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Bill of Complaint.

Bill of Complaint.

Filed August 22, 1914.

In Chancery of New Jersey.

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To his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey,

Humbly complaining, shows unto your Honor, your orators ANDREW J. CARTAN, REN CARTAN, GARRET CARTAN, BURT CARTON, KATE CARTAN WILSON and PATRICK J. DEVLIN, partners trading under the firm name of CARTAN & DEVLIN, all of the Borough of Matawan, in the County of Monmouth and State of New Jersey, that on and before the third day of February in the year one thousand nine hundred and fourteen, Ernest L. Phelps, of the Township of Matawan, in the County and State aforesaid, was seized and possessed in fee simple of all those tracts or parcels of land and premises, hereinafter particularly mentioned and described,

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ALL that certain lot, tract or parcel of land lying and being in the Township of Matawan, in the County of Monmouth and State of New Jersey, BEGINNING at the boundary line near the intersection of the Freehold and Atlantic Highlands Railroad with the Freehold and Keyport Turnpike; thence running from the corner of said boundary line along the said Turnpike in a southerly direction 80 feet to a fence; thence down said fence line in an easterly direction 500 feet to another fence thence along the last mentioned fence in a northerly direction 306 feet to the Main Ditch; then up said Main

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Bill of Complaint.

Ditch about 250 feet to the boundary line running along the aforesaid Freehold and Atlantic Highlands Railroad; thence along the boundary line of the said Atlantic Highlands and Freehold Railroad in a southerly direction to the aforesaid corner and place of beginning. Containing
 10 about three acres more or less. Being the same premises conveyed to the said Ernest L. Phelps by Rose Mooney, single, by deed dated October 24th, 1910, and recorded November 17, 1910, in Book 890 of Deeds, page 297, &c.

The second tract of land is described as follows:

ALL that certain farm tract or parcel of land situate in the Township of Marlboro in the County of Monmouth and State of New Jersey,
 20 and containing twenty-two acres and twenty-two hundredths of an acre (22 and 22/100 of an acre) as per level measurement, and more particularly set forth and described in a certain deed of James L. Terhune, widower, to Ernest L. Phelps dated January 28, 1911, and recorded January 30, 1911, in Book 896 of Deeds, page 93, &c., to which deed for description reference thereunto may be had.

And your orators further show that the said
 30 Ernest L. Phelps on and before the said first day of February, in the year one thousand nine hundred and fourteen, was justly indebted to your orators in the sum of FIVE HUNDRED AND EIGHTEEN DOLLARS AND SIXTEEN CENTS and upwards, for goods, wares and merchandise sold and delivered by your orators unto the said Ernest L. Phelps, and the said Ernest L. Phelps being so indebted to your orators in said sum of Five Hundred and Eighteen Dollars and Six-
 40 teen Cents, executed his bond with warrant of

Bill of Complaint.

attorney unto your orators, wherein he became bound unto your orators to pay to them the sum of Five Hundred and Eighteen Dollars and Sixteen Cents, on demand; that on said bond and warrant of attorney attached, judgment was entered on the twenty-sixth day of February, in said year, in the Circuit Court of the County of Monmouth, in favor of your orators against the said Ernest L. Phelps, for One Thousand and Thirty-six Dollars and Thirty-two Cents penal sum, Five Hundred and Eighteen Dollars and Sixteen Cents debt and Four Dollars costs, as by the record of the said judgment now remaining in the office of the Clerk of the said Circuit Court of the County of Monmouth, at Freehold, reference thereunto had will more fully and at large appear.

And your orators further show that for the purpose of obtaining satisfaction of said judgment they caused to be issued thereon, out of the said Circuit Court of the County of Monmouth, a writ of *feri facias de bonis et terris*, tested on the twenty-fifth day of June in the year one thousand nine hundred and fourteen, and returnable on the first Tuesday of October then next, which writ having been first duly recorded was delivered to the Sheriff of the County of Monmouth, to whom it was directed, and thereby he was commanded that of the goods and chattels of the said Ernest L. Phelps in his County he should cause to be made the said sum of Five Hundred and twenty-two Dollars and ninety-one cents, so as aforesaid adjudged to your orators; and if sufficient goods and chattels of the said Ernest L. Phelps in his County he could not find whereof to make said money, he shall cause the whole or the residue,

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Bill of Complaint.

as the case might require, of the said moneys to be made of the lands, tenements, hereditaments and real estate whereof the said Ernest L. Phelps was seized on the said twenty-sixth day of February, in the year one thousand nine hundred and fourteen, or at any time afterwards, in whose hands soever the same might be. And that the said Sheriff should have those moneys before said Circuit Court on the return day of said writ, to render to your orators in satisfaction of their said judgment, and that he should have then and there the said writ.

Your orators further show that Wilbert A. Beecroft, Sheriff of the said County of Monmouth, to whom the said writ of execution was directed and delivered, being unable to find any goods and chattels of the said Ernest L. Phelps whereon to levy and make the said judgment, levied upon the said lands and premises hereinbefore described, as the property of the said Ernest L. Phelps, as by the said writ of execution and levy thereto attached in the said Sheriff's office at Freehold reference being thereunto had will more fully and at large appear.

And your orators further show that the said Ernest L. Phelps, being so seized and possessed of said tracts of land and premises as aforesaid, which are of the value of Seven Thousand Dollars and upwards, afterwards, and on or about the third day of February in the year one thousand nine hundred and fourteen, caused to be recorded in the Clerk's office of the County of Monmouth, in Book 971 of Deeds, page 35, a deed for said premises from the said Ernest L. Phelps and Allee Phelps, his wife, unto one Wayland O. Bagley, which deed purports to be dated on the eleventh day of April in the year one

Bill of Complaint.

thousand nine hundred and thirteen, but was not recorded until the said third day of February in the year one thousand nine hundred and fourteen, and after the debt to your orators had been contracted and had accrued and become due and payable, and the consideration expressed in said deed is the sum of "One Dollar and other valuable considerations." 10

And your orators further show, as they are informed and believe it to be true, that the said conveyance was without consideration, and was made by the said Ernest L. Phelps in order to secure the said property for his own use and benefit and protect it from the claims of his creditors, including your orators, and prevent your orators from collecting their said debt; and that the said Wayland O. Bagley, grantee 20 in said conveyance, has actively aided and assisted the said Ernest L. Phelps in his purpose to cheat and defraud your orators and his other creditors, and place said property beyond their reach, and to secure the same for his own uses and purposes; and your orators charge that no consideration whatever was paid by the said Wayland O. Bagley for said premises and said conveyance, and that the said Ernest L. Phelps 30 has since the said conveyance held, used, occupied, possessed and enjoyed the said premises, and received the rents, issue and profits of the same as fully to all intents and purposes as before the execution of said pretended conveyance; and your orators charge that the said Ernest L. Phelps is still the owner of the said lands and premises, and that the said Wayland O. Bagley merely took title to accommodate and oblige the said Ernest L. Phelps, and for his use and benefit, and that the said lands and 40

Bill of Complaint.

premises are the lands and premises of the said Ernest L. Phelps.

10 And your orators further show that they have frequently and in a friendly manner applied to the said Ernest L. Phelps and Wayland O. Bagley to pay the said judgment, or to cancel and surrender the said fraudulent conveyance, or to re-convey or cause to be re-conveyed the said lands and premises, to the said Ernest L. Phelps, so that they may be sold under the said execution for the satisfaction of your orators said judgment, and a good and clear title give therefor to the purchaser thereof, as in equity and good conscience they ought to have done, and as your orator well hoped that they would have done, but which they have wholly refused to do.

20 IN CONSIDERATION WHEREOF and forasmuch as your orators are without remedy in the premises at the common law and can only have adequate relief in this Honorable Court,

To the end therefore that the said ERNEST L. PHELPS and ALLEE PHELPS, his wife, and WAYLAND O. BAGLEY, the defendants hereto, may without oath full, true and perfect answer make to all and singular the premises hereinbefore stated, according to the best of their knowledge, information, remembrance and belief; and that they
 30 may set forth and discover the real estate belonging to the said Ernest L. Phelps and conveyed as hereinbefore mentioned, and what disposition has been made of or encumbrance put upon the same, and in whose possession such real estate has been since the third day of February in the year one thousand nine hundred and fourteen; and whether the same is encumbered and if so in what manner, and in whose favor,
 40 by whom, and to what amount; and whether said

Bill of Complaint.

conveyance, as before mentioned, was made of the said lands and premises, and if so, for or upon what consideration, and to whom, when, and by whom the same was paid, and who has possessed and occupied said premises and received the rents, issues and profits thereof since the said alleged or pretended conveyance thereof; and who procured said conveyance to be made, and under what circumstances and for what purpose, and upon what consideration; and that the said defendants, or some, or one of them, may be decreed to pay to your orators the amount of their said judgment, with interest, costs and execution fees; and that the said fraudulent conveyance and all other fraudulent conveyances and encumbrances made, created or suffered between the said defendants and affecting the said lands, may be set aside and declared null and void; and that the said lands and premises may be sold free, clear and discharged of and from said fraudulent conveyances and all other fraudulent deeds and encumbrances, under the said writ of execution, or otherwise, and the proceeds thereof, or such part thereof as may be necessary, may be applied to the payment of your orators said judgment. And that your orators may have such other or further relief in the premises as the nature and circumstances of the case may require, and as may be agreeable to equity and good conscience.

MAY IT PLEASE YOUR HONOR, the premises considered, to grant unto your orators the State's writ of subpoena issuing out of and under the seal of this Honorable Court, directed to the said ERNEST L. PHELPS and ALLEE PHELPS, his wife, and WAYLAND O. BAGLEY, therein and thereby commanding them, and each of them, at a

Bill of Complaint.

certain day and under a certain penalty to be
therein expressed, personally to be and appear
before your Honor in this Honorable Court, then
and there to answer the premises, and to stand
to, abide by and perform such order or decree
therein, as to your Honor shall seem meet, and
10 as shall be agreeable to equity and good con-
science.

And your orators will ever pray, &c.

DURAND, IVINS & CARTON,
Solicitors for and of Counsel with Complainants.

FRANK DURAND,
of Counsel.

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Petition of Peter Bentley.

Petition of Peter Bentley.

Filed September 20, 1915.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>ANDREW J. CARTAN, <i>et als.</i>, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p>ERNEST L. PHELPS, Defendant.</p>	}	<p><i>On Bill, &c.</i> 10</p> <p><i>On petition of Peter Bentley to be admitted as party complainant.</i></p> <p><i>Notice.</i></p>
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To Messrs. Durand, Ivins & Carton, Solicitors for Complainants. 20

Take Notice, that on Monday, the twentieth day of September, nineteen hundred and fifteen, at the Chancery Chambers, 75 Montgomery Street, Jersey City, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as I may be heard, I shall apply to his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, for an order admitting me as a party complainant in the above entitled cause upon a verified petition, a copy of which is hereto annexed and herewith served upon you. 30

Yours very truly,
 PETER BENTLEY,
Solicitor pro se.

Dated, September 14, 1915.

Service of a copy of within notice, petition and affidavit is hereby acknowledged this 15th day of September, 1915.

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Solicitor pro se.

Petition of Peter Bentley.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>ANDREW J. CARTAN, <i>et als.</i>, Partners, &c., <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>ERNEST L. PHELPS, <i>Defendant.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>On petition of</i> <i>Peter Bentley</i> <i>to be ad-</i> <i>mitted as</i> <i>party com-</i> <i>plainant.</i></p> <p><i>Petition.</i></p>
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To His Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey.

20 The petition of Peter Bentley, of Jersey City,
Hudson County and State of New Jersey, re-
spectfully shows unto your Honor as follows:

(1) That he is a creditor of the defendant in
the above entitled cause, Ernest L. Phelps, in
the sum of seven hundred seventy-nine dollars
and twenty-one cents.

30 (2) That on the fourteenth day of August,
your petitioner caused to be issued out of the
New Jersey Supreme Court a writ of attachment
against the rights and credits, moneys and
effects, goods and chattels, lands, tenements and
hereditaments of the said Ernest L. Phelps, and
by virtue of said writ of attachment the said
sheriff attached the interests of the defendant
in and to certain land, tenements and heredita-
ments of the defendant, Ernest L. Phelps, as
described in the bill of complaint, filed herein as
tract number one; and the return of the said
sheriff to said writ of attachment has been duly

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Petition of Peter Bentley.

filed in the office of the clerk of the New Jersey Supreme Court.

Wherefore, your petitioner prays that an order may be made by this Court in the above entitled cause admitting him as a party complainant in the above entitled cause, and that he may have such other and further relief in the premises as the nature of the case may require. 10

And your petitioner will ever pray, &c.

PETER BENTLEY,
Petitioner.

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

Peter Bentley, being duly sworn on his oath, according to law says, that he is the person mentioned in the foregoing petition; that he had read the same and the matters and things therein set forth are true; 20

PETER BENTLEY.

Subscribed and sworn to before me, this 14th day of September, 1915,

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JAMES J. HIGGINS,
Attorney at Law,
of New Jersey.

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Order Admitting Party Complainant.

Order Admitting Party Complainant.

Filed September 21, 1915.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>ANDREW J. CARTAN, <i>et als.</i>, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p>ERNEST L. PHELPS, <i>et als.</i>, Defendants.</p>	<p><i>On Bill, &c.</i></p> <p><i>Order ad-</i> <i>mitting Peter</i> <i>Bentley as</i> <i>party com-</i> <i>plainant.</i></p>
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20 This matter being opened to the court by Peter Bentley, solicitor *pro se*, upon his verified petition, praying that he be admitted to intervene as a party complainant in the above cause, and upon filing said verified petition and notice to Messrs. Durand, Ivins & Carton, solicitors for complainants, duly acknowledged.

30 It is on this twentieth day of September, nineteen hundred and fifteen, Ordered, that the said Peter Bentley be and hereby is admitted as a party complainant in the above entitled cause for the purpose of prosecuting the above entitled cause with the complainants therein.

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

Supplementary Petition of Peter Bentley.

Supplementary Petition of Peter Bentley.

Filed April 27, 1917.

IN CHANCERY OF NEW JERSEY.

Between

ANDREW CARTAN, *et als.*,
Partners, &c.,
Complainants,

and

ERNEST L. PHELPS, *et als.*,
Defendants.

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On Petition.
Notice.

To Messrs. Durand, Ivins & Carton, Solicitors 20
for Complainant.

Messrs. Fort & Fort, Solicitors for Defendant,
Wayland O. Bagley.

TAKE NOTICE, that on Friday, the 27th day of
April, 1917, at the Chancery Chambers in Long
Branch, New Jersey, or such other place as Vice-
Chancellor Foster may hear the above entitled
cause, I shall apply for an order allowing the
filing of a supplemental petition in the above 30
cause, a copy of which is hereto annexed.

Yours very truly,

PETER BENTLEY,
Solicitor pro se.

Dated April 17th, 1917.

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Supplementary Petition of Peter Bentley.

IN CHANCERY OF NEW JERSEY.

	<p style="text-align: center;"><i>Between</i></p> <p style="text-align: center;">ANDREW CARTAN, <i>et als.</i>, Partners, &c., <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">ERNEST L. PHELPS, <i>et als.</i>, <i>Defendants.</i></p>	<p style="font-size: 3em;">}</p> <p><i>On Bill, &c.</i> <i>Supplemen-</i> <i>tal Petition.</i></p>
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To his Honor, John E. Foster, one of the Vice-Chancellors of the above Court.

The petition of Peter Bentley, of Jersey City, New Jersey, respectfully shows:

- 20 1. That the above cause has been referred to your Honor by the Chancellor of the State of New Jersey to hear and determine and to report what order or decree should be made in the premises.
- 30 2. That heretofore your petitioner filed a petition in the above cause setting forth that he was a creditor of the defendant, Ernest L. Phelps, and had issued a writ of attachment against his lands, tenements and hereditaments.
3. That on order was duly made in this cause admitting your petitioner as a party complainant.
- 40 4. That since the date that your petitioner was admitted as a party complainant in said cause, he has obtained a final judgment on the writ of attachment mentioned in the said petition. That said judgment was actually entered on the seventh day of March, nineteen hundred and seventeen, for the sum of Eight Hundred

Supplementary Petition of Peter Bentley.

Twenty-two Dollars and six cents damages and Seventy-three Dollars and forty-four cents costs of suit, with interest on the said damages of Eight Hundred Twenty-two Dollars and six cents from January third, nineteen hundred and sixteen, amounting to Fifty-seven Dollars and four cents, making a total balance due your petitioner of Nine Hundred Fifty-three Dollars and four cents, with interest from the seventh day of March, nineteen hundred and seventeen. 10

Wherefore your petitioner prays that an order may be made in this cause allowing him to file this, his supplemental petition showing the amount due and owing to your petitioner in addition to the amount shown in his original petition upon which he was made a party complainant. 20

PETER BENTLEY,
Solicitor pro se.

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

Peter Bentley being duly sworn on his oath according to law, says; that he is the person mentioned in the foregoing petition, that he duly signed the same; that the matters and things therein set forth are true. 30

PETER BENTLEY.

Sworn and subscribed to before me, this 17th day of April, 1917.

JAMES J. HIGGINS,
Attorney at Law,
of New Jersey.

Order duly entered granting prayer of above stated petition on April 30, 1917. 40

Petition of McCarter & English.

Petition of McCarter & English.

Filed.

IN CHANCERY OF NEW JERSEY.

10 *Between*

ANDREW J. CARTAN, *et al.*,
Partners, &c.,
Complainants,

and

ERNEST L. PHELPS, *et al.*,
Defendants.

On Bill, &c.
Petition.

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

The petition of Robert H. McCarter, Conover English, George W. C. McCarter and Arthur F. Egner, respectfully shows unto your Honor,

1. They are each counsellors at law of New Jersey and are practicing as partners in the City of Newark.

30 2. That on the 7th day of March, 1917, they, as such partners, recovered a judgment in the New Jersey Supreme Court against the defendant Ernest L. Phelps in the sum of \$272.28 damages and \$10.35 costs.

3. That the said judgment was recovered in an attachment suit commenced in the court aforesaid by Peter Bentley against the said Phelps in which your petitioners became applying creditors.

40 4. The said judgment represents legal services rendered to the defendant Phelps at his

Petition of McCarter & English.

request, and disbursements paid out by your petitioners at the request of the said Phelps.

5. No part of the said judgment has been paid and said Phelps is not within the State of New Jersey, and your petitioners know of no property of his within the State except the property which the complainants in the above entitled cause seek to have adjudged to be the property of the defendant Phelps and not of the defendant Bagley. 10

Your petitioners therefore pray that they may be admitted as parties complainant in the above entitled cause.

And your petitioners will ever pray, etc.

McCARTER & ENGLISH,
Solicitors pro se. 20

STATE OF NEW JERSEY, ss.

George W. C. McCarter, being duly sworn according to law, on his oath deposes and says:

1. I am one of the petitioners in the foregoing petition named.

2. I have read the petition and the matters and things therein contained are true to the best of my knowledge and as I verily believe. 30

G. W. C. McCARTER.

Sworn to and subscribed before me this 20th day of March, 1917.

BERNHARD J. I. FIRNER,
[SEAL] *Notary Public of New Jersey.*

Order Admitting Parties Complainant.

**Order Admitting McCarter & English as
Parties Complainant.**

Filed March 29, 1917.

IN CHANCERY OF NEW JERSEY.

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Between

ANDREW J. CARTAN, *et al.*,
Partners, &c.,
Complainants,

and

ERNEST L. PHELPS, *et al.*,
Defendants.

On Bill, &c.
On Petition.
Order.

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Upon reading and filing the duly verified petition of Robert H. McCarter, Conover English, George W. C. McCarter and Arthur F. Egner, partners practicing law under the name of McCarter & English;

It is, one this day of March, 1917, on motion of Messrs. McCarter & English, solicitors *pro se*, ORDERED that the said petitioners be admitted as parties complainant in this cause on the pleadings heretofore filed in this cause.

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Answer of Wayland O. Bagley.

Answer of Wayland O. Bagley.

Filed June 8, 1916.

IN CHANCERY OF NEW JERSEY.

Between

ANDREW J. CARTAN, *et als.*,
Partners trading under the
name of Cartan & Devlin,
Complainants,

and

ERNEST L. PHELPS, *et als.*,
Defendants.

On Bill, &c.

*Answer of de-
fendant, Way-
land O. Bag-
ley.*

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The answer of the defendant Wayland O. Bagley to the Bill of Complaint. This defendant answering says.

1. Defendant denies that on February third, nineteen hundred and fourteen, the defendant Ernest L. Phelps was seized and possessed or held any title whatever to the first tract of land described in the bill of complaint filed herein, situated in the Township of Matawan, Monmouth County, New Jersey. And this defendant has no knowledge or information sufficient to form a belief as to whether the defendant Phelps was seized and possessed of the second tract, described in the bill of complaint, situated in the Township of Marlboro. 30

2. This defendant has no knowledge or information sufficient to form a belief with respect to the indebtedness of the defendant Phelps to 40

Answer of Wayland O. Bagley.

10 complainants, nor with respect to the bringing of
suit or the entering of judgment by complainants
against the defendant Phelps in the Monmouth
County Circuit Court, nor with respect to the
entering of said judgment in the Clerk's office of
Monmouth County, nor the issuance of execution
thereon, nor any of the matters in any way con-
20 nected with this suit as alleged on pages two
and three of the bill of complaint, and defendant
calls upon the complainants for proof of these
matters.

3. This defendant denies that the defendant
Phelps was on or about February third, nine-
teen hundred and fourteen, or for a long time
prior thereto, seized and possessed of the tract
of land situated in the Township of Matawan,
20 Monmouth County, New Jersey, as described
in the bill of complaint, and this defendant denies
that a deed was recorded on February third,
nineteen hundred and fourteen, from defendant
Phelps and wife to this defendant, as is alleged
in the bill of complaint, and this defendant
states that there was recorded on February
30 third, nineteen hundred and fourteen, in the of-
fice of the Clerk of Monmouth County, New
Jersey, in Book 971 of Deeds, page 35, a deed
conveying to this defendant the property situ-
ated at Freneau, in the Township of Matawan,
Monmouth County, New Jersey, which is the
land first described in the bill of complaint
herein. This deed was executed by Ernest L.
Phelps and Allie Phelps, his wife, and is dated
April eleventh, nineteen hundred and thirteen,
and was delivered to this defendant on Novem-
ber third, nineteen hundred and thirteen, which
was long before the debt was due from defend-
40 ant Phelps to complainants. Defendant admits

Answer of Wayland O. Bagley.

that the consideration in the deed was One Dollar and other valuable considerations.

