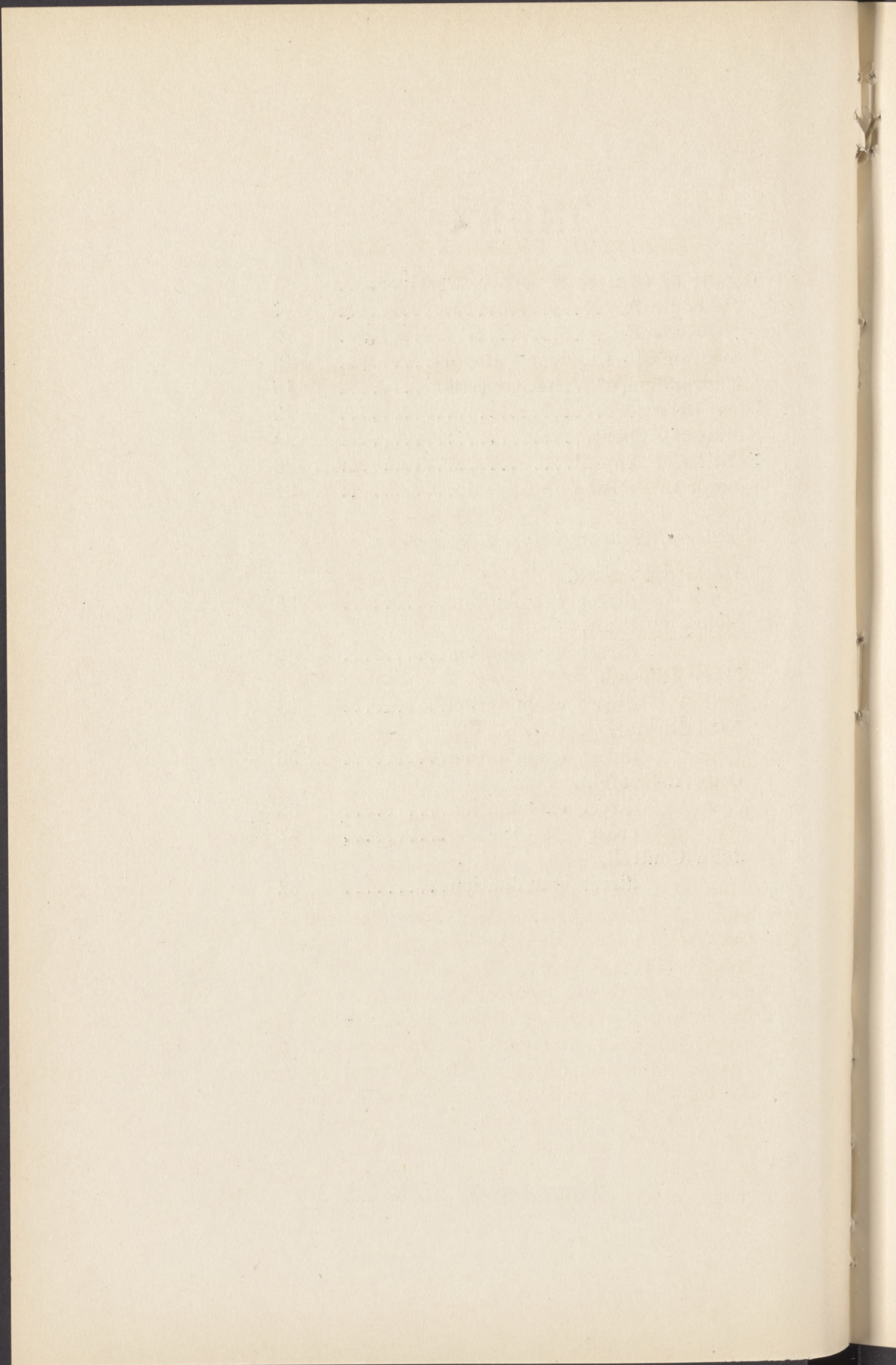
THE UNIVERSITY OF CHICAGO

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REPORT OF CHARLES F. LYNCH,  
RECEIVER.

Filed March 12th, 1929.

In Chancery of New Jersey

62/696.

10

MARY ULICSNIK, et als., Complainants,  vs.  CHARLES E. DALRYMPLE, et als., Defendants.	}	<i>On Bill, &amp;c. Report of Charles F. Lynch, Receiver.</i>
--	---	---

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey. 20

1. By an interlocutory decree entered in the above entitled cause on the 1st day of February, 1928, the subscriber was appointed receiver of the rights and credits, moneys and effects, goods and chattels and real estate named and described in said decree which comprised the estate of Otto G. Horster. A bond in the sum of \$15,000 was duly filed after having been approved by the Hon. Francis Child, one of the Special Masters of this court. By said decree I was directed to secure possession and custody of the property of Otto G. Horster, collect the income therefrom, and generally to preserve the assets and reduce them all to cash and report the amount available for distribution. The decree further provided that I, as receiver, inquire into the amount, validity, and priority of the claims of the complainants and defendants to said assets and to report thereon. 30 40

*Report of Charles F. Lynch, Receiver.*

2. The assets of the estate as set forth in the said decree were collected as expeditiously as possible; the check for \$10,000 in the hands of the Clerk of this Court was obtained, as well as the proceeds of the sale of the stamp collection placed with the Fidelity Union Trust Company, Newark, New Jersey, as collateral security for a loan, amounting to \$5,937.60.

After an investigation I ascertained that Fred G. Stickel, Jr., Esq., had in his possession a sum of money due to Otto G. Horster as a result of the sale of sixteen First Mortgage 6% bonds of the Union Cemetery Association, Nos. 1158-1173 inclusive, for \$500.00 each, to the First National Bank of Hoboken, for \$2,000.00. From the latter amount Judge Stickel deducted \$471.50 due his client, one Healey and the balance \$1,528.50 was turned over to me. The sum of \$1,066.00 was received from Otto A. Stiefel, Esq., which sum represents the collection of the rents of the premises, 158 Steuben street, East Orange, New Jersey, by him on behalf of the trustees during the period of January, 1926, to January, 1928.

3. I also have in my possession certificates Numbers 3 and 6 for three and seven shares respectively of the capital stock of the Stuyvesant Development Company in the name of Otto G. Horster, which were assigned by him on December 16, 1925, to Louis Kempf.

I also have in my possession the \$35,000 note executed by Otto G. Horster dated December 15, 1925, payable on demand, to the order of Louis Kempf, which was marked in evidence at the trial.

*Report of Charles F. Lynch, Receiver.*

In addition I have in my possession two \$1,000 notes dated October 20, 1922, and January 22, 1923, signed by George T. Vickers, payable to the order of Otto G. Horster. Suit has been instituted upon the two notes last mentioned, in the Supreme Court of this State for the recovery of the amount due thereon. This action is still pending, having not as yet been reached on the list of causes for trial. 10

4. The only real property which I have been able to locate is that mentioned in the interlocutory decree referred to above, located at 158 Steuben street in the City of East Orange, County of Essex and State of New Jersey. These premises were, prior to the assignment to the Messrs. Rockwell, Kneip, etc., as Trustees, by Otto G. Horster and Helen C. Horster, his wife, in the name of Otto G. Horster and Helen C. Horster, his wife, as tenants by the entirety. The interlocutory decree hereinbefore referred to having set aside the transfer by the latter to the Trustees places the title to the premises in its former status. This property consists of a two-family frame house, the second floor being occupied by Otto G. Horster and the first floor having been rented to various individuals. I have, from the date of my appointment as receiver, collected the rent from the first floor of the premises excepting, of course, when it was vacant, and have caused to be made the necessary repairs and have paid the taxes thereon, as is more particularly set forth in the itemized list of disbursements. The premises were sold in May, 1926, for unpaid taxes of 1925, to the Harrington Company. In order to prevent the latter from perfecting its lien it was necessary for me to redeem the premises from the Harring- 20 30 40

*Report of Charles F. Lynch, Receiver.*

ton Company by the payment of the amount due, which I did, taking from them an assignment of the tax sale certificate.

10 5. Annexed hereto and made a part hereof is Schedule "A" which sets forth in itemized form the receipts and disbursements made by me to date as receiver. I have on hand at the present time a cash balance of \$17,956.17.

20 6. For the information of the Court and for purpose of record, I desire to state that this receivership is closely connected with the case of the Fidelity Union Trust Company, Trustee, vs. Union Cemetery Association, Docket Number 61/142, in this court. This is by reason of the fact that Otto G. Horster held ten shares of stock of the Stuyvesant Development Company (now in my possession) which in turn controlled the Union Cemetery Association. I was appointed as Special Master by Vice Chancellor Backes in the Cemetery case and have filed my report. I have been informed by Vice Chancellor Backes that a settlement of the case is now pending. A settlement in that case of the rights of the Stuyvesant Development Company will, in my opinion, yield a substantial amount as the share of Otto G. Horster which will, in turn, be available for distribution to his creditors.

30 7. I have conducted a number of hearings both in my office and at the home of Otto G. Horster, in an endeavor to obtain information and discover other assets of his estate, but have not been able to ascertain any information disclosing other assets.

40 Income is being derived from the rental of the first floor of the premises No. 158 Steuben

*Report of Charles F. Lynch, Receiver.*

street hereinbefore referred to, and funds will, in my opinion, be received as a result of the settlement referred to in Paragraph No. 6, and the suit now pending in the Supreme Court of this State against George T. Vickers for the recovery of \$2,000, the amount of the two promissory notes referred to in Paragraph No. 3. 10

8. I have also inquired into the amount, validity, and priority of the claims of the parties to this action and Schedule "B," annexed hereto and made a part hereof sets forth those which in my opinion are valid claims against the estate of Otto G. Horster. The claims have been numbered for the sake of clarity.

9. With regard to priority, I find and report that Claim No. 1 of Ellen Minchen for \$5,583.48 has priority over and above all the claims inasmuch as she is the creditor who instituted the attachment suit and has obtained final judgment. Claims Nos. 2 and 3 of Margaret McLaughlin and Mary E. Reilly, which have been reduced to judgments, they having been applying creditors in the attachment suit instituted by Ellen Minchen, are second and subsequent to the claim of Ellen Minchen, and share pro rata. Claims Nos. 4 to 9, inclusive, not having been reduced to a judgment, share pro rata in the proceeds of the estate after Claims Nos. 1, 2 and 3 have been fully paid. 20 30

10. Interest has been figured on the above claims up to March 15, 1929, and any adjustment or payment of claims would have to include the interest from March 15th, 1929, to the date the claim is paid. 40

*Report of Charles F. Lynch, Receiver.*

11. A claim has been filed by Charles E. Dalrymple who was appointed auditor in the attachment suit instituted by Ellen Minchen, for services rendered by him. His affidavit states that he spent a total of one hundred three hours and requests an allowance of \$1,000, plus disbursements of \$52,00.

A claim has also been filed by Fred G. Stickel, Jr., Esq., for \$150.00 for services rendered by him in attempting to determine which one of the conflicting claimants was entitled to the sum of \$1,528.50 which he held from the sale of the sixteen \$500 First Mortgage bonds of the Union Cemetery Association deposited with him by Otto G. Horster to cover the latter's indebtedness to a client of Mr. Stickel's.

20 These claims of Charles E. Dalrymple and Fred G. Stickel, Jr., are entitled to priority over the other claimants but the receiver respectfully submits to this honorable Court what amounts should be fixed or determined as proper to be paid thereon.

Respectfully submitted this 12th day of March,  
A. D., 1929.

30 CHARLES F. LYNCH,  
Receiver.

*Report of Charles F. Lynch, Receiver.*

SCHEDULE "A."

1928		RECEIPTS	
Feb. 27	Certified check from Clerk in Chancery which was deposited with him by order of this Court.....	\$10,000.00	
Feb. 29	Proceeds from sale of stamp collection placed with the Fidelity Union Trust Company as collateral for loan to Otto G. Horster....	5,937.60	10
April 28	Interest .....	28.51	
May 28	Interest .....	21.42	
June 15	Balance due Horster from bonds sold by Fred G. Stickel, Jr., Esq., after deducting amount due latter's client .....	1,528.50	
June 18	Collection of rents by Otto A. Stiefel, Esq., for premises 158 Steuben Street, East Orange, N. J. ....	1,066.00	
June 30	Interest .....	19.89	
July 16	Rent for month of July.....	45.00	
July 26	Interest .....	24.88	20
Aug. 24	Rent for month of August.....	45.00	
Aug. 31	Interest .....	24.66	
Sept. 13	Rent for month of September.....	45.00	
Sept. 24	Interest .....	24.11	
Oct. 8	Rent for month of October.....	45.00	
Nov. 1	Interest .....	24.22	
Dec. 1	Interest .....	24.22	
Dec. 28	Interest .....	24.44	
1929			
Jan. 31	Interest .....	24.44	
Feb. 28	Interest .....	24.33	
Total Receipts .....		\$18,977.22	30

1928		DISBURSEMENTS	
Mar. 1	U. S. Fidelity & Guaranty Co., premium on Receiver's bond.....	\$ 75.00	
Mar. 2	Francis Child, Esq., approving Receiver's bond .....	5.00	
June 4	T. C. Bergen, stenographic services, examination of Mrs. Helen C. Horster and William Wentz.....	36.60	
June 18	Receiver of Taxes, East Orange, tax search, 158 Steuben Street, East Orange, N. J. ....	2.00	
June 18	Photo Process Copy Co., copies of Vickers notes .....	.50	40

*Report of Charles F. Lynch, Receiver.*

	June 27	Harrington Company, assignment of 1925 tax certificate, 158 Steuben Street, East Orange, property.....	126.47
	July 2	Frederick C. Vonhof, disbursements, subpoena fees, carfare, etc.	5.64
	July 13	T. C. Bergen, stenographic services, examination of Otto G. Horster at his home, 158 Steuben Street, East Orange, N. J.....	15.62
10	July 17	W. A. Clapp, Collector of Taxes, payment of 1926 taxes, 158 Steuben Street, East Orange, N. J.....	177.65
	July 18	Otto A. Stiefel, Esq., fire insurance premium, 158 Steuben Street, East Orange, N. J.....	7.00
	Aug. 10	W. A. Clapp, Collector of Taxes, for cancellation of tax certificate	.50
	Aug. 16	W. A. Clapp, Collector of Taxes, for payment of 1927 and 1928 taxes and assignment, 158 Steuben Street, East Orange, N. J.....	430.69
20	Aug. 29	Sheriff, Hudson County, service of summons and complaint, Lynch vs. Vickers .....	3.78
	Aug. 29	Clerk of Supreme Court, filing summons and complaint, Lynch vs. Vickers .....	5.00
	Aug. 29	Charles F. Vonhof, fire insurance premium, 158 Steuben Street, East Orange, New Jersey.....	10.50
	Jan. 14	Charles F. Vonhof, fire insurance premium, 158 Steuben Street, East Orange, N. J.....	17.50
30	Jan. 25	W. Robert Price, stenographic services, hearing of July 12, 1929..	26.60
	Feb. 1	U. S. Fidelity & Guaranty Co., premium (renewal) on receiver's bond .....	75.00
		Total Disbursements .....	\$ 1,021.05
		Total Receipts .....	\$18,977.22
		Total Disbursements .....	1,021.05
		Cash Balance on Hand.....	\$17,956.17

*Report of Charles F. Lynch, Receiver.*

## SCHEDULE "B."

## CLAIM No. 1—ELLEN MINCHIN

Judgment entered November 3, 1926, against  
Otto G. Horster

Damages .....	\$4,692.50
Costs .....	214.36

Total .....	\$4,906.86
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Interest thereon from November 3, 1926 to March 15, 1929.....	676.62
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	<u>5,583.48</u>
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## CLAIM No. 2—MARY E. REILLY

Judgment entered November 3, 1926, against  
Otto G. Horster

Damages .....	\$9,745.22
Costs .....	9.10

Total .....	\$9,754.32
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Interest thereon from November 3, 1926, to March 15, 1929.....	1,385.10
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	<u>11,139.42</u>
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## CLAIM No. 3—MARGARET McLAUGHLIN

Judgment entered November 3, 1926, against  
Otto G. Horster

Damages .....	\$3,055.00
Costs .....	9.10

Total .....	\$3,064.10
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Interest thereon from November 3, 1926, to March 15, 1929.....	3,499.18
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	<u>7,563.28</u>
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## CLAIM No. 4—UNION CEMETERY ASSOCIATION

Funds entrusted to Otto G. Horster to be  
placed on bond and mortgages, viz.:

Claridge Construction Co. mort- gage .....	\$5,500.00
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Interest thereon from October 30, 1925, to March 15, 1929.....	1,113.75
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	<u>\$6,613.75</u>
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Sieber mortgage .....	\$3,000.00
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Interest thereon from May 29, 1925, to March 15, 1929.....	683.00
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	<u>3,683.00</u>
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*Report of Charles F. Lynch, Receiver.*

Anna O'Connell mortgage .....	\$2,500.00	
Interest thereon from Oct. 24, 1925, to March 15, 1929.....	508.75	
	<u>          </u>	3,008.75
Margaret Farrell mortgage.....	\$1,500.00	
Interest thereon from Dec. 1, 1925, to March 15, 1929.....	296.25	
	<u>          </u>	1,796.25
Gabriel Iannone mortgage.....	\$6,000.00	
Interest thereon from March 12, 1925, to March 15, 1929.....	1,443.00	
	<u>          </u>	7,443.00
Lewis mortgage .....	\$4,000.00	
Interest thereon from April 3, 1925, to March 15, 1929.....	948.00	
	<u>          </u>	4,948.00
Grand Total .....		27,492.75
CLAIM No. 5—HERMAN F. NAGEL		
Funds entrusted to Otto G. Horster to be placed on bond and mortgage, balance due....	\$ 500.00	
Interest thereon from December 22, 1925, to March 15, 1929.....	96.08	
	<u>          </u>	596.08
CLAIM No. 6—GEORGE T. ROCKWELL		
Funds entrusted to Otto G. Horster to be placed on bond and mortgage, viz.:		
Schnaphagen mortgage .....	\$5,000.00	
Interest thereon from March 1, 1925, to March 15, 1929.....	1,212.50	
	<u>          </u>	\$6,212.50
Trube mortgage .....	\$5,000.00	
Interest thereon from February 15, 1925, to March 15, 1929.....	1,225.00	
	<u>          </u>	6,225.00
Grand Total .....		12,437.50
CLAIM No. 7—MARY ULICSNIK		
Funds entrusted to Otto G. Horster to be placed on bond and mortgage, viz.:		
Henry C. Pfaff mortgage.....	\$3,500.00	
Interest thereon from Sept. 28, 1925, to March 15, 1929.....	727.42	
	<u>          </u>	4,227.42
Fredericka Sieber mortgage.....	\$3,500.00	
Interest thereon from Nov. 15, 1925, to March 15, 1929.....	700.00	
	<u>          </u>	4,200.00

*Report of Charles F. Lynch, Receiver.*

Henry Post mortgage.....	\$2,500.00	
Interest thereon from Nov. 20, 1925, to March 15, 1929.....	497.92	
	<u>2,997.92</u>	
Grand Total .....		11,425.34
CLAIM No. 8—KARL REISTER		
Funds entrusted to Otto G. Horster to be placed on bond and mortgages, viz.:		
Henry C. Pfaff mortgage.....	\$3,500.00	
Interest thereon from Sept. 1, 1925, to March 15, 1929.....	743.75	
	<u>\$4,243.75</u>	
Elmer E. Wade mortgage.....	\$2,500.00	
Interest thereon from June 26, 1925, to March 15, 1929.....	557.91	
	<u>3,057.91</u>	
Fredericka Sieber mortgage.....	\$3,000.00	
Interest thereon from Sept. 1, 1925, to March 15, 1929.....	637.50	
	<u>3,637.50</u>	
Grand Total .....		10,939.16
CLAIM No. 9—ESTATE OF KARL KNIEP		
Funds entrusted to Otto G. Horster to be placed on bond and mortgages, viz.:		
Bilt-Wel Co., Inc., mortgage.....	\$6,000.00	
Interest thereon from Dec. 15, 1925, to March 15, 1929.....	1,170.00	
	<u>\$7,170.00</u>	
Anna T. Lewis mortgage.....	\$3,000.00	
Interest thereon from October 1, 1925, to March 15, 1929.....	622.50	
	<u>3,622.50</u>	
Grand Total .....		10,792.50
TOTAL CLAIMS .....		<u>\$93,905.41</u>

**EXCEPTIONS TO RECEIVER'S REPORT.**

Filed April 2, 1929.

IN CHANCERY OF NEW JERSEY.

62/696

10

*Between*MARY ULICSNIK, and others,  
*Complainants,**and*CHARLES E. DALRYMPLE, and  
others,*Defendants.**On Bill,  
Exceptions  
To  
Receiver's  
Report.*

20

Exceptions taken by complainants and by the defendants, Clara Sieder, Martha Shaw, Minna Dover, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep, Ludwig Lauerhaus to the report of Charles F. Lynch, Receiver of the rights and credits, moneys and effects, goods and chattels and real estate mentioned in the Interlocutory Decree in the above entitled cause.

30

1. For that said Receiver reported (page 3 of his report) that the title to the premises located at 158 Steuben street in the City of East Orange is placed by said interlocutory decree in the "its former status," namely the status before the conveyance of said premises unto the trustees Ulicsnik, Rockwell and Kniep, mentioned in said report; whereas said Receiver should have reported that the conveyance by Helen Horster unto said Trustees was a good and valid conveyance.

40

*Exceptions to Receiver's Report.*

2. For that the Receiver reported that the claim of Ellen Minchin for \$5,583.48 "has priority over and above all the claims"; whereas such claim is subordinate to and after the claims of complainants and the defendants who have joined in these exceptions; and the Receiver should have reported to that effect.

10

3. For that the Receiver reported that the claims of Margaret McLaughlin and Mary E. Riley are prior to the claims of complainants and the defendants who have joined in these exceptions; whereas such claims are subordinate to and after the claims of complainants and the defendants who have joined in these exceptions; and the Receiver should have reported to that effect.

4. For that the Receiver reported that the claim of Charles M. Dalrymple is entitled to priority over the claims of complainants and the defendants who have joined in these exceptions; whereas such claims have no priority over the claims of complainants and the defendant-exceptants; and the Receiver should have reported to that effect.

