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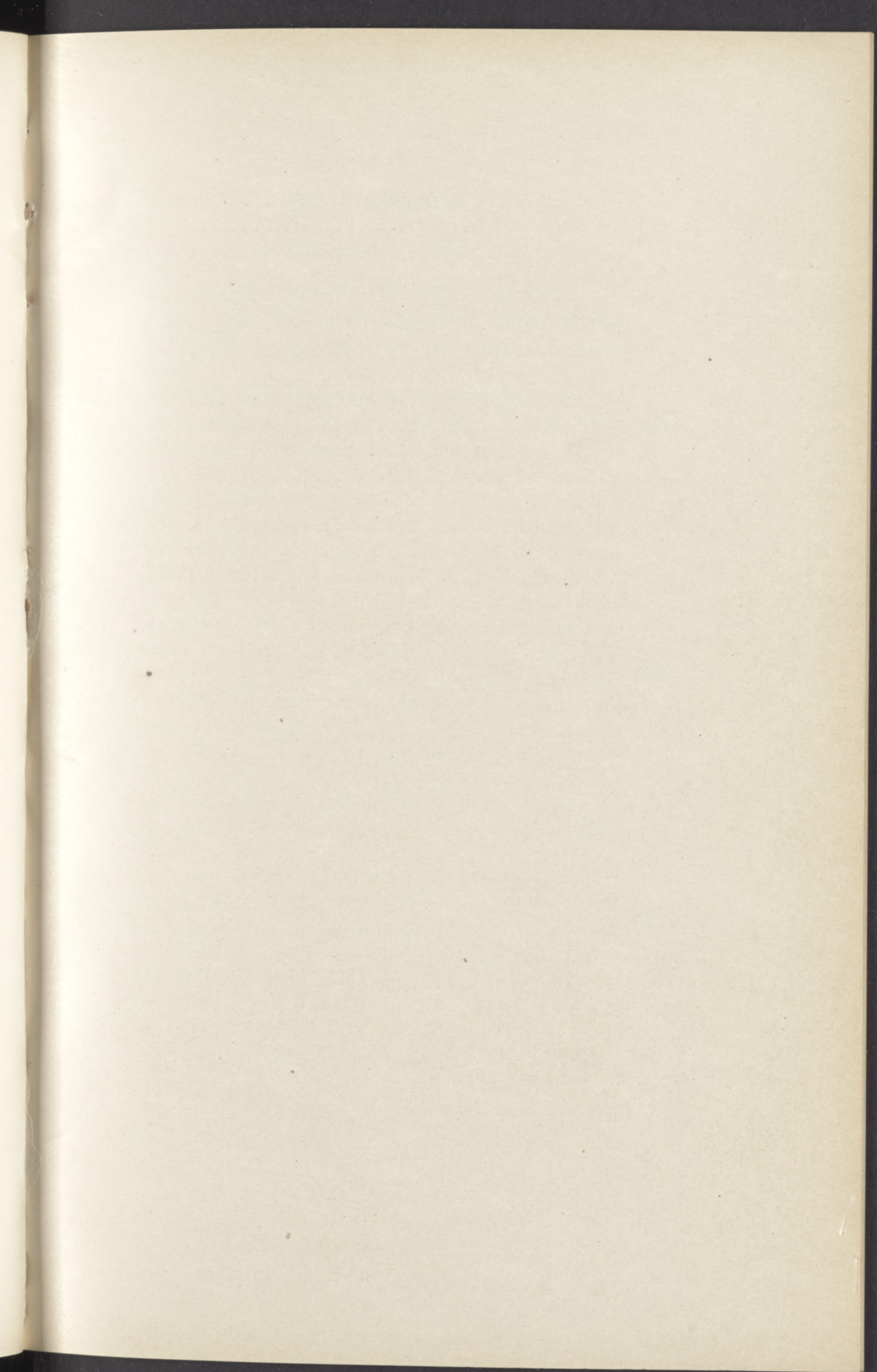
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Bill of Complaint

Filed Sept. 18, 1928

IN CHANCERY OF NEW JERSEY
TO HIS HONOR, EDWIN ROBERT
WALKER, Chancellor of the State of New
Jersey.

The Complainant, Charles G. Carluccio, who resides at Hoboken, Hudson County, New Jersey, complains of the defendants and says: 10

1. On or about January 23, 1924, the Muller Fox Brokerage Company, a corporation, recovered a judgment in the Supreme Court of the State of New York against Arthur E. Winter and Frank B. Ross in the sum of \$213,183.73.