And this defendant denies that this conveyance was without consideration and denies that the conveyance was made by defendant Phelps to this defendant to benefit and protect the said Phelps from the claims of his creditors or to cheat or defraud the creditors of the defendant Phelps, and defendant denies that he in any way assisted or aided defendant Phelps to cheat or defraud his creditors or complainants and defendant states that he is the legal owner of the first tract of land described in the bill of complaint and that the deed dated April eleventh, nineteen hundred and thirteen, conveying the property to this defendant is a valid instrument. 10

And defendant expressly states that he paid to the defendant Phelps, in consideration for the transfer of the tract of land situated in the Township of Matawan, Monmouth County, New Jersey, and described first in the bill of complaint, Forty-four Hundred Dollars and received and accepted and subsequently recorded on February 3, 1914 the deed from the defendant Phelps dated April eleventh, nineteen hundred and thirteen, as heretofore described without any knowledge or notice of any of the debts owed by the defendant Phelps or of the pendency of any actions against the defendant Phelps by any of his creditors; and this defendant consummated the transfer of the tract of land with the defendant Phelps in perfect good faith and for a valuable consideration. And defendant states that he is the valid and lawful owner of the first tract described in the bill of complaint situated in the Township of Matawan, Monmouth County, New Jersey, and has been the owner 20 30 40

Answer of Wayland O. Bagley.

thereof since November third, nineteen hundred and thirteen, and further denies that the defendant Phelps has used or occupied these premises or received the rents or profits therefrom since the conveyance to this defendant.

10 And this defendant prays that he may be dismissed with his costs.

FORT & FORT,
Solicitors for and of Counsel with
Wayland O. Bagley.

Replications duly filed.

The cause was referred to Honorable John E. Foster for hearing, and April 27, 1917, was appointed as the time for said hearing.

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Opening.

IN CHANCERY OF NEW JERSEY.

Between

ANDREW CARTAN, *et als.*,
Partners, &c.,
Complainants,

and

ERNEST L. PHELPS, *et als.*,
Defendants.

10

Transcript of testimony taken in the above entitled cause before Hon. John E. Foster, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on Wednesday, September 19th, 1917, at 10 A. M. 20

Appearances:

Messrs. Durand, Ivins & Carton for complainants.

Mr. Franklin W. Fort for defendant Bagley.

Mr. Peter Bentley, *pro se*, and also representing McCarter & English, judgment creditor.

Court. As requested, complainants may have leave to amend their bill by eliminating the second tract of land. 30

Mr. Carton. I offer in evidence certified copy of judgment and execution. Mr. Fort has consented to produce the deed; I assume we had better offer these and get all formal proof in.

I offer certified copy of judgment, Carton & Devlin, being the complainants, against Ernest L. Phelps, for \$522.16, entered on the 26th day of February, 1914.

(Marked Exhibit C. 1.)

40

Patrick J. Devlin, direct.

I also offer in evidence execution issued by the Clerk to the Sheriff of Monmouth County on this judgment, with the return and levy. The execution is dated the 25th of June, 1914; the return is dated the 25th of June, 1914, with the description of the premises in question attached.

10 (By consent copy of the execution and return is to be used in place of the original.)

(Marked Exhibit C. 2.)

Mr. Carton. The original deed called for and produced by Mr. Fort. We offer the deed from Ernest L. Phelps and Lillie Phelps, his wife, to Wayland O. Bagley, dated April 26th, 1913; acknowledged by the wife in Ohio and by Mr. Phelps on the 31st day of October, 1913, and re-
20 corded in the Monmouth County Clerk's office on February 3, 1914, in Book 971, page 35, being the deed conveying the premises in question.

(Marked Exhibit C. 3.)

PATRICK J. DEVLIN, sworn for complainants.

Direct examination by Mr. Carton.

Q Are you a member of the firm of Carton & Devlin? A Yes.

30 Q In business at Matawan? A Yes.

Q Were you acquainted with the defendant Mr. Phelps? A Yes.

Q How long have you known him? A Perhaps thirteen of fourteen years since I first knew him.

Q Where did he reside during the period of your acquaintanceship? A At Freneau, near Matawan.

40 Q Do you know where he lived there? A Yes.

Patrick J. Devlin, direct.

Q What sort of a place was it; residence, farm or what? A His residence with just a couple of acres of ground—perhaps three acres of ground to it.

Q Had your firm had business dealings with him during any portion of that period? A Yes.

Q You are generally in the feed, coal and wood supply business? A Yes, in Matawan. 10

Q Did you extend credit or sell goods to Mr. Phelps? A Yes, sir, we did.

Q When did your business relation with him commence, approximately? A Perhaps 1907 or 1908.

Q And what was the nature of the business you did with him? A We sold him lumber and coal and feed, grain and things of that sort.

Q And did you continue to do business with him, until what time was it? A Perhaps the latter part of 1913 or the early part of 1914; I don't remember the exact day. 20

Q Was he indebted to you at that time? A Yes.

Q Did you afterwards obtain a judgment—procure a judgment against Mr. Phelps? A Yes, we did.

Q The judgment has been referred to here, amounting to \$522.16? A That is right. 30

Q As set out in Exhibit C. 1? A Yes.

Q Did you collect your money on that judgment? A No, I did not.

Court. The amount of it is still owing to you?

Witness. Yes.

Q Where was Mr. Phelps living at the time you procured your judgment, if you know, Mr. Devlin? A Adjoining the railroad track on 40

Patrick J. Devlin, direct.

the easterly side of the highway at Freneau, at his home.

Q How long did he continue to reside there, if you know, after the judgment was obtained?

Mr. Fort. I object.

10 *Court.* I will allow it, assuming it is offered for some purpose.

A I don't know that he lived there at all after that.

Q Do you know who did reside there? A A man named Black, I think, was perhaps the first man to occupy the premises after Mr. Phelps left, but I understood that Mr. Phelps reserved a portion of the house.

Mr. Fort. I object.

20

Q When did Mr. Black appear to reside there?

A I will say positively a man named Black lived there.

Court. When did he begin to live there; how long after you obtained judgment?

Witness. About that same time, or shortly after.

30 Q How long did Mr. Black continue in possession of the place, if you know? A My recollection is about a year.

Q What, if anything, do you know about Mr. Phelps' association with the property during the time Mr. Black was there? A I haven't any positive knowledge.

Q Only what you have heard? A Yes.

Q Did Mr. Black live there with a family?

A He and his wife lived there together.

40 Q Do you know whether Mr. Phelps came there to the farm during the time that Mr. Black

Patrick J. Devlin, cross.

resided at the place? A I cannot say positively that he did.

Q Did you know that Mr. Phelps owned this place at the time you extended the credit to him? A We had every reason to believe that he did.

Q Did you learn afterwards that he had conveyed it? A Yes. 10

Q Do you know who took up the occupation of the place after Mr. Black left it? A No, a man named Menist is in possession now.

Court. How long has he been there, about, as far as you know?

Witness. Two years.

Q Do you know anything about the value of this place? A We have an idea of what it is worth. 20

Mr. Fort. I object.

Court. I will take the evidence. I think the allegation is broad enough to meet this sort of testimony.

Q Do you know anything about the value of the property? A It is between six and seven thousand dollars. 30

Q It is now; what was it in April, 1913, or February, 1914? A I don't know that any improvements have been made to the place since; in my opinion the value is about the same now as it was then, between six and seven thousand dollars.

Cross examination by Mr. Fort.

Q What was the last day on which you extended credit to Mr. Phelps? A I would have 40

Patrick J. Devlin, cross.

to refer to my books. (After referring to books.) January, 1914.

Q The last date is in January, 1914? A Yes.

Q What was the first day on which credit was extended which was—

10 *Court.* Embraced in the amount of this judgment?

Witness. March 23, 1911. He ran his account and always made partial payments; he never paid in full and the account never was closed from that date.

Court. There was a balance on March 23, 1911?

Witness. That was the first entry.

Court. Was there a balance then?

20 *Witness.* No, that was the first entry; after that he never closed his account; he always made partial payments.

Court. So when you sued him for the balance of \$570, that represented everything he owed you at that time?

Witness. Yes.

30 Q On March 1, 1913, the balance appears to be \$286.09? A Yes; he made a payment of \$200 and that left that balance.

Q That was in March, 1913? A No, on November 22, 1912, he made the payment, but the account was balanced up to March 1, 1913, and showed a balance at that time of \$286.09.

Q And these other items subsequent to that made the total of the account, did they? A Yes.

40 Q And they totaled what? A Without interest \$488.83, and the court's interest was added at the time the judgment was taken, amounting to \$518.16.

Patrick J. Devlin, cross.

Q How much of that account is subsequent to April, 1913, the end of the month? A A little less than \$200.

Q A little less than \$200 was contracted after the end of April? A After April, 1913.

Q A good deal less than \$200; there is only \$197 from March. A There isn't much in March. 10

Q Give me the exact total, beginning with May, 1913. A \$169 was sold after the end of April, beginning with May up to the closing of the account.

Q How much of it is between October, 1913, and the conclusion, taking the November, December and January items, leaving out October? A \$38.84. 20

Q On the 18th of February you had a bond and warrant from Mr. Phelps for a specified amount? A Yes.

Q That was February 18, 1914? A I think it was February, 1914.

Q And your judgment on which you here claim is based on that bond, isn't it? A Yes.

Q Did you make the affidavit on which judgment was entered? A Yes.

Q When did you first learn of the conveyance of this property from Mr. Phelps to Mr. Bagley? A I never knew positively that it had been made; it had been noised around that something of that kind had happened, because it was brought out in the testimony that was going on in New Brunswick in February, 1914. 30

Q Is that when you heard it noised around? A Yes.

Q You heard it before you took this bond or afterwards? A Before. 40

Patrick J. Devlin, cross.

Q And after you heard it you got hold of Mr. Phelps and got him to execute this bond and warrant of attorney so you could get a judgment? A We were after Mr. Phelps all the time.

10 Q You asked him to execute this bond and warrant of judgment after you had heard of the transfer of this property? A Sure; he did it at our request.

Q Mr. Devlin, the testimony you have given in regard to the occupancy of the premises by Mr. Black and others—how do you know that Mr. Black lived in this property? A We served him there with materials at that time.

20 Q You personally? A I suppose you might say personally; they sent orders to our store and I would fill the orders and have them sent there.

Q Did you deliver them? A I didn't actually carry them there.

Q Did you ever see Mr. Black on the premises? A I cannot say that I did.

Q Did you ever see this other man whom you mentioned on the premises—Menist? A Oh, yes, I have seen him there.

30 Q When? A Every day nearly.

Q Did you ever meet Mr. Black? A No, his wife did most of the business with us; I met his wife; I don't remember meeting Mr. Black.

Mr. Fort. Subject to my objection on all of it as relating to value, I would like to cross examine as to the basis of this witness's judgment.

40 *Court.* I have let it in.

Patrick J. Devlin, re-direct.

Q You have said that you think this property is worth six or seven thousand dollars? A Yes.

Q What do you base that on? A I bought a property myself, which was only a stone's throw from the place, and my property contains—I paid \$3,500 for a plot containing about four acres without any buildings on it, except an old building that might be considered worthless. 10

Court. That is the plot where you built your house?

Witness. Yes.

Q How far is Mr. Phelps' from your property now? A It is diagonally right across the road. 20

Q Is that the property with the bungalow where the chicken farm was? A No, there isn't any chicken farm connected with it; it is brick buildings and surrounded by trees.

Q On the road from Freneau to Matawan, on the driving road? A Yes. And if my plot should be worth \$3,500 without any buildings on it, I figured that this plot almost as large as mine with a good substantial building on it should be worth between six and seven thousand dollars. 30

Mr. Fort. I move to strike out the witness's opinion as to value.

Court. It will have to come out unless you qualify him.

Re-direct examination by Mr. Carton.

Q Has your experience in the supply of lumber business aided you any in fixing an 40

Patrick J. Devlin, re-direct.

opinion as to value of buildings on a property?

A Yes, some.

Q Have you had experience yourself in building; I mean outside of selling the material, actually building property and houses? A No, we don't do any contracting.

10 Q Have you bought and sold or dealt in property yourself other than this one you have mentioned? A No.

Q You built a residence, you say, near by the Phelps property? A Yes.

Q That is the only building you have had any experience with? A Yes.

Q Have you kept yourself informed on the value—the selling price of property in the vicinity?

20 Objected to.

Court. He may answer whether he kept himself informed.

Q Have you? A Yes.

Q You are basing the value of the Phelps property principally upon what you paid for your land? A Yes, and the character of the buildings upon it.

30 Q Do you know of any sales of land in the vicinity of the Phelps property, other than your own, which have been made, and the prices? A No, I couldn't.

Q You stated upon cross examination that you had been trying for some time to get your money from Mr. Phelps. What particular efforts had you made to do so?

Mr. Fort. This is another issue.

Court. I think it is competent; he may answer it.

40

Patrick J. Devlin, re-direct.

A In the regular way, we followed him up, and followed him up with statements and letters; that is about the only effort we made to collect the account.

Q Did you see him personally? A Couldn't see him personally.

Q Did you place the claim in the hands of an attorney? A Yes, we placed it in Durand, Ivins & Carton's hands. 10

Q Any other attorney prior to that time, any local attorney? A We asked Mr. Elmer Geran—we didn't place the account in his hands—to do what he could to get Mr. Phelps to settle with us.

Q Whom did Mr. Geran represent at the time? A At the time he represented Mr. Phelps, I think. 20

Q You asked him to intercede to collect your account? A Yes.

Q When was this with relation to the bond and warrant, the judgment, that you kept sending these letters and statements and asked Mr. Geran to get the money for you, how long before you got the bond and warrant? A On January 2, 1914, we mailed a statement to Mr. Phelps.

Q Was that any more than the ordinary statement; was there any request for payment? A Yes, we always accompanied this statement with a letter requesting a settlement. 30

Q When after that? A That was the last one I have any record of here, because the judgment was procured in February following this, a little over a month after.

Q When before January? A In December; December, 1913, we mailed him a statement, and prior to that again in November, 1913. 40

Patrick J. Devlin, re-direct.

Q It was your custom to send statements each month? A Not always, but we did it in his case toward the last there, hoping that he might pay something.

Q Were these statements accompanied by letters requesting payment or settlement? A
10 Generally.

Q Taking the date January 2, 1914, can you tell us whether it was before or after that that you had Mr. Geran see Mr. Phelps about it?

A No, I cannot tell you that.

Q Who procured the bond and warrant of attorney? A Mr. Geran did.

Q Do you know anything about where it was procured or where he saw Mr. Phelps? A
No.

20 Q He had charge of that? A Yes.

Q Had you prior to that time sought Mr. Phelps to give you a judgment? A I don't think so.

Q As I recall you stated that the account had been opened from March, 1911, and that Mr. Phelps would make payments from time to time and never closed it out? A That is right.

30 *Court.* Did you suggest getting the bond and warrant, or did that come to you through Mr. Geran?

Witness. I am not quite sure; I think perhaps I might have suggested that.

Q Was there any reason at the time for your making the suggestion, any special reason? A The only reason was that we were fearful of this case that Conover had against him, Ten-Eyck Conover, and we didn't know whether
40 there might be other cases come up against him;

Elmer H. Geran, direct.

we wanted to get in the most favorable position possible.

ELMER H. GERAN, sworn for complainants.

Direct examination by Mr. Durand.

Q You are a member of the bar of New Jersey? A Yes, sir. 10

Q Do you know Mr. Cartan and Devlin? A Yes, sir.

Q And did you know Mr. Phelps, the defendant in this suit? A Yes, sir.

Q Did you know Mr. Bagley? A No, I have never seen him.

Q You secured a judgment for Cartan & Devlin, did you not, against Mr. Phelps? A Yes, I acted as attorney, I think, in the confession of judgment which Mr. Phelps gave to Cartan & Devlin. 20

Q Did you do that at the request of Mr. Phelps or of Cartan & Devlin? A I was speaking with Mr. Devlin about his claim and I think Mr. Devlin suggested to me that perhaps Mr. Phelps would consent to give a confession of judgment, and I took that up with Mr. Phelps, and Mr. Phelps readily consented, and I prepared the papers, and that was done. 30

Q Did Mr. Cartan and Devlin speak to you about Phelps owing them and asking you to endeavor to collect it, or how did the matter come up? A I don't recall whether they asked me to collect it or not, or just assumed that Mr. Phelps didn't have any money. The thing that I recall about it is that Mr. Devlin asked me if I would get Mr. Phelps to give this confession of judgment, and I did that, but I didn't 40

Elmer H. Geran, direct.

have the claim to collect in the sense that a lawyer has it to collect.

Q At the time that Mr. Devlin spoke to you about it, did he speak to you about a deed having been recorded from Phelps to Bagley? A I don't recall positively, but I think so.

10 Q And that was his anxiety in having the matter put in judgment?

Court. You are leading pretty well; you had better ask what was said and done.

Q Can you tell us all that was said and done in regard to the matter? A My impression is that Mr. Devlin understood that that deed had been given, and that he wanted that confession of judgment, so that his claim would be in the shape of a judgment rather than a book account, and that it was simply as an act of foresight on Mr. Devlin's part that he would rather have his claim in the shape of a judgment than of a book account, in the event that anything should happen, he would be in a better position.

20 Q Where was Mr. Phelps living at the time? A I don't know; I think he was living in New York; I am not sure.

30 Q Where had he lived prior to that time? A He lived at his home, near Freneau station.

Q How long had he resided there? A I don't know, several years.

Q Were you acting as his attorney? A I was acting as his attorney in the suit for alienation of affection.

Q This Ten Eyck Conover case? A Which had been brought by Ten Eyck Conover.

40 Q Was any reference made by Mr. Devlin or Mr. Cartan or Mr. Phelps to the Conover case and its possible outcome at the time you ob-

Elmer H. Geran, direct.

tained this bond and warrant, or had that anything to do with it? A I have no recollection about that at all. I don't recall that he did or didn't; I have no recollection as to it.

Q I show you a deed from Ernest L. Phelps and wife to Wayland O. Bagley, dated April 11, 1913, and ask you if you have seen that deed before? A Yes. 10

Q The deed purports to have been executed before you October 31, 1913, by Mr. Phelps; do you remember the execution of that deed? A Yes, sir.

Q Do you remember what was said by Mr. Phelps at the time he executed that deed before you? A I don't know that I remember all the things; I remember some things that were said; I might remember others if questioned, but I remember some things very distinctly. 20

Q What did Mr. Phelps say about this deed at the time of the execution of it? A He said that he wanted to prepare a deed for the Freneau property and give it to Mr. Bagley. I asked him who Mr. Bagley was, and he said that Mr. Bagley was associated with him in his business in New York, I think in the Home Pattern Company, and that Mr. Bagley had loaned him some money and that he wanted to be sure that Mr. Bagley was going to get his money, and that he wanted to give him this deed, so that Mr. Bagley would be sure to get it. At that time the suit was pending, the Conover suit, and he didn't know what the verdict would be in the suit, and regardless of whether the verdict was in his favor or against him, he wanted to be sure that Mr. Bagley would be secured as to what he owed him. I asked him why he didn't give Mr. Bagley a mortgage instead of a deed; he said 40 30

Elmer H. Geran, direct.

that there might be a foreclosure of the mortgage and some trouble in connection with that greater than there would be in connection with a deed. I asked him how much he owed Mr. Bagley and he said he owed him a thousand dollars, and that Mr. Bagley could take this deed and hold it, and if Mr. Phelps was ever able to pay him that thousand dollars, Mr. Bagley would deed the property back to him. If Mr. Bagley never received his thousand dollars, he was to retain the deed as the title to the property, but if he did receive the thousand dollars, then the property was to be deeded back to him. I remember also that I didn't know that he had a wife out West; I was a little surprised. I asked him some questions about her, and he said that she was—I don't know whether in Iowa or Ohio, or some place out West; I asked him whether she would sign the deed, and he said yes, that he didn't have any doubt but what she would join in the deed.

Court. This conversation which you have related, was that in April or at the time the deed was prepared or in October when you took his acknowledgment, or on both occasions?

Witness. I recall only one conversation as to that and I don't know the date.

Q Did you draw the deed? A I think I did, but I am not sure; I could tell if I saw it.

Court. Mrs. Phelps appears to have acknowledged the paper on the 26th of April, and in the following October—

Mr. Durand. The deed is dated April 11th.

Elmer H. Geran, direct.

Court. I am trying to learn whether he had this conversation when he gave you instructions to prepare the deed or when he signed and acknowledged it before you in October?

Witness. I don't recall; I recall that conversation very vividly, because there were some things about it, principally the fact that he had a wife, whom I didn't know about, and I remember the things that I have stated very distinctly, but I do not recall as to the time. 10

Court. What is the consideration stated?

Witness. One dollar and other good and valuable consideration. I should say that I drew that deed, or was drawn in my office. 20

Q And it was prepared at the direction of whom? A Mr. Phelps. 20

Q Is your recollection quite clear as to the amount of indebtedness he claimed was owing by him to Mr. Bagley, a thousand dollars? A I am sure that the amount of a thousand dollars was mentioned, and it was the only amount mentioned; I am not sure whether he qualified it with "about" a thousand dollars, or "more or less" than a thousand dollars, but I am very positive as to the sum of a thousand dollars, and it was the only sum mentioned. I recall also in connection with the matter, that it was some time after that that we were actually engaged in the trial at New Brunswick, in the trial of the Conover case, and I learned then that the deed had not been recorded. 30

Court. Learned from Phelps?

Witness. Yes, sir, that the deed had not been recorded, and I suggested to him that 40

Elmer H. Geran, cross.

10 if he wanted to be sure to secure Mr. Bagley as to this money, he had better get that deed recorded before the jury had brought in a verdict in the Conover case, because he might be embarrassed by it, and I don't know when the deed actually was recorded, but I fancy that it must have been some time in February of that year in which the trial took place. I remember distinctly that the trial had been in February, but I don't remember the year.

Mr. Durand. February, 1914.

Court. The deed was recorded February 3, 1914.

Witness. That was during the progress of that trial.

20

Cross examination by Mr. Fort.

Q You have said you never met Mr. Bagley; who paid your fees for your services in this matter, if they were ever paid? A You mean the preparation of the deed?

Q Yes. A I have no recollection of having been paid at all.

30 Q You never saw Mr. Bagley; you wouldn't know him if you saw him now? A I have no recollection of ever having seen Mr. Bagley; I have no recollection of his ever having been in my office or paying any money in connection with the matter or his being there at all.