20

5. For that the Receiver in his report has not shown or reported upon what proofs are based those portions of his report against which exceptions 1, 2, 3, 4, above are directed.

30

6. For that by the relevant, competent and material proofs offered and given by these complainants it was proved that the claims of the complainants and the defendant-exceptants, are in law and equity and in fact prior to the claims of Ellen Minchin, Margaret McLaughlin Mary E. Riley; and the Receiver should have reported accordingly.

40

*Exceptions to Receiver's Report.*

7. For that by such proofs it was proved that the stock certificates of Stuyvesant Development Co., mentioned in the Receiver's report were delivered by Otto G. Horster unto Howard Kirk as security for the payment of the indebtedness of said Otto G. Horster unto Union Cemetery Association, which indebtedness is described as "Claim No. 4" in said report; that from a time long before the issuance of the attachment sued out by Ellen Minchin until the delivery of said certificates unto the Receiver by said Howard Kirk, the latter on behalf of and as agent for Union Cemetery Association held said certificates on its behalf as security as aforesaid; that no seizure of or levy upon said certificates or the shares of stock represented thereby, was ever made; that said Howard Kirk as agent for the Union Cemetery Association and said Association, through said Howard Kirk, without any knowledge of any fraud on the part of the said Otto G. Horster and without any taint of fraud attributable to said Association or said Howard F. Kirk, held said certificates and said shares of stock in good faith as security as aforesaid, and that said Association is entitled to be paid out of the proceeds of sale of said certificates and the stock represented thereby and out of the increase or issue therefrom, whether by way of dividends or otherwise, first and prior to Ellen Minchin, Mary E. Riley and Margaret McLaughlin and their respective claims and all of them.

8. For that the Receiver should have reported that the attachment sued out by Ellen Minchin was ineffective as against the stock certificates aforesaid, and that the said Mary E. Riley, Mar-

*Exceptions to Receiver's Report.*

garet McLaughlin and Ellen Minchin have no right title or interest therein.

9 For that the Receiver should have reported that by reason of the absence of a levy upon said certificates and/or said stock, or a seizure or taking of the same under or by virtue of the attachment aforesaid; coupled with the fact Mary E. Riley, Margaret McLaughlin and Ellen Minchin stood by and delayed until the filing of the answer and counter claim of Ellen Minchin and Mary E. Riley, to assert any right or claim to said certificate and/or said stock, they and each of them are in this court not entitled to any priority over these exceptants or any of them; and that the claims of said Ellen Minchin, Mary E. Riley and Margaret McLaughlin are subordinate to and after the claims of these exceptants.

10. For that the Receiver should have reported that the claims of Ellen Minchin, Mary E. Riley and Margaret McLaughlin to the proceeds of the check of \$10,000 or any part thereof are subject to the prior rights of these exceptants (or Union Cemetery Association) thereto.

11. For that the Receiver should have reported that Charles E. Dalrymple and Margaret McLaughlin having filed no counterclaim in this suit, are not entitled to any affirmative relief as against these exceptants.

12. For that the Receiver should have reported that under the proofs no fraud or fraudulent intent of Otto G. Horster affected or can affect the claims of these exceptants or any of them.

*Exceptions to Receiver's Report.*

13. For that the Receiver should have reported that the complainants and Karl Kneip respectively took under the assignments, transfers and conveyances made to Union Cemetery Association and the "Trustees" aforesaid in good faith and for value, as security for their respective claims against Otto G. Horster and the proved indebtedness of him to them, respectively, and by reason thereof are entitled to priority in respect to the avails in the hands of the Receiver.

14. For that the Receiver should have reported that the Trustees aforesaid were fraudulently led by Otto G. Horster to believe that they and those creditors for whom they were acting were the remaining unsecured creditors of said Otto G. Horster, at the time of the assignment, transfers and conveyance by said Otto G. Horster; that by reason thereof said Trustees and those for whom they were acting are exonerated and not to be prejudiced by reason of the fact that said Otto G. Horster fraudulently concealed his indebtedness to Ellen Minchin, Margaret McLaughlin and Mary E. Riley, or by reason of any fraudulent intent or act of Otto G. Horster of which they had no knowledge or notice.

15. For that the report of the Receiver, if sustained insofar as it reports that the claims of Mary E. Riley, Ellen Minchin, Margaret McLaughlin and Charles E. Dalrymple are prior to the claims of these exceptants, would deprive these exceptants of their property without due process of law in violation of the provision of the Constitution of the United States; furthermore, such report, if sustained insofar as above

*Exceptions to Receiver's Report.*

indicated, would result in a denial to these exceptants of the equal protection of the laws guaranteed by such Constitution.

OTTO A. STIEFEL,  
Solicitor of Exceptants.

OTTO A. STIEFEL,           10  
of Counsel.

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**FINAL DECREE.**

Filed June 19, 1929.

IN CHANCERY OF NEW JERSEY.

DOCKET No. 62-696.

*Between*MARY ULICSNIK, et als.,  
*Complainants,**and*CHARLES E. DALRYMPLE, et  
als.,*Defendants.**On Bill, &c.**Final Decree.*

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It appearing to the court that on February 1, 1928, an interlocutory decree was entered in this cause wherein and whereby Charles F. Lynch was appointed receiver of the rights and credits, moneys and effects, goods and chattels and real estate described in or comprehended by certain sales, assignments, transfers and deed made by Otto G. Horster, which sales, assignments, transfers and deed were adjudged to be fraudulent and void;

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And it further appearing that said receiver was, by said interlocutory decree, directed to inquire into the amount, validity and priority of the claims of the complainants and the defendants in and to the said assets and to report thereon to this court;

And it further appearing that the said receiver has, by his report dated March 12, 1929, reported the total assets which have come into

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*Final Decree.*

his hands and the total expenditures which he has made in connection with his administration thereof, which report shows a balance of assets remaining in the hands of the receiver as follows:

- 10 1. Cash balance on hand..... \$17,956.17
2. Certificates Nos. 3 and 6 for three and seven shares respectively, of the capital stock of the Stuyvesant Development Co. standing in the name of Otto G. Horster.
- 20 3. Two \$1,000 promissory notes dated October 20, 1922, and January 22, 1923, respectively, signed by George T. Vickers and payable to the order of Otto G. Horster, on which notes suits have been started.
- 30 4. A certain interest in the real estate located at 158 Steuben street, East Orange, New Jersey, being all the right, title and interest formerly held by the defendant, Otto G. Horster, in and to said land and premises as tenant by the entirety with his wife, Helen G. Horster.

And it further appearing from said receiver's report that a substantial time may be required for the reduction to cash of the real and personal estate now in his hands;

And it further appearing from said receiver's report that the claim of the defendant, Ellen Minchin, for \$5,583.48 has priority over and above all other claims in this suit, and that

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*Final Decree.*

the claims of Mary E. Riley and Margaret McLaughlin for the respective sums of \$11,139.42 and \$3,499.18 are second and subsequent to the claim of Ellen Minchin, and prior to all other claims in this suit, and that neither of these two claims are prior to the other but that they should share pro rata in any proceeds to be distributed; 10

And it further appearing from the said receiver's report that the balance of the claims should share in any dividend or distribution subsequent to the payment of the first three claims aforesaid, and that their shares as among themselves should be pro rata and that their properly proved claims are as follows:

Union Cemetery Association .....	\$27,492.75	20
Herman F. Nagel .....	596.08	
George T. Rockwell .....	12,437.50	
Mary Ulicsnik .....	11,425.34	
Karl Reister .....	10,939.16	
Estate of Karl Kneip .....	10,792.50	

And it further appearing that due notice has been given of application for entry of this decree;

It is, on this 19th day of June, 1929, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the aforesaid receiver's report be and the same hereby is in all things ratified and confirmed. 30

It is further ORDERED, ADJUDGED and DECREED that the receiver shall make disbursements from the cash now in his hands in the following order of priority:

*Final Decree.*

1. A receiver's fee of \$1,000 which is hereby allowed to Charles F. Lynch, receiver as aforesaid, for his services in this matter up to the time of the filing of his said report.

10 2. A fee of \$600 which is hereby allowed to Charles E. Dalrymple for his services as auditor in the attachment suit of Ellen Minchin against Otto G. Horster in the New Jersey Supreme Court.

20 3. A counsel fee of \$1,000 which is hereby allowed to Arthur T. Vanderbilt, solicitor of the defendants, Ellen Minchin and Mary E. Riley, for his services as such solicitor and counsel in the proceeding in this court in addition to his lawful disbursements made in that behalf in the sum of \$116.00.

4. To the defendant, Ellen Minchin, her claim of \$5,583.48 together with her taxed costs in this proceeding and on the appeal to the Court of Errors and Appeals from the interlocutory decree in this proceeding.

30 5. Such pro rata dividend on account of the claims of the defendants, Mary E. Riley and Margaret McLaughlin, as shall, in the judgment of said receiver, be advisable at this time, reserving such part of the cash balance in his hands as he may deem necessary for the expense of the proceedings to be taken for the liquidation of the remaining assets now in his hands as such receiver.

40 It is further ORDERED, ADJUDGED and DECREED that the receiver continue with the liquidation of the assets remaining in his hands with all reasonable speed and when he has reduced the entire remainder to cash to make his final

*Final Decree.*

report thereon to this court, and it is further ordered that the account of the receiver be referred to John P. Manning, Esq., Special Master to audit same and report to this court on or before June 25, 1929.

EDWIN ROBERT WALKER,

C.

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Respectfully advised,

ALONZO CHURCH,

V. C.

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## NOTICE OF APPEAL.

Filed January 21, 1930.

IN CHANCERY OF NEW JERSEY.

62/696.

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*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 to the Court of Errors and Appeals in the last resort in all causes from so much of the final decree made in this court in the above stated cause (advised by Hon. Alonzo Church, one of the Vice Chancellors, which decree bears date June 19, 1929) as orders, adjudges and decrees that the report of Charles F. Lynch as receiver mentioned in said decree "be and the same hereby is in all things ratified and confirmed;" as well as from so much of said decree as orders, adjudges and decrees that said receiver shall make disbursements "from the cash now in his hands:" unto the defendant Ellen Minchin of her claim of \$5,583.48 "together with her taxed costs in this proceeding and on the appeal to the Court of Errors and Appeals from the interlocutory decree in this proceeding;" and "such pro rata dividend on account of the claims of the de-

*Notice of Appeal.*

fendants, Mary E. Riley and Margaret McLaughlin, as shall, in the judgment of said receiver, be advisable at this time;" and "a fee of \$600.00 which is hereby allowed to Charles E. Dalrymple for his services as auditor in the attachment suit of Ellen Minchin against Otto G. Horster in the New Jersey Supreme Court;" and "a 10  
 counsel fee of \$1,000 which is hereby allowed to Arthur T. Vanderbilt, solicitor of the defendants, Ellen Minchin and Mary E. Riley, for his services as such solicitor and counsel in the proceedings in this court in addition to his lawful disbursements made in that behalf in the sum of \$116.00."

January 7, 1930.

OTTO A. STIEFEL, 20  
 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 8, 1930.

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

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*Between*

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

*Complainants-Appellants,*

*and*

CHARLES E. DALRYMPLE, ELLEN  
MINCHIN, MARY E. RILEY, MAR-  
GARET McLAUGHLIN,

*Defendants-Respondents,*

*and*

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

*Defendants-Appellants.*

*On Bill.*

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

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30 *To the Honorable Court of Errors and Appeals  
in the last resort in all causes.*

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

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*Petition of Appeal.*

Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey (advised by Honorable Alonzo Church, one of the Vice Chancellors), bearing date of June 19th, 1929, in a certain cause wherein said Mary Ulicsnik, Union Cemetery Association, George T. Rockwell, Karl Riestter and Bertha, his wife, as well as Herman Nagel, are complainants, and said Charles E. Dalrymple, Ellen Minchin, Mary E. Riley, Margaret McLaughlin, Clara Sieder, Martha Shaw, Minna Dover, Reinhold Kniep, Louis Kniep, Anna Kraemer, Karl Kniep, Ludwig Lauerhaus, Louis Kempf and John Grabach, are and remain defendants; and petitioners find themselves thus aggrieved, in this respect, to wit:

That said decree orders, adjudges and decrees as follows:

First: that a certain report, in said decree mentioned, namely, the report of Charles F. Lynch, Esq. (who, in and by a previous order of the Chancellor, made in the above mentioned cause, had been appointed receiver of the rights and credits, moneys and effects, goods and chattels and real estate described in or comprehended by certain sales, assignments, transfers and deed made by one Otto G. Horster), "be and the same hereby is in all things ratified and confirmed."

Second: that said receiver shall make disbursements "from the cash now in his hands;" unto the defendant Ellen Minchin of her claim of \$5,583.48 "together with her taxed costs in this proceeding and on the appeal to the Court of Errors and Appeals from

*Petition of Appeal.*

the interlocutory decree in this proceeding;" and "such pro rata dividend on account of the claims of the defendants, Mary E. Riley and Margaret McLaughlin, as shall in the judgment of said receiver, be advisable at this time;" and "a fee of \$600.00 which is hereby allowed to Charles E. Dalrymple for his services as auditor in the attachment suit of Ellen Minchin against Otto G. Horster in the New Jersey Supreme Court;" and "a counsel fee of \$1,000 which is hereby allowed to Arthur T. Vanderbilt, solicitor of the defendants, Ellen Minchin and Mary E. Riley, for his services as such solicitor and counsel in the proceedings in this court in addition to his lawful disbursements made in that behalf in the sum of \$116.00."

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 report aforesaid "be and the same hereby is in all things ratified and confirmed," whereas said report should have been set aside and overruled and the exceptions filed to said report by your petitioners should have been, severally, each and every one of them sustained.

2. That said decree orders, adjudges and decrees that said receiver shall make disbursements "from the cash now in his hands," to wit: the disbursements above mentioned, whereas said decree should have ordered, adjudged and decreed that from the cash in the hands of said receiver there should be paid, first, unto Union

*Petition of Appeal.*

Cemetery Association, an amount equal to the proceeds of \$10,000.00, represented by a check in that sum paid to the Clerk of the Court of Chancery, theretofore, pursuant to an order of the Chancellor, made in that behalf; secondly, that from said cash in the hands of said receiver there should be paid the proceeds of \$1,066.00 (remitted to said receiver by Otto A. Stiefel, Esq., and representing moneys collected by him on behalf of certain of the appellants) unto George T. Rockwell and Mary Ulicsnik (for and on their own behalf and on behalf of certain other appellants); thirdly, that from said cash in the hands of said receiver there should be paid unto said George T. Rockwell and Mary Ulicsnik (for and on their own behalf and on behalf of certain other appellants) the proceeds of \$5,937.60 as well as the proceeds of \$1,528.50, which came into the hands of said receiver, and to which said George T. Rockwell and Mary Ulicsnik (for and on their own behalf and on behalf of certain other appellants) had a right prior to that of any of the respondents. And said decree should have ordered, adjudged and decreed that no payment of any part of said cash should be made to any of said respondents and/or their respective solicitors until full satisfaction of the claims of your petitioners should have been fully paid and satisfied.

3. That said decree gives priority to the claims of the respondents over and before the claims of appellants, whereas in equity and good conscience the claims of the appellants are prior, in equity and good conscience, to the claims of respondents; and said decree should have established and set forth such priority of the claims of appellants.

*Petition of Appeal.*

4. That the failure of said decree to adjudge such priority in favor of the appellants and its adjudication that the claims of the respondents were prior (in right to satisfaction) to the claims of appellants, is a deprivation, in respect to appellants, of their property without due  
 10 process of law, contrary to the provisions, in that behalf, of Article XIV in addition to and amendment of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property, without due process of law.

5. That the failure of said decree to adjudge such priority in favor of the appellants herein and its adjudication that the claims of the respondents herein, were prior (in right of satisfaction) to the claims of appellants, is a denial  
 20 to the appellants of the equal protection of the laws of this State, contrary to the provisions in that behalf, of Article XIV in addition to and amendment of the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the law.

Petitioners, therefore, pray that said decree of the Chancellor may be, in the particulars  
 30 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,  
 Solicitor for and of Counsel  
 with Appellants.

## ANSWER TO PETITION OF APPEAL.

Filed February 25, 1930.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

*Between*

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

*Complainants-Appellants,**and*

CHARLES E. DALRYMPLE, ELLEN MINCHIN, MARY E. RILEY, MARGARET McLAUGHLIN,

*Defendants-Respondents,**and*

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

*Defendants-Appellants.*

10

*On Bill.**On Appeal from Court in Chancery.**Answer to Petition of Appeal.*

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The answer of Charles E. Dalrymple, Ellen Minchin and Mary E. Riley, three of the above named respondents, to the petition of appeal of Mary Ulicsnik and others, says that:

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These respondents not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a certain decree was, on the 19th day of June, 1929, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes in said petition

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*Answer to Petition of Appeal.*

mentioned and as therein set forth; but as to the substance and form of said decree, these respondents beg leave to refer thereto when the same shall be produced.

10 These respondents are advised and believe that the said decree is agreeable to equity; and therefore pray that the same may be affirmed with costs to be taxed in favor of these respondents.

ARTHUR T. VANDERBILT,  
Solicitor for and of Counsel  
with Respondents, Charles E.  
Dalrymple, Ellen Minchin  
and Mary E. Riley.

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**MINUTES OF HEARING BEFORE  
RECEIVER.**

IN CHANCERY OF NEW JERSEY.

*Between*

MARY ULICSNIK, *et al.*

*and*

CHARLES E. DALRYMPLE, *et al.*

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January 12, 1929. 11:30 o'clock A. M.

Before Hon. Charles F. Lynch, Receiver.

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Appearances:

Otto A. Stiefel, Esq., for the Union Cemetery Association and Karl Reister and wife.

Hugo Woerner, Esq., for Knief Estate.

John Contrell, Esq., for George T. Rockwell.

Arthur T. Vanderbilt, Esq., by Reynold C. Massey, Esq., for Ellen Minchin, Mary E. Riley and Margaret McLaughlin and Charles E. Dalrymple, auditor.

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Mary Ulicsnik, present in person.

Herman F. Nagel, present in person.

The Receiver: As you understand, gentlemen, according to the notice sent out, we are here to file and prove claims. Before we proceed, perhaps it would be well to give the appearances of those who are here today.

(The appearances were then stated for the record.)

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*Minutes of Hearing Before Receiver.*

The Receiver: Are all persons recorded present or represented?

Well, we will proceed.

10 Mr. Stiefel: I think I have the papers all here, and pursuant to your instructions, Judge, I have brought with me the affidavits of Herman F. Nagel, George T. Rockwell, Olive V. Wetsell, secretary of the Union Cemetery Association, Mary Ulicsnik, Karl Riester, Minna Dover (one of the Kniep heirs), to establish the amounts due as of the dates of those affidavits. They are as follows: Kniep Estate, Karl Riester, Mary Ulicsnik, George T. Rockwell, Herman F. Nagel and the Union Cemetery Association. I ask that these be marked.

20 The Receiver: Yes; we will mark them for identification at least; so that the numbers will not get confused, we will start out and called them B. 1, B. 2, B. 3, B. 4, B. 5, B. 6.

These are the original affidavits made in 1927 and copied in the printed state of the case.

Do you know the particular pages on which they appear? Can't you offer the pages for the record?

30 Mr. Stiefel: Copied on pages 198 to 207, inclusive.

The Master: All right.

Does anybody desire to inspect these affidavits or object to them in any way, If not, they will be received in evidence, if you offer them in evidence.

Mr. Stiefel: I offer them in evidence.

I would like to call Mr. Kirk as a witness.

*Howard F. Kirk, direct.*

HOWARD F. KIRK, called as a witness on behalf of the complainant, being first duly sworn, testified as follows:

*Direct examination by Mr. Stiefel.*

Q Mr. Kirk, you are a practicing attorney and counsellor-at-law of the State of New Jersey? 10

A I am.

Q And in the fall of the year 1925, I believe it was, you represented the Union Cemetery Association in a transaction of that association with Otto G. Horster did you not? A I did.

Q In connection with that transaction did Mr. Horster deliver to you any shares of stock of the Stuyvesant Development Company? A He did.

Q Have you any memorandum to indicate what shares of stock were involved and were delivered to you? A I probably have. I delivered them later, in 1928, I believe, by order of the Court, to Mr. Lynch, or his office—the originals. 20

Mr. Stiefel: Then let me put on the record this: The shares of stock, or, rather, the certificates for the shares of stock that were delivered to you by Mr. Horster were the same certificates that afterwards you delivered to Judge Lynch in this particular cause? 30

The Witness: They were.

The Receiver: Your question was a little different, you asked the conditions under which he got them.

Mr. Stiefel: First I want to put them in his possession.

The Receiver: I understand, but I thought you asked the conditions under which 40

*Howard F. Kirk, direct.*

he got them from Mr. Horster. I am not sure, but that was the impression I got.

Mr. Stiefel: I will ask, Judge, now, that it may be noted on the record; have you those certificates in your possession as receiver?

10 The Receiver: Yes, the receiver admits that he has those certificates in his possession. You have not recited the number or the amount.

Mr. Stiefel: I have copies of the originals.

The Receiver: I have the originals, but so there will not be any confusion as to how many I have—

20 The Witness: Three shares of the original stock of the Stuyvesant Development Company; then, I believe there were seven shares, making ten shares.

The Receiver: The Receiver admits that he has a total of ten shares of the stock of the Stuyvesant Development Company.

30 Q From the time of the delivery of those ten shares of stock to you, until, pursuant to the order of Court, you delivered them to Judge Lynch in this cause, did those shares of stock ever leave your possession? A They did not.

Q Were you holding them on your own account or in behalf of some other person? A I was holding them for Louis Kempf, who held them as trustee for the Cemetery Association.

Q Were you the attorney of the Cemetery Association at that time? A At the time of the delivery?

40 Q At the time of the delivery of the shares to you? A No.

*Howard F. Kirk, direct.*

Q Had you been employed by the cemetery association? A I had been asked to look into the matter of the forgery of the mortgages, and later on, I was selected as counsel for the Cemetery Association.