2. The New York Supreme Court is a court of general jurisdiction and the said judgment remains in full force and effect, has not been reversed, paid or satisfied except that there has been paid on account of the said judgment the sum of \$5,000.00. 20

3. Prior to the commencement of this action and of the suit hereinafter referred to, the said judgment was duly assigned to the complainant, who is the owner and holder of said judgment.

4. On or about July 20, 1927, complainant recovered in the New Jersey Supreme Court judgment against said Arthur E. Winter in an action brought by the complainant upon the aforesaid New York judgment and that the amount of the judgment obtained by complainant against said Arthur E. Winter in the New Jersey Supreme Court is \$251,782.93, no part of which has been paid. 30

5. The said Arthur E. Winter does not have any property which can be levied upon under an 40

Bill of Complaint

execution on the aforesaid judgment or which can be reached by ordinary legal process.

6. The obligation sued upon in the action above referred to, brought by Muller Fox Brokerage Company, was incurred by the said Arthur E. Winter in or about the month of May, 1920, and in or about the month of September, 1920, said Arthur E. Winter was indebted to the said Muller Fox Brokerage Company in the amount for which said company later obtained a judgment, and in said month of September, 1920, said Muller Fox Brokerage Company threatened suit as against said Arthur E. Winter.

7. On or about September 11, 1920, said Arthur E. Winter made a conveyance of certain real property in the City of Orange, in the County of Essex and State of New Jersey, which he then owned and had previously owned, to his wife, Katherine Humes Winter. The following is a more particular description of the said property.

All those certain tracts, parcels of land and premises hereinafter particularly described situate lying and being in the City of Orange in the County of Essex and State of New Jersey.

First Tract:

Beginning at the northwesterly side of Berkeley Avenue at the easterly corner of land of Ambrose M. Mathews, which point is distant one hundred and thirty-six feet and eighty-four one-hundredths of a foot northeasterly from the northeasterly line of Hillside Avenue, running thence along said Berkeley Avenue north thirty-eight degrees, nine minutes east two hundred and two feet and seventy-three one-hundredths of a foot to a new street fifty feet in width recently opened,

Bill of Complaint

called Fairview Avenue; thence along the line of said Fairview Avenue north forty-two degrees twenty-six minutes west two hundred feet, thence at right angles to said Fairview Avenue south forty-seven degrees thirty-four minutes west two hundred feet to land of said A. M. Matthews; 10
 thence along said land south forty-two degrees twenty-six minutes east two hundred and thirty-three feet and seventeen one-hundredths of a foot to Berkeley Avenue and the place of beginning.

Second Tract:

Beginning a point in the southwesterly line of Fairview Avenue distant two hundred feet northwesterly from the northwesterly line of Berkeley Avenue and running thence at right angles to Fairview Avenue south forty-seven degrees 20
 thirty-four minutes west two hundred feet; thence parallel with Fairview Avenue north forty-two degrees twenty-six minutes west seventy-five feet; thence at right angles to Fairview Avenue north forty-seven degrees thirty-four minutes east two hundred feet to Fairview Avenue; and thence along Fairview Avenue south forty-two degrees and twenty-six minutes east seventy-five feet to point of beginning. 30

8. Said deed of conveyance was acknowledged by Arthur E. Winter on September 11, 1920, was recorded in the office of the Register of Essex County on October 4, 1920, in Book I-64, page 53 of Deeds for Essex County.

9. At the time of the making of such conveyance, the said Arthur E. Winter was insolvent.

10. The said Katherine Humes Winter did not pay any consideration for the conveyance and the said conveyance was made by the said Arthur E. 40

Bill of Complaint

Winter to delay, hinder, and defraud his creditors, and because of such purpose it was pretended between the said Arthur E. Winter and his wife that there was a consideration of \$35,000.00 to be paid for the conveyance and it was agreed
10 between the said Arthur E. Winter and his wife, that she was to execute a mortgage which said Arthur E. Winter would hold as part of the pretended consideration, and it was also pretended that a cash payment was made as part of the consideration.

11. In accordance with this agreement, the said Katharine Humes Winter executed a mortgage to the said Arthur E. Winter in the sum of \$10,000.00, which mortgage was dated September 11,
20 1920, and was recorded October 4, 1920, in the office of the Register of Essex County in Book B43, page 154 of Mortgages for said County.