40 Q Would you say in regard to this thousand dollar item whether or not that was not a sum which was mentioned as an additional consideration to be paid by Mr. Bagley to Mr. Phelps over and above the amount already due and owing from Mr. Phelps? A I have no recol-

Elmer H. Geran, cross.

lection about anything additional. I have a very distinct recollection that he said that this thousand dollars was due Mr. Bagley and that he wanted Mr. Bagley to get it, and I suggested to him that this deed might be set aside, inasmuch as it was made after the Conover suit was pending, and he didn't concern himself as to that, because he said that if it was set aside Mr. Bagley would be no worse off than he was now; that he had no money to pay Mr. Bagley and if the deed was set aside, then Mr. Bagley wouldn't get anything, and if that deed did hold good, he would get what was owing. 10

Q He answered your question as to the amount of indebtedness to Mr. Bagley by saying that it was about a thousand dollars, in that neighborhood? A Yes, that Mr. Bagley had been very kind to him; he said that, I remember. 20

Q Did he give you any indication as to how long his indebtedness to Mr. Bagley had been running? A No, he did not.

Q You don't recall whether anything was said as to any additional consideration being paid at that time, other than the then existing indebtedness? A My only recollection is what I have stated; I recall simply the amount which he owed Mr. Bagley was about a thousand dollars. 30

Q That talk you think was prior to drawing the deed? A Yes.

Q That would date it back prior to April? A Yes. I do not recall the date; I could tell if I had the deed.

Q I ask that you look at the acknowledgment on the deed and see the erasure of "April" there and the writing of "October" over it. A The deed is dated in April and the acknowledgment 40

Elmer H. Geran, cross.

is dated in October; that doesn't refresh my recollection as to the time of the execution of this paper.

Q I am speaking of the date of the drawing of the paper, which is the time of your first talk on this subject with Mr. Phelps? A I don't
10 know that that was the date of my first talk with him.

Q You may have talked with him before the eleventh of April, on which day the deed appears to be dated? A Yes. I have no recollection as to dates at all; I do recall the conversation, but as to the time of the conversation, whether it was the time of the drawing of the deed or the acknowledgment or execution of the deed, I don't know.

20 Q It may have been either? A Yes.

Q Did you take charge of sending it to Iowa, to the wife, or did Mr. Phelps do that? A I don't know.

Q What did you do with the deed after you took the final acknowledgment in October? Did you keep it or give it to Mr. Phelps? A Mr. Phelps had it; I have no recollection of ever having had it, or seen it from that time until this.

30 Q Did you have it recorded for him? A No, sir.

Court. Does it appear who did have it recorded?

Mr. Fort. There is a mark, McDonald & Someone, 140 Nassau street, New York, to be returned to them.

Peter H. Bentley, direct.

PETER H. BENTLEY, sworn for complainants.

Direct examination by Mr. Durand.

Q You reside where? A I reside in Jersey City and am a member of the New Jersey Bar.

Q Do you know Mr. Phelps? A I did; I do. 10

Q When did you meet him? A In 1914, I should say, June or July.

Q Did you ever have any talk with Mr. Phelps about the property at Freneau? A I did.

Q Will you tell us what Mr. Phelps said in regard to that property and when and where? A It was during the month of January, 1915; I had appeared in the re-trial of the case of Conover against Phelps; I had been in the appeal to the Supreme Court on the reversal of the judgment of \$7,000; the trial started, I think, on the 22nd of January, 1915, the second trial, and lasted nine consecutive court days. I had continually pressed Mr. Phelps for money, especially coming from New York to New Brunswick for the trial of the case. He finally said to me on one of the mornings that there was no question but that I would be paid, and liberally paid, especially if the verdict was in favor of him, the defendant. I said to him, "Well, you have confessed to me that you have no money, that you are in business in Toronto, working for someone on a very small salary; you already told me that you had trouble to even obtain the necessities of life since you left New York and went to Toronto; how are you going to pay me?" "Well," he said, "I own a piece of property at Freneau and I conveyed it to a man named Bagley, Mr. Bagley"— 20 30 40

Peter H. Bentley, direct.

Mr. Fort. I renew my objection to this whole evidence, which seems to me to be hearsay so far as Mr. Bagley is concerned.

Court. The objection will be overruled.

10 A (Continuing.) He said that he had conveyed this property to a man named Mr. Bagley, who I understood was his superior, or who he said was his superior, in the Home Pattern Company; that he made the conveyance to him some time before to secure him for moneys which he (Mr. Bagley) had advanced to him (Mr. Phelps). I asked him the amount, and he said it was in the neighborhood of \$1,200; I asked him the value of the property, and I think he said that it stood him about \$8,000. He said that the arrangement between him and Mr. 20 Bagley was that Mr. Bagley after obtaining the title was to endeavor to sell it, and first to pay himself (Mr. Bagley), and the difference which was realized was to be turned over—

Mr. Fort. I object to this evidence and move to strike it out on the ground that it is not directed to any issue under the pleadings.

30 *Court.* If I should find that this conveyance was made by Phelps with an attempt to defraud his creditors, I could also find that if there was an actual existing indebtedness due Mr. Bagley at the time of the conveyance to him, that the conveyance might stand as security for the amount of that indebtedness, and the judgment creditors would be subject to it. Mr. Bentley may tell all the conversation he had with Mr. Phelps in regard to this transaction.

40

Artemas M. Lambertson, direct.

A (Continuing)—and the difference which was realized was to be turned over to him (Mr. Phelps). That the property could be easily sold, and that out of the first money he received he would pay me what he owed me. I think that was the whole conversation.

Q Did he say anything about what his purpose was in making the conveyance to Bagley originally? A Yes, he referred to the fact that he didn't know what would be the outcome of the suit of Ten Eyck Conover against him; he said that he was innocent of the charges against him, and if the judgment was recovered against him, he wasn't going to let Mr. Conover collect that judgment. 10

Mr. Fort. No cross examination. 20

ARTEMAS M. LAMBERTSON, sworn for complainants.

Direct examination by Mr. Carton.

Q Where do you reside? A Matawan, New Jersey.

Q What is your business? A I am farming now; I am usually in the real estate business.

Q How long have you been interested in the real estate business? A Since 1882. 30

Q Since when have you taken up farming? A Within the last four of five years.

Q Were you actively engaged in the real estate business until you took up farming? A Yes.

Q And since that time have you had anything to do with real estate matters? A Yes.

Q As well as farming? A Yes.

Q Are you acquainted with the Phelps property at Freneau? A Yes. 40

Artemas M. Lambertson, cross.

Q Do you know where it is? A Yes.

Q And what it comprises? A Yes.

Q In your real estate operations have you had to do with the buying and selling of property in and about Matawan and Freneau? A I sold this property originally, when it was in a farm—the property in question.

Q As a broker or owner? A As a broker.

Q And are you familiar with the value of the property? A Yes.

Q And its value in 1913? A Yes.

Q What do you say was the fair value of that property in 1913? A I consider the land worth \$1,000 an acre; I understand there were three acres in it, or about that.

Q What was the character of the buildings upon the land at the time, say in 1913, after Mr. Phelps had owned it? A There was a brick veneer house that he built there, according to my knowledge of it, which should have cost about \$5,000.

Q Then what would you say would be the fair value of the whole property at that time? A I consider it could be sold at that time for \$7,000.

Q Were there outbuildings as well as the house? A Yes.

Q The whole property in your judgment was worth \$7,000 at that time? A Yes.

Cross examination by Mr. Fort.

Q Do you know anything about the encumbrances of the property at that time? A No, sir.

Q Did you ever go through the house? A Yes.

Q When? A When Mr. Phelps lived there.

Artemas M. Lambertson, cross.

Q Went through from top to bottom? A Yes, sir; he showed me through it.

Q What is the rental value of the property?

A Thirty dollars a month.

Q Do you think property renting for \$30 a month is worth \$7,000? A Yes, sir; that is no gauge of the value, what it rents for. 10

Q That depends on whether it is for residential purposes or for investment, doesn't it? A Yes.

Q At that value of \$7,000, is that what you think might be secured for the property, or might have been secured for the property in 1913? A Yes, sir.

Q What about 1914; would there have been any change? A Very little.

Q What about now? A Equally valuable now. 20

Q Could it be secured now? A Yes.

Q You still think so? A Yes, sir.

Q Any real estate being sold in that locality now? A Mr. Devlin bought a piece on the opposite side of the road, for which he gave \$3,500, for four acres.

Q When was that? A Three years ago, I think.

Q Have there been any sales in the neighborhood since? A The Central Railroad Company bought a piece of land for a railroad yard on the opposite side from this property, under condemnation proceedings; that cost them over a thousand dollars an acre. 30

Court. When was that?

Witness. About four years ago.

Q Have there been any free sales of land in that neighborhood in the last three years, since 40

Artemas M. Lambertson, cross.

the declaration of war between France and Germany in 1914? A Yes.

Q What were they? A The adjoining property, off of which this property originally came.

Q What was that sold for? A It was \$17,000.

10 Q For how much land? A Nineteen acres.

Q When was that sold? A About July of this year.

Q That was sold for what? A A chicken farm.

Q Was there a chicken farm there? A Yes.

Q Have buildings on it? A Yes.

Q Very many buildings? A A lot of buildings that were very poor.

Q What sort of buildings? A Chicken
20 houses.

Q Heated and all that? A Only the incubator houses.

Q There were incubator houses? A Yes.

Q Did the incubators go with that sale? A Yes.

Q Do you know of any other sales in that neighborhood recently? A Yes, the property immediately adjoining, the second chicken farm that has been sold.

30 Q What did that sell for? A I think twenty-three acres of that, I think the selling price was \$26,000.

Q Did that have buildings also? A Yes.

Q Better buildings than the other one has?
A Yes.

Q Incubators? A Yes.

Q House? A Yes.

Q House for people? A Yes, one house.

Q Were the other houses for people on the
40 first farm you spoke of? A Yes.

Elmer H. Geran, direct.

Q What were the value of the buildings on the first farm, the nineteen acre farm? A About \$3,000.

Q What was the value of the buildings—when I say “buildings,” I mean including the incubators and everything else? A Yes.

Q What were the value of the buildings and incubators and everything on the second farm, the one that sold for \$26,000? A About \$8,000. 10

Q Were these chicken farms right alongside of this Phelps property ever since Mr. Bagley had it in 1914? A Yes,

Q In your opinion does that have any influence on the value of the Phelps property for residential purpose? A Not in the least.

ELMER H. GERAN, recalled for complainants. 20

Direct examination by Mr. Carton.

Q Do you know who occupied the premises during the season of 1914? A Yes, I do.

Q Who was it? A A man by the name of Black.

Q How did he occupy the premises, under whom?

Mr. Fort. I object. 30

Court. You may test his knowledge.

A I know whom he purported to occupy it under, under whom he claimed to occupy it. I saw the lease.

Court. In relation to this property?

Witness. Yes.

Court. From whom to whom?

Mr. Fort. If there is a lease, it should be produced. 40

Elmer H. Geran, direct.

Court. I will allow him to testify.

Witness. I recall that I was in Mr. Phelps' apartments or rooms in New York City—

Court. When?

10 *Witness.* 1914, or 1915, at the time Black occupied this property and Mr. Phelps complained because Mr. Black was going to take away some of the personal things and effects that were in the house, and he said that Black had no right to do it, that it was not in the lease; I asked him if he had a lease and he said yes, and Mr. Phelps produced a lease, which I saw, between him and Mr. Black; that was in Mr. Phelps' home, I think on Twenty-third street.

20 *Court.* Did you notice the date of the lease?

Witness. No, sir, but I know that it was after our transaction—after this deed, and I know that Mr. Phelps signed it. My recollection is that it was a typewritten form of a lease with very little writing in it; it was filled in with writing and not with the typewriter.

30 *Mr. Fort.* I move to strike out all evidence in regard to the lease, for two reasons: the witness states that he does not know the date of the lease, and therefore there is no value to the evidence if admitted, and it is proof of the contents of a paper by parole, which seems to me absolutely improper.

Court. The motion will be overruled.

William G. Bedle, direct.

Q Was that after or before the first New Brunswick trial, the Conover trial? A It was after that trial.

Q Do you know where Mr. Phelps is?

Mr. Fort. I further object on the ground that it discloses a professional communication, rather than to have it put in the form of a motion to strike out. 10

Court. You can have the benefit of that objection on the record if you wish. I make the same ruling in regard to it. I do not see any breach of a professional privilege at all.

Q You saw that in Mr. Phelps' residence in New York City? A Yes, sir.

Q Do you know where Mr. Phelps is at present? A The last that I knew of him—that is all I know—which was sometime ago, he was in Toronto; I think his address is in my office, but I don't know just the street. 20

WILLIAM G. BEDLE, sworn for complainants.

Direct examination by Mr. Carton.

Q You reside at Matawan? A Yes.

Q What is your business? A Real estate. 30

Q How long have you been engaged in the real estate business? A About ten years.

Q Actively? A Yes.

Q Engaged in that business at the present time? A Yes.

Q Are you acquainted with the Phelps farm, formerly owned by Mr. Phelps at Freneau? A Yes.

Q Do you know where the property is located? A Yes. 40

Wayland O. Bagley, direct.

Q Are you familiar with the value of real estate and properties in that community? A I believe so.

Q What do you say is the fair value of the Phelps property at Freneau, or what was its value in 1913? A It is just as valuable now as
10 it was then; I should say it is worth about \$7,000.

Q About \$7,000 now and a similar value in 1913? A The buildings were new in 1913 but the land has increased enough to offset the value of the buldings in the meantime.

Cross examination by Mr. Fort.

Q Do you know anything about the encumbrances on this property? A I do not.

COMPLAINANTS REST.

20

Mr. Bentley. I would like to prove my judgment later, and McCarter & English also have a judgment, which I would like to prove before the close of the case.

Complainants and Intervenors rest, reserving the right of Mr. McCarter and Mr. Bentley to put in the transcript of the judgments and the amount of the same.

30

Mr. Fort. I move a dismissal of the bill.

Court. Do you rest?

Mr. Fort. No.

WAYLAND O. BAGLEY, sworn for defendant.

Direct examination by Mr. Fort.

Q What is your business? A At the present time I am general auditor for the Charles Williams Stores.

40 Q In 1913 and 1914, and for a period of years prior thereto, what had been your business? A

Wayland O. Bagley, direct.

Assistant treasurer and treasurer of the Home Pattern Company.

Q And was there a man named Ernest L. Phelps employed by that company? A There was.

Q From when until when? A It is my recollection he was employed in 1907, but I am not certain. 10

Q How long did he remain in that employment? A Until the fall of 1912, I think.

Q During that period did you have any financial transactions with Mr. Phelps? A Yes, I loaned him quite a lot of money.

Q When and under what circumstances? A I cannot give you the dates, he would come down to the office and get it; he was on the third floor and I was on the second floor. 20

Q When did you first open a bank account in your own name in any bank? A The first time was some years ago in Iowa.

Q In New York City, since meeting Mr. Phelps? A I think it was in 1911, I am not certain.

Q And prior to that time what did you do with your money and how did you handle it? A I kept it there in the safe, naturally. 30

Q In the safe in the company's office? A They had several of them.

Q The loans which you made Mr. Phelps, what record or receipt did you have for them? A He gave me notes in some instances, and in other instances I. O. U's.

Q What were the amounts of these loans? A They varied from \$50 to \$200, \$300; in one instance \$400. 40

Wayland O. Bagley, direct.

Q What was the total of them? A Up to 1913, early in 1913, I can give you the approximate total.

Mr. Carton. I object; the witness has said that he has notes and I. O. U's.

10 *Mr. Fort.* He said he had them.

Q Where are those notes now and I. O. U's?

A I gave them to Mr. Phelps when he gave me the deed.

Q What was the total, the approximate total?

A You mean to the time he gave me the deed?

Q Yes. A Somewhere between \$2,800 and \$3,000; I cannot give it to you exactly.

Q At the time that he gave you the deed did you give him any other money? A I don't recall about that.

20 Q I show you two checks, first check dated April 15, 1913, to the order of E. L. Phelps, for \$400, signed W. O. Bagley, on the West Side Bank of New York; did you give that check to Mr. Phelps? A I did.

Q Has the amount thereof been deducted from your bank account by the bank? A Yes.

Q What was the consideration of that check? A I gave that to him, as I recall it, at the time that he said that he would get the deed signed by his wife and would furnish me with the deed; we talked about a deed before.

30 Q I show you another check, dated July 18, 1913, for \$100, to the order of E. L. Phelps, drawn by you on the West Side Bank of New York, and ask you what that check was given to him for? A It was a loan, the same as the others.

Q Did he ever repay these loans? A No.

40 Q Or any part of these loans? A No.

Wayland O. Bagley, direct.

Q In cash? A No.

Q You say that you gave him this \$400 check at the time he told you he would get the deed signed by his wife; that he had been talking about giving you a deed; tell us what the conversation was between you and Mr. Phelps about the giving of the deed. A I never could give you the conversation at that time. 10

Q Generally give it, can't you; I don't mean any particular conversation; you said he had been talking about giving you a deed for some-time? A Yes.

Q What talk had you had with him on the subject? A In addition to what I had already loaned him, the understanding was that if I would give him a thousand dollars more, it would clear the matter up. 20

Q Clean what matter up? A Deed the property to me, or he would sell it to me.

Q When was that understanding reached? A I cannot give you the date of that.

Q Approximately how long before he gave you the deed? A A long while. I didn't get the deed until the first of the following November.

Q Months or a year or two or what? A I should judge it was about eight months or nine months that we had the matter under discussion. 30

Q How did you first get into conversation with Mr. Phelps about a deed, do you remember that; how did that first come up? A I thought it was time he paid me some of my money back.

Court. When did you get that thought?

Witness. I think in November, 1912.

Court. Did you then talk to him about it?

Witness. Yes. 40

Wayland O. Bagley, direct.

Court. What did you say and what did he say?

Witness. I told him I wanted my money and he said he wanted to sell me the property, and I asked him how much, and he said see about that later and look it over;
10 that was the first conversation.

Q What was the next conversation; what was the course of the negotiations in regard to the deed? A I don't know just what answers you want me to make; I haven't given them much thought.

Q That deed was actually recorded in February, 1914, wasn't it? A Yes.

Q I show you a letter under date of April 10, 1914, and ask you—addressed to Kenneth McEwen, and ask you if that is your signature?
20 A Yes.

Q And that letter is a memorandum which you made in April, 1914, as to the circumstances of this transaction, is it? A One of the letters.

Q Refreshing your recollection from the memorandum you made at the time, will you tell me what the course of the negotiations were?

30 Objected to. Objection sustained.

Q You say that in November, 1912, you took up the question of being paid with Mr. Phelps?
A Yes.

Q Did you get any payment of money? A No.

Q And did you know that he owned this property at that time down here at Freneau? A Yes.

Q After this first talk in which he suggested to you that he would look it up and fix a price
40

Wayland O. Bagley, direct.

on it, did you have further talks with him on the same subject? A Yes.

Q What were those talks? A He was going to sell it to me for an additional thousand dollars.

Q Did you go down and look at the property? A Yes, so did my wife. 10

Q When was that, if you know? A It was in the late winter.

Q Of 1913 or 1912? A It would be the late winter of 1913.

Q After you had gotten the deed or before? A I hadn't any deed then; this was before.

Q You said you got the deed in November, 1913? A Yes.

Q You said you went down there in the late winter; did you go before or after you got the deed? A Before I got the deed. 20

Court. That must have been the winter of 1912-1913?

Witness. Yes, February or March, somewhere in there.

Q What did you decide about it when you went down with your wife? A It didn't look very good to us at first and my wife said she wouldn't live down there, so I made extra efforts to get Mr. Phelps to pay me off, but he couldn't, and then we arranged for a thousand dollars additional; I would take the property; that is all there was to it. 30

Court. Did you pay him that thousand dollars?

Witness. No, not then.

Q After you had made that first arrangement as to the purchase of the property for a 40

Wayland O. Bagley, direct.

thousand dollars additional, do you know whether at that time there was any first mortgage on the property? A I was told there was not.

Q Was there as a matter of fact? A Not that I know of. There was on the Hill farm.

10 *Court.* That isn't in the case; that was stricken out by the amendment; it is the second tract.

Q After the first agreement was made that you should take this property and pay a thousand dollars for the deed, did Mr. Phelps tell you anything about the reason for any delay about closing the transaction? A He said he was trying to sell it, for one thing.

20 Q And if he sold it, then what? A He would pay off what he owed me.

Q Did he make any other suggestion about any other method by which he would pay you instead of giving you the deed? A If he sold the property he would give me cash.

Q Did he make any other suggestion about any other way that he might get cash out of the property?

Court. Anything said about a mortgage?

30 *Witness.* No.

Q Or placing a mortgage with anyone else? A I believe there was some arrangement at one time to place a mortgage on it, but I don't know the particulars of that; I don't remember that.

Q What was the purpose of placing that mortgage on it? A Pay me off.

40 Q But eventually he did not either sell it or place the mortgage and pay you, did he? A No.

Wayland O. Bagley, direct.

Q When did you finally return to the original proposition of your paying a thousand dollars and purchasing it, do you recall that? A No, but I think it was along the first part of April; possibly the latter part of March, 1913.

Q The year you got the deed? A Yes, in the fall. 10

Q I show you again check already referred to, of April 15, to the order of E. L. Phelps, for \$400, and ask you whether that was part of that thousand dollars? A It was.

Q How was the rest of the thousand dollars paid? A I paid them in money; not all of it, all but about \$200, I believe. About \$200 never was paid, because—well, he got some money from Mr. Black when he had no right to, and then there was some interest to be paid. 20

Court. Interest due on what?

Witness. On money I had advanced to him; he got a first payment from Mr. Black that he leased the property to without my knowledge.

Q When did he lease the property to Mr. Black, if you know? A Sometime in the winter of 1913-1914.

Q When did you first know that he had leased the property to Mr. Black? A I cannot tell you; sometime after that. 30

Q What did you do when you found it out? A I complained about it to my attorney, for one thing.

Q What did your attorney do at your request? A Demanded Mr. Black to pay or get off the property.

Q What did happen? A Mr. Black paid up and got off the property, too. 40

Wayland O. Bagley, direct.

Q Paid you and got off the property? A Yes.

Q That money that he paid you, did you retain or give that to Mr. Phelps? A I kept it.

Q How much was it? A You remember that better than I do; I think it was about \$120, as
10 I remember it, the balance.

Q What was that \$120 for? Rent? A Yes.

Q And that action to collect from Mr. Black and put him off the property was commenced as soon as you found out he was there? A I told the attorneys to go ahead with it, and they had a number of conversations with him.

Q Who were your attorneys in the matter; were we or Mr. McEwan? A You handled it over here in Jersey, and Mr. McEwan in New
20 York.

Q Did you make any advance of \$600 in the year 1913 for the account of Mr. Phelps to anyone named Howard?

Mr. Carton. Objected to as leading.

A No, my dealing with Mr. Howard had nothing to do with Mr. Phelps' deal; that was money I loaned to somebody else.