Q When did you become counsel for the cemetery association? A I could not say exactly; shortly after. 10

Q Shortly after. Would you say, just a few weeks after? A Yes.

Q Mr. Kempf, did he have any personal interest in these shares of stock? A No.

Q Who was the beneficiary for whose benefit these shares of stock were given to you? A The cemetery.

Q The Union Cemetery Association. Now, tell us, briefly how it came about that those shares of stock were delivered to you? A By briefly, where do you want me to begin? 20

The Receiver: I beg your pardon?

The Witness: Where do you want me to begin on that; prior to the assignment.

Q Begin shortly prior to the assignment when you were called into the case. A Shortly prior to this assignment, I represented a man by the name of Henry C. Pfaff. It was brought to my attention that a mortgage with a signature of himself and his wife had been attempted to be put on the records in Essex County, and later on, I heard that it had come through Mr. Horster. Having found this out, I called Mr. Pfaff who was a client, and asked him if he was interested in any way whatsoever in any other matter that Mr. Horster was interested in, and he said, "Yes, in the Union Cemetery." I said, "What are their 30 40

*Howard F. Kirk, direct.*

assets?" He said, "largely mortgages." I said, "Perhaps it would be well if you would get the secretary of the cemetery association who had charge of them to get them out of the safe, and we will go up and see if they are recorded." So, we went up to the register's office, and found that  
 10 although they had a book and page record on them, none of them had been recorded and were all presumably forgeries.

Q You mean the documents of the Cemetery Association had the appearance, by endorsement, of having been recorded, but an examination of the records of the register's office, disclosed that, in fact, they had never been recorded? A That is right.

Q Go on. A Then I took the matter up with  
 20 Mr. Audrey, who has since died, and was president of the Cemetery Association, and I got Mr. Kempf and told him the situation.

Q Who was Mr. Kempf? A Mr. Kempf was at that time a trustee of the Cemetery Association.

Q When you say trustee, you mean one of the Board of Trustees of the Association? A I do.

Q And we arranged to have a meeting of the Cemetery Association with Mr. Horster present.  
 30 About a day or so prior to that time, Fred Burnett came in, and he, having been talked to by Mr. Kempf, said that he represented, in a way, Ottor Horster, as a personal friend, and was also a friend of Mr. Kempf. In this discussion, it was decided that if we could in any way help Otto, we would, and he gave me a personal letter to Otto Horster, stating that he had known him a long while as a friend, and it would be best for him to do as I would suggest that morning. So, Mr.  
 40 Burnett and I agreed that it would be wiser to

*Howard F. Kirk, direct.*

make one assignment, and to make one member trustee, and we picked Louis Kempf as the member. At the meeting next morning, Otto Horster was present with Mr. Audrey and Mr. Depew and Mr. Pfaff, and myself, and Mr. Schwartz, the brother-in-law of Mr. Horster.

Q Mr. Depew was secretary of the Union Cemetery Association? A Right. 10

Q And Mr. Pfaff was its treasurer? A Yes.

Q Mr. Audrey was its president and Mr. Schwartz was the superintendent of the Cemetery Association? A That is right. I then called Mr. Horster's attention to the fact that I had examined a number of mortgages presumed to be on record, and I found that they were not. I told him that they were apparently forgeries. Mr. Horster admitted it. I showed him a letter, a friendly letter of Mr. Burnett's which he read, and I suggested that he make an assignment to protect the Cemetery Association, which he agreed to do. I asked him what he had, and he said that he had some bonds of the Stuyvesant Development Company, he did not know how many, but he put down a certain number. I took an assignment of his right in them. He said that he owned ten shares, which was one-third of the Stuyvesant Development Company. He said they comprised most of his assets. He had great faith in the value of them. So, I took an assignment of his right, title, and interest in that, adding to that assignment that he would deliver the stock the next morning, as he did not have it there. For fear that there might be some other indebtedness, such as interest on the mortgages and things we did not know about in dealing with the cemetery, Mr. Burnett and I decided to get a promissory note of \$35,000. The mortgages amounted 20 30 40

*Howard F. Kirk, direct.*

to around \$23,000, as I recall, in order to cover any probable further indebtedness to the cemetery.

Q Let me stop you right there. Prior to the meeting with Mr. Horster on this occasion, had you told Mr. Horster why you wanted a meeting? A I do not recall how Mr. Horster got word. I think that word was sent in some way that we wanted him there.

Q Did you let him know that you were going to meet him and talk to him about the forged mortgages? A No, I do not think I did.

Q You had a conference with Mr. Audrey, president of the association? A I did.

Q And the other officers you mentioned, before you met Mr. Horster? A Yes.

20 Q And it was your intention to confront Mr. Horster with the facts and see what he had to say, and see what he would do; is that the idea? A And get some security, if possible, for the trustees of the Cemetery Association.

Q Why was the note made out for \$35,000? What was the idea? A I just explained that.

30 Q Will you explain it again please? A For fear that there might be some further indebtedness to the cemetery about which we knew nothing, and to cover any possible interest on these mortgages which were forged.

The Master: All of the note was for that unknown quantity?

40 The Witness: That is it. That was explained to Mr. Horster. It was also explained to Mr. Horster that Mr. Burnett and I had agreed it would be wise to put the assignment in the hands of and have the note made to, Louis Kempf, who would hold it for

*Howard F. Kirk, direct.*

the trustees of the cemetery association, to which Mr. Horster agreed.

Q He knew that Mr. Kempf was one of the trustees of the association? A He did.

Q Now, Mr. Kirk, you never delivered to Mr. Kempf those assignments or certificates of stock? 10

A I did not.

Q But kept them in your safe? A I did.

Q Did you ever write to Mr. Burnett a letter in regard to the delivery to you of these documents? A I wrote to Mr. Kempf.

Q You wrote to Mr. Kempf. Have you got a copy of that letter there? A Yes. I would like to have the copy read into the record upon my promise that, if required, I will call Mr. Kempf and have the original produced, if it is still in existence. 20

The Receiver: If there is any question about the existence of this, you mean? I do not know whether anybody disputes it or not.

Mr. Massey: No objection.

Mr. Stiefel: "December 16, 1925, Mr. Louis A. Kempf, 725 Clifton avenue, Newark, N. J. Dear Sir: I have some papers in the matter in which you are interested in my safe. 30

"Everything was conveyed to you, you to hold them, for the association until cash in place of the same is received to make up the deficiency. This was done as the result of a meeting of the minds between your attorney Fred Burnett and myself. Yours truly."

The Witness: I signed that letter "Howard F. Kirk." 40

*Howard F. Kirk, direct.*

Q Were you ever paid by anybody for your services rendered on that occasion in connection with these assignments and the security given?

A Well, I represented the cemetery later on, in various things, and rendered a bill. I do not know whether it covered this.

10

The Receiver: The question is in connection with this transaction; were you ever paid anything by anybody?

The Witness: I do not recall that I was paid except as putting in a bill to the cemetery afterwards and receiving a fee.

Q The officers of the cemetery knew that you were holding the shares of stock, or rather, the certificates? A They did.

20

Q And the assignments? A Yes.

Q And Mr. Kempf knew, as a matter of fact, that you were holding? A I talked to Mr. Kempf over the telephone. Mr. Kempf said, "Keep them there in your safe."

Q And at the time he was the trustee of the association? A He was.

Q And you continued to be attorney of the association until about the middle of 1927, I believe, Mr. Kirk? A Probably about that time.

30

Q Do you remember attending a meeting of certain creditors of Otto Horster about March 11, 1926, in the office of Mr. Murray? A Yes, sir.

Q Mr. Norberry Murray? A I remember that.

Q You remember that Mr. Kempf was present at such meeting? A He possibly was; I do not recall.

Q Do you remember Mr. Lehlback was present at that meeting? A I remember he was there.

40

*Howard F. Kirk, direct.*

Q You remember Mr. Lehlbach was present as attorney for Mr. Kempf? A I do.

Q And you were present as attorney for the Union Cemetery Association? A I was.

Q I believe you may recall that Mr. Woerner and myself and Mr. Contrell, in addition to Mr. Kempf and Mr. Lehlbach were present? A I remember that you were present and Mr. Vickers was present. 10

Q Col. Vickers was present? A And Norberry C. Murray.

Q It was at that meeting, there was flashed the \$10,000 check, wasn't it? A Absolutely.

Q And there was no question that at that time you represented the Union Cemetery Association? A None whatsoever. 20

Q And spoke up for them in that conference? A Yes.

Q And stated to the persons assembled that you held stock for the benefit of the Cemetery Association? A I did.

Q And it was in your possession and in your safe at that time? A Yes.

Q That is correct? A Yes.

Q At the time you surrendered the certificates of stock to Judge Lynch, did you surrender the other documents you received in connection with this transaction with Mr. Horster? A I believe that all that was fundamental was turned over. 30

The Receiver: What particular documents do you refer to, Mr. Kirk?

The Witness: The two shares of stock.

The Receiver: Yes.

The Witness: And the promissory note, as I recall. It may possibly be that you did 40

*Howard F. Kirk, direct.*

not get that, but as I recall, they were all kept together in the one folder.

The Receiver: Did you get a receipt?

The Witness: I might have gotten a receipt.

10 Mr. Stiefel: You had better look.

The Receiver: I do not remember offhand of anything except the stock. It may be here. Of course, the receipt would show.

The Witness: I haven't any receipt here.

The Receiver: Is that important?

Mr. Stiefel: My idea is this, to show that he, as attorney for the Cemetery Association, kept these documents until he delivered them to you.

20 The Receiver: I mean, whether he turned them all over or simply the stock.

Mr. Stiefel: Simply for the purpose of identification so that you will know what is in the documents when you come to consider the matter. They are in the printed record.

The Receiver: All right. You may refer to the record.

30 Mr. Massey: Why not mark the whole record in evidence.

Mr. Stiefel: I have offered such parts as we want to refer to.

The Receiver: It is considered in evidence. You can refer to any part that you want to.

Mr. Massey: Wouldn't it be desirable not to repeat all that is in there?

40 The Receiver: These are two notes I received from Mr. Stiefel. Mr. Stiefel, you gave me these notes?

*Howard F. Kirk, direct.*

Mr. Stiefel: I gave you the Sugarman notes.

The Receiver: That is all I received. You may have them in your file.

Mr. Stiefel: Yes, sir, I may have them in my files.

10

That is all.

The Receiver: Any questions, gentlemen? Is there a claim in this testimony?

Mr. Stiefel: My claim is that Mr. Kirk, as attorney for the Cemetery Association, had the actual possession and custody of these shares of stock on behalf of the Association for a long period of time as mentioned, that the subsequent attachment is ineffective as against that possession by the Cemetery Association of that stock, possession through its attorney, irrespective of whether the assignments are good, bad or indifferent in themselves; that the possession for the benefit of the Cemetery Association in connection with an admitted claim, gives rise to a prior right.

20

The Receiver: That is an argument.

Mr. Stiefel: That is right.

The Receiver: All right. If there are no further questions, Mr. Kirk, you may be excused.

30

(Witness excused.)

40

*Henry C. Pfaff, direct.*

HENRY C. PFAFF, called as a witness on behalf of the complainant, being first duly sworn, testified as follows:

The Receiver: Is there anything in the printed record that would save time?

10 Mr. Stiefel: He never testified.

The Receiver: All right.

*Direct examination by Mr. Stiefel.*

Q Mr. Pfaff, you live in East Orange? A I do.

Q And are engaged in business in the City of Newark? A I am.

20 Q And have been a great many years? A Yes, sir.

Q You were, in the years 1925 and 1926, one of the trustees of the Union Cemetery Association? A I was.

Q You have heard Mr. Kirk's testimony this morning? A I did.

Q Do you recall Mr. Kirk bringing to your attention the fact that your name might have been forged? A I do.

30 Q And, as a result of that, did you tell Mr. Kirk, or accept Mr. Kirk's offer to make further inquiry? A I did.

Q Now, as a result of that, you eventually discovered, I believe, that the Cemetery Association, of which you were the treasurer, held what appeared to be forged mortgages, given to it by Mr. Horster? A I did.

Q Were you present at the meeting in which Mr. Horster was confronted with his signature? A I was.

40

*Henry C. Pfaff, direct.*

Q Where was that meeting? A In the cemetery office; in the Union Cemetery, on Stuyvesant avenue.

Q In the cemetery grounds? A Yes.

Q And Mr. Audrey and Mr. Depew were present? A They were.

Q Did you tell Mr. Horster what you had discovered, or was it somebody else that told him? A Mr. Kirk told what we had discovered.

10

Q Did Mr. Horster admit that the mortgages were forgery? A He did.

Q Did you tell him anything about protecting the Association, the Cemetery Association, or did Mr. Kirk? A Mr. Kirk did.

Q What did he say, as you recall? A He said that he would.

20

Q When you say that he said he would, who do you mean by "he?" A Mr. Horster.

Q Mr. Horster said he would? A He would protect them, after he admitted they were forgeries. He consented to give security to the best of his ability. He was asked to sign over the property where he lived in East Orange.

Q You mean, real property? A Real property. But he objected.

Q Why? A He did not want to put his wife into this case.

30

Q What developed then? What did he offer? A He offered stock in the Stuyvesant Development Company, his share in it and some bonds.

Q Bonds of what? A Of the cemetery.

Q He did not have the documents with him at that time? A No, he did not.

Q Do you remember whether on that day or the next day, it was he made out a note for \$35,000? Can you recall that, Mr. Pfaff? A No.

40

*Henry C. Pfaff, direct.*

All I know is that the documents were delivered the next morning.

Q Where were they delivered? A In the Wiss Building.

Q When you say documents, you mean certificates of stock? A I do.

10 Q Was Mr. Audrey present again? A Yes.

Q Mr. Depew? A Yes.

Q He was present? A Yes.

Q Mr. Kirk? A Yes, sir.

Q Mr. Horster? A Yes.

Q Did you consider at that time that Mr. Kirk was attorney of the Cemetery Association, acting in that matter, or what? A He was in a way, but only acting, I guess, to safeguard the trustees to help them make good, to protect the cemetery.

20 Q You mean he had not been attorney before that? A No.

Q But Mr. Audrey, did he suggest the employment of Mr. Kirk to act in this matter? A No. We had a meeting shortly after that and engaged Mr. Kirk as attorney in the matter, recorded on the books of the cemetery.

30 Q I mean when he was participating in this transaction, did you consider that he was acting for the benefit of any other person than the Cemetery Association? I am referring to Mr. Kirk? A Only for the benefit of the cemetery.

Q Did you know the exact amount Mr. Horster's embezzlement of moneys of the Cemetery Association? A Not exactly.

Q Was there any discussion or talk with Mr. Horster or Mr. Kirk, or anybody about that fact that you did not know the exact amount? A Yes.

40 Q If possible, tell us with whom the conversation was, and what the conversation was. A

*Henry C. Pfaff, direct.*

There was approximately \$23,000 in mortgages that proved to be forgeries and on which interest had not been paid for some time. There was an item of \$1,500 that had been given to Charette Horster, acting in behalf of Otto G. Horster to be paid on a mortgage of a supposed client of Otto G. Horster which had not been settled, so we stipulated the amount in that note of \$35,000, to safeguard the cemetery if there were any other discrepancies. 10

Q Did you, at that time, know anything about Mr. Horster being indebted to Mrs. Minchin or Mrs. McLaughlin? A I did not.

Q Or Mrs. Riley? Did you know anything about them at all? A Never heard about the names, or never knew the people. 20

Q Did you know at that time about the fact that he had embezzled money from Mrs. Ulicsnik or Mr. Rockwell? A I did not. 20

Q Or any other party to this suit? A No. The only thing I recall; we asked Mr. Horster at that time if that was all he was in trouble; that amount, because we had a letter from a lawyer who is very friendly to him asking him to do right, and that they would try to help him out. 30

Q That was Mr. Burnett? A Mr. Burnett. Mr. Horster stated at that time that was all he defaulted. 30

Q In other words, that his defalcation from the cemetery comprised his entire defalcation? A He did.

The Receiver: That is what Mr. Horster said?

Mr. Stiefel: Yes. 40

*Henry C. Pfaff, direct.*

Q Did anybody, during any of these conferences, or talks with Mr. Horster say or suggest that this ought to be done for the protection of Mr. Horster or for the protection of the Cemetery Association? A Why, I acted for the protection of the cemetery as a trustee.

10 Q Did you, at that time, have any other purpose in view except to secure the Cemetery Association? A None whatever.

Q You knew that the certificates of stock had been delivered to Mr. Kirk, did you? A Yes. I was present.

Q You were present when they were delivered to Mr. Kirk? A I was.

20 Q From the time of the delivery until long afterwards, certainly more than a year after, you knew that they were in his possession, did you? A I did.

Q And you knew, of course, that he was attorney of the association? A I did.

Q You knew Mr. Kempf, did you? A I do.

Q He was one of your co-trustees? A He was.

Q Until about the summer of 1926? A Yes, sir.

30 Q And then he resigned? A He did.

Q You knew that the stock certificates were not delivered up to him when he resigned? A They were not.

Q You knew that? A I did.

40 Q Did you ever have a conversation with Mr. Kempf about these stock certificates at all, even if it was only an incidental conversation? A Yes, sir, I think on one occasion, I think he said that he disliked the whole matter; that he held that responsible position.

*Henry C. Pfaff, direct.*

Q What do you mean, "responsible position?" A Well, that he had hold of the certificates—he called it a dirty mess.

Q I see. And when he resigned, he did not ask that the certificates be delivered up to him, so far as you know, did he? A No, never did.

Q You were present at the meeting when he resigned, were you not? A I was. 10

Q There was no such request made on that occasion? A No.

Q From that time, or until the certificates were delivered up, Mr. Kirk continued to hold them on behalf of the Union Cemetery Association? A He did.

Q Did you know anything about the value or have you any idea of the value of this stock at the time it was given up to the association? A I did not. 20

The Receiver: Was anything said by anybody at that time as to the value of the stock?

The Witness: Well, Mr. Horster told us that it represented about one-third of the cemetery.

The Receiver: No; as to the value, not as to the proportion or percentage. Was it said by anybody— 30

The Witness: I was once upon a time a dear friend of Mr. Horster, but after this occurrence I did not believe anything he said.

The Receiver: The question was, did he say anything or anybody else, at that time, as to the value?

The Witness: He did. He told us it represented about one-third of the value.

The Receiver: Yes, but what was the value? One-third of what? 40

*Henry C. Pfaff, direct.*

The Witness: He did not say.

The Receiver: All right. Did anybody else say anything?

The Witness: No.

10 Q Mr. Pfaff, before, in answer, or speaking, you said that it represented one-third of the cemetery. You did not mean that, you meant one-third of the Stuyvesant Development Company?  
A Yes, which I was told by Mr. Horster controlled the cemetery.

Q When did he tell you that? On this occasion or on some previous occasion? A It may be on a previous occasion or that occasion, I do not know.

20 Q Now, you speak of Mr. Burnett, did you ever have a conversation with Mr. Burnett on this subject? A No.

Q You saw the letter, though, did you? A I did.

Q And you say that letter spoke of Mr. Burnett's making good? A No; trying to help Mr. Horster out of the difficulty.

Q Did it speak of financial aid, or what kind of aid? A I presume that he meant financial aid.

30 Q That is the way you took the letter? A I do not recall the exact wording of it.

Q Prior to the employment of Mr. Kirk, had the officers of the Cemetery Association, as long as you were a member ever mention any attorney other than Col. Vickers or Mr. Horster? A We only made use of Mr. Horster, never of Mr. Vickers.

Q You never actually employed them? A No.

40 Q But you did consult with them? A No; only with Mr. Horster.

*Mary Ulicsnik, direct.*

Q Only with Mr. Horster. And you had no independent attorney? A No; because we presumed that Mr. Horster acted as the attorney.

Q Up to the time of the discovery of his defalcation, you had trust in him? A Implicitly.

Q And after that, after the discovery of his defalcation, did you trust him then? A No. I severed all connections. 10

Q And the Cemetery Association then employed Mr. Kirk? A They did.

Q Was it at your suggestion that Mr. Kirk was employed or somebody else's suggestion? A I suggested it; in fact, I begged Mr. Kirk to take the position, and he did it very reluctantly.

Mr. Stiefel: That is all.

Mr. Massey: No questions. 20

*By Mr. Stiefel.*

Q You have turned over the forged bonds and mortgages regarding which you testified to the prosecutor's office had you not? A Yes.

Q And so far as you know, they remain in the possession of the prosecutor? A Yes.

(Witness excused.)

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MARY ULICSNIK, called as a witness on behalf of the complainant, being first duly sworn, testified as follows:

*Direct examination* by Mr. Stiefel.

Mr. Stiefel: I do not need to prove the claim because it is all in there. 40

*Mary Ulicsnik, direct.*

The Receiver: Yes, it is all in there.

Q Do you remember attending a meeting at the office of Mr. Norberry Murray, late in December, 1925? A Yes, I do.

10 Q And you remember that I was there? A Yes, I do.

Q And you remember this gentleman to my right, Mr. Hugo Woerner? A At that time only Mr. Murray was there, and Mr. Stiefel and I and my husband, at that meeting.

Q Those are the ones that you remember? A Yes.

Q You do not remember Mr. Woerner? A I did not see Mr. Woerner then.

20 Q You did not know him then? A I did not know him then.

Q Will you look at the gentleman sitting by your side? Do you remember his being there? A No, he has not been there.

Q Do you remember him? A No.

30 Q You remember that I went into the room with Mr. Murray and the door was closed and you sat outside? A That was in February or March, the following year. But in the meeting where you said, in the fall, there was only you and I and my husband and Mr. Murray.

Q That is the only meeting you remember? A No, I remember another meeting, too, in March.

Q That is the only meeting you remember in December? A Yes.

40 Q Do you remember what Mr. Murray told us, if you heard Mr. Murray speak? Did you hear Mr. Murray speak at that meeting? A He gave me a paper to sign.

*Mary Ulicsnik, direct.*

Q That is the first meeting you remember?

A Yes, sir.

Q Did he tell you anything about the paper?

A He told me that Mr. Horster and Mrs. Hoster assigned the house, the stands, and the search plant, to the Cemetery Association—whatever he owned, he assigned that over to us.