12. At the time the conveyance aforesaid was made, said Katharine Humes Winter pretended to pay to her husband \$25,000.00 and executed the aforesaid mortgage for the balance of the pretended purchase price.

13. The aforesaid \$10,000.00 mortgage was
30 paid off and discharged with the proceeds of a new mortgage placed upon the property and executed to one Augustine L. Humes, which mortgage bears the date of December 27, 1920, and is recorded in Book Q45, page 357 of Mortgages for Essex County, and was made to the said Augustine L. Humes by the said Arthur E. Winter, and the said Arthur E. Winter received the proceeds of said mortgage amounting to \$10,000.00.

14. Thereafter, and at various dates, said
40 Arthur E. Winter and his wife executed mort-

Bill of Complaint

gages, one of which was to the Fidelity Union Trust Company of Newark, and another of which was to one Catherine Waldron. The said Arthur E. Winter received the proceeds and benefits of such mortgages.

15. Ever since the conveyance above referred to by the said Arthur E. Winter to his wife, said Arthur E. Winter has retained control of the premises, has had the use and benefit thereof, and has treated the same as his own property and has provided the monies for the carrying charges, including interest on the mortgages, taxes, insurance and other charges, and has been and is the beneficial owner of the premises, and the only interest therein of the said Katharine Humes Winter is that she has held and holds the legal title to the premises for the benefit, however, of her said husband, Arthur E. Winter.

16. In connection with this property, said Katharine Humes Winter has maintained a bank account with the Orange National Bank and in this account monies have been deposited belonging to the said Arthur E. Winter, and the monies of the said Arthur E. Winter, and of his wife, have been commingled therein, and from this account monies were drawn by said Katharine Humes Winter and turned over by her to said Arthur E. Winter, and were used by him. Said Katharine Humes Winter also borrowed money from said bank upon the security of stock certificates which were the property of the said Arthur E. Winter and the proceeds of such loan were turned over to and used by the said Arthur E. Winter, and all of the aforesaid transactions were had for the purpose of concealing the true

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Bill of Complaint

transaction between the parties for the purpose of giving color to the claim that Arthur E. Winter had actually sold the aforesaid property to his wife and received a valuable consideration therefor. The fact is that such sale was a pretended sale and the property was at all times in reality the property of said Arthur E. Winter.

10

17. As a part of the said plan, and in furtherance thereof, said Arthur E. Winter in or about the month of September, 1920, or shortly prior thereto, borrowed money on certain stock certificates belonging to him, from a business concern known as "Prichett & Company," in New York City. Thereafter this stock was released by obtaining the money from the Orange National Bank, as above stated, through the means of the account in the name of Katharine Humes Winter, and thereafter it was pretended between the parties that the amount used to redeem the stock was the consideration or the conveyance of the premises, but as a matter of fact, said Katharine Humes Winter did not furnish the consideration or pay the same to the said Arthur E. Winter, and the money said to represent the consideration was in fact at all times the money of the said Arthur E. Winter.

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18. Said Arthur E. Winter also received \$10,000.00 upon the mortgage executed by him to the said Augustine L. Humes, and in doing so, treated the property as his own property and the mortgage made by Katharine Humes Winter to Arthur E. Winter for \$10,000.00 was never paid or discharged by her, but was merely placed on record for the purpose of deceiving the said

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Bill of Complaint

Arthur E. Winter's creditors and to give color to the pretended sale.

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

1. That Arthur E. Winter and Katharine Humes Winter, who are the defendants in this cause, answer this Bill of Complaint and each statement therein made. 10

2. That a decree be made that the conveyance by Arthur E. Winter to Katharine Humes Winter, described in this Bill of Complaint, is void as against the complainant.

3. That the defendant Katharine Humes Winter be decreed to hold the premises described in this Bill of Complaint in trust for the defendant Arthur E. Winter, and that she be decreed to reconvey the same to the said Arthur E. Winter. 20

4. That the defendants be decreed to account for the rents and profits of the premises and the mortgage monies contained thereon and that they be decreed to pay to the complainant the amount thereof on account of the complainant's judgment.

5. That complainant's judgment be decreed to be a lien upon the premises described in this Bill of Complaint and that the premises may be sold to satisfy such a lien. 30

6. That complainant have such other and further relief that shall be just.

7. That a writ of subpoena may be issued, commanding the defendants to answer this Bill of Complaint and abide by such decree as the Court may make.

JOHN W. OCKFORD,
Solicitor for and of Counsel 40
for Complainant.