Q Was the \$100 check of July 18, 1913, to
30 Mr. Phelps' order any part of the thousand dollars that you paid for this property? A It was.

Examination by the Court.

Q You said that was a loan, the same as the others. A He hadn't turned over the deed to me yet, not until the fall.

Q You stated that \$400 you gave when he promised— A I gave more than that; there
40 are several \$50 checks, making a total of \$800.

Wayland O. Bagley, direct.

Q You said that was a loan the same as the other loans you made him, that \$100? A It was a loan to Mr. Phelps.

Q When you took this deed did you expect to simply have your debt secured or to become the owner of the property? A I felt it was mine. 10

Q Did you have the insurance transferred? A I did.

Q When? A I don't know; along in the fall sometime.

Q What year? A No, I will take it back; the insurance wasn't transferred until February.

Q When the deed was recorded? A As I recollect it, the reason that it wasn't was because there were the household goods mixed up in it.

Q Did you understand between the time you got the deed in November, 1913, and the recording of it in 1914, that you were covered by any insurance on the buildings? A I didn't think much about it. I supposed Mr. Phelps looked after it, but it may be I am wrong; it may be in December. 20

Court. You haven't the policies here?

Mr. Fort. No.

Witness. Mr. McEwan had the policies. 30

Q When did Phelps make this lease to Mr. Black which you objected to, without your knowledge? A In December, 1913, I believe.

Q Did you see him about it and ask him why he made that? A Yes.

Q What did he say? A He said that Mr. Black had agreed to buy the property, and if he could get an agreement to buy, he thought I would be better satisfied, too, so I could get my money out of it. 40

Wayland O. Bagley, direct.

Q What did you say to that? A I told him he had no right to; then he said take it up with Mr. Black, which I did.

Further examination by Mr. Fort.

10 Q You offered to sell the property to Mr. Black? A Yes.

Q At what price? A As I remember, it was \$5,900 or \$5,700.

Q Did he purchase it? A No.

Q Did Mr. Phelps sanction that price? A He had nothing to do with it.

Q Did you consult him about it, whether you should sell it at that price? A No.

Q And that price included your taking a \$2,200 second mortgage? A Yes.

20 Q Have you paid the taxes on this property personally since you got title? A I have.

Q And are these receipts for 1914, 1915 and 1916, for taxes you paid? A Yes.

Q You paid those with your own money? A Yes.

Q None has reimbursed you for them? A No, sir.

30 *Mr. Fort.* I offer in evidence these two tax bills of April 15 and July 18, and three tax bills for 1914, 1915 and 1916.

Q Do you know who paid the taxes for 1913? A I don't remember. Mr. Phelps may have, but I don't remember.

Q Those are the only receipts you were able to find? A Yes.

Court. Have you ever occupied the property?

Witness. No, I have rented it.

40 Q To the present tenant? A J. Menist.

Wayland O. Bagley, direct.

Q When did you lease to him first? A After Mr. Black was put off; I think it laid idle for five or six months, and then I leased it to Mr. Menist, who has re-leased it each year since.

Q Did you have counsel at the time you made your settlement with Mr. Phelps? A No. 10

Q You say you surrendered to him the notes and the I. O. U.'s you had of his? A Yes.

Q Representing this indebtedness of \$2,800 or \$3,000? A It was more than that I surrendered to him when I got the deed.

Q How much more? A I cannot tell you exactly.

Q Was there any suggestion made as to putting the consideration for the transaction in the deed, instead of one dollar? A I don't believe it was ever mentioned; he brought the deed to me. 20

Court. You never saw the deed until the day you got the deed?

Witness. I never saw the deed until November.

Court. Did you keep any book account of your transactions with Phelps?

Witness. No, I did not. 30

Court. Or anything that would show the amount of his indebtedness to you at the time this deed was given you, any record of any kind?

Witness. I don't believe I did.

Q Mr. Bagley, as treasurer of the company, were you in charge of the payrolls of the company? A Yes.

Q And was it or was it not customary to advance—for you as an individual to advance 40

Wayland O. Bagley, direct.

wages to various employees? A I did that quite frequently, but I never advanced any such amount as I did to Mr. Phelps, to others.

Q But in those cases did you keep a book account or an I. O. U. account? A Just the slips.

10

Court. Do you know why Mr. Phelps should have told Mr. Geran when he prepared this deed, or at any other time, or should have told Mr. Bentley, when he was acting as his counsel, that his total indebtedness to you was in the neighborhood of a thousand dollars or twelve hundred dollars?

Witness. Nothing, except he owed them.

20

Court. He was a man that would be inclined to deceive people who were helping him?

Witness. He deceived me; I didn't know he had any case on.

Q When did you first learn of the litigation against Mr. Phelps in New Jersey? A The week of the trial.

30

Q The Conover case? A The first one, yes, sir.

Q What did you do as soon as you learned that? A I went after Mr. Phelps.

Q How did you go after him? A I think he was living on 23rd street, and I asked him what about it, and he said that some people had gotten up a case against him and there was nothing to it, but I immediately phoned at that time McDonald DeWitt and asked him where I stood on my deed,—

40

Court. He was your attorney?

Wayland O. Bagley, direct.

Witness. He was at that time, with Mr. Clarence Shearn.

A (Continuing)—and he said the best thing to do is to get it filed, so I sent it down to him by special delivery, and he sent someone from his office down to Matawan to file it, or Freehold. 10

Q Had you known before that that it was necessary to file it? A I didn't think there was any reason as long as Phelps was all right.

Q Did you know that it was necessary to file a deed in order to make it good as against creditors? A I hadn't thought anything about it; eventually I expected to. I didn't know he owed anything except me.

Q Had you ever dealt in real estate before; ever owned or bought or sold any? A Up to that time I had owned one lot I paid \$50 for. 20

Q Did you ever loan any money on mortgage? A Yes, once; I didn't file the mortgage though.

Court. Why didn't you suggest getting a mortgage from Phelps to secure you, instead of a deed?

Witness. Well, I thought the best thing to do was to buy the property from him.

Court. Did he tell you how much the property was worth? 30

Witness. No, I didn't ask him that question, I don't believe.

Court. When you and Mrs Bagley went down to see it, you were dissatisfied with the general conditions and appearance of it, and she didn't care to live there; what value did you place on it then?

Witness. Myself; what I thought it was worth? 40

Wayland O. Bagley, direct.

Court. Yes.

Witness. I figured it was worth between four and five thousand dollars.

Court. Sufficient to cover the amount of the indebtedness and the thousand dollars as well?

10 *Witness.* The total indebtedness up to that time, including the thousand dollars mentioned, would have amounted, with interest, to a little over \$4,000, probably \$4,300 or \$4,400.

Q You went there with the idea of looking at it, with a view of making it your home? A Yes.

20 Q That was the purpose of your trip there with your wife, to decide whether you would buy it for a home? A Yes.

Q Mr. Phelps was a high salaried employee in your company? A He got \$100 a week.

Court. Did he tell you what he was borrowing all this money for and using it for?

30 *Witness.* He bought that Hill farm, as I understood, and he told me he was covering it with fruit, peach trees, and clearing the property.

Court. Is the Hill farm near this other property?

Witness. I don't know; I never was over to the Hill farm.

Q He also had some school he was working? A Yes, he has had a school off and on for a number of years.

40 Q A drafting school? A Yes, and then he abandoned it and started it several times.

Wayland O. Bagley, direct.

Q So that at the time you made your loans to him, he not only had the property and his salary, but he had other enterprises that he was interested in? A Yes.

Court. Why didn't you ask for a mortgage on both properties, the Hill farm and the house, when you found on your inspection that this was only worth about the amount of his indebtedness to you? 10

Witness. I cannot tell you that.

Q Mr. Bagley, did you ever draw checks in any other way than to Mr. Phelps' name, or for the purpose of getting money for him? A Several times I drew them to "Cash", in addition to using his name.

Q Have you any way of identifying which of the checks you drew to "Cash" were drawn for advances to him? A When the matter first came up I identified the bank account, but I cannot do it now from memory. 20

Q How did you do it, from memory at that time? A Yes, it was from memory at that time.

Court. How are you and Mr. Phelps, friendly, so far as coming in contact with him? 30

Witness. I haven't heard from him in several years.

Court. Did you hear from him after this transaction?

Witness. Yes, I heard from him once or twice.

Court. Has there been any rupture between you in your relations?

Witness. No, not that I know of. 40

Wayland O. Bagley, direct.

Court. Have you communicated with him in regard to this case and the pendency of it and the fact that there will be a hearing about it today?

Witness. No.

10 Q We asked you to try to find his address?

A Yes, I have written two letters to Mr. Phelps; I wrote him once in April a year ago, that is, a year ago this coming April, and I wrote him once after that, and I never got any answer to either of my letters.

Court. Where did you address him then?

Witness. I addressed them to a number in Cecil street in Toronto.

20 Q Where had you gotten that address from?

A I got it from Mrs. Conover who had come to my office and asked for \$10 to ship some goods to Toronto, and I gave her the \$10.

Q Is this the Mrs. Conover that was involved in the law suit? A Yes.

30 Q That is the only way you found out or knew Mr. Phelps' address since you last saw him two or three years ago? A No, he wrote me one letter, as I remember it, after he went to Toronto, but I hadn't preserved his address.

Q When did he write you a letter and what was it about? A It was about the hard luck he was having up there, not about the case.

Q Did he in that letter suggest anything as to your selling the property or anything else for his benefit? A No, absolutely not.

40 Q And that is the only communication that you have had from him since 1914? A It is the only communication, as I remember it; right

Wayland O. Bagley, *direct.*

after he went up to Toronto, he came back for some reason, because of some case he had, and he stopped at the office then, and I saw him, but I have had no other communications that I recollect of.

Court. Did you have any understanding with Mr. Phelps that if this property were sold by you for enough to repay you, with interest, all that was due you, the surplus if any, would be paid to him? 10

Witness. I did not; I did have an understanding with him that if he sold the property, I would give him a liberal commission for selling it.

Q Were any of the rest of your negotiations on this subject in writing with Mr. Phelps? A 20
No.

Court. Have you anything that will establish the amount of his indebtedness to you at the time of this conveyance to you, other than your mere statement?

Witness. I wrote out the facts at the time.

Court. I mean any evidence of his indebtedness to you in any way, either on your books or the books of your company. 30

Witness. I wouldn't have them on the books of the company, and I haven't any books.

Court. You haven't anything charged up against his weekly salary, anything in the way of indebtedness?

Witness. No.

RECESS.

40

Wayland O. Bagley, direct.

Q Mr. Bagley, do you know about what time Mr. Phelps ceased to be employed by the Home Pattern Company? A The latter part of November, 1912.

10 Q How does that date relate to the beginning of your negotiations with him on the subject of the deed? A I think I began to talk about taking the property a little before that.

Q Did his leaving affect your attitude on the subject of his indebtedness to you in any way?

A I didn't feel so safe because I couldn't keep my eye on him.

Q At that time did he have any other property that you knew of? A He had a farm that he called Hill farm, of about twenty acres.

20 Q What happened to that farm, do you know? A No, I didn't know anything had happened to it.

Q Do you know now whether he still has it or not? A I don't imagine he has.

Q Have you made any investigations as to the value of the property down there recently or at any time? A I have offered it for sale.

Q Have you received any offers? A No.

30 Q Have you had any negotiations with the present tenant with regard to selling? A Yes, I have.

Q And at what price are those negotiations?

Mr. Carton. I object; that does not fix the value.

Court. No.

Q The basis of selling is \$5,000? A Yes.

40 Q If you should sell that property for \$5,000, is there any arrangement or understanding, expressed or implied, between Mr. Phelps and

Wayland O. Bagley, direct.

yourself that any part of that sum is due or payable to him? A Positively not.

Q Is there any arrangement or understanding, or has there been any arrangement or understanding, between you and Mr. Phelps that if you sold that property at that price that any part of it was to be returned to him? A Positively not. 10

Q At the time that you took the title to this property, were you aware of the fact that Mr. Phelps was in debt seriously to others than yourself? A I didn't know he owed a dollar.

Q Was there ever any understanding or arrangement of any kind or description between you and Mr. Phelps, directly or through any third person whatever, by virtue of which you were, under any circumstances, to account to Mr. Phelps, either for this property or for the proceeds of sale of this property? A Positively not, no. 20

Q What rent have you received for the property? A \$30 a month, but I believe the first lease was for \$27.50 a month.

Court. The one to Black?

Witness. The one to the present tenant.

Q Have you spent any money in repairs or improvements of any kind since you acquired title? A Yes. 30

Q How much? A I cannot tell you offhand.

Court. Approximately.

Witness. Probably between \$75 or \$100.

Q You made no permanent improvements of any kind, but just simply repairs? A Yes.

Court. What does the taxed bill show the assessed value to be? 40

Wayland O. Bagley, cross.

Witness. \$2,000, \$300 for the land and \$1,700 for the buildings.

Q What is the shape of the tract of land which you own? A It is narrow in front and gets wider as it goes back.

10 Q How narrow in front; what is the width in front, do you know? A I cannot give you the exact width; the railroad company, you know, owns quite a big piece of the front of it in a triangular shape amounting to one acre; I rent that of them at one dollar a year.

Q Does that change the appearance of your property? A It improves it considerably.

Q How long a lease have you got from the railroad company? A It is made yearly; I have it as long as I want it that way.

20 Q Do you know the approximate date of your first loan to Mr. Phelps? A In the summer of 1908.

Q That loan has never been repaid except by this deed? A That is all.

Cross examination by Mr. Carton.

Q How long have you known Mr. Phelps? A Since 1907.

30 Q Has your acquaintanceship been intimate? A Not especially; not any more so than with other men connected with the establishment in his position.

Q You were employed by the same house, or firm? A Yes, the Home Pattern Company.

Q You were both employees of that concern? A Yes.

Q And Mr. Phelps was associated with it up until what time? A As I remember it, the fall of 1912, the latter part of November.

40

Wayland O. Bagley, cross.

Q Then you knew him and met him constantly from 1907 until 1912? A No, not until in 1908, because most of the time in 1907 I was in Chicago straightening out that branch there.

Q You first began to know him intimately in 1908? A He was out in Chicago at times; I met him then and knew him well then, too. 10

Q You say he borrowed money from you at that time? A In 1908.

Q Did you take any security for it? A Notes, I. O. U.'s if he was in a hurry to catch a train.

Q When after that did you loan him money again? A Every little while; I haven't got any dates to go by; in 1909 and 1910.

Q You were loaning him money from time to time? A Yes. 20

Q Didn't he ever pay any of it back? A No.

Q Notwithstanding the fact that he was getting a good salary? A He had good excuses.

Q After his failure to pay you back, did you continue to make loans to him without any security? A I didn't push him for any of it.

Q Did you continue to make him loans? A Yes, up until he left the company, about that time, then I loaned him some. 30

Q Up until 1912? A No.

Q Do you mean to say that he hadn't returned any of the money he borrowed from you? A He hadn't repaid me any money or paid me any interest.

Q Did you call upon him to repay you the money? A I spoke to him several times about it, yes, naturally.

Q He always had an excuse? A Yes. 40

Wayland O. Bagley, cross.

Q Still you permitted him to continue his obligation to you? A Yes.

Q And to increase them? A Yes.

Q What did you say you had loaned him up until 1912? A Somewhere between \$2,800 and \$3,000, I cannot tell you the exact amount.

10 Q Loaned him that out of your salary?

A I had some money with me when I came here.

Q You took I. O. U.'s and notes? A Notes and I. O. U.'s in small amounts.

Q Were these amounts that were loaned by you to him during the period of 1908 to 1912 small sums? A Sometimes small and sometimes large.

20 Q How much would they be at times? A They ran from \$25, I believe was the smallest, up to \$300, although I made him a bigger loan after that, after 1912.

Q When was that? A That was one of \$400.

Court. Represented by this check produced today?

Witness. Yes.

30 Q When did you make the loan of \$400?

Court. April, 1913.

Q Had he left the firm at that time? A Yes.

Q Where was he then? A As I remember it, he was on 23rd street, New York.

Q When he left your business, did you make any effort then to get repaid to you the money?

40 A Then is when I brought up the question of getting the money or getting a deed—

Wayland O. Bagley, cross.

Q Getting what deed? A A deed for the property.

Q Did you know about the property that he owned at that time in Matawan? A I knew he owned it; he talked about it for several years previous, as well as the Hill farm.

Q When was it that you turned over to Mr. Phelps the notes and the I. O. U.'s? A My best recollection is in November, 1913. 10

Q What took place in November, 1913, that induced you to turn over these obligations? A He gave me a deed.

Q He gave you this deed that has been offered here to day? A Yes.

Q Where were you when he gave you that deed? A Probably in my office.

Q Don't you know? A Somewhere around the building; I am not sure whether it was in my office or in the upstairs room or where. 20

Q Did you insist that he give you a deed at that time or did he volunteer it? A Everything come along naturally; I don't know whether there was any great insistance.

Court. Can't you tell us what occurred on that occasion? It is quite important to know what he said to you and what you said to him. 30

Witness. I wouldn't want to say.

Q Was it then in November, 1913, when you made the arrangement about turning the property over to you? A Then is when I took a deed for it; there was some talk about his staying there a short while.

Q Was that the time the arrangement was made between you to take the deed for the property, November, 1913? A Yes. 40

Wayland O. Bagley, cross.

Q He hadn't agreed to give you a deed prior to that time? A Yes, in a way he had.

Q You hadn't concluded any arrangements on it? A No.

Q What actually took place in November, 1913, when the deed was turned over to you?

10-

Court. Was the deed given at your request or did he voluntarily give it to you?

(At the request of counsel and the Court the following question and answer were read to the witness:

Q Was it then in November, 1913, when you made the arrangement about turning the property over to you?

A Then is when I took a deed for it; there was some talk about his staying there a short while.)

20-

Witness. I cannot answer that now; I cannot tell which was which, whether I demanded it of him, or whether he said "Here it is."

Q You are entirely in the dark on that? A Yes.

Q Have no recollection about it? A No.

30-

Q Did you pay him any money at that time? A No, nothing except what I had in the way of notes.

Q You took that deed for what he owed you at that time? A Yes.

Q You said it was some \$2,800 or \$3,000?

A No, I didn't say that; I said at the time we had the first talk of the deed, a year previous, it was between \$2,800 and \$3,000; that was a

40-

year previous.

Wayland O. Bagley, cross.

Q Had you loaned him money in the meantime? A I paid him money since then towards that thousand dollars.

Q When did you agree to pay him the thousand dollars? A That was sometime in the winter previous.

Q Before November, 1913? A Oh, yes, the winter previous. 10

Q But you didn't conclude any insurance until the following November, when you got your deed? A Yes, because I gave him some more money, because he said at that time he had sent the deed out West to be signed by his wife—that was in April—or had received it; I don't know which.

Court. Can you tell us how you come to give him this check of \$100 in July; will you explain why you gave him the \$400 in April? 20

Witness. Nothing further than except he asked for it.

Court. Was anything said then about the deed having been returned from his wife or having been signed by her?

Witness. No, there wasn't any mention of it then, but there had been talk about why he hadn't given me the deed, and he said he was right on the eve of selling the property. 30

Court. Did he say whether Mrs. Phelps had signed the deed at the time you gave him the \$100 check?

Witness. I don't know whether he told me at that time or not; I believe he told me previous to that time. 40

Wayland O. Bagley, cross.

Q When did he say he was on the eve of selling the property? A He strung me along all through the spring and summer on that.

Q Was it after you paid him this \$400 that he told you he was on the eve of selling the property to someone else? A Yes, and before,
10 too.

Q Did you protest against that? A No, not exactly. I had agreed with him that if he could find me a buyer, I would be very glad to have him do it.

Q He had the title yet and he said he was on the eve of selling to someone else, and I told you so? A Yes, he said that I was to have it all right enough, and I was to pay him a commission at that time.

20 Q He understood you were to get your money back when he sold it? A There was no understanding about that.

Q Do you recall why you paid him this additional \$100 in July, 1913? A No, except that he asked for it.

Q You say you opened a bank account in 1911; did you do your business through your bank from that time on? A Only a part of it.

30 Q The payments you made to Phelps, were they in checks? A Some of them were.

Q Have you any other checks at all outside of these two? A I had some checks payable to "Cash" that I knew went to him.

Q Have you any other checks here payable to him since 1911, since you opened your bank account? A No, not one, unless my attorney has some of those payable to Cash.

40 Q You have made an effort to look up your checks since this case has been prepared? A Indeed I have.

Wayland O. Bagley, cross.

Q And these are all you found? A Those and what is on a statement there.

Q When was it that Mr. Phelps said to you that he thought you would be better satisfied if he could sell the property and you could get your money back? A I haven't any recollection of that.

10

Q You testified that he made much a statement to you at one time after the deed had been turned over to you? A After the deed had been turned over to me?

Q Yes, he was dealing with the property as if it was his own; you talked with him about it and you stated you would be better satisfied if you got it back. A I didn't know that he was dealing with the property as if it was his own.

Q You knew he had rented it to Black? A No, I did not.

20

Q You learned that afterwards? A Yes.

Q You knew he had a room in the place after Black occupied it? A No.

Q Did you make investigation about that? A I don't believe he did.

Q When was it you took your wife down there to examine the property? A Sometime in the winter of 1912 and 1913—I don't remember just when it was now, sometime through there.

30

Q Was Phelps living in the place at that time? A Not at that time, no.

Q Was Phelps with you when you went through the house? A No. My wife didn't go through the house; she saw it from the outside.

Q And said it didn't suit her and wouldn't live there? A Yes.

40

Wayland O. Bagley, cross.

Q Why didn't you then, instead of buying the property, take a mortgage for the amount Phelps owed you? A I cannot tell you why I didn't then.

Q You knew this property would be of no service to you as a residence? A Yes.

10 Q And all you wanted from this property, by deed or mortgage, was security for what you had given him, wasn't it? A And interest on the money.

Q When you agreed to buy the property, did you have search made against the title? A No.

Q You didn't know whether it was encumbered or not? A No, I had every reason to believe it wasn't; everybody told me it wasn't. Mr. McCampbell told me it was clear, so I took
20 it for granted it was clear.

Q What connection did he have with it? A He lived in the neighborhood and was president of the Home Pattern Company at that time.

Q You didn't employ any counsel and didn't have a search made or anything of the kind? A No.

Q You relied entirely on Mr. Phelps? A Yes.

Q What did you do with the deed when it
30 was returned to you in November, 1913? A Just kept it.

Q Why didn't you put it on record? A I don't know why I didn't put it on record; I haven't the least idea now.

Q What induced you to put it on record subsequently? A I heard Mr. Phelps had a suit against him; as soon as I heard about it, I went down to him.

Q Who told you about that? A Someone at
40 the office; I don't remember who.

Wayland O. Bagley, cross.