10

Q For what purpose? Did he tell you for what purpose? A For the purpose of paying us back for the forged mortgages that he made.

Q Do you know you were not the only person covered by that assignment? A At that time I only knew of Mr. Nagel and Mr. Graback.

Q You did not know of Mr. Rockwell? A I heard that letter; not at that meeting; I did not know it then.

Q At the meeting at which you signed, you did not know Mr. Rockwell? A At that time I did not know it. I learned it—I read it in the paper, but I did not know it—

20

Q Did you read the paper before you signed it? A Well, I read some of it, not all the way down.

Q Didn't you notice that Mr. Rockwell's name appeared in it; that he signed the paper? A I can't remember.

Q You can't remember. Do you remember being told by anybody that this covered all the creditors of Mr. Horster? A I do not know. I can't remember.

30

Q You can't remember even that? A No.

Q When you attended a meeting, as you think, in February, was Mr. Rockwell there? A He was there.

Q And Mr. Kniep was there? A Mr. Kniep was there.

Q Mr. Graback? A No, sir.

40

*Karl Riester, direct.*

Q Mr. Riester, was he there? A No.

Q Did you ever see Mr. Riester in Mr. Murray's office? A I don't remember.

Q You don't remember. Did you ever know that Mr. Riester was covered by any of these assignments? A Later on.

10 Q How much later on? A Just the things you told me. I do not remember when.

Q Do you remember when I told you that Mr. Riester was covered by them? A I can't remember.

Mr. Stiefel: That is all.

The Receiver: Any questions?

Mr. Massey: No questions.

(Witness excused.)

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KARL RIESTER, called as a witness on behalf of the complainant, having been duly sworn, testified as follows:

*Direct examination* by Mr. Stiefel.

30 Q Mr. Riester, were you ever present at a meeting in Mr. Murray's office in connection with this Horster matter? A I was.

Q Do you remember when that was? A It was early in, I guess, December.

Q It was early in December? A December.

Q You say early in December? A No; late in December.

The Receiver: What year?

The Witness: It was 1928—1924.

40 Q 1924? A 1925.

*Karl Riester, direct.*

Q You will have to tell us, of course. But it was in December? A It was in December, yes.

Q Did you go into the room where Mr. Murray was? A Yes.

Q You did? A Yes.

Q Was Mrs. Ulicsnik there at that time? A I remember that Mrs. Ulicsnik was there at the time. 10

The Receiver: What was the answer?

The Witness: I say at that time Mrs. Ulicsnik was there.

Q Do you remember Mr. Murray saying anything about the Horster matter at all? A Yes, sir.

Q Did he tell you anything at all about a proposition of some kind to protect you and others, or something of that sort? A He said \$40,000—\$40,000—that would be all, and that cover the ground, and everybody would get the money at that time. I remember that. 20

Q \$40,000 would cover the ground? A Yes.

Q Did he tell you how much Mr. Horster owed? A No.

Q What do you mean by saying that \$40,000 would cover the ground? Were those the exact words that he used? A Yes; about \$40,000 he said, and everybody would get their money. 30

Q Did you know that Mrs. Ulicsnik was a creditor? A Yes.

Q Did you know Mr. Rockwell was? A Yes.

Q Did you know that Mr. Nagel was? A Yes.

Q And Mr. Graback? A Mr. Graback, yes, sir.

Q And you knew about yourself? A Yes, sir. 40

*Otto A. Stiefel, direct.*

Q Did you know about any other creditors?

A No.

Q Do you remember my explaining the matter to you at that time, or some subsequent time?

What do you remember? A I remember at that time you told me everybody could get their  
10 money; that was all; in your office.

Q Do you remember whether I told you this included all the creditors of Mr. Horster or not?

A Yes. You told me at that time only Mrs. Ulicsnik, myself, Mr. Rockwell and Mr. Kniep.

Q Did I tell you anything, so far as you can recall about whether Mr. Murray had told me that covered or embraced all of the claims against Mr. Horster? Do you remember that? A No.

Q Did I tell you anything, so far as you can  
20 recall, about what Mr. Murray had told me? You can't remember? A No.

The Receiver: Any questions?

Mr. Massey: No questions.

(Witness excused.)

Mr. Stiefel: I will have to testify myself.

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30 OTTO A. STIEFEL, called as a witness on behalf of the complainant, being first duly sworn, testified as follows:

#### DIRECT STATEMENT.

The Witness: In December of 1925, Mr. Murray of the firm of Burnett, Murray and others, and Mr. Burnett, had several talks with me regarding the indebtedness of Otto  
40 G. Horster, due to Karl Riester and Mary

*Otto A. Stiefel, direct.*

Ulicsnik, whom I represented at that time. I cannot separate these conversations in my mind. I do recall distinctly that Mr. Burnett and Mr. Murray both told me—

Mr. Massey: I object to what they told him.

The Receiver: Who was present at the time this took place? 10

The Witness: The conversations that I have in mind were between the attorneys and myself.

The Receiver: I will take it subject to the objection. I will pass on the relevancy of it afterward.

The Witness: They both told me that upon the discovery of Mr. Horster's difficulty with the Union Cemetery Association, Mr. Burnett and some other friends contemplated raising a fund to liquidate Mr. Horster's indebtedness to the Union Cemetery Association; that when they discovered that there were other defalcations, they abandoned that idea; that Mr. Horster had been brought to their office, and had disclosed to them other indebtedness, and that they were confident and felt sure that they now knew all the other indebtedness of Mr. Horster. 20 30

In particular, Mr. Burnett proposed to me an assignment for the protection of these creditors, and wanted me to be one of the assignees. I refused.

Shortly prior to January 1, 1926, there was a conference held in the office of Burnett, Murray and others—I can't remember the full name of the firm at that time. 40

*Otto A. Stiefel, direct.*

Mr. Massey: Sorg, Murray & Duncan.

10 The Witness: I will call them Sorg, Murray & Duncan. I recall that Mr. Contrell and Mr. Woerner were present. There was submitted to us a draft of a proposed trust agreement covering an assignment to the creditors of Mr. Horster that had been mentioned in the prior conversations, including Mr. Rockwell who was Mr. Contrell's client, Mr. Kniep, who was Mr. Woerner's client, Mr. Riester and Mrs. Ulicsnik who were my clients.

20 We discussed the form of the proposed agreement submitted to us there, and somebody suggested a few changes in phraseology, but the substance of the proposed agreement was not changed. It was eventually written out in the form which was signed by the two Horsters, Mr. and Mrs. Horster, and by three trustees, Mr. Kniep, Mrs. Ulicsnik and Mr. Rockwell.

30 I represented to my clients that Mr. Murray had informed me that the persons named by him constituted all the creditors of Mr. Horster remaining unpaid or unsecured. I also told him that the proposed assignment and transfer was to be only by way of security, and I remember distinctly Mrs. Ulicsnik asking me whether this released Mr. Horster if she would sign. She asked me that several times, and I told her this was purely by way of security.

40 Mr. Murray, in the course of these conversations, and especially at this conversation where Mr. Woerner, Mr. Contrell and myself were present, and the proposed document

*Otto A. Stiefel, cross.*

was submitted, explained to us that it was his confident expectation that within a few weeks, or a few months at the latest, there would come in sufficient moneys from the Stuyvesant Development Company or from something or other connected with the Stuyvesant Development Company, which would enable Mr. Horster to pay all, or substantially all of his indebtedness to be covered by the trust agreement and assignments made pursuant thereto. 10

I informed my clients of that fact. I never knew at that time of the existence of Mrs. Minchin, Mrs. Riley or Mrs. McLaughlin, and I believed that I was dealing with a high-class firm of lawyers, and that I could rely upon their assurances that all the creditors of Mr. Horster who had not been paid or secured, were being covered or were to be covered by the trust agreement and the documents in connection therewith. I so believed until some time in the spring of 1926. I can't fix the date, but long after the trust deed and the deed to the property on Steuben street mentioned therein, and other documents in connection therewith, were delivered. 20 30

I think that is all I need testify to.

*Cross examination by Mr. Massey:*

Q Mr. Stiefel, you prepared the documents, didn't you; the trust agreement and the assignments? A No. They were prepared in Mr. Murray's office. Perhaps I should add to that, I think I made a suggestion in regard to a change in the phraseology in one part. I think that 40

*John Contrell, direct.*

was my sole participation. The documents were delivered to me some time after January 1st by Mr. Murray. I have a letter which would enable me to give the exact date, but I do not think it is important.

10           The Receiver: Is there any further testimony?

              Mr. Massey: This goes in.

              The Receiver: Yes, you may refer to any part of the printed state of the case.

              Do you gentlemen desire to put in any evidence?

20           Mr. Contrell: As a representative of Mr. Rockwell, I think the question of fraud hangs very strongly upon this suit, and I might offer a little testimony, as one of the attorneys on behalf of Mr. Rockwell.

              The Receiver: You desire to testify?

              Mr. Contrell: I do, yes.

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JOHN CONTRELL, called as a witness on behalf of the complainant, testified as follows:

30           The Witness: I want to testify to all that Mr. Stiefel has said, so as not to go over it, but I want to say further—

              Mr. Massey: Every bit of it is within your knowledge?

              The Witness: Practically, because that was done at the December meeting. At that time, as I recall, Mr. Rockwell, Mr. Woerner, Mr. Murray and myself were in one room, and the people who were interested—

40

*John Contrell, direct.*

Mr. Stiefel: You said Mr. Rockwell.

The Witness: No, not Mr. Rockwell; Mr. Woerner, Mr. Stiefel—instead of Mr. Rockwell; Mr. Rockwell was not in the room at the time these conversations took place. Mr. Murray had prepared the draft, and I raised the question myself at that time, as to whether there were any other outstanding claims, also, as to the amount of the assets, or the possible assets that there might be to liquidate it. I believe Mr. Horster was in the adjacent room, and we were given to understand, through Mr. Horster, that there were no other outstanding claims, and Mr. Murray also made that assertion, because he said he had investigated, and if the truth were not verified on that fact, he would get out of the case, because he thought everything was there, and we would be taken care of.

Mr. Stiefel: Let me ask a question.

*By Mr. Stiefel.*

Q Do you remember that Mr. Murray told us Mr. Horster was in the adjoining room? A I saw him there.

Q But he was not admitted to the meeting? A He was not admitted to the meeting. As I recall, he came there, and somebody assisted him; he was not in very good shape.

Q And you remember that Mr. Murray went in the room where Mr. Horster was to see him? A Yes, Mr. Murray went out several times. In our March meeting, which was the one where this \$10,000 check was flashed, Col. Vickers brought it there, and all these said gentlemen

*John Contrell, direct.*

- were present, including Mr. Woerner, Mr. Lehlback and Mr. Kirk. At that time the question was also brought up as to any further claims, and Col. Vickers volunteered this information, that he had great confidence in Mr. Horster at the time, and he would have a great number of funds himself, and give him his own funds, or very substantially personally contribute in order to help him out, he had so much confidence in him. As I recall, that day, we had a reiteration of the entire assets and liabilities written out in Mr. Horster's own handwriting, which I saw, and somewhat verified by the statement of Col. Vickers that there would be more than enough if things developed as the Colonel expected, in order to liquidate all of our claims.
- 10
- 20 At the time all these meetings took place, there was not a scintilla of thought—not in my mind, and I hardly think in any one else's—but what we were doing everything in order to protect each one of the outstanding claimants. There was not a degree of any kind of fraud at all in our minds. It was not based on anything but what we thought was fair and just. We thought we had them all. I did not know they were not all in until I heard later of Mrs.
- 30 Minchin; heard of Mr. Vanderbilt representing a party by the name of Minchin. I think, I recall, he called me up at the court house on the telephone, and asked if there was any objection to letting Mrs. Minchin in, and I told him I did not think there was; that I did not see any reason why they should not come in, and that I would take up the matter with Mr. Stiefel.

*Minutes of Hearing Before Receiver.*

Mr. Stiefel: Just for my benefit, I would like to have it put on the record what happened, not that it influences the case; when you came to me, I said, "Of course," didn't I?

The Witness: Yes.

Mr. Stiefel: I do not want it to appear that I blocked something when I did not.

10

The Receiver: Does anybody else desire to be heard before we adjourn?

Mr. Massey: I want to put these claims in. Of course, this testimony is a repetition of what is in the case, a lot of it was objectionable, but I did not object because it would take unnecessary time, and there was not anything to be accomplished by it.

20

The Receiver: This is an informal hearing by the Receiver anyway; it is not like a trial in court.

Mr. Massey: Yes.

I have a certified copy of the roll for judgment in favor of Ellen Minchin, Mary Riley and Margaret McLaughlin, with certified copies of their respective tax bills and costs attached to it in the Supreme Court, judgment entered November 3d, 1926, in an attachment suit.

30

I would like to have that marked in evidence.

The Receiver: Do you want to state the amount for this record, to simplify the discussion later on, perhaps?

Mr. Massey: I will read them.

The Receiver: Just the amount it is as of that date.

40

*Minutes of Hearing Before Receiver.*

Mr. Massey: The roll for judgment shows the amount due Ellen Minchin was \$4,692.50; Mary E. Riley, \$9,744.22, and Margaret McLaughlin, \$3,055. These sums bear interest from date of judgment, and items of taxes and cost.

10 The Receiver: What is the date of the judgment?

Mr. Massey: From November 3, 1926.

The Receiver: Do those amounts include—

20 Mr. Massey: In addition, there are costs in favor of Ellen Minchin in the sum of \$24.36; in favor of Mary E. Riley, the sum of \$9.10, and Margaret McLaughlin, the sum of \$9.10.

(Copy of judgment roll marked Exhibit D. 1.)

Mr. Massey: The roll for judgment was marked Exhibit D. 6 in the final hearing before the Vice Chancellor.

30 I have certified copies of the original writs of attachment; one issued to the sheriff of Essex County, bearing a certified copy of his return attached thereto, and the other issued to the sheriff of Hudson County, bearing a certified copy of that sheriff's return.

Mr. Stiefel: They are exhibits in the record of this case.

Mr. Massey: These were marked on the final hearing before Vice Chancellor Church, D. 4 and D. 5.

40 Mr. Stiefel: And are in the printed state of the case.

*Minutes of Hearing Before Receiver.*

Mr. Massey: I do not know whether you incorporated them or not.

Mr. Stiefel: Yes.

Mr. Massey: Some things were left out in that state of the case.

Mr. Stiefel: Here they are.

10

The Receiver: Page what?

Mr. Stiefel: Pages 208 to 227.

Mr. Massey: The testimony in the State case, will show that these mortgages arose out of fraud in the same way the others did.

I also want to offer affidavits of service by Charles E. Dalrymple, who was appointed auditor in the attachment case. He was allowed \$100 by the Chief Justice for services up to the entry of judgment. He performed services subsequent to the entry of judgment and performed services prior to the entry of judgment, for which he should possibly be allowed, in addition to the allowance he has already had.

20

The Receiver: What does he ask for?

Mr. Massey: He states that he spent 103 hours altogether on this case, and asks for an allowance of \$1,000 and disbursements, for which he has not been compensated.

30

The Receiver: Is he here?

Mr. Massey: Yes. I am referring to the contents of his affidavit.

The Receiver: It does not state the amount he requests, does it?

Mr. Massey: No, sir. It states everything I said, except that amount.

40

*Minutes of Hearing Before Receiver.*

The Receiver: Yes.

Mr. Massey: His affidavit shows disbursements of \$52.

The Receiver: The affidavit speaks for itself.

10 Mr. Massey: Yes.

The Receiver: What is the amount of the claim?

Mr. Dalrymple: My affidavit shows 103 hours spent, services after the judgment, for which I think I am entitled to a fee of at least \$1,000, plus \$52 disbursements.

20 The Receiver: You have not filed a formal claim; you are simply stating this for my consideration now?

Mr. Dalrymple: Yes, because I was made a party-defendant in the Court of Errors and Appeals and had to testify as to all the assets I had, and appeared in the Court of Chancery as a witness.

Mr. Stiefel: You did not file an answer in the Chancery suit, did you?

Mr. Dalrymple: No. Everything that was set forth was admitted.

30 Mr. Massey: He was not personally interested.

Mr. Dalrymple: No.

Mr. Massey: No; he was acting as an officer of the court by the Chief Justice's appointment, and there was no need to file an answer.

40 The Receiver: What is your claim to the order of preference so far as your bill is concerned?

*Minutes of Hearing Before Receiver.*

Mr. Dalrymple: I think I am entitled to preference.

The Receiver: Over everybody.

Mr. Dalrymple: Yes, just the same as in every receivership proceeding.

The Receiver: I am trying to get your viewpoint. 10

Mr. Massey: This whole matter, I think—the same issue that is sought to be raised here was raised in the interlocutory decree and briefs were submitted. If your Honor needs assistance, a copy of those briefs might help.

The Receiver: After we have finished the hearing and have before us everything that ought to be before us, I will be glad to hear from you by letter; you do not need to go to the extent of filing briefs, but just a statement of your positions. 20

Mr. Stiefel: I do not want to burden you with a long brief, but I think that I ought to call your attention to the peculiar features of the decree when I can find it. The decree adjudges that the transfers are fraudulent, and then it orders, adjudges and decrees that you shall inquire into the amount, validity and priority of the claims of the defendant and the complainant and the question of priority of claims of all parties to this suit in and under the assets in the hands of said receiver, which shall be reported upon by you. This is an interlocutory decree. If it had been a final decree, I would have taken it into the Federal Court, but on the interlocutory decree, I could not. I have examined the decree 30 40

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10 since the decision of the court, several times, to see whether there is any view possible which will harmonize my thought, and the fact that there is a declaration that the assignments and transfers were fraudulent. Without waiving my position, the decree is entirely outside the issues, so far as Mrs. Ulicsnik's claim and Mr. Rockwell's claim are concerned, because there was no litigation as to fraud before Vice Chancellor Church. I can't waive that; and maintain, as I have in the note that I have handed you of my position, that the decree involves a violation of the rights of these parties secured to them by the Constitution, and that I propose now, to raise that Federal question. The said question is suggested in the memorandum I have handed you, that the decree deprives my clients of property without due process of law, because they have not had a hearing on the issue of fraud. And when I say my clients, I mean that to incorporate Mrs. Ulicsnik, Mr. Kniep, Mr. Rockwell, and so on.

20  
30 Secondly, that the decree violates the Constitution in that it denies to them, or destroys, the equal protection of law, because it is unquestionably the law, settled law of this state, that a decree of the Court of Chancery, insofar as it is beyond the issue of the cause is invalid. Upon the basis of this decree an attempt is being made to assert or place a priority in the creditors represented by Mr. Dalrymple and Mr. Massey. I do not give that up at all. I assert that now, in its fulness. I assert it as a Federal question. I propose, if I am per-

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mitted by my clients, to take this question into the Federal court. But, irrespective of that, there is no finding that Mrs. Ulicnik, Mr. Kniep, Mr. Rockwell, Mr. Riester, Mr. Nagel, and Mr. Graback were participants in any fraudulent intent of Mr. Horster. After he made the assignment which, because of what was in his mind, probably was fraudulent—that does not deprive us of our right to retain our securities for payment of all owing to us. When I say “us,” I mean these clients of mine and Mr. Contrell and Mr. Woerner. 10

I want to state that claim in the presence of Mr. Massey now, and I think that is the most important of the questions to which you will have to direct your attention. The other questions have been suggested in that memorandum which I gave you this morning. 20

I think the decree left open—if it is a good decree—it left open that question and simply said, in effect, Mr. Horster was trying to work fraud on Mrs. Minchin, Mrs. Riley and Mrs. McLaughlin, but does not impute that fraud to the persons who took the security, and that in as much as they received security for unquestionably valid debts, they are entitled to retain that security to the extent necessary to pay their debts before giving up any part of it to subsequent attachment creditors. 30

Mr. Massey: But the decree also sets them aside.

Mr. Stiefel: It sets them aside because of the fraud, but the fraudulent conveyance 40

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act provides, I think, what I have contended for. That, of course, I want to deal with in a brief to your Honor.

10 Mr. Woerner: This does not prevent us from raising one point, does it? We want to attack the attachment proceeding which we claim is void.

(Hearing closed.)

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## New Jersey Court of Errors and Appeals

Between:

MARY ULICSNIK, UNION CEME-  
TARY ASSOCIATION and others,  
Complainants-Appellants,

and

CHARLES E. DALRYMPLE, ELLEN  
MINCHIN, MARY E. RILEY and  
others,  
Defendants-Respondents,

and

CLARA SEIDER, MARTHA SHAW  
and others,  
Defendants-Appellants.

On Appeal.  
From a  
Final Decree  
of the Court  
of Chancery.

### BRIEF ON BEHALF OF UNION CEMETERY ASSOCIATION and Other Appellants.

#### Statement of Facts.

The present appeal brings up a "final decree" of the Court of Chancery (advised by V. C. Church) in a litigated suit and contest, between creditors of Otto G. Horster, for all the assets of his insolvent estate. On the one side are ranged, as respondents, Charles E. Dalrymple (auditor in attachment) together with three attachment credit-

ors; on the other side are ranged, as appellants, all the other creditors of Horster, parties to the litigation.

That decree will be found printed on pages 19 to 23 of the State of the Case (Book II). It is based in part upon a report made by a Receiver of the assets aforesaid, appointed in an "*interlocutory* decree" of the Court of Chancery, on February 1, 1928. (State of Case, Book I, pages 11-14). The petition of appeal is printed in Book II, State of the case, on pages 26-30. That "*interlocutory* decree" was the subject of an unsuccessful appeal heard and considered in this court heretofore—6 A. R. page 1653, bottom.

The "*final* decree", now before this court, extends the prior "*interlocutory* decree" so far as to deprive the appellants of their property, without due process of law, and also so far as to bring about a denial to the appellants of the equal protection of the laws of this State—contrary to the provisions of the 14th Amendment of the Constitution of the United States, in that behalf. This feature of the case will be developed as we proceed.

The appellants are the beneficiaries of certain assignments and transfers (hereinafter more particularly described) made and given by Otto G. Horster to the appellants, who accepted the same in good faith *without any fraud on their part*, for the purpose of securing or gaining for themselves the satisfaction of payment as far as possible, of what was then and now remains justly due to them—subject to the obligation to return any surplus or overplus unto Horster, or his assigns.