Answer

Filed Oct. 30, 1928

IN CHANCERY OF NEW JERSEY

10	Between: CHARLES G. CARLUCCIO, <i>Complainant,</i> AND ARTHUR E. WINTER AND KATHARINE HUMES WINTER, <i>Defendants.</i>	}	On Bill, Etc.
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The answer of the defendants Arthur E. Winter and Katharine Humes Winter.

20 These defendants, Arthur E. Winter and Katharine Humes Winter, his wife, answering the Bill of Complaint, say:

1. They admit the allegations of paragraphs 1 and 2 of the Bill of Complaint.

2. They have no knowledge of the facts alleged in paragraph 3 of the Bill of Complaint, and leave the complainant to make such proof thereof as he may be advised.

30 3. They admit the allegations of paragraphs 4 and 5 of the Bill of Complaint.

4. They deny that the obligation upon which the judgment now claimed by the complainant was subsequently entered was incurred in or about the month of May, 1920, or that the defendant Arthur E. Winter was indebted in September, 1920, to the complainant's assignor in the amount for which the judgment was subsequently entered, as alleged in paragraph 6 of the Bill of Complaint. They do not know the date when the complainant's assignor threatened suit against said

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Answer

Arthur E. Winter, and leave the complainant to make such proof thereof as he may be advised.

5. They admit the allegations of paragraphs 7 and 8 of the Bill of Complaint.

6. They deny the allegations of paragraphs 9 and 10 of the Bill of Complaint. 10

7. They admit the making of the mortgage as alleged in paragraph 11 of the Bill of Complaint, but deny the said mortgage was made without consideration, or with the intent to hinder, delay or defraud the creditors of said Arthur E. Winter.

8. They deny the allegations of paragraph 12 of the Bill of Complaint.

9. They admit the allegations of paragraph 13 of the Bill of Complaint. 20

10. They admit the execution of mortgages to the Fidelity Union Trust Company of Newark, and to Catherine Waldron, as alleged in paragraph 14 of the Bill of Complaint. They deny that the defendant Arthur E. Winter received the proceeds and benefits of such mortgages.

11. They deny the allegations of paragraph 15 of the Bill of Complaint. The only use and benefit of the premises which the defendant Arthur E. Winter has had since the conveyance to his wife is that he has lived in the house with his family as their home. 30

12. They deny the allegations of paragraph 16 of the Bill of Complaint, except as herein expressly admitted. The defendant Katharine Humes Winter has maintained a bank account in the Orange National Bank, but the monies therein have been her own personal estate. The defendant Arthur E. Winter has from time to time de- 40

Answer

posited in said account, or given to his wife to make such deposit such amounts as he was able to contribute towards the maintenance of their joint home and payment of the family living expenses. Such money so deposited was not turned
10 over to him or used by him, nor was it expended for his purposes, except as he shared in the family life. The stock certificates which were pledged with said bank to obtain the loan were the separate property of the defendant Katharine Humes Winter, and were not the property of the defendant Arthur E. Winter.

13. They deny the allegations of paragraphs 17 and 18 of the Bill of Complaint, except as herein expressly stated.

20 14. Further answering the Bill of Complaint, the defendants say that at the time of the making of the conveyance referred to in the complainant's Bill of Complaint, and for some time prior thereto, the defendant Arthur E. Winter had been actively engaged in business in New York City, with his partner, Frank B. Ross, and believed that he then was possessed of large means, although his business was in need of ready
30 cash to meet obligations then maturing. He discussed with his wife the sale or mortgaging of the house in question, in order that he might contribute further capital to his partnership business, and she thereupon suggested that she would buy the property for \$35,000.00, which was then a fair and adequate price, and would pay at once \$20,000.00 in cash and \$5,000.00 within a short time thereafter, and give him a purchase money mortgage for \$10,000.00, the sale of which he
40 could probably negotiate. The defendant Arthur