Q What time was that, when the suit was in progress? A No, that was before the suit began, or just about the time it was to begin—the trial, I mean.

Q That is the Ten Eyck Conover suit? A The first suit.

Q Didn't Phelps have this deed recorded? A He did not. 10

Q Who had it recorded for you? A McDonald DeWitt; the address is on top of it.

Q Did he represent Mr. Phelps? A No, he didn't know who they were.

Q Did Mr. Phelps talk with you prior to this being recorded about recording it? A No, I talked to him about it.

Q Just about the time the trial was coming off? A Just as soon as I heard about it I went down to his place on 23rd street, I think it was—he lived in two different streets, one 23rd, and one time 34th street—and I asked him what about it, and he made light of the matter; he said that something had been—suit had been brought against him and nothing would come of it. 20

Q Did Mr. Phelps ask you not to record the deed? A At that time? 30

Q When he first turned it over to you in November. A I don't remember about that.

Q Did he at any time ask you not to record the deed? A I cannot say; I don't remember.

Q Did you hear Mr. Geran testify this morning that Mr. Phelps told him the following February that he hadn't yet recorded it, and that he had better record it, and Mr. Geran advised him to record it? A I didn't get all of his testimony. 40

Wayland O. Bagley, cross.

Q Was that the time that Phelps talked with you about having it recorded? A I don't think Phelps talked with me about having it recorded.

Q You said you had talked to him? A I did and asked him what about it, if the property was in danger, and I didn't get a very satisfactory answer, and I immediately telephoned
10 McDonald DeWitt, who is in Mr. Clarence Shearn's office, and he said the thing to do would be to get it filed, so I sent it down to him by special delivery; he sent a messenger down to the county seat.

Q That was on the third day of the following February? A I don't remember the date.

Q Where had you kept the deed from November until February? A With my papers
20 there.

Q In the safe? A Yes.

Q I understood you to say that you hadn't effected any insurance up to that time? A I don't think so.

Q Up to which time, February or November? A I don't remember when the insurance was transferred.

Q You really never made any effort to protect the property or take control of it until you
30 had your talk with Mr. Phelps in February about the possible danger of this Conover suit? A I had no talk with him about the Conover suit; I didn't know what the nature of it was; I simply heard a rumor at the office, so I went down to him and asked him, and he said it was something that wouldn't amount to anything, and then is when I called up Mr. McDonald DeWitt for advice.

Q Will you tell us at what time it was that
40 you ever agreed with Mr. Phelps as to what the

Wayland O. Bagley, cross.

purchase price for these premises should be? A I cannot fix the date; sometime in the winter, but that is as near as I can come to it.

Q The winter of 1912-13? A Yes.

Q What was the purchase price to be? A \$1,000 over and above whatever I had paid to him.

10

Q Did you pay him that thousand dollars afterwards? A Most of it, not all of it.

Q You haven't paid it all yet? A No; not going to either.

Q Did I understand you this morning that you did pay something to Mr. Phelps after you got the deed? A I think I did make a small payment; he was needing some money, but it wasn't a large amount at all; I don't remember what it was, either \$25 or \$30.

20

Q And when did you turn over these notes and obligations of Phelps? A In November, 1913, as near as I can get at all.

Q Where were they; where did you keep them? A I kept them in the safe at the office.

Q Where did the turning over take place, in your office? A Either in my office or else in one of the upstairs rooms; I cannot tell you positively; I don't remember.

Q You cannot recall what was said when Phelps came there with the deed that day and gave it to you, and what induced you to go to your safe and get these notes and I. O. U.'s and turn them over to him; that is what I would like to hear more about, if you can refresh your memory. A I don't remember what we talked about; I suppose it was about this transaction, but I feel unable to quote the language that was given.

30

Q The substance of it, I mean.

40

Wayland O. Bagley, cross.

Court. You didn't pay a dollar to Phelps either at the time you made the agreement, as you say, to take the property, or at the time the deed was turned over?

Witness. Yes, I gave him all these notes.

10 Q When he turned the deed over to you in November, 1913, you didn't pay him any money?
A I gave him notes at that time.

Q You gave him back his obligations and took this property for it? A Yes.

Q You say that it was to cover the interest, too; was that the understanding that the deed was to cover all the obligations and interest accrued? A Yes.

20 Q When did you first learn that Mr. Black was in possession of the premises? A Sometime in January or February, 1914—or March, I don't remember which.

Q How did you come to find out that he was there? A I don't remember now.

Q What did you do in November, 1913, when you got the deed, to take possession of the property or to put a caretaker in it and rent it?
A I didn't do anything; as long as I had the deed I felt easier.

30 Q You didn't lock it up or insure it or put a caretaker there or anything? A I think Mr. Phelps was there then.

Q You left it to Mr. Phelps to take care of the situation? A I had lots of confidence in him then.

40 Q When did you lose confidence in him? A When I heard that there was a suit brought against him, at one time; and then I lost confidence in him when he rented the property to Black without saying anything to me about it.

Wayland O. Bagley, cross.

Q Did you visit Phelps in the Freneau property after you got the deed? A No.

Q Who told you that Mr. Black was a tenant there? A I don't remember now how I found it out, whether Mr. Phelps mentioned it or came to me and told me or someone else told me.

Q Did Mr. Phelps tell you that he rented it to Black and gave an agreement to buy it? A I don't remember. 10

Q Do you know he had a first payment on account of the purchase price? A No.

Q When did you find that out? A When I asked for the lease; when I asked Mr. Phelps.

Q For what lease? A That he had with Black.

Q Did he turn the lease over to you? A Yes. 20

Q Where is that now? A I recollect some of the conversation if you care to have it.

Court. In relation to the lease?

Witness. Yes.

Q Will you tell us what it was? A I was very much excited and I asked him what right he had to lease property that didn't belong to him, and he said well, I was the owner of it, I am simply his agent, and when I come to look at the lease he doesn't say anything about his being the owner in it. 30

Q Did he say anything about being the agent? A No, I don't think it does say "agent" there either.

Q When was that you had this conversation with him? A I cannot give the date now.

Q Was it before you recorded your deed or afterwards? A I put it down there at the time, but I don't remember now. 40

Wayland O. Bagley, cross.

Q Was it before you went down to inspect the property? A After I inspected it. I inspected the property nearly a year before this lease was made.

Q Is this the lease Mr. Phelps turned over to you (witness shown lease)? A Yes.

10 Q Which is such a paper as Mr. Geran described? A Yes.

Mr. Fort. I offer the lease in evidence.
(Marked Exhibit C. 5.)

20 *Mr. Carton.* Being lease dated January 15, 1914, by E. L. Phelps of the first part, to C. W. Black of the second part, for property located at Freneau, New Jersey, consisting of house and four acres of ground for one year from January 15, 1914, at \$400, payable on or before April first, 1914. Signed E. L. Phelps and C. W. Black; no subscribing witness. Signed at New York, January 15, 1914. It is further agreed that party of the first part does give the party of the second part the option to buy the aforesaid property for the sum of \$8,000.

30 Q Can you give us anything more definite as to the date that you saw Mr. Phelps and got from him this lease? A My recollection was the early part of February, but just when, I cannot say for sure.

Q Did you ascertain that Mr. Phelps had gotten a payment from Black on that lease? A I did some time or other; whether I did just at that time I got the lease, or whether I read it through just at that time and noticed it or not, I don't know, but I know it wasn't long.

Court. How old a man is Phelps?

40 *Witness.* About sixty, I should judge.

Wayland O. Bagley, cross.

Q How long did Black continue to stay in the place? A You will have to ask my attorney.

Q I am asking you. A I don't remember.

Q How much longer did Mr. Phelps continue to stay there after February? A He wasn't there then; he left when he leased it to Black.

Q Didn't he have a room at this place? A 10
He had a room on his Hill farm, but he lived in New York.

Court. When Phelps gave you the deed in November, did you and he have any understanding about Phelps continuing to occupy the place?

Witness. Only temporarily.

Q What was said about it? A He said he would like to stay there for awhile, and I said all right. 20

Q Did his wife live with him there so far as you know? A The woman that we supposed to be his wife had left him, but he hadn't lived for fifteen or twenty years with his real wife out in Iowa.

Q Have you any book account to show your transaction with Phelps at all? A No, nor with anyone else.

Q Haven't anything at all to show the amount of money you advanced to him other than these two checks covering \$500? A No. 30

Court. Suppose he disputed the amount you claimed, how could you have proved it?

Witness. I had the notes and I. O. U.'s.

Court. After you delivered them to him when you got the deed in November, you had no other evidence of his indebtedness then?

Witness. I didn't think any other was 40
necessary.

Wayland O. Bagley, cross.

Court. Did he ever write you any letters or anything in which the account of the indebtedness or the extent of it was shown?

Witness. No, he never wrote me very much; I wrote him twice since he went to Canada.

10

Q After you procured this Black lease from Mr. Phelps did you collect the rent yourself?

A I tried to; we had to sue Mr. Black for it.

Q He refused to pay? A Yes.

Q Did you get your money? A Yes.

Q What months were they that you sued and collected for? A I didn't see the complaint.

Q Do you know? A No, I don't know.

Q Did Mr. Black continue at his farm? A
20 No.

Court. He left the year before?

Witness. Yes, we put him out.

Q You collected some and when he wouldn't pay the balance, you dispossessed him? A Yes.

Mr. Fort. That is not the fact.

Q Is it your recollection that you brought
30 a suit and collected some rent from Black? A
Yes.

Court. How are the tax bills made out?

Witness. To Mr. Bagley.

Q How did the assessors learn that you were the owner; did you notify them of the change of ownership? A The deed was filed in February, 1914.

Q You had no occasion to notify them of the change of ownership? A No.

40 Q You let the public record do that? A Yes.

Wayland O. Bagley, re-direct.

Re-direct examination by Mr. Fort.

Q Immediately after the time you had this deed recorded, you retained Mr. Kenneth McEwen, of the firm of Worcester, Williams & Saxe, did you not, as your attorney? A Yes.

Q And instructed him to act in the matter? 10
A Yes.

Q Were we retained through Mr. McEwen?
A Yes.

Q The proceedings taken in either the Black or Conover suit you had no personal knowledge of? A No, I wasn't called on.

Q Can you recall how soon after you learned that Mr. Black was in possession you took the matter up with Mr. Ewen? A I cannot, but it was mighty quick, because I was beginning 20
to worry.

Q Do you recall anything in connection with the peach crop in connection with Mr. Black's tenancy? A I don't know.

Q Do you recall anything as to any claim made by Mr. Black that he had paid any part of the rent to Mr. Phelps? A Yes, he said he had made a payment to him.

Court. To you, or did you get that 30
information through your attorney?

Witness. I think the lease mentions it, doesn't it, the first payment?

Q Did you ever meet Mr. Black yourself?
A Yes, twice.

Q When you met him was anything said about his having paid \$200 to Mr. Phelps? A Undoubtedly something was said.

Q You cannot recall what your instructions either to Mr. McEwen or to my firm were in 40

Wayland O. Bagley, re-direct.

regard to collecting that \$200 from Mr. Phelps?

A Collecting it from Mr. Black?

Q No, from Mr. Phelps, do you recall your instructions on that subject? A No, I don't.

Q There was also some complication in the Black matter, due to some furniture; you recall that? A Yes, Black made some claim on Mr. Phelps—I don't know what the deal was—but I wouldn't have anything to do with it.

Q Didn't you have to take that into consideration in your settlement? A Yes.

Q The furniture in the house was the property of Mr. Phelps, wasn't it? A Part of it.

Q Whose was the rest? A Mr. Black's.

Q What was done with that furniture, if you know? A I don't know; I have no idea. Mr. Black took it, as far as I know, when they cleaned out the house.

Q All of it? A Yes.

Q You and Mr. Phelps were pretty good friends until 1912 or 1913? A We were business acquaintances and met almost every day in a business way; I cannot say that we were so awfully friendly, but we were business friends.

Q What was your impression as to Mr. Phelps' means? A I thought he was in pretty good shape with the Hill farm and this place, and then he had this school, that I supposed was a good money maker, if he would stick to it.

Q When did you first learn that he was not living with his real wife? A I think my first knowledge—I wouldn't want to say, but it was about the time I got the deed.

Q Did that have anything to do with your loss of confidence in him? A It was one of the things only, but I didn't really lose confi-

Discussion.

dence in him until this matter come up in February, this suit.

Re-cross examination by Mr. Carton.

Q Did you know whether Mr. Phelps had any other obligations or notes outstanding against him at the time you took the property over? 10

A No, I did not.

Q Did you make any investigation to ascertain whether or not he had? A No, I didn't see how he could have.

Q You don't know whether he did or did not?

A I don't know.

Mr. Carton. I omitted to offer certified copy of the summons in the original Ten Eyck Conover suit, to show the date of bringing the original suit. 20

(Marked Exhibit C. 6.)

Mr. Bentley. I offer in evidence transcript of judgment in the Supreme Court in the case of Peter Bentley against Ernest L. Phelps, judgment entered on the seventh day of March, 1917, for the sum of \$895.50, with interest on the damages of \$822.06, running from January 3, 1916; also judgment in favor of McCarter & English against the same defendant, for the sum of \$282.63, costs and damages and interest on the damages from January 3, 1916. 30

Mr. Fort. Is there any formal proof to show what the date is when the judgment arose?

Court. Mr. Bentley testified this morning his services and promises to pay him.

If I should hold that it was a mortgage it wouldn't make so much difference; if I 40

Discussion.

should hold that the conveyance should be set aside, it would make all the difference in the world; your motion would prevail.

(Transcript of judgment of Peter Bentley marked Exhibit D. 1 for Peter Bentley.)

10 (Transcript of judgment of McCarter & English, together with bill marked Exhibit D. 1 for McCarter & English.)

20 *Court.* It seems to me there are just two questions in this case: one is whether Mr. Bagley has completed his purchase of the property, assuming him to be a purchaser for the amount, instead of obtaining it as security; he has not paid the thousand dollars, which was one of the conditions for the acquiring by him of the ownership of the property; furthermore, he says he is not going to. He said that he paid \$400 and \$100 and some additional money on account of the thousand dollars, referring to those payments as a loan. I regard Mr. Bagley the same as I regard Mr. Carton and these other gentlemen; he is an innocent party in this matter. I think that his difficulty is to satisfy me now that the amount of his indebtedness, which I think he is entitled to be secured for, is in excess of the amount admitted to be owing him by Phelps. I have nothing but his statement. I can take a declaration of Phelps, against his own interest, made to Mr. Bentley and to Mr. Geran, that his indebtedness to Mr. Bagley is at least \$1,200; to that extent I think Mr. Bagley is entitled to be secured, as well as for the other moneys, \$75 he put into the property, his interest, his taxes he

30

40

Discussion.

has paid and other items that he testified to, and which are definite, and for which I have some corroborative proof. But beyond that I see nothing in the case that entitles me to hold that the conveyance to Mr. Bagley from Phelps is an absolute one rather than a conditional one in the form of a mortgage as security for the amount of his indebtedness which he may establish. The amount of the indebtedness which I find established by independent testimony—the testimony against interest—is \$1,200 and interest. That seems to be the situation before me. I am mentioning it, because unless further proofs on these two points can be offered—and I don't see how there can be on the one point, about the payment of the thousand dollars, in view of Mr. Bagley's own statement—the only reason for the postponement is to see if you can get further evidence to establish the amount of the indebtedness due from Phelps to Bagley at the time.

Mr. Fort. I would like to produce further proof. I would like to produce Mrs. Bagley for the purpose of proving that she went there to view the place as a prospective residence on the theory of an absolute purchase. I would like to produce proof by Mr. McEwen as to the situation under the Black transaction, as indicating the question as to whether Mr. Bagley was actually or impliedly guilty of fraud here in any manner whatever.

Court. I am inclined to hold that he has not been guilty of fraud. He misconstrued

Exhibit C. 3.

his rights in the premises as an absolute owner rather than a conditional owner. I have seen no fraud on his part whatever, and I do not think that counsel on the other side can successfully state that there has been any.

10 *Mr. Fort.* I should like to take proof on the question of value.

Court. I will make an order that the balance of the testimony will be taken within two weeks before Mr. Bindseil, and a memorandum to be exchanged within another week following, and the final memorandum to be in within one month from today.

20

EXHIBIT C. 3.

DEED.

ERNEST L. PHELPS and
ALLIE PHELPS, his wife

To

WAYLAND O. BAGLEY.

Dated, April 11th, 1913.

30 RECEIVED in the Clerk's office of the County of Monmouth, N. J. on the 3rd day of Feby. A. D., 1914, at 1:20 o'clock in the afternoon, and Recorded in Book 971 of DEEDS for said County, pages 35 &c.

JOSEPH McDERMOTT,
Clerk.

Pd. 2.00

McDONALD DEWITT
140 Nassau St.

40

N Y

Exhibit C. 3.

THIS INDENTURE,

Made the Eleventh day of April, in the year of Our Lord One Thousand Nine Hundred and Thirteen BETWEEN ERNEST L. PHELPS, of the Township of Matawan, in the County of Monmouth and State of New Jersey, and ALLIE PHELPS, his wife of the Township of Marion in the County of Lynn and State of Iowa the GRANTORS AND WAYLAND O. BAGLEY, of the City of New York in the County of New York and State of New York the GRANTEE

WITNESSETH, That the grantors in consideration of One dollars (and other good and valuable considerations). lawful money of the United State, to us paid by the grantee the receipt whereof is acknowledged do by these presents grant, bargain, sell and convey unto the grantee and his heirs and assigns forever ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Matawan, in the County of Monmouth and State of New Jersey:

BEGINNING at the boundary line near the intersection of The Freehold and Atlantic Highlands Railroad with The Freehold and Keyport turnpike; thence running from the corner of said boundary line, along the said turnpike, in a southerly direction, eighty feet to a fence; thence down said fence line, in an easterly direction, five hundred feet, to another fence thence along the last mentioned fence in a northerly direction, three hundred and six feet to the main ditch; thence up said main ditch about two hundred and fifty feet to the boundary line running along the aforesaid Freehold and Atlantic Highlands Railroad; thence along the boundary line

Exhibit C. 3.

of the said Freehold and Atlantic Highlands Railroad, in a southerly direction to the said corner and place of Beginning; containing about three acres of land, more or less.

10 Being the same premises conveyed to TenEyck Conover and the said James MacDonough Conover, in his lifetime, by Samuel S. Whiting and Sarah J., his wife, by Deed dated May 9, 1902, and recorded in the office of the Clerk of the County of Monmouth, at Freehold, in Book 690 of Deeds, page 444 &c.

20 Being the same premises conveyed to Zoe Phelps, by two certain Deeds, to wit, a Deed made by Levi S. Emmons, Administrator of the Estate of James MacDonough Conover, deceased, by virtue of and Order of the Orphans' Court of the County of Monmouth, bearing date September 8, 1908, which Deed bears date September 18, 1908, and is recorded in the office of the Clerk of the County of Monmouth, in 838 of Deeds, on pages 290, &c.; also by a certain Deed made by TenEyck Conover and Hallie D., his wife, to the said Zoe Phelps, bearing date September 18, 1908, and recorded in the office of the Clerk of the County of Monmouth, in 30 Book 838 of Deeds, on pages 292, &c.; by virtue of which Deeds the entire title to the said tract of land and premises was vested in the said Zoe Phelps.

Being the same premises conveyed to the said Ernest L. Phelps of the first part by Rose Mooney, by Deed dated October 24, 1910, and recorded in the office of the Clerk of the County of Monmouth, in Book 890 of Deeds, page 297 &c.

Exhibit C. 3.

TOGETHER WITH the appurtenances, and also all the right, title and interest of the grantors of, in or to the same,

TO HAVE AND TO HOLD the same unto the grantee his heirs and assigns, to his and their own use forever.

AND the said Ernest L. Phelps and Allie Phelps, his wife for themselves, their heirs, executors and administrators, do covenant and agree with the said grantee his heirs and assigns: 10

(1) That the title to said premises is vested in fee simple absolute in the said Ernest L. Phelps

(2) That the said Ernest L. Phelps has lawful authority to grant, bargain, sell and convey the same in form aforesaid. 20

(3) That the grantee his heirs and assigns may forever peaceably and quietly hold, possess and enjoy the same against every person lawfully claiming the same.

(4) That the same are now free and clear of all encumbrance whatsoever.

(5) That the grantors and their heirs, and all persons lawfully claiming under them any interest in said premises, shall and will at any time hereafter, upon the request and at the cost of the grantee his heirs or assigns, execute all further conveyances that shall be reasonably required. 30

(6) AND the said Ernest L. Phelps and Allie Phelps, his wife, their heirs, the above described premises, and every part thereof with the appurtenances unto the grantee his heirs and assigns against the grantors and their heirs, and against all persons lawfully claiming the 40

Exhibit C. 3.

same shall and will WARRANT and by these presents forever DEFEND.

IN WITNESS WHEREOF, the grantors have hereunto set their hands and seals the day and year first above written.

10

ERNEST L PHELPS (SEAL)
ALLIE PHELPS, (SEAL)

Signed, Sealed and Delivered
in the Presence of

As to Ernest L. Phelps

[SEAL]

ELMER H. GERAN
MRS. L. M. PHELPS
B. P. HARDING

20

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

30

BE IT REMEMBERED, That on this thirty-first day of October in the year of our Lord, One Thousand Nine Hundred and Thirteen before me, the subscriber a Master in Chancery of New Jersey personally appeared ERNEST L. PHELPS who, I am satisfied, is the grantor mentioned in the within Indenture, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed;

ELMER H. GERAN

Master in Chancery of New Jersey.

40

And the said
being by me privately examined, separate and
apart from said husband, further ac-

Exhibit C. 3.

knowledged that signed, sealed and delivered the same as voluntary act and deed, FREELY, without any fear, threats or compulsion of said husband .

STATE OF IOWA }
 COUNTY OF LINN } ss:

10

BE IT REMEMBERED, That on this 26th day of April in the year of our Lord, One Thousand Nine Hundred and Thirteen before me, the subscriber a Notary Public in and for said county personally appeared ALLIE PHELPS who, I am satisfied, is the grantor mentioned in the within Indenture, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed; And the said Allie Phelps being by me privately examined, separate and apart from her said husband further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

20

(SEAL)

B. P. HARDING
Notary Public in and for
Linn County, Iowa

30

My commission expires July 4, 1915

40

Exhibit C. 5.

STATE OF IOWA }
COUNTY OF LINN }ss:

10 I, Wm. Dennis, Clerk of the County of Linn
and also Clerk of the District Court for said
County being a Court of Record, do hereby
certify that Mr. B. P. Harding the Notary
Public before whom the within acknowledgment
was made, was at the time of taking the same
authorized by the laws of the State of Iowa
to take acknowledgments and proofs of deeds
of conveyances for lands, tenements and heredi-
taments situate, lying and being in said State
of New Jersey And further that I am well
acquainted with the handwriting of such B. P.
Harding and verily believe that the signature
20 to said certificate of proof of acknowledgment is
genuine.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of the said Court
and County the 26th day of April 1913.