There will be no surplus; the security given by Horster, as all persons familiar with the facts know full well, is manifestly insufficient to satisfy even the just claims of the appellants. The *inadequacy* of Horster's assets, indeed, is what has given

rise to the trouble, and has led the respondents to attack—thus far successfully—the transfers and assignments given to the appellants, though largely on the ground that they were “*excessive*”.

Those assignments and transfers were made and given without any knowledge *by the appellants* of the respondents' claims or of the respondents' existence. And it was not until months after those assignments and transfers had been made and accepted that the respondents even appeared upon the scene of conflict or that their existence as creditors of Horster became known to appellants.

Indeed the course and character of appellants' dealings with Horster in respect to those assignments and transfers was *predicated* upon his *assurance* in one case and *his lawyer's assurance* in the other cases, that the respective appellants to whom security was going at the given time, were his only remaining unsecured creditors. These assurances were reiterated at a meeting of all the appellants (through their attorneys), held a few days before the issuance of respondents' attachment. This meeting was at the offices of attorneys of high repute, Burnett, Murray, Sorg and Duncan; they represented Horster; the meeting was deemed necessary to settle differences then existing *between the appellants*. So free were the appellants from fear that other creditors might be involved then, that they deferred until some future time, renewal of endeavors to reconcile their own differences with respect to \$10,000.00 represented by the certified check for that amount which is part of the *res* in this case.

In respect to this, the uncontradicted testimony was (in part) as follows:

Mr. Murray, one of Horster's attorneys, testified:

"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.

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.

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, 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.

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 other debts of Mr. Horster that I know of, and that these documents which you have just shown me

transferred all 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.

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.

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.

Q. When you found out that you had been, perhaps, misled, 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 that I withdrew from the case.

(State of Case Book I, pages 123, 124).

Mr. Pfaff, Treasurer of Union Cemetery Association, testified before the Receiver, as follows:

Q. Did you, at that time, know anything about Mr. Horster being indebted to Mrs. Minchin or Mrs. McLaughlin? A. I did not.

Q. Or Mrs. Riley? Did you know anything about them at all? A. Never heard about the names, or never knew the people.

Q. Did you know at that time about the fact that he had embezzled money from Mrs. Ulicsnik or Mr. Rockwell? A. I did not.

Q. Or any other party to this suit? A. No. The only thing I recall: we asked Mr. Horster at that time if that was all he was in trouble; that amount, because we had a letter from a lawyer who is very friendly to him asking him to do right, and that they would try to help him out.

Q. That was Mr. Burnett? A. Mr. Burnett. Mr. Horster stated at that time that was all he defaulted.

Q. In other words, that his defalcation from the cemetery comprised his entire defalcation? A. He did.

(State of Case, Book II, page 49).

Mr. Contrell, an attorney of repute, who represented Mr. Rockwell (now deceased) testified as follows:

Q. Do you remember that Mr. Murray told us Mr. Horster was in the adjoining room? A. I saw him there.

Q. But he was not admitted to the meeting? A. He was not admitted to the meeting. As I recall, he came there, and somebody assisted him; he was not in very good shape.

Q. And you remember that Mr. Murray went in the room where Mr. Horster was to see him? A. Yes, Mr. Murray went out several time. In our March meeting, which was the one where this \$10,000 check was flash-

ed, Col. Vickers brought it there, and all these said gentlemen were present, including Mr. Woerner, Mr. Lehlbach and Mr. Kirk. At that time the question was also brought up as to any further claims, and Col. Vickers volunteered this information, that he had great confidence in Mr. Horster at the time, and he would have a great number of funds himself, and give him his own funds, or very substantially personally contribute in order to help him out, he had so much confidence in him. As I recall, that day, we had a reiteration of the entire assets and liabilities written out in Mr. Horster's own handwriting, which I saw, and somewhat verified by the statement of Col. Vickers that there would be more than enough if things developed as the Colonel expected, in order to liquidate all of our claims. At the time all these meetings took place, there was not a scintilla of thought—not in my mind, and I hardly think in any one else's—but what we were doing everything in order to protect each one of the outstanding claimants. There was not a degree of any kind of fraud at all in our minds. It was not based on anything but what we thought was fair and just. We thought we had them all. I did not know they were not all in until I heard later of Mrs. Minchin; heard of Mr. Vanderbilt representing a party by the name of Minchin. I think, I recall, he called me up at the court house on the telephone, and asked if there was any objection to letting Mrs. Minchin in, and I told him I did not think there was; that I did not see any reason why they should not come in, and that I would take up the matter with Mr. Stiefel.

Mr. Stiefel: Just for my benefit, I would like to have it put on the record what happened, not that it influences the case; when you came to me, I said, "Of course", didn't I?

The Witness: Yes.

Mr. Stiefel: I do not want it to appear that I blocked something when I did not.

The Receiver: Does anybody else desire to be heard before we adjourn?

(State of Case, Book II, page 63-65).

Despite the outstanding fact that appellants unquestionably dealt and acted (until respondents appeared upon the scene) without the slightest knowledge or notice of the existence of respondents, the court below has utterly failed to mention that fact or attribute to it any significance.

*Its manifest significance is first that Horster's concealment of respondents existence and their claims against him, was a fraud upon appellants; secondly that in so far as it was a fraud upon respondents, appellants are not chargeable therewith in any way, but, on the contrary, are exonerated from all responsibility in connection therewith. The fraud was not appellants' fraud; it was Horster's fraud practiced upon appellants.*

The respondents' rights rest upon the attachment above mentioned and the proceedings thereunder. All the claims of respondents (except part of the claim of Mrs. Minchin) *arose before any assignments or transfers to appellants.* That exception is limited to \$1500.00 (Book I, page 167, lines 30-40).

The attachment was sued out on March 20th, 1926.

More than three months prior thereto, the first assignment involved, namely to appellant, Union Cemetery Association, was perfected, i. e. on December 16th, 1925 (State of Case, Book I, pages 29, 32, Exhibits A, B, C and D; testimony of Howard Kirk, pages 135, 136; page 192, top). Notice of that assignment was given to the third party

affected thereby not later than December 17th, 1925 (Book I, State of Case, page 147, line 23 to page 148, line 13). The transfers and assignments to the other appellants and the perfection of the same were completed by January 4th, 1926 (as will hereafter be more particularly pointed out).

In the considerable interval between January 4th, 1926 and some day after March 1926, the appellants rested in the quiet and assured belief that they were the only unsatisfied creditors of Otto G. Horster and that all was well. Word that an attachment had been issued reached attorneys representing appellants some little time after such issuance. Then those attorneys promptly communicated with the office of Mr. Vanderbilt who had the attachment suit in charge. (Book II, page 64, lines 20-40; Book I, page 173, lines 20-32).

When the cause was before this court upon the first appeal, the validity of the appellants' claims against Horster's estate had not been judicially admitted or adjudged, though the uncontradicted proofs were all available to the learned Vice Chancellor. His opinion, upon which the interlocutory decree is founded, never conceded the validity of the appellants' claims. Indeed, in referring to those claims he used (*inter alia*) language of doubt as follows: "*alleged* indebtedness" (Book I, State of Case, page 231, lines 32-33); "for the benefit of Union Cemetery Association for its claim *now said* to be \$22,500.00" (*ib.* page 229, lines 13-14); "The receiver can then assemble the assets and can under direction of the Court decide on the *validity* of the claims against the estate and their *priority*" (*italics our own*). Book II, page 234.

The refusal of the Court of Chancery to concede that the appellants' claims were unquestionable is incorporated in the interlocutory decree,

the penultimate paragraph of which reads as follows: (Book I, State of the Case, page 14):

“It is further ordered, adjudged and decreed that the receiver inquire into the amount, validity and priority of the claims of complainants and priority of the claims the said assets and report thereon to the court.”

When that interlocutory decree with the provision just quoted was before this court, it must have been impressed by the doubt as to appellants' claims reflected in the opinion of Vice Chancellor Church and the decree thereon, for it affirmed that decree upon the basis of the Vice Chancellor's opinion, without any comment of its own, and in these words:

“The decree appealed from will be affirmed for the reasons stated below in the opinion filed in the court below by Vice Chancellor Church.”

6 A. R. page 1653 bottom.

It is therefore a *fact* in this case that up to the time of the affirmance of the interlocutory decree the validity of appellants' respective claims was judicially held to be in doubt both in this forum and in the forum below; and so much in doubt, as to require investigation and report by the Receiver appointed in part for that purpose.

That doubt was like a cloud upon the appellants' case; if the appellants' claims might not be as large as alleged, if the assets assigned or pledged might be excessive or the respondents might be prejudiced by permitting control of those assets to be retained by the appellants, then the appointment of a Receiver might appear desirable.

But all doubt as to the validity of the appellants'

claims has been dissipated by the report of the Receiver filed in March 1929, which in this respect is unchallenged by the respondents and which was confirmed by the "final decree" now under review. (Book II, State of the Case, pages 1 et seq especially pages 9 to 11).

That report establishes that the aggregate of appellants' claims exceeds \$73,000.00 in amount. The items as reported by the Receiver are as follows:

Union Cemetery Association	\$27,492.75
Herman T. Nagel	596.98
George T. Rockwell	12,437.50
Mary Ulicsnik	11,425.34
Karl Riester	10,939.16
Karl Kniep Estate	10,792.50

(Book II, pages 9-11)

*We are, therefore, in a most important respect, faced by a situation entirely different from that which confronted us on the occasion of the earlier appeal. Now, for the first time, this court knows that the appellants claims were in reality just and valid—that they are not doubtful—that in each case they represent:*

"Funds entrusted to Otto G. Horster to be placed on bond and mortgage."

(Book II, pages 9-11).

The court now *knows* that the claims are not merely "alleged" but unquestionable, valid for the full amounts demanded.

We shall ask this court upon this appeal, to draw conclusions from the fact that there is now established what before was made to appear doubtful or uncertain, by reason of the course pursued by the Vice Chancellor when the case was first before him.

Equally doubtful and uncertain, by reason of the Vice Chancellor's opinion, must have appeared at the first hearing, the aggregate value of the assets pledged with or for the appellants or assigned to them. That opinion leads to the impression that Horster had made a paper assignment and transfer to favored creditors, of an entire estate, worth much more than the claims of those creditors; that he had done this to protect his equity in that estate against the respondents; that appellants by a course of supine neglect had failed to realize upon the assets of the estate, had permitted (in one instance) one of the respondents to be misled, had permitted \$15,000 in bonds to "apparently disappear" and, indeed, had permitted Horster to retain possession of the property and use it as his own and as if there had been no transfer by him. (Book I, page 233).

Now, however, upon this appeal, we have the Receiver's report which makes plain that he has followed substantially the same course as the appellants did before him with respect to realization or conversion into money of the assets and that he was and is met by the same difficulties and obstacles with respect to reduction of the estate to cash, which confronted the appellants.

An analysis of the Receiver's report shows that (aside from interest and rent) all the money that has come into his hands thus far was money which would have been available for payment to appellants, had it not been for the existence of litigation. The Receiver, wisely, but no more wisely than appellants, has not sold any saleable property which came into his hands; he has not discovered any new property; he has not found the "bonds" which "apparently disappeared", for the good reason that they had never "disappeared".

The doubtful value of what was believed to be the main asset of Horster remains just as doubtful at the time of this report, as it did in 1926; and depends for any realization upon the possibility of settlement in another lawsuit, just as it did in 1926. (Book II, page 4, paragraph "6", where the Receiver points out the uncertainties in regard to the value of Stuyvesant Development Company stock—the assumed main asset of Horster; compare this with stipulation at the first hearing before the Vice Chancellor, in the same regard (Book I, page 153, line 13, to 154, line 30).

We will deal with the Receiver's report in detail hereafter and show therefrom how fully in respect to assets it supports the position taken by appellants upon the first appeal to this court.

At this point, however, perhaps the most important aspect of the Receiver's report, for us to emphasize, is that it is *premature* and that it does not furnish us with the assured and ascertained valuation of Horster's entire estate in the Receiver's hands, which the interlocutory decree contemplates *as a condition precedent to distribution*.

Only, if and when we are definitely assured by realization or conversion into money of substantially all the assets which passed to the receiver, will it be possible for appellants to assert in any judicial tribunal, without the possibility of contradiction:

"It is now apparent that the value of what was pledged or assigned to us, is far less than the amount assuredly due to us and therefore you must correct all former conclusions founded upon the assumption that we received an excess of security, or upon the assumption that our course of conduct with respect to the assets pledged, could possibly have injured or impaired any right of respondents."

The first decision of the Court of Chancery in this cause—the one which led to the “interlocutory decree” and the appointment of a Receiver therein—is built, in the main, upon conclusions of fact which the Receiver’s report, actually filed, certainly impairs. A final report of the Receiver, after all the assets are converted into cash, may well make those conclusions of fact wholly untenable.

The receiver, in the interlocutory decree was ordered:

“ \* \* \* upon discovery, recovery and conversion to cash of all the assets which he can find report to this court the amount in his hands for distribution.”

“ \* \* \* inquire into the amount, validity and priority of the claims of the complainants and defendants in and to said assets and report thereon to the court.”

Then follows the direction of the court in this behalf, namely the order:

“that the question of priority of claims of all the parties to this suit in and to the assets in the hands of the Receiver \* \* \* be reserved for adjudication upon the coming in of the Receiver’s report.”

(Book I, page 14).

This comprehensive scheme of a full report as to money available for distribution upon liquidation of all the assets and the priorities in such assets of the respective parties, would have permitted a final “adjudication” as to the priorities *with all the facts before the court*.

If the Receiver could realize sufficient to pay all claimants, the question of priorities would become academic. The very nature of the present contest shows that all parties concerned believe the result

suggested to be beyond hope. If the Receiver's eventual total realization will not exceed \$25,000, then the position taken by the Court below in its first opinion, that excessive security was given, will prove to be erroneous.

No *just* decision as to priorities, adverse to appellants, is possible until the Receiver's administration demonstrates whether or not this is or is not a case of excessive security given to appellants.

The interlocutory decree required the reduction by the Receiver of "all" assets to cash (Book I, page 14, line 14) and the "report to this court the amount in his hands *for distribution*". (Book I, page 14, lines 15-16).

Until the moment for "distribution" comes, pursuant to the interlocutory decree and all the money possible will have been realized, the payment of any money to the respondents is manifestly unfair.

That, however, is what the "final decree" orders and adjudges.

It shows that the Receiver has a cash balance on hand \$17,956.17" that he holds certain stock certificates, two promissory notes of George T. Vickers "on which notes suits have been started", and also a certain interest in real estate.

Then the decree recites:

"And it appearing from the said Receiver's report that a substantial time may be required for the reduction to cash of the real and personal estate now in his hands"

(Book II, page 20).

Following this (Book II, page 22) the decree orders payment of the following sums:

- |   |           |
|---|-----------|
| 1. To Charles F. Lynch, Receiver                              | \$1000.00 |
| 2. Charles E. Dalrymple                                       | 600.00    |
| 3. Arthur T. Vanderbilt                                       | 1000.00   |
| 4. Ellen Minchin  | 5383.48   |
| 5. Partial dividends to Margaret McLaughlin and Mary E. Riley |           |

The Receiver, at the time he made his report, had before him the entire record and proceedings, as printed in Book I of the State of the Case. Also, he had before him important additional proofs, namely those furnished by the testimony, given in his presence, of six witnesses sworn on behalf of the appellants (Book II, State of the Case, pages 33 to 72).

No witnesses on behalf of respondents were sworn or testified before the Receiver, and no new evidence was offered on their behalf (except as to the fees of the auditor in the attachment suit and as to the exact amounts due to respondents as ascertained in such attachment suit).

The Receiver reported that the claims of all the respondents are prior to the claims of the appellants.

The pertinent portion of the report reads as follows:

“With regard to priority, I find and report that Claim No. 1 of Ellen Minchin for \$5,583.48 has priority over and above all the claims inasmuch as she is the creditor who instituted the attachment suit and has obtained final judgment. Claims Nos. 2 and 3 of Margaret McLaughlin and Mary E. Riley, which have been reduced to judgments, they having been applying creditors

in the attachment suit instituted by Ellen Minchin, are second and subsequent to the claim of Ellen Minchin, and share pro rata. Claims Nos. 4 to 9, inclusive, not having been reduced to a judgment, share pro rata in the proceeds of the estate after claims Nos. 1, 2 and 3 have been fully paid."

(Book II, page 5, paragraph "9")

The Receiver apparently concluded that the claims of respondents having been reduced to judgment in the attachment suit took precedence over the claims of appellants, irrespective of what was levied upon or seized in such suit and irrespective of any other circumstances.

Exceptions were filed to that report. (Book II, pages 12 to 17).

Consideration of those exceptions led to the Vice Chancellor's memorandum, printed on page 18 of Book II, State of the Case, as follows:

"I have considered the exceptions filed in the above entitled cause to the report heretofore filed by the Receiver, Hon. Charles F. Lynch.

"I do not consider that they possess any merit. I will advise a decree dismissing them and confirming the receiver's report for the reasons therein stated."

The final decree does confirm that report in all respects and so in substance and effect overrules all of appellants' exceptions. The decree goes further than that, however, and orders the partial distribution to respondents above described.

The additional testimony taken before the Receiver was intended to prove, and did prove, the following:

## Additional Proofs Before the Receiver.

### I.

The priority of the claim of Union Cemetery Association—in respect to the stock of Stuyvesant Development Company and a \$10,000 check of that company, representing proceeds of the stock, which the Receiver had cashed—rested not merely upon the paper assignment of that stock by Otto G. Horster to Louis Kempf, one of the trustees of the cemetery association, but also rested upon the fact that the stock certificates themselves had been delivered up by Horster to Howard Kirk, attorney of the cemetery association, before the attachment was issued; from December 1926 until the certificates were delivered by Kirk to the Receiver under order of the court, Kirk held those certificates on behalf of the cemetery association.

Even if the paper assignment in the eyes of the law was fraudulent, because the value of the stock was excessive security for the debt owing to the cemetery association, the *physical pledge of that stock with the attorney of that association, plus the fact that no levy either effective or ineffective upon that stock was ever made*, established a priority in the cemetery with respect to that stock and the avails thereof, as against Horster, and the respondents.

The purpose of Mr. Kirk's evidence in this respect was clearly pointed out to the Receiver (Book II, page 45, lines 12 to 30).

In this connection it should be noted that at the meeting above mentioned (prior to the attachment) of March 11, 1926, at which attorneys representing all the appellants, as well as one of the

attorneys represented <sup>my</sup> Horster, all gathered and conferred, Mr. Kirk represented the cemetery association and Mr. Lehlbach represented Mr. Kempf, its trustee—thus establishing at that time the recognition that while Kempf (having accepted the trust) was a party interested in the matter of the conference, *the cemetery association represented by Kirk was through him in actual possession of the stock certificates.* Horster's attorney who testified, said:

“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.”

(Book I, Page 127, bottom).

From that time, when Horster knew that Kirk had his grip on the stock certificates for the cemetery association, Kirk retained the certificates *for that association.* Kirk, a reputable attorney, testified, without contradiction or cross-examination:

“Q. Col Vickers was present. A. And Norbury Murray.

Q. It was at that meeting there was flashed the \$10,000 check, wasn't it? A. Absolutely.

Q. And there is no question that at that time you represented the Union Cemetery Association? A. None whatsoever.

Q. And you spoke for them in that conference? A. Yes.

Q. And stated to the persons assembled that you held the stock for the benefit of the cemetery association? A. I did.

Q. And it was in your possession and in your safe at that time? A. Yes.

Q. That is correct? A. Yes.

Q. At the time you surrendered the certificates of stock to Judge Lynch, did you surrender the other documents you received in connection with the transaction with Mr. Horster? A. I believe all that was fundamental was turned over.

(Book II, page 43).

The Receiver utterly ignored in his report the legal aspect of the *bailment* of the stock certificates with Kirk, and the absence of any levy thereon, under the attachment.

The only levies attempted under the attachment were as follows:

(a) On Horster's interest in his home, postage stamps, and office equipment (Book I, pages 219, 220, 221).

(b) On "a certified check, for \$10,000, in the possession of Colonel Vickers, at 999 Bergen Avenue, Jersey City, due the defendant".

(Book I, page 217).

That certified check, however, had been caused to be so certified by Colonel Vickers and was held by him, under an agreement to turn over the same when the parties represented at the March 11th, 1926 conference aforesaid, should reach an agreement amongst themselves. (Book I, page 127, line 18, to page 128, line 40):

" \* \* \* My recollection of it is, and I am sure of this, that he said he would have the check certified, and as soon as the parties that were represented at that conference agreed amongst themselves as to who should get it,

he, Vickers, would turn it over to that agreed party." (Page 128, lines 13, 19).

Colonel Vickers himself virtually substantiated this when he testified (Book I, page 148, lines 17, 31).

That check was not Horster's check. It was a check that belonged to at least one of the parties to the conference of March 11th, 1926.

## II.

The second feature of the proofs taken before the Receiver, was that none of the appellants were parties to any fraudulent intent or purpose which may have subsisted in Horster's mind. Appellants took their security, respectively, as shown above, without knowledge of respondents existence, and after assurances by Horster's attorneys which led them to believe as late as the conference of March 11th, 1926 (before the attachment) that appellants were all the unsatisfied creditors.

We have already quoted in this regard from the testimony of Mr. Contrell, a respectable attorney, but the court should read all the testimony beginning at the bottom of page 58, Book II, and concluding in the middle of page 65—testimony not questioned, doubted or contradicted.

The Receiver should have applied to the proofs before him, the rule that

"It is not sufficient to a determination of actual fraud to find that the debtor disposed of or made away with his property with the intent to hinder, delay or defraud his creditors. There must be found, in addition there-

to, proof of a participation by the transferee or grantee in such intent."

(Horton vs. Bramford, 79 N. J. Eq. 356.)

The witness Pfaff's testimony, relevant to this feature of the case, has already been quoted, in part, above.

In order to avoid unnecessary repetition all other features of fact, which should be considered, will be treated under appropriate heads hereafter.

The history of the assignments and transfers involved, will be presented under the head of Point III, in which it is shown that appellants dealt honestly and fairly with the estate which afterwards passed into the hands of the Receiver.