Answer

E. Winter accepted this offer, and the defendant Katharine Humes Winter thereupon endorsed in blank and delivered to her husband certain shares of stock of the Texas Company, a corporation of the State of Texas, which she then owned, and in which her husband had no right or interest, and he thereupon borrowed from Prichitt & Co., New York brokers, the sum of \$20,000.00, delivering to said brokers the said certificates of stock as security. This money was received by Arthur E. Winter as part of the consideration of said conveyance, and was contributed by him to the capital of his said partnership. Thereafter, the defendant Katharine Humes Winter arranged with the Orange National Bank, in which she kept her account, to loan to her \$26,000.00, on the pledge of the same stock of the Texas Company as collateral, and said bank thereupon paid off the loan which had been obtained from Prichitt & Co., obtained the stock from them, and credited her account with the balance of said loan, \$6,000.00. From this balance, the defendant Katharine Humes Winter paid to her husband \$5,000.00 in several payments, making up the agreed on cash of \$25,000.00. This amount was also contributed by the defendant Arthur E. Winter to the capital of his partnership. Thereafter the defendant Katharine Humes Winter arranged with her brother Augustine L. Humes to loan to her \$10,000.00 upon a mortgage upon said property, and upon the receipt of said sum the same was paid to the defendant Arthur E. Winter, who cancelled his purchase money mortgage, and paid the amount so received into the capital of his said partnership.

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Answer

15. These defendants say that at the time of the conveyance set out in the Bill of Complaint, the defendant Arthur E. Winter was not insolvent, but was actively carrying on his business, and was reasonably expectant that with the proceeds
10 obtained from the sale of the house, his partnership would be able to pay its business obligations, and continue its business; that the purchase price paid by the defendant Katharine Humes Winter for said conveyance was a fair and adequate consideration for said property, and that the money
20 so paid was her own property and not the property of said Arthur E. Winter; that the transaction was an honest and bona fide attempt by these defendants to enable the defendant Arthur E. Winter to continue his business and meet the maturing obligations of his firm; that the conveyance was not made to hinder, delay or defraud the creditors of said Arthur E. Winter, but was an honest endeavor to supply him with additional capital for use in his business, in the expectation that he would be able to meet all maturing obligations and continue the business of his firm.

30 These defendants pray to be hence dismissed with their costs.

CARRICK & WORTENDYKE,
Solicitors and of Counsel with Defendants.

Replication

Filed November 2, 1928

IN CHANCERY OF NEW JERSEY

Between

CHARLES G. CARLUCCIO,
Complainant,

AND

ARTHUR E. WINTER AND
KATHARINE HUMES WINTER,
Defendants.

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On Bill, Etc.
Replication.
69-565

The complainant joins issue on the Answer of 20
the defendants.

JOHN W. OCKFORD,
Solicitor of Complainant.

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Interrogatories
Also Exhibit C-4

IN CHANCERY OF NEW JERSEY

Between:

CHARLES G. CARLUCCIO,
Complainant,
 AND
 ARTHUR E. WINTER AND
 KATHARINE HUMES WINTER,
Defendants.

10

On Bill, Etc.
 Interrogatories.

To the above-named defendants, Arthur E. Winter, and Katherine Humes Winter. 20

You are hereby required to answer under oath, fully, directly and responsively, confining each answer to the interrogatory proposed, those of the following interrogatories respectively addressed to each of you.

INTERROGATORIES TO BE ANSWERED BY
 THE DEFENDANT, ARTHUR E. WINTER.

30

1. State fully the consideration received by you for the conveyance made by you to Katherine Humes Winter, under date of September 11, 1920, of certain premises in the City of Orange, in the County of Essex, and State of New Jersey.

2. State the purpose of the making of such conveyance.

3. What disposition did you make of the monies received by you on account of such transfer.

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Interrogatories—Also Exhibit C-4

4. State what disposition was made by you of the mortgage executed to you by the said Katherine Humes Winter as part consideration for the said transfer.
- 10 5. State the particulars of the transaction, whereby a mortgage was executed by the defendants to one, Augustine L. Humes, under date of December 27, 1920.
6. State if any money was received by you out of the proceeds of the aforesaid mortgage loan.
7. State what disposition was made of such monies so received by you.
8. State fully the particulars of the transaction whereby the defendants executed a mortgage on the aforesaid property to the Fidelity Union
20 Trust Company of Newark.
9. State fully the particulars with respect to the transaction whereby the defendants mortgaged the aforesaid premises to one Catherine Waldron.
10. State what disposition was made by you of the monies obtained upon the foregoing mortgages.
11. State whether on September 11, 1920, you
30 were in possession of the aforesaid premises, and state whether or not you have been in possession thereon ever since said date.
12. State fully what payments you have made since September 11, 1920, for interest on the aforesaid mortgages, or upon any mortgages upon said property for taxes thereon, for insurance and for any and all other items in connection with the carrying of the said property, and also state what
40 monies you have paid to the defendant, Katherine Humes Winter, for use in connection with the carrying of the aforesaid property.