[SEAL]

WM. DENNIS,
Clerk.

EXHIBIT C. 5.

LEASE.

30

Dated.....19.....

THIS INDENTURE, made the 15th day of
January one thousand nine hundred and four-
teen BETWEEN E. L. Phelps of the first part,
WITNESSETH, That the said party of the first
part has letten, and by these presents does
grant, demise, and to farm let unto the said
party of the second part C. W. Black property
located at Freneau, New Jersey, consisting of
40 a house and four acres of Orchard Ground

Exhibit C. 5.

with the appurtenances, for the term of one year from the 15 day of January one thousand nine hundred and '14 at the yearly rent or sum of Four Hundred to be paid on or before April 1/1914 payments.

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said part....of the first part to re-enter the said premises, and to remove all persons therefrom. AND the said part....of the second.....part.... docovenant to pay to the said part....of the first part the said yearly rent as herein specified. 10

AND at the expiration of the said term, the said part..of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. 20

AND the said part....of the first part, do.... covenant that the said part....of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. 30

It is further agreed that the party of the first part does give the party of the second party, the option to buy the aforesaid property for the sum Eight thousand dollars \$8,000

Signed at New York
January 12/1914

E L PHELPS
C. W. BLACK

Exhibit C. 5.

IN CONSIDERATION of the letting of the premises within mentioned to the within named
 and the sum of one dollar to me paid by the said *part* of the first part do hereby covenant and agree, to and with the *part* of the first
 10 part above named, and legal representatives, that if default shall at any time be made by the said

in the payment of the rent and performance of the covenants contained in the within lease on part to be paid and performed, that will well and truly pay the said rent, or any arrears thereof, that may remain due unto the said *part* of the first part, and also all damages that may arise
 20 in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said *part* of the first part.

WITNESS *hand* and *seal* this day of in the year one thousand nine hundred

WITNESS.

30 STATE OF }
 of } s. s.
 County of

On the.....day of..... in the year one thousand nine hundred..... before me personally came

to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and.....
 40 acknowledged that he executed the same.

Exhibits D. 1 and D. 2.

EXHIBIT D. 1.

No. _____ New York, Apr. 15 1913

WEST SIDE BANK
8th Avenue & 34th Street.Pay to the order of E. L. Phelps _____ 10
Four hundred # _____ Dollars
\$400/00 W. O. Bagley
Safe Deposit Vault.

Endorsed:

E L Phelps
Received Payment
Through New York Clearing House
Apr 16 1913
Garfield National Bank, N. Y. 20
—No. 81—

EXHIBIT D. 2.

No. _____ New York, July 18 1913

WEST SIDE BANK
8th Avenue & 34th Street.Pay to the order of E. L. Phelps _____
One hundred # _____ Dollars 30
\$100/00 W. O. Bagley
Safe Deposit Vault.

Endorsed:

E L Phelps
Received Payment
Through New York Clearing House
Jul 18 1913
Garfield National Bank, N. Y.
—No. 81— 40

Exhibit D. 3.

EXHIBIT D. 3.

NOTICE

10 All appeals are now made directly to the Monmouth County Board of Taxation. Any person wishing to appeal can procure the necessary blanks by applying to Charles L. Stout, Secretary, Freehold, N. J.

20 All appeals must be filed with the Secretary of the Board at Freehold, at least three days before the date fixed for hearing appeals from the taxing district; and at the same time a copy of the appeal must be served on the Clerk of the taxing district where said assessment has been levied. The Clerk will at once notify the Assessor of such appeal and the name or names of the parties appealing. No appeals can be filed by law after December 20th, 1916.

The Board will meet for hearing appeals for the taxing districts of Matawan Township and Matawan Borough, on Friday, December 1, 1916, at Borough Hall, Keyport, N. J., at 10:30 a. m.

30 The Collector will sit in the following places from 9:00 a. m. to 2:00 p. m., to receive taxes: On Monday, December 11 in the Township Hall; on Friday, December 15, at Dan Martin's, Oak Shades; on Monday, December 18, at J. E. Aplegate's Hotel, Freneau, and on Wednesday, December 20, in the Township Hall. Also at my residence at Cliffwood every week day to December 20, except as above.

GEORGE F. KELLER, Collector.
Cliffwood, N. J.

C. A. NEIDLINGER, Assessor.
Freneau, N. J.

Exhibit D. 4.

Cliffwood, N. J., November, 1916

M Wayland O. Bagley

To THE TOWNSHIP OF MATAWAN, DR.

Acres Assessed...3.....		
Value of Land.....\$ 300		10
Value of Improvements.. 1700		
Personal		

Amount Taxed\$2000

Rate per \$1,000

State School	2.656
County	5.525
Special School	5.95
Township	5.50

To State School Tax.....\$	5 31	
“ County Tax	11 05	20
“ Special School Tax.....	11 90	
“ Township Tax	11 00	
“ Dog Tax		
“ Poll Tax		

Total Tax\$ 39 26

Received Payment, Dec 12/16

G. F. KELLER, Collector. 30

EXHIBIT D. 4.

NOTICE

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Exhibit D. 4.

All appeals must be filed with the Secretary of the Board at Freehold, at least three days before the date fixed for hearing appeals from the taxing district; and at the same time a copy of the appeal must be served on the Clerk of the taxing district where said assessment has
 10 been levied. The Clerk will at once notify the Assessor of such appeal and the name or names of the parties appealing. No appeals can be filed by law after December 20th, 1915.

The Board will meet for hearing appeals for the taxing districts of Matawan Township and Matawan Borough, on Friday, November 26th, 1915, at Town Hall, Keyport, N. J., at 10:00 a. m.

The Collector will sit in the Township Hall
 20 on Atlantic Avenue, from 9:00 a. m. to 2:00 p. m., as follows to receive taxes: On Monday, December 13; Thursday, December 16, and Monday, December 20. Also at my residence at Cliffwood every week day to December 20, except as above.

GEORGE F. KELLER, Collector.
 Cliffwood, N. J.

RICHARD HEUSER, Assessor.

Matawan, R. D. 1.

30

Cliffwood, N. J., October, 1915

M Wayland O. Bagley

To THE TOWNSHIP OF MATAWAN, DR.

Acres Assessed...3.....	
Value of Land.....	\$ 300
Value of Improvements..	1700
Personal	

40

Amount Taxed	\$2000
--------------------	--------

Exhibit D. 5.

Rate per \$1,000	
State School	2.6422
County	4.8083
Special School	5.60
Township	5.00
To State School Tax.....	\$ 5 30
“ County Tax	9 60 10
“ Special School Tax.....	11 20
“ Township Tax	10 00
“ Dog Tax	
“ Poll Tax	
<hr/>	
Total Tax	\$ 36 10
Received Payment, 12/9/15	

GEO. F. KELLER, Collector.
per F. E. P.

20

EXHIBIT D. 5.

NOTICE

All appeals are now made directly to the Monmouth County Board of Taxation. Any person wishing to appeal can procure the necessary blanks by applying to Charles L. Stout, Secretary, Freehold, N. J.

30

All appeals must be filed with the Secretary of the Board at Freehold, at least three days before the date fixed for hearing appeals from the taxing district; and at the same time a copy of the appeal must be served on the Clerk of the taxing district where said assessment has been levied. The Clerk will at once notify the Assessor of such appeal and the name or names of the parties appealing. No appeals can be filed by law after December 20th, 1914.

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Exhibit D. 5.

The Board will meet for hearing appeals for the taxing districts of Matawan Township and Matawan Borough, on Friday, November 27th, 1914, at Town Hall, Keyport, N. J., at 10:00 a. m.

10 The Collector will sit in the Township Hall on Atlantic Avenue, from 9:00 a. m. to 2:00 p. m., as follows to receive taxes: On Monday, December 14; Thursday, December 17, and Monday, December 21. Also at my residence at Cliffwood every week day to December 20, except as above.

GEORGE F. KELLER, Collector.
Cliffwood, N. J.

RICHARD HEUSER, Assessor.
Matawan, R. D. 1.

20

Matawan, N. J., Oct., 1914

M W. O. Bagley

To THE TOWNSHIP OF MATAWAN, DR.

Acres Assessed...3.....	
Value of Land.....	\$ 300
Value of Improvements..	1700
Personal	
30	_____
Amount Taxed	\$2000
Rate per \$1,000	
State School	2.6899
County	4.1167
Special School	4.81
Township	4.10

40

Exhibit D. 5.

To State School Tax.....	\$ 5 38	
“ County Tax	8 23	
“ Special School Tax	9 62	
“ Township Tax	8 20	
“ Dog Tax		
“ Poll Tax		
		10
Total Tax	\$ 31 43	
Received Payment, Nov. 28/14		

G. F. KELLER, Collector.

20

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Conclusions of V. C. Foster.

Opinion of V. C. Foster.

Filed May 20, 1918.

IN CHANCERY OF NEW JERSEY.

10 *Between*

ANDREW CARTAN, *et als.*,
Complainants,

and

ERNEST L. PHELPS, *et al.*,
Defendants.

20 Messrs. Durand, Ivins & Carton for complainants.

Messrs. Fort, Hunt & Shipman for defendants.

FOSTER, V. C.

30 This action is brought to set aside a deed of conveyance made by the defendant, Phelps, to the defendant, Bagley, for lands near Matawan, in Monmouth County, because the same was made to defraud complainant and other judgment creditors of Phelps.

40 The proofs in this case satisfy me—particularly the testimony of Mr. Geran who prepared the deed, and of Mr. Bentley, the attorney of Phelps in the Conover case—that Phelps, in executing the deed in question, made it to secure to Bagley the payment of an indebtedness of \$1,000 or \$1,200, and that Phelps also intended by this conveyance to prevent his property being reached, in case of an adverse verdict in the Conover case, which was then about to come to trial, and

Conclusions of V. C. Foster.

the trial of which resulted in a verdict of \$7,000 against him, which was subsequently set aside. I am further satisfied that the conveyance from Phelps to Bagley was a voluntary one on Phelps part, unsolicited at the time by Bagley; and that the conveyance was in the nature of a security or mortgage, further appears from the facts that the deed was not delivered until some months after its execution; that it was not recorded until some months after its delivery; that Phelps continued, after the delivery of the deed, to exercise acts of ownership over the property and rented the same and collected the rents thereof for some time; and that subsequently he made a further arrangement with Bagley, according to Bagley's testimony, whereby the deed was to be regarded as an absolute, rather than a conditional, conveyance of the property, upon Bagley paying to Phelps the further consideration of a thousand dollars. Assuming that Bagley did pay seven or eight hundred dollars of this amount, as he claims, to Phelps, he also states that he has not paid the balance of this additional consideration and never intends to do so. He thereby puts himself in the position of refusing to perform and complete the contract of purchase of the property, if such a contract were ever made. For the reasons stated, I am satisfied that the principal purpose of the conveyance of this property from Phelps to Bagley, as far as Bagley was concerned, was merely to secure him for the money owing by Phelps to him, and not to convey the property to him, except in a conditional way. Bagley, while he claims the amount of the indebtedness is nearer \$3,000 than \$1,200, as Phelps stated to Geran and Bentley, is unable to produce any vouchers to substantiate

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Conclusions of V. C. Foster.

his statements, and I am, therefore, obliged to rely upon the only tangible proof in the case regarding the amount of this indebtedness, viz: that given by Mr. Geran and Mr. Bentley, based upon statements made to them by Phelps at the time when he had the deed prepared, and shortly
10 thereafter; and while Phelps' statements would not be conclusive as to the amount of the indebtedness owing by him to Bagley, in the absence of any proof to the contrary, they must be accepted as stating the facts.

I think the interests of all parties in this cause can be conserved and protected by a decree that the conveyance in question is, in effect, a mortgage between Phelps and Bagley, and that the property should be sold under the direction of a
20 Special Master, and from the proceeds of the sale the amount due Mr. Bagley of \$1,200, with interest, should be first paid; the balance of the proceeds, if any, can then be applied to the payment of the several judgments, in the order of their priority; and the surplus money, if any, can be paid into this court to await such further order as the Court may make on the application of either Phelps or Bagley, or any other party interested in the surplus fund; and a de-
30 cree will be advised accordingly.

*Final Decree.***Final Decree.**

Filed March 16, 1918.

IN CHANCERY OF NEW JERSEY.

Between

ANDREW J. CARTAN, *et als.*,
Partners, etc.,
Complainants,

and

ERNEST L. PHELPS, *et als.*,
Defendants.

10

On Bill, &c.
Final Decree.

This cause coming on to be heard in the pres- 20
ence of Durand, Ivins & Carton, of counsel with
the complainants, Cartan & Devlin, and of Peter
Bentley, *pro se.*, and of counsel with the com-
plainants, McCarter & English, the said Peter
Bentley and McCarter & English having been ad-
mitted as parties complainant in the above en-
titled cause for the purpose of prosecuting said
cause with the complainants therein, and of Fort,
Hunt & Shipman, of counsel with the defendant,
Wayland O. Bagley; and the pleadings having 30
been read, and the testimony of the witnesses
and proofs of the respective parties, and the
arguments of the respective counsel having been
heard, and the said pleadings, testimony, proofs
and arguments having been duly considered,

AND it appearing to the Court that there is
due to the complainants, Cartan & Devlin, on
their judgment against the defendant, Ernest L.
Phelps, in the complainants' bill set forth, the
sum of \$522.16, together with interest thereon 40

Final Decree.

from the 26th day of February, 1914; and that there is due to the complainant, Peter Bentley, on his judgment against the said Ernest L. Phelps, in his supplemental petition filed in this cause set forth, the sum of \$953.04, together with interest thereon from the 7th day of March, 1917; and that there is due to the complainants, McCarter & English, on their judgment against the said Ernest L. Phelps, in their petition filed in this cause set forth, the sum of \$282.63, together with interest thereon from the 7th day of March, 1917;

AND the Court being of the opinion that the conveyance of the lands and premises in the bill of complaint described, by the defendant, Ernest L. Phelps and wife, to the defendant, Wayland O. Bagley, was for the purpose of securing to the said Wayland O. Bagley, an indebtedness of the said Phelps to him of the sum of \$1,200, and that said conveyance was also made by the said Ernest L. Phelps with the fraudulent intent of placing said lands and premises beyond the reach of any judgment that might be recovered against him; what difference if he sold it—

AND the Court being also of the opinion that the consideration of said conveyance was an inadequate one, and the said conveyance should be permitted to stand only as security for the consideration actually paid by the said Wayland O. Bagley to the said Ernest L. Phelps, and that there is due to the said Wayland O. Bagley the sum of \$1,200, together with interest thereon from the 11th day of April, 1913, and that the said amount should be declared to be a first lien upon the said premises, and that the judgment of the complainants, Cartan & Devlin, should be de-

Final Decree.

clared to be a second lien upon the said premises, and that the judgment of the complainant, Peter Bentley, should be declared to be a third lien upon the said premises, and that the judgment of the complainants, McCarter & English, should be declared to be a fourth lien upon the said premises; and that one of the masters of this court should be directed to sell the said premises at public sale, and the proceeds thereof should be applied first, in payment of the amount due the said Wayland O. Bagley, together with his costs of this suit, and secondly in payment of the judgment of complainants, Cartan & Devlin, and thirdly in payment of the judgment of the complainant, Peter Bentley, and fourthly in payment of the judgment of the complainants, McCarter & English, together with their costs of this suit.

IT IS thereupon on this 15th day of March, 1918, by his HONOR EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the Chancellor does by virtue of the power and authority of this court, hereby order, adjudge and decree, that the said deed of conveyance in the bill of complaint mentioned and described, made by Ernest L. Phelps and Allie Phelps, his wife, to the defendant, Wayland O. Bagley, bearing date the 11th day of April, 1913, and recorded in Book 971 of deeds for Monmouth County, page 35, for the lands and premises in said bill set forth, stand only as security to the said Wayland O. Bagley for the sum of \$1,200, the consideration actually paid by the said Wayland O. Bagley to the said Ernest L. Phelps for the same, and that the amount thereof with interest thereon from the 11th day of April, 1913, be and the same is

Final Decree.

hereby declared to be a first lien on said lands and premises.

AND it is further ordered, adjudged and decreed, that the judgment of the said complainants, Cartan & Devlin, be and the same is hereby declared to be a lien second in order of
 10 priority upon the said lands and premises; and that the judgment of the said complainant, Peter Bentley, be and the same is hereby declared to be a lien third in order of priority upon the said lands and premises; and the judgment of the said complainants, McCarter & English, be and the same is hereby declared to be a lien fourth in order of priority upon the said lands and premises;

AND it is further ordered, adjudged and decreed that an execution do issue out of and under the seal of this Honorable Court, to be directed to Halsted H. Wainwright of Manasquan, one of the special masters of this court, commanding him to sell the said lands and premises in the bill of complaint particularly described, at public sale, and that out of the proceeds thereof he pay, first, to the said defendant, Wayland O. Bagley, the sum of \$1,200, with interest thereon from April 11, 1913, together with his costs
 20 of this suit; and second, to the complainants, Cartan & Devlin, the sum of \$522.16, with interest thereon from February 26, 1914, together with their costs of this suit; and third, to the complainant, Peter Bentley, the sum of \$953.04, with interest thereon from March 7th, 1917, together with his costs of this suit; and fourth, to the complainants, McCarter & English, the sum of \$282.63, with interest thereon from the 7th day of March, 1917, together with their costs of this suit,
 30 and the surplus moneys, if any, after making
 40

Final Decree.

such payments and retaining the fees and costs on said sale he pay into this court subject to the further order of this court.

AND it is further ordered that forthwith after such sale said Master make report thereof to this court and after his report of sale shall have been confirmed by this court, make and execute unto the purchaser or purchasers, good and sufficient conveyance or conveyances in the law for the said real estate, upon their complying with the conditions of said sale, and that such sale and conveyance, or conveyances, duly executed as aforesaid, shall be valid and effectual forever, and operate as an effectual bar both at law and in equity against the said parties, complainant and defendant, and all persons claiming by, from, or under them, or any of them.

AND it is further ordered that the said parties, or either of them, be at liberty to apply to this court for further direction if occasion shall require.

Respectfully advised,

JOHN E. FOSTER,
V. C.

Notice of Appeal.

Notice of Appeal.

Filed April 8, 1918.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>ANDREW J. CARTAN, <i>et als.</i>, Partners, etc., <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>ERNEST L. PHELPS, <i>et als.</i>, <i>Defendants.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Notice of</i></p> <p><i>Appeal.</i></p>
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20 The defendant, Wayland O. Bagley, hereby ap-
peals from the whole and every part of the final
decree made in this court in the above stated
cause, to the Court of Errors and Appeals in
the last resort in all causes.

Dated, March 18, 1918.

FORT, HUNT & SHIPMAN,
Solicitors and of Counsel
with Complainant.

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

HENRY C. HUNT,
Of Counsel with Complainant.

Petition of Appeal.

Petition of Appeal.

Filed April 11, 1918.

New Jersey Court of Errors and Appeals

Between

ANDREW J. CARTAN, *et als.*,
Partners, etc.,
Complainants-Respondents,
and

ERNEST L. PHELPS, *et als.*,
Defendants-Appellants.

On Appeal.

*Petition of
Appeal.*

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

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The humble petition of Wayland O. Bagley, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the fifteenth day of March, 1918, wherein the said Andrew J. Cartan and others were complainants and the said Wayland O. Bagley and others were defendants, in this respect, to wit, that the said decree adjudges that the said deed of conveyance in the bill of complaint mentioned and described, made by Ernest L. Phelps and Allie Phelps, his wife, to the defendant, Wayland O. Bagley, bearing date April eleventh, 1913, and recorded in Book 971 of Deeds for Monmouth County, page 35, for the lands and premises in said bill set forth, stand only as

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Petition of Appeal.

security to the said Wayland O. Bagley for the sum of Twelve Hundred Dollars, with interest therein from April eleventh, 1913, and declaring that the same should be a first lien on the lands and premises described in said bill of complaint. And your petitioner humbly appeals from that
10 part of the decree of the Chancellor, which decree is as aforesaid, upon the ground that the same is erroneous for that it orders and decrees that there is due the said Wayland O. Bagley the said sum of Twelve Hundred Dollars, with interest, whereas in fact there was due and owing the said Wayland O. Bagley from the said Ernest L. Phelps the sum of Four Thousand Dollars, with interest prior to the delivery of said deed, in consideration whereof the said indebted-
20 ness was cancelled and discharged by the said Wayland O. Bagley; and further for that the said decree is erroneous in that it directs that the said deed made, executed and delivered by the said Ernest L. Phelps and wife to the said Wayland O. Bagley should stand as a lien against the said premises, whereas the said decree should declare that the said deed is a valid and absolute conveyance in fee simple of the said lands and premises therein described and was made for a
30 valuable consideration and that there was no fraud committed by the said Ernest L. Phelps nor by said Wayland O. Bagley in the execution, delivery and acceptance of said deed, and that the complainants have no lien or claim upon the said lands.

2. Because the said decree is in other respects contrary to law and the testimony.

Your petitioner therefore prays that the said decree of the said Chancellor may be in the particular
40 aforesaid reversed, set aside and for

Petition of Appeal.

nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

WAYLAND O. BAGLEY,
Appellant.

FORT, HUNT & SHIPMAN, 10
Solicitors and of Counsel.

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Answer to Petition of Appeal.

**Answer of Peter Bentley to Petition
of Appeal.**

Filed April 12, 1918.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

Between

ANDREW J. CARTAN, *et als.*,
Partners, etc.,
Complainants-Respondents,

and

ERNEST L. PHELPS, *et als.*,
Defendants-Appellants.

*On Appeal.
Answer to
Peter Bentley to Peti-
tion of Ap-
peal.*

20

The answer of the complainant-respondent, Peter Bentley, to the petition of appeal of the defendant-appellant, Wayland O. Bagley.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was on the 15th day of March, 1918, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto, when the same shall be produced.

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And this respondent is advised and believes, that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to respondent.

PETER BENTLEY,
Solicitor pro se.

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Answer to Petition of Appeal.

**Answer of McCarter & English to Petition
to Appeal.**

Filed April 19, 1918.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

ANDREW J. CARTAN, Partners,
etc., *et al.*,
Complainants-Respondents,

vs.

ERNEST L. PHELPS, *et als.*,
Defendants-Appellants.

On Appeal.