Under Point XIII we will analyze the Receiver's report, to establish that the court below erred, when it concluded in its first opinion, that excessive security had been given to appellants or that respondents were prejudiced by appellants administration of that estate.

### **Questions involved and the manner in which they are raised.**

All the questions involved are raised by the exceptions to the Receiver's report and by the petition of appeal in this court. Appellants rely upon each and every one of those exceptions and upon the matters presented in the petition of appeal. Pursuant to the rule each and every exception is described hereinafter, under the heading "Grounds of Appeal".

The exceptions are found printed on pages 12 to 17 of Book II, State of the Case.

The petition of appeal may be read at pages 26 to 30 of Book II, State of the Case.

However, we can succinctly state here the main questions involved by roughly stating our position at this stage of the litigation—as follows:

### I.

While the “interlocutory decree” sets aside all the transfers and assignments to the appellants; it nevertheless reserves to those appellants the right to establish the validity and priority of their claims against the assets in the hands of the Receiver. If this right thus reserved is in any way impaired by a prior declaration in said interlocutory decree that said assignments and transfers were fraudulent, then said interlocutory decree is a nullity as against these appellants for it then goes outside the issues raised by the pleadings in the cause; likewise if the ultimate rights of appellants are impaired by the express judgments in said interlocutory decree setting aside said transfers and assignments, said decree is, as far as those judgments are concerned, a nullity as against these appellants. The cause was tried upon the basis of the pleadings. Adjudications in the “interlocutory decree” outside the pleadings are null and void under the established law of this State, and in this case, if such adjudications are upheld to affect the rights of appellants, they then transgress the safeguard of the fourteenth amendment to the United States Constitution. It is fundamentally wrong to determine the rights of parties in a suit, upon grounds in respect to which those parties have not fairly had their day in court. The first opinion in the Court of Chancery went way outside the issues tried; the interlocutory decree, which is the formal expression of that opinion, to the extent that it

tends to prejudice the fundamental rights of appellants, is therefore ineffective and should be disregarded.

## II.

By assigning to the "interlocutory decree" an *interlocutory characteristic* and by taking the view that the decree means what it says at the end and that the question of the priority of appellants remained wide open before the Receiver, it is possible to come at once to conclusions, which appellants maintain are correct conclusions. Those conclusions are: the appellants are assignees or transferees whose rights as such became fixed at a time long prior to the attachment upon which respondents rely; under the established law, assignments, grants and transfers which are prior in time are prior in equity, as against a subsequent attachment; appellants in each case took the transfers and assignments, honestly, with the simple intention of thus obtaining security for their respective debts; there is nothing in the case which will permit the destruction of appellants priorities in favor of the respondents.

## III.

Whatever fraud may be attributed to Horster, the appellants are not parties thereto and should not be prejudiced thereby. A fraudulent transfer to an honest creditor does not destroy the priority of that creditor.

#### IV.

The assets in the hands of the Receiver should be distributed as follows:

(a) Proceeds of Stuyvesant Development Company stock to Union Cemetery Association to such extent as may be necessary to satisfy its claims and cover its expenses in the litigation.

(b) Balance of estate, as far as necessary to satisfy the claims of the other appellants, who share pro rata if estate be insufficient.

(c) Any balance then remaining to the respondents.

#### V.

The Receiver's attempt to destroy the effect of Mrs. Horster's conveyance of her interest in the real property involved (which stood in her name and her husband's name as tenants by the entireties) is utterly without justification and in the teeth of the interlocutory decree. Mr. and Mrs. Horster were tenants by the entireties, in respect to the property. Voiding any transfer made by her husband does not in any way affect her or the transfer of her interest, nor does it restore such interest to her.

#### VI.

The respondents are precluded by their laches from any attack upon the transfer of the Stuyvesant Development Company stock. Moreover there was no levy on the same under the attachment.

When respondents were brought into court by complainants bill of complaint, two of them filed a counterclaim attacking the assignment of that stock. This counterclaim was filed over one year after the writ of attachment was issued.

## VII.

The right of Otto G. Horster to prefer certain creditors over others was established law at the time the assignments were made.

National Bank vs. Massopust, 85 N. J. Eq. 564.

Muchmore vs. Budd, 53 N. J. L. 385-386.

## VIII.

The entire estate in the hands of the Receiver has a value less than the claims of appellants. Respondents cannot therefore be affected by appellants mismanagement of the same, if there was any mismanagement.

## GROUND OF APPEAL.

### First Ground of Appeal.

This is based upon the refusal of the Court of Chancery to sustain the first exception to the Receiver's report; instead, the court, in its final decree, confirmed the entire report without expressly overruling the exception. (Book II, page 21, lines 29-33).

This exception is directed to the part of the Receiver's report (Book II, page 3, paragraph 4) which speaks of the property known as No. 156 Steuben Street, East Orange, and sets forth: that this property was

"prior to the assignment to Messrs. Rockwell, Kniep, etc. as Trustees by Otto G. Horster and Helen C. Horster his wife, in the name of Otto G. Horster and Helen C. Horster, his wife, as tenants by the entirety. The interlocutory decree hereinbefore referred to having set aside the transfer by the latter to the Trustees, places the title to the premises in its former status."

(Book II, page 3, lines 19-22). The pertinent exception is to the effect that "said receiver should have reported that the conveyance by Helen Horster unto said Trustee was a good and valid conveyance". (Book II, page 12, lines 30-40).

The Receiver had patently overlooked that the "interlocutory decree" to which he refers, expressly excepted from its force and effect Mrs. Horster's interest, by providing: "however, that any interest complainants may have acquired by said conveyance from Mrs. Horster is reserved to them" (Book I, page 12, top).

### Second Ground of Appeal.

This is based upon the refusal of the court below to sustain the second exception to the Receiver's report; instead, the court confirmed the entire report in its final decree (Book II, page 21, lines 29-33) without expressly overruling this exception.

That exception is aimed at the part of the Receiver's report which states (Book II, page 5, paragraph 9) that the claim of Ellen Minchin for \$5,583.48 "has priority over and above all other claims"; the exception reads as follows: (Book II, page 13, paragraph 2):

"For that the Receiver reported that the claim of Ellen Minchin for \$5,583.48 'has priority over and above all other claims'; whereas such claim is subordinate to and after the claims of complainants and the defendants who have joined in these exceptions; and the receiver should have reported to that effect."

### Third Ground of Appeal.

This is based upon the refusal of the court below to sustain the third exception to the Receiver's report; instead the court confirmed the entire report, in its final decree (Book II, page 21, lines 29-33) without expressly overruling this exception.

That exception is aimed at the part of the Receiver's report which states that the claims of Margaret McLaughlin and Mary E. Riley are prior to the claims of these appellants. (Book II, page 5, paragraph 9).

The exception is substantially identical in form with the second exception (*supra*).

#### Fourth Ground of Appeal.

This is based upon the refusal of the court below to sustain the fourth exception to the Receiver's report; instead the court confirmed the entire report, in its final decree (Book II, page 21, lines 29-33) without expressly overruling this exception.

That exception is aimed at that portion of the Receiver's report which states that the claim of Charles E. Dalrymple, auditor in attachment, is entitled to priority over all other claimants (Book II, page 6, lines 20-30).

The exception reads as follows: (Book II, page 13, paragraph 4).

"For that the receiver reported that the claim of Charles E. Dalrymple is entitled to priority over the claims of complainants and the defendants who have joined in these exceptions."

Dalrymple, the auditor in attachment, *filed no answer or counterclaim in this suit*. An allowance was made to him by the court of law in the attachment suit. We do not know the legal justification for an allowance in this equity suit, to Mr. Dalrymple, to cover his services as auditor in the attachment suit of Ellen Minchin against Otto G. Horster in the New Jersey Supreme Court. (Book II, State of the Case, page 22, lines 8-12).

#### Fifth Ground of Appeal.

This brings up the fifth and sixth exceptions to the Receiver's report (Book II, page 13, paragraphs 5-6) which exceptions the Court failed to sustain.

Those exceptions pointed out that the Receiver

“has not shown or reported upon what proofs are based those portions of the Receivers’ report to which the prior exceptions are directed”; also that “by the relevant, competent and material proofs offered and given by the complainants it was proved that the claims of” these appellants “are in law and equity and in fact prior to the claims of” respondents.

### **Sixth Ground of Appeal.**

This brings up the seventh, eighth and ninth and tenth exceptions to the Receiver’s report. (Book II, pages 14-15, paragraphs 7, 8, 9 and 10) which exceptions the court failed to sustain but in effect overruled by its blanket confirmation of the Receiver’s report (Book II, page 21, lines 29-33).

Those exceptions read as follows:

“7. For that by such proofs it was proved that the stock certificates of Stuyvesant Development Co. mentioned in the Receiver’s report were delivered by Otto G. Horster unto Howard Kirk as security for the payment of the indebtedness of said Otto G. Horster unto Union Cemetery Association, which indebtedness is described as “Claim No. 4” in said report; that from a time long before the issuance of the attachment sued out by Ellen Minchin until the delivery of said certificates unto the Receiver by said Howard Kirk, the latter on behalf of and as agent for Union Cemetery Association held said certificates on its behalf as security as aforesaid; that no seizure of or levy upon said certificates or the shares of stock represented thereby, was ever made; that said Howard Kirk as agent for the Union Cemetery Association and said association, through said Howard Kirk, without any knowledge of any fraud on the part of the said Otto G. Horster and without any taint

of fraud attributable to said Association or said Howard Kirk, held said certificates and said shares of stock in good faith as security as aforesaid, and that said Association is entitled to be paid out of the proceeds of sale of said certificates and the stock represented thereby and out of the increase or issue therefrom, whether by way of dividends or otherwise, first and prior to Ellen Minchin, Mary E. Riley and Margaret McLaughlin and their respective claims and all of them.

"8. For that the Receiver should have reported that the attachment sued out by Ellen Minchin was ineffective as against the stock certificates aforesaid, and that the said Mary E. Riley, Margaret McLaughlin and Ellen Minchin have no right title or interest therein. •

"9. For that the Receiver should have reported that by reason of the absence of a levy upon said certificates and/or said stock, or a seizure or taking of the same under or by virtue of the attachment aforesaid; coupled with the fact Mary E. Riley, Margaret McLaughlin and Ellen Minchin stood by and delayed until the filing of the answer and counterclaim of Ellen Minchin and Mary E. Riley, to assert any right or claim to said certificate and/or said stock, they and each of them are in this court not entitled to any priority over these exceptants or any of them; and that the claims of said Ellen Minchin, Mary E. Riley and Margaret McLaughlin are subordinate to and after the claims of these exceptants.

"10. For that the Receiver should have reported that the claims of Ellen Minchin, Mary E. Riley and Margaret McLaughlin to the proceeds of the check of \$10,000 or any part thereof are subject to the prior rights of these exceptants (or Union Cemetery Association) thereto."

### **Seventh Ground of Appeal.**

This brings up the eleventh exception (Book II, page 15, paragraph 11) to the Receiver's report which exception the court failed to sustain but in effect overruled by its blanket confirmation of the Receiver's report (Book II, page 21, lines 29-33).

That exception reads as follows:

"11. For that the Receiver should have reported that Charles E. Dalrymple and Margaret McLaughlin having filed no counterclaim in this suit, are not entitled to any affirmative relief as against these exceptants."

### **Eighth Ground of Appeal.**

This brings up the twelfth exception (Book II, page 15, paragraph 12) to the Receiver's report which exception the court failed to sustain but in effect overruled by its blanket confirmation of the Receiver's report (Book II, page 21, lines 29-33).

That exception reads as follows:

"12. For that the Receiver should have reported that under the proof no fraud or fraudulent intent of Otto G. Horster affected or can affect the claims of these exceptants or any of them."

### **Ninth Ground of Appeal.**

This brings up the thirteenth exception (Book II, page 15, paragraph 13) to the Receiver's report which exception the court failed to sustain but in effect overruled by its blanket confirmation of the Receiver's report (Book II, page 21, lines 29-33).

That exception reads as follows:

"13. For that the Receiver should have reported that the complainants and Karl Kneip respectively took under the assignments, transfers and conveyances made to Union Cemetery Association and the "Trustees" aforesaid in good faith and for value, as security for their respective claims against Otto G. Horster and the proved indebtedness of him to them, respectively, and by reason thereof are entitled to priority in respect to the avails in the hands of the Receiver."

#### **Tenth Ground of Appeal.**

This brings up the fourteenth exception (Book II, page 16, paragraph 14) to the Receiver's report which exception the court failed to sustain but in effect overruled by its blanket confirmation of the Receiver's report (Book II, page 21, lines 29-33).

That exception reads as follows:

"14. For that the Receiver should have reported that the Trustees aforesaid were fraudulently led by Otto G. Horster to believe that they and those creditors for whom they were acting were the remaining unsecured creditors of said Otto G. Horster, at the time of the assignment, transfers and conveyance by said Otto G. Horster; that by reason thereof said Trustees and those for whom they were acting are exonerated and not to be prejudiced by reason of the fact that said Otto G. Horster fraudulently concealed his indebtedness to Ellen Minchin, Margaret McLaughlin and Mary E. Riley, or by reason of any fraudulent intent or act of Otto G. Horster of which they had no knowledge or notice."

### **Eleventh Ground of Appeal.**

This brings up the fifteenth exception (Book II, page 16, paragraph 15) to the Receiver's report which exception the court failed to sustain but in effect overruled by its blanket confirmation of the Receiver's report (Book II, page 21, lines 29-33).

That exception reads as follows:

"15. For that the report of the Receiver, if sustained insofar as it reports that the claims of Mary E. Riley, Ellen Minchin, Margaret McLaughlin and Charles E. Dalrymple are prior to the claims of these exceptants, would deprive these exceptants of their property without due process of law in violation of the provision of the Constitution of the United States; furthermore, such report, if sustained insofar as above indicated, would result in a denial to these exceptants of the equal protection of the laws guaranteed by such Constitution."

**BRIEF OF THE ARGUMENT.****POINT I.**

**Before appellants' claims can justly be subordinated to respondents' claims, there must be established that appellants participated in some fraudulent intent of Otto G. Horster.**

"The complainant contends that there is sufficient proof to lead the court to find that the transactions attacked were actually fraudulent, with the result that they should be wholly set aside in favor of the creditors of Joseph Jr. To render this result a just one, the court must find that there was a covinous agreement between Walter and Joseph, Jr., to transfer the property belonging to Joseph with the intent to hinder, delay and defraud the creditors of Joseph, Jr. It is not sufficient to a determination of actual fraud to find that the debtor disposed of or made away with his property with the intent to hinder, delay and defraud his creditors. There must be found, in addition thereto, proof of a participation by the transferee or grantee in such intent. *Muirheld v. Smith*, 35 N. J. Eq. 308, 311, Ct. of Er. 1882; *New York Fire Ins. Co. v. Tooker*, 35 N. J. Eq. 408, 412 (*Van Vleet V. C.* 1882); *Flemington Nat. Bank v. Jones*, 50 N. J. Eq. 244, 249, 24 Atl. 928 (*Pitney, V. C.* 1892); affirmed 50 N. J. Eq. 486, 27 Atl. 636; *Claflin Co. v. Freudenthal*, 58 N. J. Eq. 298, 302, 43 Atl. 529 (*Emery, V. C.* 1899); *Perrine v. Perrine*, 50 Atl. 694 (*Pitney, V. C.* 1901); and innumerable cases cited in the notes in 32 L. R. A. 33, and 36 L. R. A. 335."

*Horton vs. Bamford*, 79 N. J. Eq., 356,  
at page 374.

We quote further from the opinion in the case just cited, as follows:

“The doctrine with respect to conveyances upon some consideration, and therefore attackable at law, but subject to attack in equity, was first clearly laid down by Chancellor Kent in *Boyd vs. Dunlap* (1815) 1 Johns Ch. 478; and this was adopted in New Jersey by Chancellor Green in *Beekman v. Montgomery* (1861) 14 N. J. Eq. (1 McCart.) 106 (at p. 113); and has since been followed in *Coley v. Coley* (Chancellor Green, 1862), 14 N. J. Eq. (1 McCart.) 350 (at p. 354), and *Demarest v. Terhune* (Court of Errors and Appeals, 1867) 18 N. J. Eq. (3 C. E. Gr.) 532 (at p. 539); and cited with approval in *Robinson v. Urquhart* (Chancellor Williamson, 1858), 12 N. J. Eq. (1 Beas.) 515 (at 537); *Lashley v. Souder* (Vice-Chancellor Pitney, 1892), 24 Atl. Rep. 919 (at p. 921), and the principle has been applied in all of the numerous cases above cited holding that a court of equity will decree a conveyance voluntary for any excess of such an amount as to shock its conscience over the actual value of the consideration given for the property conveyed or transferred.”

*Horton vs. Bamford*, 79 N. J. Eq., 356, at page 374.

## POINT II.

**The pertinent principles of equity applied by this court in *Muirheid v. Smith* require that the transfers to appellants shall be protected by recognition of the priority of their claims, in and to the assets in the hands of the receiver.**

Muirheid, et al, appellants, vs. Smith, respondent, 35 N. J. Equity, involved an attack made by an attachment creditor upon the conveyance of lands from Charles H. Muirheid to his brother, William H. Muirheid.

The Court of Chancery (as in the instant case) held the conveyance void for fraud. The consideration was past due indebtedness.

This court was divided, six judges concurring with Knapp, *J.* in holding that the conveyance must be permitted to stand and in absolutely reversing the decree below, and five judges concurring with Depue, *J.* in holding that the conveyance should be permitted to stand, *as security only.*

In both the prevailing and dissenting opinions it was admitted that the conveyance could not be entirely set aside; the prevailing opinion was that it could not be impaired to any extent; the dissenting opinion being that the inadequacy of consideration called for a conversion of the conveyance into a mere security.

Knapp, *J.* said in part (35 N. J. Eq. at 309) :

“Astute as courts should be in the detection of fraud, they are not justified in finding it on grounds which shows no more than its possible existence. When the acts of parties admit of a reasonable interpretation in favor of honesty and fair dealing, they should receive it.”

The prevailing opinion also referred to the well-established distinction between actual fraud and fraud in law. The court said (bottom of page 309 to 310):

“But conceding the failure in the proof to establish actual fraud as against William, it is still contended that the conveyance ought not to stand, because the consideration for which it was made was so inadequate that it is, under the circumstances, inequitable that William should hold on to his bargain. In this court in *Demarest v. Terhune*, 3 C. E. Gr. 532, a conveyance of lands by a debtor in failing circumstances to a creditor, in payment of a debt due him, the amount of such debt appearing to be an inadequate price, the conveyance was held to be voluntary as to such excess of value, therefore constructively fraudulent against creditors, and was allowed to stand only as security of the grantee's debt, a doubt existing as to the bona fides of the transaction, the burden of proving which was held to be upon the creditor. Inadequacy of consideration and doubt as to the bona fides of the conveyance for other purposes than as security of a debt, were the essential features of that case.”

*Depue, J.* said (35 N. J. Eq. at 313):

“When a debtor in embarrassed circumstances makes a conveyance to one of his creditors for a consideration apparently inadequate, the burden is thrown upon him to show by full proof that the transaction was bona fide; and, as against other pre-existing creditors, to sustain the conveyance the grantee must satisfy the court not only that he accepted the deed in good faith but also that he gave adequate consideration for it. If adequate consideration be not made apparent, the court will allow the deed to stand only as security.”

The application of the principles applied in the Muirheid case, to the case in hand is too plain, we submit, to require any remark by us.

### POINT III.

#### **There is no evidence of fraud on the part of the appellants.**

The case of Union Cemetery Association is the simplest and easiest with which to deal, because there were no formal documents involved. The proofs show that when the Treasurer of the cemetery association, its other officers, and its attorney, specially employed for the purpose, confronted Horster with the evidence of his misdeeds, he admitted the facts and agreed to give security. First he was asked "to sign over the property where he lived in East Orange" \* \* \* "He did not want to put his wife into this case" \* \* \* "He offered stock in the Stuyvesant Development Co., his share in it and some bonds \* \* \* of the cemetery" \* \* \* "He did not have the documents with him at that time" (Book II, page 47, lines 20-40). The matter was entrusted to the attorney. The informal documents shown at bottom of page 31 and the head of page 32, Book I, State of the Case, were signed in the presence of the three officers of the Association and a promissory note for \$35,000 to one of the trustees was signed (Book I, State of the Case, page 32). The next day (December 16th) the stock certificates were delivered to Mr. Kirk bearing endorsements to Louis Kempf, the Trustee. Kirk retained possession of the certificates, until,

under order of the court, he delivered them to the receiver. The amount of the note was fixed at \$35,000 because of the uncertainty as to the exact amount of Horster's indebtedness to the cemetery association (State of Case, Book I, page 91, lines 15-20; page 136, lines 25-40). The existence of this note was disclosed when appellants filed the bill of complaint below. If there had been any thought of fraud on the part of the cemetery association, the existence of the note would not have been disclosed. In the bill of complaint the claim of the cemetery association is not stated as \$35,000 but it is stated "according to the best of their knowledge, information and belief" as \$22,500.00, and has been limited to that (plus interest) throughout the litigation. The letters of Otto G. Horster and Frederick A. Lehlbach, attorney of the trustee Kempt, shown on pages 192 to 195 inclusive of Book I, State of the Case, make plain that the transfer was simply by way of security.

The letter of Mr. Lehlbach sets forth, under date of February 23, 1926 (inter alia) :

"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."

Notice of the assignment had been given to Stuyvesant Development Co. immediately after the assignment. Colonel Vickers, President of that Company admitted the facts on cross examination (Book I, State of the Case, page 151, from line 12 to page 152, line 35); there is no question about

that in the case. As shown heretofore, Mr. Kirk maintained the right of the cemetery association, at the conference of creditors held in Mr. Murray's office on March 11, 1926.

All this was before the issuance of the attachment.

Now, how can any fraud be spelled out of this?