Interrogatories—Also Exhibit C-4

13. State fully what certificates of shares of stock were turned over by you to the defendant, Katherine Humes Winter, in connection with the transfer of the aforesaid property, and for the purpose of enabling said Katherine Humes Winter to obtain monies from the Orange National Bank upon said stock certificates, which were used as collateral, and state fully the exact amount of the monies received by you from the said Katherine Humes Winter either directly or through the Orange National Bank, as a result of the use of the said stock certificates as collateral, security or otherwise. 10

14. State fully the details of the transaction whereby you borrowed money upon certain stock certificates from the concern known as Pritchett & Co., of New York City, and particularly with respect to the transaction with the said Company or one of similar name, whereby monies were obtained for the purpose of crediting the same to the account of Katherine Humes Winter with the Orange National Bank. 20

15. State fully what compensation has been paid by you to the said Katherine Humes Winter for the use of the aforesaid property ever since the conveyance of the same by you to her. 30

16. State fully the present status of the aforesaid property with respect to open mortgages against same.

INTERROGATORIES TO BE ANSWERED
BY THE DEFENDANT,
KATHERINE HUMES WINTER.

17. State what consideration you paid the defendant, Arthur E. Winter, for the conveyance to 10

Interrogatories—Also Exhibit C-4

you by him in or about the month of September, 1920, for certain real property in the City of Orange, County of Essex, and State of New Jersey, and which property is known as 501 Berkeley Avenue.

10 18. State the amount of the mortgages on the property at the time of its purchase by you.

19. State from what source you obtained the monies with which you made payment for the purchase of the said premises.

20 20. State the facts with respect to the discharge of the mortgage given by you to the defendant, Arthur E. Winter, particularly as to the time and the amount of payment made, and the source of the monies used for the purpose of discharging such mortgage.

21. State fully the circumstances with respect to the execution of any and all mortgages made upon the premises after its acquisition by you and particularly the dates and the amounts of monies received, and the disposition of the proceeds of each of such mortgages, and particularly to the mortgages executed to Augustine L. Humes, Fidelity Union Trust Company of Newark, and Catherine Waldron.

30 22. State the amounts and dates of any and all payments made by you for the payment of interest on mortgages, taxes, insurance and other carrying charges.

40 23. State the amounts and names of stock certificates transferred to you by the defendant, Arthur E. Winter, in connection with the aforesaid transactions, and particularly with respect to the stock certificates so obtained by you and used as collateral, security and otherwise with the Orange National Bank.

Interrogatories—Also Exhibit C-4

24. State the details of the transactions whereby you obtained monies for the payment of the consideration for the said property, and for the discharge of mortgages thereon, and particularly money so obtained by the use of securities given to you by the defendant, Arthur E. Winter.

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25. State what, if any, monies were received by you from the defendant, Arthur E. Winter, in connection with the carrying of the property and its use, after the conveyance of same to you in September, 1920, and particularly what monies of the said Arthur E. Winter were deposited in your bank account with the Orange National Bank, or any other bank in connection with the carrying of this property or in connection with its use and maintenance.

20

26. State what, if any, authority the defendant, Arthur E. Winter, has had as your agent in connection with the care and control of the aforesaid property and particularly with respect to the financing of the same or mortgage or otherwise.

JOHN W. OCKFORD,
Solicitor for Complainant.

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Answers to Interrogatories

Also Exhibit C-5

IN CHANCERY OF NEW JERSEY

10

Between:

CHARLES G. CARLUCCIO,
Complainant,

AND

ARTHUR E. WINTER, et ux.,
Defendants.

On Bill, Etc.
Answers to
Interroga-
tories.

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The answer of the defendant, Arthur E. Winter, to interrogatories propounded by the complainant, numbered 1 to 16, inclusive:

1. \$20,000.00 cash on September 1, 1920; \$5,000.00, part in October and part in December, 1920, and a purchase money mortgage for \$10,000.

2. To obtain funds to meet pressing obligations of my firm.

3. I deposited the money with the National City Bank of New York, to the credit of my firm, Winter, Ross & Company.

30

4. I held the mortgage until the receipt of \$10,000.00 from A. L. Humes, then the mortgage was cancelled. This money was also paid into the capital of my partnership.

5. Augustine L. Humes, the brother of the defendant, Katharine Humes Winter, offered to take a mortgage upon the premises of \$10,000.00. He paid to my wife the sum of \$10,000.00, and accepted a mortgage to himself for that sum.