*Answer to
Petition of
Appeal.*

Answer of Robert H. McCarter, Conover English, George W. C. McCarter and Arthur F. Egner, partners as McCarter & English, some of the respondents in the petition of appeal above named. 20

. These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer nevertheless say and admit that a decree was, on the 15th day of March, 1918, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated, but as to the substance thereof these respondents pray to refer thereto when the same shall be produced. 30

And these respondents are advised and believe that the said decree is agreeable to equity and they pray that same may be affirmed, with costs to be adjudged to these respondents.

McCARTER & ENGLISH,
Solicitors pro se.

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Answer to Petition of Appeal.

**Answer of Andrew J. Cartan, et als.,
to Petition of Appeal.**

Filed April 19, 1918.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

Between

ANDREW J. CARTAN, *et als.*,
Partners, etc.,

Complainants-Respondents,

and

ERNEST L. PHELPS, *et als.*,
Defendants-Appellants.

*Answer to
Petition of
Appeal.*

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The answer of the respondents, Andrew J. Cartan, Ren Cartan, Garrett Cartan, Burt Cartan, Kate Cartan Wilson, and Patrick J. Devlin, partners trading under the firm name of Cartan & Devlin, Peter Bentley, and Robert H. McCarter, Conover English, George W. C. McCarter, and Arthur F. Egner, partners practicing law under the name of McCarter & English, to the petition of appeal of the appellant, Wayland O. Bagley.

30

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was on the 15th day of March, 1918, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, these respondents pray

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Answer to Petition of Appeal.

to refer thereto, when the same shall be produced.

And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to respondents.

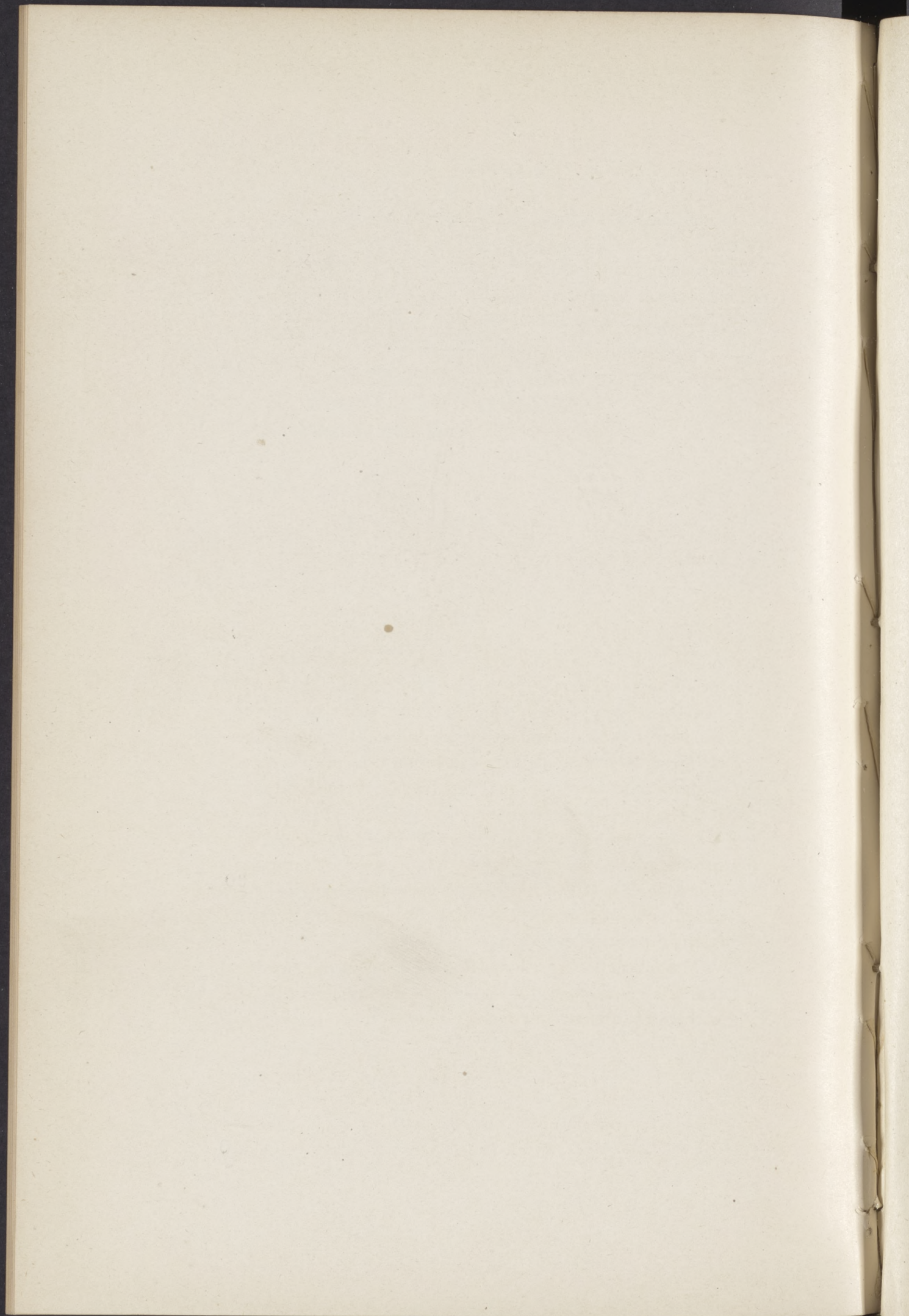
DURAND, IVINS & CARTON,
*Solicitors for and of Counsel
with Respondents.*

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NEW JERSEY COURT OF ERRORS AND
APPEALS

BETWEEN
ANDREW J. CARTAN, et als,
Partners, &c.,
Complainants-Respondents
ERNEST L. PHELPS, et als.,
and
Defendants-Appellants.) ON BILL, &c. 10

BRIEF OF DURAND, IVINS & CARTON,
Counsel for Cartan & Devlin, Complainants-Respondents

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The complainants, Cartan & Devlin, are creditors of the defendant, Ernest L. Phelps, and they filed their bill of complaint to set aside a conveyance made by him and his wife to the defendant, Wayland O. Bagley, of certain premises at Freneau, in Monmouth County, as made without consideration and in fraud of the judgment recovered by them on their claim.

Peter Bentley and McCarter & English, other creditors of the defendant Phelps, who recovered judgments subsequent to the filing of complainants' bill of complaint, were upon their petitions admitted by order as complainants.

The learned Vice Chancellor who heard the case held that the conveyance was voluntary and made by Phelps with a fraudulent intent and was in effect a mortgage

between the defendants Phelps and Bagley and the property should be sold to pay first to Bagley the amount due him of \$1200. and then the judgments of complainants in the order of their priority, and any surplus should be paid into Court (Case P. 110) and a decree was thereupon entered in accordance therewith (Case P. 113) from which the defendant Bagley appeals.

The complainants Cartan & Devlin are dealers in flour, feed, etc., and sold and delivered to the defendant Phelps, 10 feed amounting to \$518.16, all but \$38.84 of it being contracted prior to the execution of the deed, and all of it prior to the record of the deed. Complainants' debt was already contracted, an existing debt, at the time of the alleged delivery of the deed. Phelps being unable to pay them executed to them his bond with warrant for confession of judgment, dated February 18, 1914, for the amount, on which judgment was entered in the Circuit Court of Monmouth County, February 26, 1914, for, real debt \$518.16, and costs \$4.00.

20 On this judgment an execution was issued and a levy made on the lands in question, conveyed by Phelps to Bagley.

February 3rd, 1914, the deed from Phelps to Bagley was recorded in the Clerk's office of the County of Monmouth, in Book 971 of Deeds, page 35, and was dated April 11th, 1913. The consideration stated being, "One Dollar and other valuable considerations."

The deed as to complainants was a voluntary conveyance and presumptively fraudulent as to them. The 30 owner of property in debt cannot give away his property without paying his debts. The law requires him to be just before being generous, and will take his property and apply it to the payment of his debts.

February 3rd, 1913 a summons was issued in an action brought in the Supreme Court, by TenEyck Con-

over, against the said Phelps for damages for alienating the affections of Conover's wife, and the papers were served on Phelps February 4th, 1913, personally.

Elmer H. Geran, a counsellor at law, testified that he had prepared the deed in question for the defendant Phelps, and Phelps had executed it in his presence in October, 1913, and at the time he directed him to prepare the deed, or at its execution, stated to him that he was giving the deed to Bagley to secure Bagley for \$1000. which Bagley had loaned to him. 10

As the testimony of this witness is important, and brief, we quote from Printed case, Page 37,—

“Q. What did Mr. Phelps say about this deed at the time of the execution of it?

A. He said that he wanted to prepare a deed for the Freno property and give it to Mr. Bagley. I asked him who Mr. Bagley was, and he said that Mr. Bagley was associated with him in his business in New York, I think in the Home Pattern Company, and that Mr. Bagley had loaned him some 20 money and that he wanted to be sure that Mr. Bagley was going to get his money, and that he wanted to give him this deed, so that Mr. Bagley would be sure to get it. At that time the suit was pending, the Conover suit, and he didn't know what the verdict would be in the suit, and regardless of whether the verdict was in his favor or against him, he wanted to be sure that Mr. Bagley would be secured as to what he owed him. I asked him why he didn't give Mr. Bagley a mortgage instead of a deed; he 30 said that there might be a foreclosure of the mortgage and some trouble in connection with that greater than there would be in connection with a deed. I asked him how much he owed Mr. Bagley

that Mr. Bagley could take this deed and hold it, and if Mr. Phelps was ever able to pay him that thousand dollars, Mr. Bagley would deed the property back to him. If Mr. Bagley never received his thousand dollars, he was to retain the deed as the title to the property, but if he did receive the thousand dollars, then the property was to be deeded back to him."

and from his cross-examination, on page 40,—

10 "Q. Would you say in regard to this thousand dollar item whether or not that was not a sum which was mentioned as an additional consideration to be paid by Mr. Bagley to Mr. Phelps over and above the amount already due and owing from Mr. Phelps?

20 A. I have no recollection about anything additional. I have a very distinct recollection that he said that this thousand dollars was due Mr. Bagley and that he wanted Mr. Bagley to get it, and I suggested to him that this deed might be set aside, inasmuch as it was made after the Conover suit was pending, and he didn't concern himself as to that, because he said that if it was set aside Mr. Bagley would be no worse off than he was now, that he had no money to pay Bagley, and if the deed was set aside, then Mr. Bagley wouldn't get anything, and if that deed did hold good, he would get what was owing."

30 Peter Bentley, also a counsellor at law, and who represented Mr. Phelps in the trial of the alienation suit, testified, and we quote the important part of his testimony, found on pages 43, 44 and 45,—

"Q. Will you tell us what Mr. Phelps said in regard to that property and when and where?

A. It was during the month of January, 1915;

I had appeared in the retrial of the case of Conover against Phelps; I had been in the appeal to the Supreme Court on the reversal of the judgment of \$7,000; the trial started, I think, on the 22nd of January, 1915, the second trial, and lasted nine consecutive court days. I had continually pressed Mr. Phelps for money, especially coming from New York to New Brunswick for the trial of the case. He finally said to me on one of the mornings that there was no question but that I would be paid, and 10 liberally paid, especially if the verdict was in favor of him, the defendant. I said to him, "Well, you have confessed to me that you have no money, that you are in business in Toronto, working for someone on a very small salary; you already told me that you had trouble to even obtain the necessities of life since you left New York and went to Toronto; how are you going to pay me?" "Well", he said "I own a piece of property at Freno and I conveyed it to a man named Bagley, Mr. Bagley"— 20

A. (Continuing) He said that he had conveyed this property to a man named Mr. Bagley, who I understand was his superior, or who he said was his superior, in the Home Pattern Company; that he made the conveyance to him some time before to secure him for moneys which he (Mr. Bagley) had advanced to him (Mr. Phelps). I asked him the amount and he said it was in the neighborhood of \$1200; I asked him the value of the property, and I think he said that it stood him about \$8,000. He 30 said that the arrangement between him and Mr. Bagley was that Mr. Bagley after obtaining the title was to endeavor to sell it, and first to pay himself (Mr. Bagley), and the difference which was realized was to be turned over —

A. (Continuing)—and the difference which was realized was to be turned over to him (Mr. Phelps). That the property could be easily sold, and that out of the first money he received he would pay me what he owed me. I think that was the whole conversation.

Q. Did he say anything about what his purpose was in making the conveyance to Bagley originally?

A. Yes, he referred to the fact that he didn't
10 know what would be the outcome of the suit of TenEyck Conover against him; he said that he was innocent of the charges against him, and if the judgment was recovered against him, he wasn't going to let Mr. Conover collect that judgment."

The evidence of the witnesses Geran and Bentley is competent. The rule of evidence, that the statements and declarations of a grantor or mortgagor are admissible, is well settled.

The rule in *Amer. & Eng. Enc. of Law*, page 94, is
20 stated as follows:

Upon inquiry into the intent of the grantor in the execution of a conveyance alleged to be fraudulent, it is competent for the purpose of proving such fraudulent intent, to admit in evidence the declarations of the grantor, made either prior to, contemporaneously with, or subsequently to the sale. To render these declarations admissible as proof merely of the grantor's intention, they need not have been made in the presence of the grantee, nor is the complainant required to prove a
30 knowledge of them on the part of the grantee."

The testimony of the witness Geran, of what Phelps said at the time he executed the deed, is competent and is not objectionable as disclosing a privileged communication. Such statements and declarations under the cir-

cumstances were not a privileged communication. Neither is the testimony of Geran and Bentley of these declarations as was suggested by defendant's counsel, hear-say.

The testimony of these witnesses conclusively proves that the conveyance was a voluntary conveyance, not absolute, but given merely as security for the purpose of securing Bagley for the loan, or loans, he had made Phelps, and that the deed was not made upon Bagley's solicitation but at Phelps own instance, because of the 10 pendency of the Conover suit and the danger of an unfavorable result, and in order to secure Bagley for the amount he had loaned him, and also to protect Phelps against the Conover suit.

The evidence discloses Phelps had two purposes in executing the deed,—

1. To secure Bagley for what he owed him.
2. To place the property beyond the reach of any judgment that might be recovered against him in the Conover suit. 20

The first purpose, that of securing a debt, made the deed in effect a mortgage, whatever its form might be, and it could not afterward, by any arrangement between Phelps and Bagley, change its character and be converted into an absolute title; once a mortgage always a mortgage; the right to redeem was there and could only be extinguished by foreclosure. And the conduct of Phelps in making the lease for the property to Black, January 15, 1914, for a year, collecting the rent, and giving in the lease an option to purchase is convincing that he had 30 not intended to and did not understand he had sold the property to Bagley. The deed then was only as security to Bagley for an indebtedness, a mortgage, and the statements and declarations of the mortgagor Phelps were again competent to prove for what amount it had been

so given as security, and the burden was upon Bagley to prove any greater indebtedness or consideration than that stated by Phelps, if he could, and the complainants are entitled to have the equity in the property, above the amount then due Bagley, applied to the payment of their debt.

And as the deed is only a mortgage, this right also extends to the intervenors, Bentley and McCarter, and English, as creditors of Phelps, to be paid out of the
10 equity in the property.

The second purpose, that of protecting the property against any unfavorable result in the Conover case, was clearly a fraudulent design, an actual fraud, and sufficient to justify setting the deed aside in favor of the complainants, and but little proof is necessary to show such fraudulent intention.

In the Selover case, 62 N. J. Eq., 761, the husband testified that he was about to engage in business; that he had some money and the property in question, and
20 was willing to risk the money but not the property, and made the conveyance to his wife, but did not actually engage in business. The Court held, the fraudulent intent was there, and refused the husband relief.

If the proof was that Bagley had participated in such fraudulent design and scheme of the defendant Phelps, then as against him, as well as Phelps, the deed would be set aside, and Bagley would lose the benefit of the deed as security for his debt. But, in the absence of such proof the deed would be set aside in favor of the com-
30 plainants, and allowed to stand only as security to Bagley for the actual consideration for which it had been given, under the well established rule of the *Terhune-Demerest* case.

The witnesses Lambertson and Bedle, who both qualified as property witnesses, and showed an expert know-

ledge of real estate values in the locality of the property in question and who were undoubtedly qualified to speak upon the question of the value of real estate, testified the property was worth \$7000. (Case pp. 45-51). Taking a most liberal view of Bagley's proof of indebtedness, it is far below the real value of the property, showing a gross inadequacy of consideration.

It is, therefore, immaterial to the success of the complainants' action whether Bagley participated in the fraudulent intention of Phelps or not. Complainants' debt was existent; Phelps executed the deed with an actual fraudulent intent, he also gave it to secure to Bagley a previous indebtedness, the amount of which was a small part of the value of the property, and in the most favorable aspect the deed can only stand as security for that amount.

The defendant Bagley has testified that he had taken the notes and the I. O. U.'s of Phelps for the moneys he had loaned him, and when Phelps gave him the deed, in November, 1913, they amounted to between \$2800 and \$3000, and that he had destroyed them. He was unable to fix any time when he advanced the money, in what amounts, or where, and his testimony is very indefinite and unreliable, and he produces only two checks payable to Bagley, one for \$400 and the other for \$100.

The reasonable conclusion is, that Phelps when sued by Conover in the action for the alienation of his wife's affections, in which there was danger of a large verdict, anticipating this possibility, and wishing to protect his property against such a contingency, borrowed some thousand dollars or so from the defendant Bagley, who at that time was his friend, and made the deed to him.

It will be noticed that the deed was dated April 11, 1913, and was not acknowledged by Phelps until October 31, 1913, and Bagley says delivered to him in No-

vember, and was not recorded until February 3, 1914, then during the progress of the alienation suit, which resulted in a verdict against Phelps, February 9th, 1914, for \$7000 damages and costs, and was undoubtedly recorded upon the suggestion of Mr. Geran. (See his testimony on page 39).

All the circumstances connected with the transaction show that the deed was executed primarily for the purpose of placing the property of the defendant Phelps
10 beyond the reach of a possible judgment that might be recovered against him in the alienation suit, and secondly, to secure Bagley for a loan of about one thousand dollars he had made him, and in view of the discrepancy between the amount of the loan and the value of the property, the conveyance was voluntary, and on the part of Phelps actually fraudulent. See cases cited in *Horton v. Bamford*, 79 Eq., 374.

And if the view of this court should be that the defendant Bagley did not participate in the fraudulent
20 intention of Phelps, then the deed should still be set aside as fraudulent because of the fraud of Phelps, the grantor, and the deed would stand only as security to the defendant Bagley for the moneys actually loaned. The proof of which does not exceed \$1200.

The principles applicable to the case and the authorities in support thereof are stated and collected in *Horton v. Bamford, Supra*.

It is respectfully submitted that the decree should in all things be affirmed.

30

DURAND, IVINS & CARTON,
Counsel for Cartan & Devlin,
Complainants-Respondents.

New Jersey Court of Errors and Appeals

Between

ANDREW J. CARTAN *et al.*,
Partners, &c.,

Complainants-Respondents,
and

ERNEST L. PHELPS *et al.*,
Defendants-Appellants.

On Bill, &c.
On Appeal from
Chancery.

Brief of Complainants-Respondents,

McCarter & English and Peter Bentley.

The defendants-appellants, McCarter & English and Peter Bentley, beg to refer to the brief of the complainants-respondents, Cartan, et al., which has been filed in this cause as part of their brief on the argument of the above case, and the conclusion reached by Vice-Chancellor Foster in disposing of the case in the Court of Chancery.

It is respectfully submitted that the decree below should be affirmed with costs.

MCCARTER & ENGLISH,
Solicitors pro se.

PETER BENTLEY,
Solicitor pro se.

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THE JERSEY CONTROL SYSTEM

In Chancery of New Jersey.

Between

ANDREW J. CARTAN, *et als.*,
Partners, &c.,

Complainants,

and

ERNEST L. PHELPS, *et als.*,

Defendants.

On Bill, &c.

Brief for Defendant Wayland O. Bagley.

The bill in this case was filed by Andrew J. Cartan and others, partners trading under the firm name of Cartan & Devlin, against Ernest L. Phelps and Wayland O. Bagley, and the purpose of the bill is to set aside a conveyance made by the defendant Ernest L. Phelps to the defendant Wayland O. Bagley, conveying certain lands in the Township of Matawan, in the County of Monmouth, and which deed bears date April 26, 1913, and which was recorded February 3, 1914, the consideration expressed in the deed being one dollar, the contention of the complainant being that the said deed was given in fraud of creditors and for the purpose of hindering and delaying complainants in the collection of an indebtedness which they held against Phelps and which had been reduced to a judgment entered February 26, 1914, for \$518.16 and \$4 costs, and afterwards, on June 25, 1914, a writ of execution was issued on the said judgment delivered to the sheriff of Monmouth County, and that the sheriff levied upon the lands in question and described in and conveyed by the deed from Phelps to Bagley.

The contention of the complainant, based upon the charge of fraud in the transaction between Bagley and Phelps, is that Bagley, at the time the deed was executed and delivered to him by Phelps, knew that Phelps was indebted to various persons, and that in order to secure the indebtedness which Phelps owed Bagley, Bagley secured from Phelps the execution of the deed, and complainants further allege that at or about the time of the execution of the deed Bagley knew of the indebtedness of Phelps to the complainants, and also to Peter Bentley and Robert H. McCarter, who appeared also as creditors in the case and as intervenors. They also allege that the indebtedness of Phelps to Bagley did not exceed the sum of one thousand dollars, and that the value of the property conveyed by Phelps to Bagley was in the neighborhood of six or seven thousand dollars and was largely in excess of Phelps' indebtedness to Bagley and that therefore the deed from Phelps to Bagley should be set aside as being executed in fraud of the complainants and the intervenors.