The learned Vice Chancellor felt that the security was excessive. But even today the receiver does not know what the stock is worth; the receiver holds it today awaiting the issue of another lawsuit. Also the learned Vice Chancellor is impressed with the fact that the cemetery association did not receive the promised bonds. He says that they have "apparently disappeared"; they had never disappeared; they had gone to Judge Stickel on behalf of his client and the balance of the funds realized by him passed to the Receiver and are shown in the Receivers' report (See Book I, page 7, \$1528.50). It was fully disclosed at the first hearing before the learned Vice Chancellor why the cemetery association had not received the bonds—that Judge Stickel had received them.

Under these facts and circumstances how can Union Cemetery Association be deprived of its prior right to the proceeds of the Stuyvesant Development Co. stock? The \$10,000 certified check represents part of those proceeds; as heretofore shown it was certified under an agreement with Col. Vickers, who was to hold the same for the benefit of such party present at the above mentioned conference, as would appear entitled thereto.

On March 12, 1926, Colonel Vickers transmitted the check to the bank with instructions to certify and with this information:

"In order to protect the Stuyvesant De-

velopment Co. 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, II 24-31).

The "Trustees" mentioned by Col. Vickers in his letter are—of course—Kempf for Union Cemetery Association and Ulicsnik, Rockwell and Kneip for the other appellants, 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 it was attached in the hands of Col. Vickers. The proceeds of that check and the stock are now in the possession of the Receiver.

In the case of the other appellants there are more formal documents than appear in the case of Union Cemetery Association.

Those documents are:

1. Deed executed by Horster and his wife conveying to Ulicsnik, Kniep and Rockwell, Trustees, the premises on Steuben Street.
2. Bill of sale from Horster alone to the same trustees transferring all his assets save his household furniture and also "to the extent of \$5000.00" his bank balance.
3. Trust agreement signed by the trustees and Mr. and Mrs. Horster.

The documents are shown in Book I, State of the Case, pages 177 to 191.

The trust agreement gives the right to the trustees to permit Horster and his wife to continue to occupy that part (one flat) of the Steuben Street property occupied at the time by them as long

as the trustees deem advisable (Book I, page 185, lines 10 to 20).

In view of the fact that Mrs. Horster was a tenant by the entirety, she had a right to impose this reasonable provision upon the trust, when executing a conveyance of *her* interest. Can we believe that Mrs. Horster would have signed, if she knew she would have to vacate the next day.

Also, the trustees were empowered to permit Horster to use his title plant "pending developments" (Book I, page 186). Horster did not own that plant; it was "attached" by the Sheriff under Mrs. Minchin's attachment; it went eventually to Rosinger and Albano, attorneys, who had a prior right thereto. (Book I, State of the Case, page 96, lines 20-30).

The trustees were also empowered to admit any other creditors (who might appear) to participate upon terms of equality with those named in the trust agreement.

There were three such possible creditors, viz: Fidelity Union Trust Co., who held Horster's stamp collection to secure his \$3000.00 note; Union Cemetery Association and Judge Stickel's client. While all of these held security, it could not be known how they would fare and what would be their attitude in the event their claims were not satisfied. The trustees were empowered to meet eventualities.

The three secured creditors just enumerated were the only other creditors known or disclosed at the time the trust agreement was signed.

The pertinent testimony of Mr. Murray (Horster's attorney), upon whom the other attorneys relied, has been given, in extenso, above.

The trust agreement, as presented by Mr. Murray, viewed in the light of his representations, had an aspect so fair and attractive that it would have been foolish to reject it.

A reputable firm of lawyers brings into conference the attorneys of all the creditors of their client, whose demands remain unsatisfied; the debtor will turn over substantially all his assets to trustees selected by those creditors; the wife of the debtor will surrender her interest in her home. The creditors inquire: "Do you know whether there are any other claims?" Assurances that there are no others, is given.

*That trust agreement must be read in the light of that assurance.*

Notices of the transfers were given on January 4, 1926 to all persons to whom it appeared that notice should go (Book I, page 188-191, inclusive).

*Lulled into a sense of security by Mr. Murray's assurance, the trustees in complete ignorance of the existence of respondents awaited developments.*

The claims which they represented exceeded \$40,000.00 in amount. To say that these appellants were in any way in cahoots with Horster is to transgress the rule laid down by Judge Knapp (*supra*):

"Astute as courts should be in the detection of fraud, they are not justified in finding it on grounds which show no more than its possible existence. When the acts of parties admit of a reasonable interpretation in favor of honesty and fair dealing, they should receive it."

## POINT IV.

If there is anything obnoxious to the law in the reservations for Horster's benefit or his wife's benefit which appear in the "trust agreement" given to the trustees, Ulicsnik, Rockwell and Kniep, then that trust agreement should be disregarded as far as is necessary to insure that the appellants shall not suffer by reason of their reliance upon Mr. Murray's assurance to them.

It must be plain that if Mr. Murray's assurance had been true no question could have arisen to perplex us. To the credit of Mr. Murray be it said that he resigned from the case when respondents appeared upon the scene and he found that he had unwittingly deceived the parties who had relied upon him.

Mr. Contrell testified in this regard:

"I believe Mr. Horster was in the adjacent room and we were given to understand through Mr. Horster that there were no other outstanding claims, and Mr. Murray had also made that assertion, because he said he had investigated, and if the truth were not verified on that fact, he would get out of the case because he thought everything was there and we would be taken care of."

(Book II, page 63, lines 15-20).

Mr. Murray went into the adjoining room several times to see Mr. Horster. (ib. lines 35-40). He was plainly the authorized spokesman of Horster. The documents were signed in Mr. Murray's office after the conference.

Now, the deed and the bill of sale are separate

instruments, distinct from the "Trust Agreement". The last can be eliminated wholly, or as far as equity requires, and the other two can be permitted to stand as security for the debts due appellants. It was security that was desired by the appellants. The trust agreement was of no substantial benefit to appellants. It assured to Horster any surplus that might result from the trustees administration of his estate. But the trustees agreed to that and to all subsidiary provisions in Horster's favor *on the assumption that there were no other unsecured creditors.*

*Upon what principle of justice can they now be held bound by the provisions of the trust agreement? And not merely bound, but in peril of losing their security, by reason of the existence of that trust agreement.*

*The respondents wish to avail themselves of the results of a fraud practiced upon appellants.*

*The respondents seek to profit by that fraud.*

That, we respectfully submit, is abhorrent to equity and good conscience.

## POINT V.

**The transfers to the trustees, Ulicsnik, Kniep and Rockwell, do not constitute a statutory general assignment, despite the fact that substantially all assets remaining to Horster at the time were transferred.**

It is true that the creditors who were involved believed that they were the only remaining creditors of Horster not holding security and that substantially all his remaining assets were pledged to them. Nevertheless, what they intended was to avoid the expense and the sacrifice of values which forced sales under a statutory general assignment might have entailed. The transfers involved, rest upon agreement between the parties; a statutory general assignment is made despite the wishes of the creditors.

The distinction between a transfer of the kind involved in this case and the statutory general assignment, is so thoroughly elucidated in the leading case of *Muchmore vs. Budd*, 53 N. J. L. 369, that further comment by us is hardly required. The prevailing opinion of Reed, *J.*, speaking for this court said (inter alia):

“The assignment act was not designed for the purpose of creating and regulating a new species 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."

In the present case there was no thought of releasing Horster from his obligation; it was security that was taken; any surplus was to be returned to Horster.

It has been necessary to make this point because the learned Vice Chancellor below, in his first opinion, refers to the Act concerning general assignments and we cannot permit the impression to prevail unchallenged that such act has any application to the case.

#### POINT VI.

**Examination of the trust agreement in all its parts makes plain that appellants were acting in good faith and for a lawful purpose.**

The Trust Agreement contains this provision:

"5. The undersigned may at any time, without the consent of or notice to any of the parties hereto, or to any one 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."

(Book I, State of Case, page 185).

Primarily, since a trust is involved, the court

having jurisdiction is our Court of Chancery; fraud feors normally do not expressly provide that any of them may apply to a court of equity for relief.

While Horster was imbued with the idea that his assets were of a large value and sufficient to more than pay the appellants, on the face of things those assets were of doubtful value and the experience of both the appellants and the receiver has virtually demonstrated that they will be insufficient to pay appellants.

In *Muchmore vs. Budd* (53 N. J. L. at page 396), the prevailing opinion refers to such a situation and cites other decisions to support the view that the insufficiency of the assets precludes any notion of fraud. We quote, as follows:

“In *Richards et al v. Levin*, 16 Mo. 596, the decision is stated to be, that where a debtor in insolvent circumstances assigns all his property for the benefit of certain preferred creditors, directing the surplus, if any, to be paid to the grantor, this does not make the deed fraudulent, where it is admitted that the whole property is insufficient to pay even the preferred debts.”

(53 N. J. L. at 396).

The appellants were not in a position to appraise correctly the value of what they were to receive from Horster; since it was represented to them to be all the property that Horster had left and would pay their claims and leave a surplus, they naturally were willing to accept and execute a document which provided for the return to Horster of any surplus; as the situation was represented to *them*, as they understood it, there was no one to be harmed by such a provision.

Reading the whole document, in the light of the understanding and belief of appellants at the time

the trust agreement was executed, is it not apparent that their purposes were not collusive but self-protective.

Reading the whole document in the light of what we now know respecting the insufficiency of Horster's assets, the rule approved (*supra*) in *Muchmore vs. Budd*, precludes any charge of fraud no matter what may be the terms of the trust agreement.

It would be improper to combine part of the facts and beliefs of the date of the trust agreement with the demonstrated facts of today, and thus spell out a fraudulent intent which never had any real existence.

The general rule that a debtor may prefer certain creditors to the exclusion of others, by transferring to the favored creditors *all* his property, has received the express approval of this court:

"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."

Mr. Justice Kalisch speaking for this court in *National Bank vs. Massopust*, 85 N. J. Eq. 564, quoting the late Chief Justice Depeue to that effect.

That such assignments may be to a trustee was decided by this court in *Muchmore vs. Budd*, 53 N. J. L. 369 especially at 387, middle.

Of course, a trust such as that in *Van Clief v. Melville*, 79 N. J. Eq. 176 is illegal.

The vice of such a trust was epitomized in *Regina Music Box Co. vs. Otto*, 65 N. J. Eq. at 594, when it was said:

“In the case of National Bank of Metropolis vs. 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 these 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.”

In the case *sub judice* the trust was framed to secure the last known group of unsecured creditors and was based upon a representation that there were no other unsecured creditors.

*The provision in the trust agreement relating to other possible creditors was inserted for an equitable purpose and not for an unconscionable purpose. There was no thought of delaying or hindering respondents, because the representation was that they did not exist.*

## POINT VII.

**The "Uniform Fraudulent Conveyance Act" is unconstitutional as far as the chattels involved in this case are concerned.**

The act is entitled "An Act concerning fraudulent conveyances and to make uniform the law relating thereto" (Cumulative Supp. Comp. Stat., Vol. I, page 647).

In the first paragraph of that statute we find the following definition:

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property and also the creation of any lien or encumbrance. (ib).

The statute, in the compilation, appears as part of the title "Conveyances".

Until the enactment of that statute the word "conveyance" was supposed to be confined to real property and interests therein; an assignment of corporate stock would hardly have been called a "conveyance". Indeed the ground of decision in *Lauter & Co. vs. O'Toole* (77 N. J. L. 29) seems to have been that an act relating to conditional sales of personal property had no place in an act respecting conveyances.

The court said in part:

" \* \* \* There is, however, a more far reaching ground upon which the present case must be decided, viz: that "An act respecting conveyances" is not a proper title under which to provide for the recording of contracts for the conditional sale of personal property or under which to alter the existing law respecting the effect of such contracts when unrecorded. \* \* \* "

(ib, top of page 31)

Also we call attention to the following:

“A ‘conveyance’ as used in a statute prohibiting fraudulent conveyances, or conveyances intended to defeat or defraud creditors, does not apply to chattels, but means a transfer of real estate by deed.”

Livermore v. Bagley, 3 Mass. 487, 505.  
(Words & Phrases, Vol. 2, page 1579)

Certainly an act which denominates the payment of money as a “conveyance” is one which gives to the word a new meaning. We believe that this is a case of the kind which gave rise to the address of Prof. Powell before the New Jersey State Bar Association on June 7th, 1929 (see especially Year Book N. J. State Bar Association, 1929-1930, page 104).

Not only in the Lauter case but in many other cases attention has been directed to the fact that the title of an act should not be permitted to mislead by using a word of established meaning, which in the body of the act is given some new or weird meaning.

The very fact that the compilers of the cumulative supplement were led to print the statute in question as part of the title “Conveyances”, instead of as part of the title “FRAUDS AND PERJURIES”, shows how misleading is the title of the statute in question.

In the first opinion of the learned Vice Chancellor he stated that the assignment of Stuyvesant Development Co. stock to Kempf constituted excessive security and cites the “Uniform Fraudulent Conveyance Act”. If that act be unconstitutional, insofar as assignments of corporate shares of stock are concerned, any conclusion based upon the provisions of that act, necessarily must fall.

### POINT VIII.

**The assignment of the corporate stock of Stuyvesant Development Co. to Union Cemetery Association and the subsequent sale of Horster's remaining interest in that stock to the trustees, Ulicsnik, Kniep and Rockwell, being prior in point of time is prior in equity.**

None of the parties involved are purchasers for a new consideration. All the parties are creditors of Horster. This makes applicable the rule applied in *Flostroy vs. Corby Coal Co.*, 80 N. J. Eq. 547, the decree in which case was affirmed for the reasons given in the opinion of Vice Chancellor Stevens below. That learned Vice Chancellor said:

"The weight of the evidence is that Flostroy was a creditor of Girvan, and that on March 21, 1911, the stock certificate was actually transferred to him, in blank, in satisfaction for his debt. There is no doubt but that Johnson was also a creditor. Neither parted with anything of value at the time of obtaining title. Flostroy's transfer was prior in time but he gave no notice until after Johnson had, under the execution sale, obtained from the company a transfer on its books. The question, which, under these circumstances has the better title, has been directly adjudicated by Vice Chancellor Pitney in *Board of Education vs. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922. He there held that notice was not necessary in order to give priority to the prior assignee over a subsequent attaching creditor, and that, as between the former and the latter, the former had the better title. There is a manifest distinction between such a creditor and one who,

without notice, parts with value, on the strength of an assignment based on the apparent ownership of the assignor, in cases where he has notified the debtor and the first assignee has not. *Cogan vs. Conover Manufac. Co.*, 69 N. J. Eq. 814, 64 Atl. 973, 115 A. St. Rep. 629; *Jenkinson's Ex'r v. N. Y. Finance Co.*, 79 N. J. Eq. 247, 82 Atl. 36, *Emery, V. C.*"

*Flostroy vs. Corby Coal Co.*, 80 N. J. Eq. 547.

In support of this point we may also cite *Brink vs. Flanagan*, 87 N. J. Eq., 639; *Vail vs. 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."

### POINT IX.

**The rule in *Flostroy vs. Corby Coal Company* and analogous cases holds good even in the one case in which notice of transfer or assignment was not at once given to the third party involved.**

The one instance in which no notice was given that Horster had made a transfer (until after the attachment) is that of Fidelity Union Trust Company, which held Horster's postage stamp collection as a pledge, to secure the payment of a \$3000.00 note.

The rule, as above shown, requires no notice to preserve the priority, where the hostile claimant is an attachment creditor.

**POINT X.**

**The ten thousand dollar check of Stuyvesant Development Co. dated March 5th, 1926 should follow the assignment of Stuyvesant Development Company stock.**

14 Corpus Juris, page 822, title corporations, see 1243;

St. Louis National Bank vs. Trust Co., 227 Fed. Rep. 526;

Gaty v. Holliday, 8 Mo. App. 118;

Meredith Savings Bank v. Marshal, 68 N. H. 417; 44 Atl. Rep. 526;

Thompson on Corporations, 2nd Ed. Vol. 4, Sec. 4238;

Cook on Corporations, 7 Ed. Vol. 2, Sec. 468.

**POINT XI.**

**The Stuyvesant Development Co. stock certificates were held, with the knowledge and consent of Horster, by the attorney of Union Cemetery Association, as a pledge on behalf of that association, from a time prior to the attachment until delivery of the same to the receiver, under order of court. There was no levy upon those shares under the attachment. The right of Union Cemetery Association is therefore prior to that of respondents.**

The proofs in this connection have been analyzed in our statement of the facts. Mr. Kirk, the attor-

ney of the cemetery association testified directly to the point before the Receiver (Book II, page 43).

In the "sixth ground of appeal" (*supra*) we have so fully set forth our reasons for the position taken under this head that we will ask the court to read the pertinent prior portion of our brief, in lieu of repetition here.

If we were to expunge entirely the assignment unto Kempf of the shares of stock involved (endorsed by Horster, upon the back of the stock certificates) because Kempf was only a trustee of the association and was not the *creditor* of Horster, nevertheless the pledge of the stock with the attorney of that creditor, *on that creditor's behalf, remains.*

The fact that Kempf was acting only as a trustee is made manifest both by the testimony and the letter of Frederick Lehlbach, Kempf's attorney, which as shown above, is in exhibit in the cause. Just upon what principle the assignment to Kempf may be expunged, we do not know, but if it is, *the unattached pledge remains.*

The bill of complaint in this cause was not filed by the respondents, it was filed by certain of the appellants. The counterclaim of respondents was filed on May 21, 1927 (Book I, page 41, top). Until that counterclaim was so filed appellants had no notice that their title to the shares of stock involved was disputed. The element of laches on the part of respondents should be added to their failure to make any attempt to levy upon the certificates.

## POINT XII.

**The receiver erred in reporting that the title to the premises formerly owned by Mr. and Mrs. Horster, as tenants by the entirety, had been restored to their former status by the interlocutory decree.**

There is both error in fact and error in law. The interlocutory decree (Book I, top of page 12) referring to the subject matter of this point expressly reserves to appellants the interest of Mrs. Horster acquired by them; the exact language is:

“ \* \* \* provided, however, that any interest complainants may have acquired by said conveyance from Mrs. Horster is reserved to them”.

(Book I, top of page 12)

This proviso followed a prior decision in another cause expressly in point.

It was not within the province of the Master to report upon this feature of the case; the parties had not been heard in respect thereto by him; he was acting under the interlocutory decree which contained the reservation above mentioned.

### POINT XIII.

**Examination of the receiver's report confirms the view of appellants in respect to assets and liabilities, taken upon the first appeal.**

As far as the liabilities are concerned there never has been any dispute as to the amount due the respective parties and the fact that they all arose out of defalcations by Horster. The failure of the learned Vice Chancellor to concede the validity and amount of appellants' claims, at the time of the first hearing before him, has been pointed out in the statement of facts; also, there its effect has been indicated.

Now, as to assets, the first item shown (Book II, page 7) is the certified check for \$10,000 so often mentioned in this brief and transmitted to the Clerk in Chancery pursuant to the order of the Court below, made upon filing of Appellants' bill of complaint.

The next item shown is the money which Fidelity Union Trust Company held after satisfaction of its loan, in the sum of \$3000.00. This was an item the nature and amount of which was fully known to the parties at the time of the first hearing.

The third item of principal shown in the Receiver's report involves the sum of \$1528.50 which at the time of the first hearing remained in the hands of Judge Stickel and represented the proceeds of the sale of the bonds which Horster should have delivered to Union Cemetery Association. There never has been any real mystery about this, although the court below, in its first opinion, said, "\$15,000 worth of bonds has apparently disappear-

ed" (Book I, page 233, lines 30-31). Mr. Murray, upon cross-examination, described briefly the history of those bonds and told how they had been delivered to Judge Stickel (Book I, page 131, line 28 to page 132, line 14). They were mentioned at other times during the production of the proofs.

All other cash assets shown in the report involve interest on moneys or rents derived from the real property.

The receiver describes the (above mentioned) bonds fully, in that part of his report which is printed in Book II of the State of the case, page 2, lines 12 to 28. From what is printed on page 3 of the same Book, lines 31 et seq. it appears that the Receiver, like the appellants before him, "collected the rent from the first floor of the premises" on Steuben Street, East Orange. In paragraph seven (Book II, page 4) he briefly states that he has "not been able to ascertain any information disclosing other assets."

In paragraph 6 of the Report printed upon the same page, the Receiver shows that his hopes of further realization from Stuyvesant Development Co. stock are built upon the same basis as that which led to the stipulation printed upon page 153 of Book I of the State of the Case.

Over two years have elapsed since that stipulation was framed. The Receiver names no figure in appraisal of that stock. It depends upon the settlement of another law suit. We respectfully submit that there is nothing in the record to justify a reasoned belief that sufficient will ever come into the Receiver's hands to satisfy the claims in excess of \$73,000 held by the appellants.

From the foregoing it is plain:

(a) *As far as the first opinion of the learned Vice Chancellor rest upon doubt as to the validity and amount of appellants claim, it should manifestly no longer be followed or be permitted to influence the determination of this court.*

(b) *As far as such doubt is reflected by the "interlocutory decree" in this cause, that "interlocutory decree" should be disregarded in testing the validity of the "final decree".*

(c) *The cash realized by the receiver (except rent and interest) was cash in plain sight of all parties litigant at the first hearing.*

(d) *The Receiver has not realized upon the salable assets which the appellants did not reduce to cash, and is withholding attempts to realize thereupon for the same good reasons that influenced the appellants.*

(e) *The interlocutory decree is in large part founded upon misconceptions of fact which the proofs taken thereafter have demonstrated to be misconceptions.*

#### XIV.

**The final decree should have followed the proofs taken after the interlocutory decree and pursuant to the directions of that decree.**

The order of reference orders that the Receiver "inquire into the amount, validity and priority of the claims of the complainants and the defendants in and to" the assets of Otto G. Horster (Bk I, page 14, ll. 17-21).

*That provision of that order, we assume, did not*

*order a vain thing, did not order something which the court upon the proofs taken theretofore could have determined.*

We submit that both the validity of all the claims and their priorities were left open for future adjudication, *upon proofs to be taken by the Receiver.*

The proofs taken after the final decree *establish the validity* of appellants' claims. Respondents do not challenge the *validity* of those claims.

*Only the priorities, therefore, remain debatable.*

Those priorities must be determined by application of a fundamental rule of equity, namely:

“Where there are equal equities, the first in order of time must prevail.”

Pomeroy Eq. Jur. Section 413, Vol. I.