40

Answers to Interrogatories—Also Exhibit C-5

6. The whole \$10,000.00 received from said mortgage loan was paid to me.

7. I paid the entire sum into the capital of my partnership.

8. In November, 1923, a mortgage loan in the sum of \$16,000.00 was negotiated by me for Mrs. Winter, with the Fidelity Union Trust Company of Newark, for which a mortgage in that amount was executed to the Company. 10

9. In April, 1925, the second mortgage loan was negotiated and the mortgage executed to Catherine Waldron, in the sum of \$7,500.00.

10. I made no disposition of the monies obtained on the foregoing mortgages. The money was not received by me. 20

11. On September 11, 1920, I was in possession of the aforesaid premises. On that day I conveyed the property to Mrs. Winter, since which time I have not been legally in possession of the premises, but have been living in them as has the whole of our household, consisting of my wife, myself and two children. 20

12. I have not paid any interest on mortgages on said property, nor any taxes thereon since September 11, 1920. I have made no payments in connection with the carrying of said property, nor have I paid Mrs. Winter any monies for use in connection with the carrying of this property, except as follows: On September 14, 1922, I paid a fire insurance premium of \$65.19. On December 29, 1922, I paid a fire insurance premium of \$16.19. On July 18, 1923, I paid a fire insurance premium of \$32.38. 30

13. No certificates of shares of stock were turned over by me to Mrs. Winter in connection with the transfer of said property, or for the 40

Answers to Interrogatories—Also Exhibit C-5

purpose of enabling her to obtain monies from the Orange National Bank upon said stock certificates.

10 14. On September 1, 1920, Mrs. Winter handed me certain stock certificates, with instruction to borrow the sum of \$20,000.00 on said certificates as collateral, and I thereupon opened an account with Prichitt & Company, of New York City, and received from them a check for \$20,000.00, as part payment for the aforesaid property. No monies were obtained from Prichitt & Company for the purpose of crediting the sum to the account of Mrs. Winter with the Orange National Bank.

20 15. Since the conveyance of the property to Mrs. Winter, I have not paid to her any regular or definite compensation for the use of the property, but have contributed such sums as I could from time to time, toward the household and living expenses of my family.

30 16. The present status of the property, with respect to open mortgages is, to the best of my knowledge, as follows: April 8, 1927, \$25,000.00, with the Fidelity Union Title & Mortgage Guaranty Company. February 2, 1928, \$7,500.00, with the Reserve Mortgage Corporation, of Newark, N. J.

ARTHUR E. WINTER.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON } SS:

Arthur E. Winter, being duly sworn according to law, upon his oath deposes and says:

I am one of the defendants in the above-entitled cause, and have made the foregoing answers to the

Answers to Interrogatories—Also Exhibit C-5

16 interrogatories propounded to me by the complainant. The answers so made by me are true.

ARTHUR E. WINTER.

Subscribed and sworn to before me
at Jersey City, this sixth day of
May, A. D. 1929. 10

ELSIE B. MACCRACKEN,
Master in Chancery of New Jersey.

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IN CHANCERY OF NEW JERSEY

10	Between: CHARLES C. CARLUCCIO, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;">AND</div> ARTHUR E. WINTER, et ux., <div style="text-align: right;"><i>Defendants.</i></div>	}	On Bill, Etc. Answers to Interrogatories.
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The answer of the defendant, Katharine Humes Winter, to interrogatories propounded by the complainant, numbered 17 to 26, inclusive:

17. I paid Mr. Winter the sum of \$20,000.00 September 1, 1920. I further executed to him a purchase money mortgage of \$10,000.00, and in October and December paid him a further sum of \$5,000.00, as the consideration for the conveyance of the property by him to me.

18. There were no mortgages on the property at the time of its purchase by me.

19. I obtained the monies with which I made payment for the purchase of said property by negotiating a loan on certain stock certificates which I owned as collateral security, from Prichitt & Company, of New York City.

20. The mortgage given by me to Mr. Winter was discharged by the payment to him by me of the sum of \$10,000.00, December 27, 1920. The money was received by me from my brother, Augustine L. Humes, on that date.

21. On December 27, 1920, I executed a mortgage to my brother, Augustine L. Humes, in the sum of \$10,000.00, which sum he paid me by check, which I endorsed over to Mr. Winter. On November 3, 1923, I obtained a mortgage loan of \$16,000.00 from the Fidelity Union Trust Com-

Answers to Interrogatories—Also Exhibit C-5

pany of Newark, from which the mortgage held by my brother was paid off, taxes upon the property in the sum of \$3,494.80 were paid, the expenses of obtaining the loan were also paid, and from the balance, various repairs on the property and house and living expenses were paid.