The contention of the defendant Bagley, as set out in his answer and as substantiated by his testimony which is uncontradicted in this case, asserts that Bagley had no knowledge or information concerning the indebtedness of Phelps to Cartan & Devlin, or to any other persons who appeared as intervenors in this suit; that he had from time to time, beginning in the year 1908 and from that time continually up until 1912, loaned Phelps various sums of money, ranging from \$50 to \$200 and \$300 and in one instance \$400; that the only evidence he had from Phelps for these various loans were I. O. U.'s and notes; that there was never any book account kept, nor did Bagley keep books of account

of any of his personal transactions, not even having a bank account when the earlier transactions took place; that these loans to Phelps within the period specified amounted to \$2,800 or \$3,000; that some time in 1913 Bagley began to press Phelps for payment of his indebtedness, and that Phelps then offered to convey to him the property in question, and in April, 1913, caused the deed to be drawn, which Phelps subsequently executed in November, 1913, and the deed was then sent to Phelps' wife in the West and executed by her and afterward delivered to Bagley. Bagley, however, because he was ignorant of the requirements of the statute as to the recording of deeds, as would appear by his testimony, did not have the deed recorded until February, 1914, somewhere about the time when the *Conover suit* was started against Phelps; that as soon as he learned that there was litigation against Phelps by Conover in New Jersey Bagley consulted counsel and as the result of the advice given to him he immediately sent the deed to the clerk of Monmouth County and caused it to be recorded. This was prior to the entry of the judgment of the complainants, but it does not appear anywhere in the testimony that defendant Bagley had any knowledge at the time the deed was recorded of the indebtedness of Phelps to complainants, or of the litigation commenced by complainants against Phelps. As previously stated, at the time the deed was executed, when Bagley was insisting that Phelps should pay him, Phelps' indebtedness to Bagley was \$3,000, and Bagley, upon Phelps' solicitation, agreed that if Phelps would convey the property to him that he would pay him, in addition to the \$3,000, \$1,000, making in all the sum of \$4,000, which was the consideration actually

paid in cash by Bagley to Phelps. I say actually paid in cash; it appears that some \$200 was not actually paid in cash at that time for the reason that out of the \$1,000, \$200 was retained by Bagley as representing loans and interest on the various sums that he had loaned to Phelps from time to time, but that \$200 represented part of the cash which went to make up the total consideration of \$4,000 (p. 54).

Considerable emphasis has been laid upon the circumstance that Bagley has only slight documentary evidence of the indebtedness of Phelps to him, that evidence being in the form of checks which figured in the transaction. What he testifies, and this is not contradicted, is that at the time the deed was delivered to him the whole transaction between him and Phelps was closed and he delivered to Phelps all the evidence of indebtedness which he then held against him which, as before stated, were I. O. U.'s and notes of hand; and it may be remarked that this was a perfectly natural and businesslike transaction, as Phelps would, in settling an indebtedness of this nature or of any other nature, demand and undoubtedly would receive all evidence of indebtedness held by his creditor. It would actually have been suspicious if such evidence had been retained.

(20 Cyc. 499, note 62.)

It might be said here, in passing, that there was an attempt made on the part of the complainants to show that the property conveyed by the Phelps' deed to Bagley was far in excess of the indebtedness owing by Phelps to Bagley, but it is submitted that the evidence of this excess is not of a nature to impress the Court, because the witnesses who testified to this valuation are not qualified to speak upon the question

of the value of real estate, and, in any event, mere differences of opinion as to the appraisal value of real estate are not evidence on the question of the adequacy of consideration actually paid. The inadequacy must be such as to "startle a correct mind." 12 R. C. L. 479.

In the testimony of Elmer Geran it appears that the complainants had knowledge of the existence of this deed at the time they placed their claim in the hands of Mr. Geran for collection. His testimony on this will be found on page 36, l. 9, and on this point it might be said that at no time was the claim of complainants against Phelps of a sufficiently large amount to cause any uneasiness to Bagley as to their particular claim even had he known about it, but he did not know about it and his uneasiness about the indebtedness that Phelps owed him was solely owing to the Conover case. He did not know anything about Bentley's claim; in fact, Bentley had no claim against Phelps at the time the deed was given, because Bentley's claim was for services in the Conover case, which was admittedly after the execution and recording of the deed and therefore Bentley must have had notice of its existence, and the same is true of the McCarter claim.

To return to the testimony of Geran; a very extraordinary situation is disclosed, according to his testimony, as appears on page 35, *et seq.*, and he is very careful to say that his recollection is not at all distinct on the subject. It appears that Phelps came to him in April, 1913, and directed him to prepare the deed in question, which he did and which is dated April 11th, 1913, but was not executed before Mr. Geran until October 31, 1913; that at that time witness asked Phelps who Bagley was and witness was

informed that Bagley was associated with Phelps in business in New York and that Bagley had lent him, Phelps, some money that he, Phelps, wanted to be sure that Mr. Bagley was going to get and he wanted to give him this deed. The witness then says, "At that time the suit was pending, the Conover suit, and he didn't know what the verdict would be in the suit, and regardless of whether the verdict was in his favor or against him, he wanted to be sure that Mr. Bagley would be secured as to what he owed him." Which places beyond the peradventure of a doubt the fact that when the deed was given Mr. Bagley knew nothing about any indebtedness other than the fear of a judgment against Phelps in the Conover suit, thereby corroborating Mr. Bagley in his statements on that point. Continuing, the witness said that he asked Phelps how much he owed Bagley at that time and Phelps told him he owed Bagley a thousand dollars, and it is a fair presumption that in making that statement Mr. Geran's confessedly uncertain memory on the conversation has been misled by the fact that probably Phelps referred to the thousand dollars which Bagley had agreed to pay him in addition to the pre-existing indebtedness of \$3,000. The only other assumption upon which that statement can be based is that Phelps deliberately lied to Geran, which in itself is not beyond the range of either possibility or probability. The testimony of Mr. Geran was characterized as remarkable. It is remarkable in that an attorney should disclose upon the witness stand confidential relations between himself and his client, and that in the face of objections on the part of the defendant. It was just as much the duty of the complainants to have made an effort to secure the attendance of

Phelps at the trial for the purpose of giving testimony concerning the transaction between him and Bagley, or, failing to obtain his presence at the trial, to take his testimony by commission, as it was on the part of the defendant, because the burden of proof rested upon the plaintiffs to prove their case affirmatively, and at the best the evidence which is abduced in this case on the part of the plaintiffs as to the indebtedness of Phelps to Bagley is only hearsay and should not weigh and cannot weigh against the direct, positive and uncontradicted testimony of the defendant, Bagley, as to the amount owing to him.

The Court permitted this alleged admission of Phelps to Geran to the effect that his indebtedness to Bagley was only \$1,000, to be introduced in evidence, together with another somewhat similar admission of Phelps to Bentley upon the ground that Phelps was a defendant in the cause. But whatever weight may be attached to it, if regarded as an admission as against Phelps, whether its effect be regarded as slight or great, it cannot be so much as considered as against Bagley. Even in cases involving adultery or other joint offenses, civil or criminal, where both participants are necessarily equally guilty or equally innocent, the declaration of a co-party is refused as against the other party.

Chamberlayne, Mod. Law Ev. Sec. 1317.

This rule has recently been sharply illustrated in the New York courts.

Scully v. Scully, 179 App. Div. 266, decided July 31, 1917.

In that case the adultery of the defendant wife with the intervening defendant co-respondent was proven. But the Trial Court had admitted

in evidence, over the co-respondent's objection, a letter written by the wife to the co-respondent, but not received by him. The Court described that letter as at once damaging, cogent and persuasive evidence of the guilt of the parties. Yet the judgment was reversed and a new trial ordered on the ground that the letter was not admissible as against the co-respondent. The Court said:

“The letter was evidence against the wife, but not against the co-respondent. It results therefore that the offense might be fully established by evidence competent as to the wife, and the proof might fail as to the co-respondent; and yet they both must be equally guilty or equally innocent.”

Yet, anomalous as this situation is, there can be no question as to existence of the rule.

The effect of the rule is necessarily stronger in the case at bar than in the case cited. Here there is no presumption that Bagley shared in any fraudulent intent on the part of Phelps, and the learned Vice-Chancellor distinctly absolves Bagley from any fraudulent intent (p. 92, l. 28; p. 93, ll. 39-40), assuming such intent to have existed. Yet even if such an intent on Phelps' part had been conclusively shown, the proof would still have failed as to Bagley, who is in no way connected by the evidence with any design which Phelps may have cherished; and on the contrary, Bagley's good faith is affirmatively and convincingly shown by the evidence.

That this conveyance was made as an absolute conveyance and not as an equitable mortgage is evidenced by the practically undisputed testimony in the case that Bagley took possession of the property shortly after the delivery of the

deed to him and by verbal arrangement between him and Phelps, Phelps was permitted to occupy the property for a limited period. It appears, however, that, without the knowledge or consent of Bagley Phelps rented the property to one Black and for a time collected a portion of the rents; that as soon as Bagley became cognizant of that situation he proceeded with all expedition to compel Black either to pay the rent to him or to vacate the premises. Such an act on the part of Phelps cannot be taken as a badge of fraud on the part of Bagley, because Phelps practiced the deception without any knowledge or connivance on the part of Bagley, and as soon as the situation became known to Bagley he proceeded to repudiate the Black lease, and Bagley has been in absolute possession and control of these premises since that time. He has been paying the taxes and has been paying the insurance.

The foregoing is the state of the case as it is made by the testimony of the witnesses.

Complainants in their brief rely upon the case of *Horton v. Bamford*, 79 Equity, 556, and more particularly at page 374, to the authorities cited by Vice-Chancellor Garrison in deciding that case but it is submitted that the doctrine held in that case does not apply to the facts as disclosed in this case. Vice-Chancellor Garrison, citing the case of *Haston v. Castner*, 31 N. J. Eq., 697, states that that case held as to a *voluntary* conveyance by one who was indebted there was an irrebuttable presumption of fraud. But it is submitted that the facts are not similar in the two cases because in the case before the Court there was not a voluntary conveyance, but was for a very substantial consideration. The conveyance was made by Phelps to Bagley

because Bagley insisted upon the payment of an honest indebtedness which Phelps recognized as such, and Bagley's insistence upon the payment of the debt was not because he feared that this property might be seized by the complainants to pay their indebtedness, for he had no knowledge of that indebtedness. Not only was the conveyance made in consideration of an indebtedness past due to Bagley, but there was also a new consideration paid, namely, the sum of \$1,000, in excess of the \$3,000 indebtedness.

The complainants are not in a position to complain of the conveyance from Phelps to Bagley to secure the amount of money that was due Bagley, because they were endeavoring to place themselves in the same position by securing from Phelps a bond and warrant of attorney, upon which judgment would be entered in their favor, in order that they might obtain a preference in the payment of their debt over other creditors. Another feature of this transaction between the complainants and Phelps is this: The bond and warrant of attorney executed by Phelps to the complainants was a new debt and the execution of the bond and warrant was subsequent to the Bagley deed.

The Vice-Chancellor says in the case of *Horton v. Bamford*, "Each case, of course, must be judged by its own facts, and the principles of law or equity laid down in one case with one set of facts does not apply to another case with a different set of facts."

The following authorities are cited upon the question of fraudulent conveyances:

The first requisite that must exist to enable a creditor to attack the fraudulent conveyance is that the creditor's claim must be due, that is,

at the time the alleged fraudulent conveyance was made.

14 A. & E. Enc., 281.

Bentley's credit was not extended on the strength of any representation that defendant owned property, and, as before stated, at the time the deed was made there was no indebtedness owing to Bentley from Phelps.

The power of disposal is not terminated by the indebtedness, or even the insolvency, of the owner; a creditor, though he has an equitable interest in the property of the debtor, has no right to insist that the debtor's resources shall remain in any given shape. The latter has a general right to manage, control, sell, exchange, mortgage, pledge or deal with his property in such way and manner as he thinks will best conduce to its preservation and increase, and if he acts in good faith, a creditor *having no specific lien* cannot complain though in fact the debtor's dealings be unwise or improvident.

14 A. & E. Enc., 223.

An embarrassed or insolvent debtor may sell his property, and if the sale be an honest one and in good faith and for a valuable consideration, it is valid. Nor will the mere fact that the consideration is inadequate have the effect of invalidating the transaction. Inadequacy of consideration is only one of the circumstances by which the *bona fides* of the transaction is to be determined.

Id.

A failing or insolvent debtor (and it is not alleged in this case nor is there any proof that Phelps was insolvent) unrestrained by statute may prefer and pay one or more of his creditors, and such conveyance will be upheld if the

debt thus satisfied is *bona fide*, its amount not materially less than the fair and reasonable value of the property conveyed, and *the payment of the debt is the sole consideration* and no use or benefit is secured or reserved to the debtor.

14 A. & E. Enc., 226-227.

It is not the consideration, but the intent with which the conveyance is made that makes it good or bad against creditors.

14 A. & E. Enc., 242.

When a consideration has passed fraudulent intent must be proved as a distinct fact, and a voluntary conveyance to be fraudulent as to creditors must be made with intent to defraud, hinder and delay creditors, which intent must be proved. The validity of the conveyance is to be determined, not by its effect, but by the intention with which it is made.

Arnold v. Hagerman, 45 Eq., 186.

A conveyance not fraudulent in its inception will not be made so by subsequent conduct of the parties. Although a conveyance is rendered fraudulent as to the vendor by his covinous intent in making it, the title of the vendee will not be vitiated unless he participated in such intent, had knowledge of its existence, or notice of some fact calculated to put him on inquiry which, if followed up, would have led to the discovery of the fraudulent intent. If the vendee has paid value and has no such knowledge, he is a *bona fide* purchaser and will be protected as such.

N. Y. Fire Ins. Co. v. Tooker, 35 Eq. 408.

Bagley had no knowledge in April, 1913, of any excess value in the property over and above

the amount he was paying for it. He had never seen the property and was buying wholly upon the representation of Phelps.

As has been repeatedly said in this case, there is absolutely no evidence that either the vendor or vendee had any intention to defraud anybody, either the complainants or the intervenors, and that there was absolutely no fact of which Bagley was cognizant to put him upon inquiry that Phelps was conceiving and attempting to carry out a fraud against his creditors, and it is unnecessary to state in this connection, except for the purpose of completing the statement, that fraud is never presumed but must be proved.

It is laid down in 14 A. & E. Enc., 287, that a *bona fide* purchaser is one who has first paid a valuable consideration for the conveyance; second, he must have purchased in good faith and both of these must concur; and it is submitted that both those elements were present in this case; namely, that the purchase was for a valuable consideration; that Bagley purchased in good faith, and both these elements concur, and therefore the deed is not fraudulent either as to the complainants or any other creditors of Phelps.

In the case of *New York Fire Insurance Co. v. Tooker*, cited above, Vice-Chancellor Van Fleet states the law as follows:

“Now, in a case of this kind, it is not enough to show that the vendor made the sale with intent to defraud his creditors, but the parties seeking to set the sale aside must show, in addition, that the vendee was either an active or passive participant in the vendor’s fraud. He must show, either that the vendee had direct information that

the vendor desired to make the sale to defraud his creditors, or that the vendee purchased with notice of facts and circumstances from which the fraudulent purpose of the vendor was a natural and legal inference."

Citing Atwood v. Impson, 5 C. E. Green, 150;

Tantum v. Green, 6 C. E. Green, 364;

Merchants Bank of Newton v. Northrop, 7 C. E. Gr., 58.

To the same effect, also, it is held by the New York courts that despite the grantor's fraudulent intent, title in the grantee will be upheld if he paid a valuable consideration, and the creditor fails to show that the grantee had notice of the grantor's fraudulent intent.

Starin v. Kelly, 88 N. Y., 418.

In *Starin v. Kelly*, *supra*, it was held that if the purchaser shows that he paid a valuable consideration, the party assailing his title must prove that he had previous knowledge of the fraudulent intent of the vendor, or that he participated in the latter's fraud, even where the vendor's fraud is established. The Court said that the title of the purchaser would be "unimpeachable" unless the assailing party connected him with the vendor's fraud by evidence of knowledge or participation.

Parker v. Conner, 93 N. Y., 118.

Metcalf v. Moses, 35 App. Div., 596.

In the case of *National Bank of Slatington v. Joseph Massopust*, a Court of Errors and Appeals case, 85 N. J. Eq., 564, the Court says:

"1. The legal rule is that where a debtor has fraudulently made a sale or assignment of his property with intent to hinder, delay and defeat a judgment creditor in collecting

his debt, such judgment creditor may file a bill in equity to have such sale or assignment set aside, even though the vendee or assignee be a purchaser for full value. But in order to succeed, the judgment creditor must not only prove that the judgment debtor made the sale or assignment for the purpose of hindering, delaying and defeating the collection of the judgment, but also that the vendee or assignee of the property participated in such fraudulent intent, or at the time such sale or assignment took place, had brought to his notice facts and circumstances from which the fraudulent intent of the vendor or assignor was a natural and legal interference.

2. This legal rule, however, is to be applied in such a manner that it will not conflict with another well-settled rule, namely, that a debtor may prefer one creditor over another.

3. The question whether a debtor in failing circumstances can dispose of all of his property by voluntary assignment, either absolutely or by way of pledge, for the benefit of certain creditors to the exclusion of others, has never been doubted by the courts of this state.

4. No design to defraud creditors will be presumed from the mere fact that a debtor in failing circumstances has sold his property for the purpose of preferring certain creditors over others, although such a transaction may, in conjunction with other facts and circumstances, be a potent factor in determining whether or not there was such a fraudulent design existing in the

mind of the debtor at the time he made the conveyance; but, if the facts and circumstances are consistent with an honest purpose, the mere fact that the creditor left out is prevented from collecting his judgment is not sufficient to raise the inference of fraud."

In the case of *Kinsey v. Feller*, 64 Eq., 367, Vroom, speaking for the Court of Errors and Appeals, lays down the following doctrine:

"The attack upon these conveyances is made by these complainants who both are subsequent creditors, and the burden then is upon them to show that at the time they were made there was an actual intent to hinder and defraud creditors. The law upon this subject may be said to be authoritatively settled in this state. It was held by this court in the case of *Carpenter v. Carpenter's Executors*, 12 C. E. Gr. 502, that 'to enable a subsequent creditor to impeach a conveyance made under these circumstances, it must be shown to have been made *mala fide*; its fraudulent character must be proved as a fact. And if the evidence does not lead to the conviction that there was a present purpose to contract future indebtedness, the payment of which was to be evaded or hindered, or some other fraudulent design to the injury of creditors or purchasers, then the conveyance will stand.'"

And again in the later case of *Hagerman v. Buchanan*, 18 Stew. Eq. 292, 296, the doctrine is stated with equal force. "The rule that has been recognized is that a voluntary settlement can be attacked by a subsequent creditor only upon the ground of the ex-

istence of an actual intent in the minds of the parties at the time of the execution of the conveyance to hinder, delay or defraud creditors by means of the deed." See, also, *Bouquet v. Heyman*, 5 Dick. Ch. Rep. 114.

* * * *

"While the law requires that one should be astute in ferreting out the evidence of fraud, yet the law will not presume actual fraud. The evidence, when produced, must satisfy the judgment that it exists."

In the case of *Hepburn v. United Water, Gas & Electric Co.*, 103 Atl. Rep., 522, opinion by Vice-Chancellor Leaming, affirmed by the Court of Errors and Appeals, the Court states:

"It follows that, owing her this money, it was his privilege, under the law of this state, to prefer her as a creditor, however much he may have been involved in his financial matters; even though he was at the time insolvent, it was his privilege to pay to his daughter a debt which he honestly owed her, if he saw fit to do so, and in that manner constitute her a preferred creditor."

In his opinion in the case before the Court the learned Vice-Chancellor says, at line 37, page 111:

"Bagley, while he claims the amount of the indebtedness is nearer \$3,000 than \$1,200, as Phelps stated to Geran and Bentley, he is unable to produce any vouchers to substantiate his statements and I am, therefore, obliged to rely upon the only tangible proof in the case regarding the amount of this indebtedness, viz: that given by Mr. Geran and Mr. Bentley, based upon statements

made to them by Phelps at the time that he had the deed prepared and shortly thereafter.”

On page 92, in his oral comments, at the close of the testimony in the case, at line 13, page 92, the learned Vice-Chancellor says:

“It seems to me there are just two questions in this case: one is whether Mr. Bagley has completed his purchase of the property, assuming him to be a purchaser for the amount instead of obtaining it as security.”

* * * *

And on line 25, page 92:

“I regard Mr. Bagley the same as I regard Mr. Cantan and these other gentlemen; *he is an innocent party in this matter*. I think that his difficulty is to satisfy me now that the amount of his indebtedness, which I think he is entitled to be secured for, is in excess of the amount admitted to be owing him by Phelps. I have nothing but his statement. I can take a declaration of Phelps, against his own interest made to Mr. Bentley and to Mr. Geran, but his indebtedness to Mr. Bagley is at least \$1,200.”

And at line 39, page 93, the Court says:

“I am inclined to hold that he has not been guilty of fraud * * * I have seen no fraud on his part whatever.”

There is an apparent inconsistency in these statements and in the views held by the Vice-Chancellor. He holds Bagley innocent of any fraud or fraudulent intent in this transaction, and holds that Phelps was guilty of intent to defraud his creditors, and yet, holding that opinion, he accepts Phelps' statement of the amount

of his indebtedness to Bagley and rejects Bagley's statement of the amount due and bases that opinion upon the ground that Bagley has produced no evidence of the indebtedness and that Phelps' statement was a statement against interest, entirely overlooking the fact brought out in the testimony and undisputed that the evidence of the indebtedness from Phelps to Bagley was in the form of promissory notes and I. O. U.'s, and that these had naturally and properly been surrendered to Phelps at the time the property was conveyed to Bagley in satisfaction of the indebtedness. We merely suggest what has been stated before, that the evidence of Mr. Bentley and Mr. Geran is absolutely inadmissible upon this point because it was hearsay evidence, and while, under other circumstances, it could have been taken as a statement against interest if Phelps alone was affected by such a statement, it certainly could not prejudice the rights of Mr. Bagley, the statement not having been made in his presence and without opportunity to deny its truthfulness.

We think the situation of Mr. Bagley is very similar to that of Mr. Hepburn, in the case above cited of *Hepburn* against *United Water Company*, concerning which the Court holds:

“Had he observed special care to make altogether unnecessary declarations of that kind (that is, that the stock was the property of his wife), he would have created more suspicion in my mind and would have been the source of more patent suggestion of some understanding of an improper nature between him and his father-in-law, with a view of avoiding creditors of his father-in-law, than the transactions which did transpire suggest. *A careless attitude not infre-*

quently suggests innocence of purpose.

* * * It frequently occurs that the failure to protect oneself and to guard against a future claim of want of *bona fides* is evidence of good faith."

There is some evidence in the case produced on the part of the complainants showing that the value of the property was in excess of the amount paid for it by Bagley, even if Bagley paid a consideration of \$4,000. This evidence, however, is of doubtful value. But assuming that it has some value, the question is naturally raised under the findings by the learned Vice-Chancellor that if the property sells for \$7,000 and Bagley's claim is satisfied, either at \$1,200 and interest, or at the sum which Bagley claims is due him and interest, and also the indebtedness of the complainants, a surplus will remain and the question will arise for solution, to whom does that surplus belong; will the Court say that it belongs to Phelps, held in the findings of the Court below to have been guilty of fraudulent intent with regard to the indebtedness due his creditors, or will it belong to Bagley, whose deed the Court holds to be a mortgage? We submit that under the evidence in the case and under the authorities the decree of the Court below should be reversed.

Respectfully submitted,

FORT, HUNT & SHIPMAN,
Solicitors and of Counsel with Defendant,
Wayland O. Bagley.

HAMMERMILL

JIMMIE WILSON