That the equities of all the main litigants are equal—except in point of time—is plain. All were alike the innocent victims of Horster's misappropriations; there is no difference between them on that score.

The fundamental distinction between them lies in the fact that the complainants and Kniep obtained security long before Mrs. Minchin, Mrs. Riley and Mrs. McLaughlin took any action to protect themselves.

It is true that the decree declares that the assignments and transfers made by Horster were fraudulent, and that the opinion states they were made “with the deliberate intent to defraud some or all of his creditors”, but Union Cemetery Association, Mary Ulicsnik, Rockwell, Kniep and Rieser were not parties to that fraudulent intent and therefore, ~~the~~ <sup>their</sup> prior right of payment is not disturbed.

The court, neither by its opinion nor by its <sup>first</sup> decree, destroys the *priorities* of complainants and of the Kniep Estate; the question of priorities was left "wide open"; *and when those who oppose appellants utterly failed to produce a scintilla of evidence to prove that complainants and Kniep were parties to Horster's fraudulent intent, they necessarily left unimpaired the right of complainants to payment ahead of the attachment creditors.*

**Even the Uniform Fraudulent Conveyance Act expressly distinguishes actual fraudulent intent from fraudulent intent presumed in law and protects a creditor who is without actual fraudulent intent to the decree necessary to insure repayment.**

Paragraph 9, subdivision (2) of the Uniform Fraudulent Conveyance Act provides that

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

Paragraph 10 of that act provides for the appointment of a Receiver.

Paragraph 3 (b) provides that

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

"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. page 647).

A reading of the entire statute, from the four

corners, thus makes plain that a creditor who takes security without any intent on his part to defraud other creditors of the debtor retains his right to his security to the extent necessary to effect repayment of his claim, even though the security is excessive in amount.

The fact that an antecedent debt is the basis of the transfer does not affect the equity which the Statute recognizes.

As was said by the Court of Appeals of Maryland, in dealing with its Uniform Fraudulent Conveyance Act:

“An antecedent debt is fair consideration for a conveyance. Sec. 3B of the Act”.  
(Merchant’s Bank vs. Page, 128 Atl. Rep. Page 272).

The proofs taken in open court and especially the proofs before the Master leaves no doubt that complainants took their security for the purpose of securing debts which stand upon a footing identical with those of Mr. Vanderbilt’s clients.

They took that security “without actual fraudulent intent” (to use the words of the Statute).

To now award priority to Mrs. Minchin, Mrs. Riley and Mrs. McLaughlin or any one of them, we respectfully submit, would offend the very Statute upon which their counsel relied.

Ignoring that Statute and applying the common law, the same result must be reached—the appellants are entitled to their security; this we have endeavored to make plain in Points I and II of this brief.

## POINT X V .

**Union Cemetery Association relies upon the actual pledge of the certificates of stock with its attorney and agent, who held the same on its behalf from a date preceding the attachment until delivery of those certificates to the Receiver.**

The *pledge* of that stock is distinguishable from the *assignment* to Kempf. That assignment has been declared void. In its first opinion the court has said:

“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.”

For the *pledge* of the stock with the attorney of Union Cemetery Association there was, however, consideration—that is, indebtedness amounting to \$27,492.75 at the date of the Receiver’s report. This *pledge* was not declared void. This *pledge*, we submit, has not been attacked by any pleading in the cause. There is nothing in the Statute, there is nothing in the proofs, there is nothing in the pleadings, we submit, which would entitle our opponents to this *pledge* as against Union Cemetery Association.

The pledge was made in December, 1925. The attachment bears date March 20, 1926. *No levy was made on the stock or the certificates.* Not until May 21st, 1927 was Union Cemetery Association in any way apprised that its security was in jeopardy. The counterclaim then filed, however, is silent as to the pledge.

The \$10,000 check representing a dividend, as a matter of course, follows the pledge.

The court below in its brief memorandum (page 18, Book II) is silent both in respect to this pledge of stock and its effect upon the priorities.

That silence is not due to any failure of appellants to clearly present the point.

On page 45, Book II, State of Case, we find the following:

“The Receiver: Any questions, gentlemen? Is there a claim in this testimony?”

“Mr. Stiefel: My claim is that Mr. Kirk, as attorney for the Cemetery Association, had the actual possession and custody of these shares of stock on behalf of the Association for a long period of time as mentioned, that the subsequent attachment is ineffective as against that possession by the Cemetery Association of that stock, possession through its attorney, irrespective of whether the assignments are good, bad or indifferent in themselves; that the possession for the benefit of the Cemetery Association is connected with an admitted claim, gives rise to a prior right.”

“The Receiver: That is an argument.

“Mr. Stiefel: That is right.”

How in the absence of any levy upon this pledged stock, the attachment creditors can gain any right, prejudicial to the valid claim of the UNION CEMETERY ASSOCIATION we have never had pointed out to us, and we submit that no such right exists.

## POINT X V I.

The Receivers report makes manifest that appellants did not receive excessive security. With that manifestation it would be inequitable to destroy the priorities of appellants upon any prior finding that the security was excessive.

The entire realization of the Receiver thus far amounts to \$17,956.17 (Book II, State of Case, page 8, bottom).

The single claim of Union Cemetery Association as established by the Receivers report exceeds that amount.

The aggregate of *appellants* claims as established by the Receivers report exceeds \$73,000.00.

The hope of ever realizing sufficient to pay all the appellants claim would have no justification in any fact or facts.

The charge of "excessive" security, (which is so prominent in the first opinion) we therefore submit, cannot justly be advanced to impair appellants priorities.

## POINT XVII.

The "Final Decree" is premature and the distribution to certain creditors ordered thereby destroys such measure of security and protection to the appellants as was afforded by the interlocutory decree.

That interlocutory decree was affirmed by the Court of Appeals, notwithstanding the attack made upon it heretofore. Any departure from its safeguards was therefore without the prior sanction of this court.

By that decree, there is called for the Receiver's conversion of the *entire* estate into cash to be followed by his report to the Court of "the amount in his hands for distribution"; also a report upon the validity and priority of the claims of all parties (Book I, page 14)

Then comes this direction, viz:

"that the question of the *priorities* of *all* the parties in and to the assets in the hands of the 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*" (ib. page 14; Italics our own).

Those provisions, had they been observed, by the very court which formulated them, would have furnished to these appellants safeguards *which we must assume this Court of Appeals perceived and approved when it affirmed that interlocutory decree.*

Those provisions seemed to assure—and so, we assume, it must have appeared to this Court—that

no distribution would be made to any claimant until the Court of Chancery had, through the agency of its Receiver, gained adequate knowledge of the actual amount or value of *all* Horster's assets and liabilities.

A final report of the Receiver, *in accordance with the plan of the interlocutory decree*, would make possible a final answer to these questions:

(a) Is the Court entitled, upon distribution, to act upon its first opinion that the security given to Union Cemetery Association was "greatly in excess of the alleged indebtedness" (Book I, page 231, line 31-32); or, on the contrary, does not equity and good conscience require that the "alleged indebtedness" having been found to be true indebtedness, and the security having been found to be less in value than such true indebtedness, Union Cemetery Association cannot justly be deprived of any part of such security.

(b) In view of the fact that the entire amount of cash realized by the best efforts of the Receiver is much less than the ascertained and demonstrated aggregate of the claims of appellants, can a court of equity and conscience justly deprive appellants of any part of their inadequate security?

(c) Whatever may have been Horster's views of the value of his assets and whatever may have been his intent to save for himself the assumed excess value in assets over and above liabilities, does not that intent become immaterial in the light of the assured fact that all the security received by the appellants is insufficient to pay their just claims.

The opinion (Book I, pages 228-234) which is translated into the interlocutory decree as well as that interlocutory itself, will necessarily have to be

subordinated to the ascertained facts, if the ultimate result and the final report of the Receiver demonstrate that appellants' claims are largely in excess of the value of Horster's assets given as security.

This statement is based upon comparison of the Vice Chancellor's opinion (Book I, pages 228-234) with the opinion of this Court in *Muchmore vs. Budd* (53 N. J. L. at pages 395-396) from which we quote as follows (*Italics being our own*):

"In my judgment, the rule is an arbitrary one, for I cannot conceive why the assignment of a person who happens to include in it a customary reservation of a surplus, when in fact the value of the property transferred is less than the amount of debts, should be held to be constructively fraudulent.

"Chancellor Walworth announced so much doctrine in *Beck v. Burdett*, 1 page 305. He held, that inasmuch as it was doubtful whether the property assigned was sufficient to pay the debts, a mere hypothetical reservation of the surplus would not vitiate the assignment.

"The Supreme Court of Pennsylvania in *Rahn v. McElrath*, 6 Watts, 151, took the view of Chancellor Walworth. The court say that the proper limitation upon the right to assign property to preferred creditors, is, that the amount assigned bear a reasonable proportion to the debt provided for, a defect in which would be evidence of fraud in fact, which, however, is not the subject of legal direction.

"In *Dana v. The Bank of the United States*, 3 Watts & S 223, 250, where there was an equity of redemption and a reservation of surplus, as in the present case, the deed of assignment for preferred creditors

was held legal. The same result was reached in the case of *Phillips vs. Improvement Co.*, 25 Penn, St. 56, where a surplus was reserved.

“In the case of *Floyd & Co. v. Smith*, 9 Ohio St. 546, the court referred to, and expressly disapproved of, the rule laid down in *Goodrich v. Downs*, *supra*, and *Barney v. Griffin*, *supra*, and hold that the reservation of a surplus, after paying certain debts, by a person contemplating insolvency, is not a conclusive badge of fraud.

“In *Ely v. Hair, et al.*, 16 B. Monr. 230, the facts in which case presented the very question decided in the two New York cases. there is a discussion of the rule in them promulgated, and these cases are disapproved.

“In *Richards et al. v. Levin*, 16 Mo. 596, the decision is stated to be that where a debtor in insolvent circumstances assigns all his property for the benefit of certain preferred creditors, directing the surplus, if any, to be paid to the grantor, this does not make the deed fraudulent, where it is admitted that the whole property is insufficient to pay even the preferred debts.

“In *Miller v. Stetson & Co.*, 32 Ala. 161, the case of *Goodrich v. Downs* was under discussion and the court refused to recognize it. The court held that the reservation of a surplus in that case was not fraudulent.

“Involving substantially the same question is the case of *Andrews v. Ludlow*, 5 Pick. 28, where there was an assignment by an insolvent debtor of property to such of his creditors as should, within a certain time, become parties to the assignment, with a reservation to the assignor of the dividends that would have gone to such creditors as failed to come in. Here, in a different form,

was the same trust that was held to be so calculated to baffle creditors, in *Goodrich v. Downs*, as to be conclusively fraudulent. The court said that the agreement to pay over the surplus could have no effect, because the debts greatly exceeded the value of the property. Other cases are cited in note 2 to section 207 of *Burrill on Assignments* (3rd ed.)

“In the present case, the property subject to execution was less in value than the amount of the debts. There is no evidence that the accounts had any value. There is no proof, therefore, that any property was put beyond the reach of creditors fraudulently.”

Now, the premature action of the Court of Chancery in entering a “final decree” before it had in hand a Receiver’s report setting forth the entire cash avails of Horster’s property, makes it impossible to state at this time as an absolutely ascertained fact that Horster’s entire estate will produce an amount far less than the aggregate of the appellants’ claims. The premature action of the Court of Chancery, therefore, obscures the categorical application of the principles recognized in the many cases (*supra*) quoted in part by this court in deciding *Muchmore vs. Budd*.

The piecemeal manner in which this cause has been tried, culminating in the premature “final decree”, has been most prejudicial to the appellants. In the first opinion of the learned Vice Chancellor, he doubts the very validity of their claims, though such claims were undisputed; the validity of those claims is now established, but its establishment is not permitted to reflect back upon the first opinion of the Vice Chancellor; *he has failed to reform his conclusions to accord with the now established*

*fact.* Also, the first opinion of the Vice Chancellor proceeded upon the theory that the action of the appellants was calculated to keep from the attachment creditors an excess of assets (transferred to appellants) over and above their claims; but there is no such excess and there is no reason to believe that there ever will be such excess; nevertheless, the error of the original assumption that there was an excess is not noticed by any expression of the Vice Chancellor, but that error is carried forward into the final decree.

If the Receiver's report does not fairly assure us that the cash eventually to be distributed will be far less than the amount of appellant's claims, then such report is premature within the purview of the interlocutory decree. If such report assures us of the insufficiency of assets then it precludes adherence to the assumptions of the first opinion and requires that the priorities of the appellants shall not be denied by adherence to those assumptions.

The "final decree" is not a final decree at all—in the sense of disposing of the entire cause; it is "final" only in that it takes property away from the appellants. No "final decree" should have been entered in the cause until the Receiver had reported that no further efforts on his part would increase the amount of money capable of distribution. Then the case would be ripe for final adjudication, with nothing but assured facts before the court instead of assumptions.

## POINT XVIII.

The failure of the Final Decree to adjudge that the claims of appellants are prior to those of Mrs. Minchin, Mrs. Riley and Mrs. McLaughlin and its adjudication instead that the claims of said respondents are prior (in right to satisfaction) to the claims of appellants, is a deprivation, in respect to appellants, of their property without due process of law, contrary to the provisions, in that behalf, of Article XIV in addition to and amendment of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property, without due process of law.

Patently, the only possible basis for according priority to the claims of the attachment creditors is the adjudication in the *interlocutory decree* that the various assignments and transfers to appellants, be set aside "as null and void and of no effect" (Book I, page 11); which adjudication, in turn, is based upon the recital in said interlocutory decree that it appears to the satisfaction of the court that said transfers, etc. "are fraudulent" (ib.)

Now, in a petition for rehearing or reconsideration, filed in this court, after this court had announced, per curiam, its affirmance of the interlocutory decree, the three counsel who signed said petition analyzed the pleadings in the cause and showed how and why the appellants did not have their "day in court", in respect to the aforesaid finding and adjudication.

We repeat under this head the pertinent portions of said former petition for rehearing, and do

so by way of present argument in support of the above stated point and of the fourth assignment of error upon this appeal (Book II, page 30). Said former petition for rehearing ran as follows:

“1. The sole ground set forth in the interlocutory decree of the Court of Chancery for the orders therein set forth appears in the following words, viz:

“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.” (State of the Case, page 11, top).

“2. Nowhere in the answer and counterclaim of the defendants, Minchin, Riley and McLaughlin was there any averment or allegation that the “transfers of property” unto the trustees Ulics-nik, Kniep and Rockwell, were fraudulent. Such answer and counter-claim are set forth in full in the printed State of the Case, on pages 41 to 54. The ground of attack upon the transfer to the defendants Ulics-nik, Kniep and Rockwell are set forth in the counter-claim of the defendants Minchin and Riley, as follows:

“Defendants, Ellen Minchin and Mary E. Riley allege that the assignments and transfers made by Otto G. Horster to Mary Ulics-nik, Karl Kniep and George T. Rockwell, mentioned in paragraphs 9 to 14 of the bill of complaint, are void as to the defendants Ellen Minchin, Mary E. Riley and Margaret McLaughlin, for the following reasons:

(a) They constitute a general assignment of all the property of 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.

(c) The sale of personal property described in said bill of sale, were never consummated, there 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 9 to 13 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:

(a) Said deed constitutes a part of a general assignment of all the property of the 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."

"3. In point XVIII of the brief submitted by Frederick A. Lehlbach and Otto A. Stiefel on behalf of appellants it is pointed out

"The counter-claim of respondents Minchin and Riley does not set up that the conveyance and transfers to the trustees Ulics-nik, Kniep and Rockwell were fraudulent. The determination below that such conveyance and transfers were fraudulent and therefore void, went beyond the issues in the case." (Page 43 of the aforesaid brief).

"4. The result is that the appellants concerned have never had their "day in Court", in respect to the matter decided by the decree against them and

to sustain that decree would deprive them of their property without due process of law and would deny to them the equal protection of the law.

"5. The Court in *Reynold's v. Stockton* (43 N. J. Eq. 211, at 214), and the Supreme Court in *Munday v. Vail* (34 N. J. L., 418) have, even in a collateral proceeding, denied to a decree of the Court of Chancery any effect, beyond its determination of the issues of record even though the Court had jurisdiction of the parties. Upon direct attack in the form of an appeal, such a decree is even more vulnerable, we submit. In *Moore Realty Co. v. Holdman*, decided October 15, 1928 (VI N. J. Adv. Rep. 1507, at 1508, bottom), this Court approved the action of the Court of Chancery in confining itself to the matter "presented by the pleadings in the cause."

"6. As to the appellants, Union Cemetery Association and its trustee, Louis Kempf, the fraud declared to be found by the decree is based essentially upon the assumed excess of the value of the security given over the debt secured. However, in the brief of counsel for the respondents in this Court (as in the Court below), it was admitted:

"the value of which stock may be large or small, but whose present value is uncertain" (page 3 of respondents' brief).

This also was admitted upon the oral argument in this Court. This admission is in complete harmony with the proofs which show that the value of the stock involved is contingent upon realization of certain expectations; that the stock has no market value; that the value of the stock will only be capable of ascertainment when a certain "cemetery suit comes to a close or thereabouts" (State of Case, page 153 and 154).

"7. In the counter-claim of the respondents, Minchin and Riley, the invalidity of the security of Union Cemetery Association and its trustee Kempf is set up in these words:

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

(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.

(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 criminal complaint against him and made said assignments for the purpose of avoiding such criminal complaint."

"8. The decree of the Court below, these petitioners respectfully show, outside the issues affecting Union Cemetery Association and its trustee, Louis Kempf and goes beyond the admitted pertinent facts."

*Whatever may have been the propriety of the foregoing arguments upon the first appeal, they substantiate, we submit, upon this second appeal, the claim made that the "final decree" if upheld would deprive appellants of their property without due process of law.*

The "due process" clause of the constitution assures to every person a fundamental right, which

the jurisprudence of any civilized state should accord to its citizens without any express enactment.

This fundamental right has thus far been denied to the appellants in this cause and more particularly to the appellants Ulicsnak, Kniep, Reister and Rockwell. They, with Union Cemetery Association were parties to this suit brought to enjoin misuse of the \$10,000.00 check of Stuyvesant Development Co.; Mrs. Minchin and Mrs. Riley filed an answer and counter-claim in which are set up the defenses above mentioned and described; the cause went to a hearing upon the basis of the pleadings: the evidence and proofs were taken without any notice that there would be any departure from the pleadings; the proofs offered and given by the appellants were directed to the issues raised by the pleadings; the proofs offered and given by the attachment creditors were offered and given without any notice that from them would be drawn new defenses or defenses other than those set forth in the pleadings.

Now, in deciding, the Vice Chancellor after pointing out circumstances that impressed him 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." (Book I, page 233).

That finding is reflected in the interlocutory decree; without it the interlocutory decree would fall; the property mentioned in the interlocutory decree, was, upon the basis of that finding taken from appellants and handed over to a receiver, notwithstanding that appellants had never been duly heard with respect to that finding—without having

had their day in court in respect to the *subject-matter* of that finding.

The point which we make involves the application of fundamental principles and hardly requires the citation of reported cases; however, we quote as particularly apposite, the following:

“That due process of law without which parties may not be deprived of their property gives to them an opportunity to be heard respecting the justice of the judgment sought. It gives notice of the issue to be determined before it is tried. One may not bring suit upon one cause of action and recover upon another, nor may he go to trial upon one defense and sustain a judgment in his favor upon another and inconsistent defense. He may not deny in his answer the plaintiff's averments of a good cause of action, and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter no notice of which was given by the pleadings or by the course of the trial until the plaintiff had introduced substantially all his evidence. Proofs without averments and averments without proofs are equally unavailing. *Gentry vs. U. S.*, 41 C. C. A. 185, 101 Fed. 51; *Burton vs. Platter*, 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; *Taussig's Ex'rs vs. Glenn*, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; *Merrill vs. Rokes*, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452; *Live Stock Co. v. Blackburn*, 30 U. S. App. 571, 579, 17 C. C. A. 532, 536, 70 Fed. 949, 954; *Wood vs. Collins*, 23 U. S. App. 224, 230, 8 C. C. A. 522, 525, 60 Fed. 139, 142.”

*Castle vs. Persons*, 117 Fed. Rep. 835, at 843, per Sanborn, Circuit Judge.

## POINT XIX.

The adjudication in the Final Decree that the claims of Mrs. Minchin, Mrs. Riley and Mrs. McLaughlin were prior (in right of satisfaction) to the claims of appellants, is a denial to the appellants of the equal protection of the laws of this State, contrary to the provisions in that behalf, of Article XIV in addition to and Amendment of the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the law.

What has been said under the head of Point XVIII, is, in the main, useful or applicable here; however there are further considerations, to which we will briefly call attention.

The equal protection of the laws, guaranteed by the United States Constitution requires that there shall not be one law for A and another law for B; but, if the final decree (resting as it does on the errors in the interlocutory decree) is permitted to control, the appellants will not receive but will be deprived of the protection of the laws of this State.

From the March Term in the year 1891 (*Muchmore vs. Budd*, 53 N. J. L. 369) it had been the settled law of this State that the act relating to assignments for the benefit of creditors had no relation to an assignment such as was made by Otto G. Horster and his wife to Ulicsnik, Kniep and Rockwell as trustees.

Has there been any change in that settled law? If so, where is the evidence of such change to be found? *Muchmore vs. Budd* has not been overruled. *It simply has not been applied* either in the court below or in this court upon appeal hereto-

fore, although both below and in this court appellants consistently have relied upon the law established by *Muchmore vs. Budd*.

Moreover it was the settled law of this State that a decree of the Court of Chancery which went beyond the issues was ineffective insofar as it was extraneous to those issues. That we believe is still the settled law of the State; a failure to apply that law at this juncture, would, we maintain, deprive appellants of the equal protection of the law of this State.

#### POINT X X .

**The "Final Decree" below should be reversed, with costs to the appellants. In remitting the cause the Court below should either be directed to withhold its Final Decree until all the assets of Horster have been liquidated or that it should enter a decree adjudging that the claims of appellants are valid and prior to the claims of Mrs. Minchin, Mrs. Riley and Mrs. McLaughlin.**

Respectfully submitted,

OTTO A. STIEFEL,  
Of Counsel with Appellants.