10

On April 8, 1925, I obtained a mortgage loan of \$7,500.00, and executed a mortgage to Catherine Waldron. The proceeds of this mortgage were used by me for taxes, interest, and various house and living expenses.

On April 19, 1927, I obtained a mortgage loan of \$25,000.00 from the Fidelity Union Title & Mortgage Guaranty Company of Newark, from which the earlier mortgage of \$16,000.00 with interest was paid, also \$4,000.00 was paid on account of the Waldron mortgage, besides interest and taxes amounting to over \$2,000.00 were paid, and after paying the expense of obtaining the loan and interest, I received \$2,021.89. This was used by me for interest, repairs and living expenses.

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22. The amounts paid by me for interest on mortgages, taxes and other carrying charges are shown on the schedule hereto annexed, marked "Schedule A."

23. No stock certificates were transferred to me by Mr. Winter in connection with the aforesaid transactions.

30

24. No monies were obtained by me for the payment of the consideration of said property, or for the discharge of mortgages thereon, from Mr. Winter. The money obtained from Prichitt & Company, by pledge as collateral of 608 shares of Texas Company, 8 shares Atlantic Refining Company, preferred, and 10 shares of Union Tank

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Answers to Interrogatories—Also Exhibit C-5

Car, preferred, was my property. Said securities included 50 shares of the Texas Company, which had been given to me by Mr. Winter October 4, 1918.

25. No money was received by me from Mr. Winter for the carrying of the property, except some small amounts paid by him for insurance premiums. He contributed toward the maintenance of the household by depositing checks or cash, from time to time, in my account in the Orange National Bank, but not in connection with the carrying of the property or its use and maintenance.

26. Mr. Winter had no general authority as my agent in the care and control of the property, or in financing the same by mortgage or otherwise. He assisted me and co-operated in such transactions, from time to time, as I requested him.

KATHARINE H. WINTER.

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

Katharine Humes Winter, being duly sworn according to law, upon her oath deposes and says:
I am one of the defendants in the above-entitled cause, and have made the foregoing answers to the 11 interrogatories propounded to me by the complainant. The answers so made by me are true.

KATHARINE H. WINTER.

Subscribed and sworn to before me
at Jersey City, this sixth day of
May, A. D. 1929.

ELSIE B. MACCRACKEN,

Master in Chancery of New Jersey.

SCHEDULE A

Interest on mortgages, taxes and other carrying
charges paid by Katharine Humes Winter.

1924			
May 6	Fidelity Union Trust Co., Interest on mortgage,	\$480.00	10
Nov. 6	Fidelity Union Trust Co., Interest on mortgage,	480.00	
1925			
May 6	Fidelity Union Trust Co., Interest on mortgage,	480.00	
Nov. 6	Fidelity Union Trust Co., Interest on mortgage,	480.00	
1926			
May 12	Fidelity Union Trust Co., Interest on mortgage,	480.00	20
Nov. 3	Fidelity Union Trust Co., Interest on mortgage,	480.00	
1927			
April 8	Fidelity Union Trust Co., Interest on mortgage,	405.33	
Aug. 1	Fidelity Union Title & Mortgage Guaranty Co., Int. on mtg.,	375.00	
Nov. 4	Fidelity Union Title & Mortgage Guaranty Co., Int. on mtg.,	375.00	30
1928			
Feb. 9	Fidelity Union Title & Mortgage Guaranty Co., Int. on mtg.,	375.00	
May 2	Fidelity Union Title & Mortgage Guaranty Co., Int. on mtg.,	375.00	
Aug. 1	Fidelity Union Title & Mortgage Guaranty Co., Int. on mtg.,	375.00	
Nov. 1	Fidelity Union Title & Mortgage Guaranty Co., Int. on mtg.,	375.00	

Schedule A

	1929		
	Feb. 2	Fidelity Union Title & Mortgage Guaranty Co., Int. on mtg.,	375.00
	1928		
10	Jan. 4	Reserve Mortgage Corporation, Int. on mtg.,	37.50
	April 13	Reserve Mortgage Corporation, Int. on mtg.,	37.50
	July 12	Reserve Mortgage Corporation, Int. on mtg.,	37.50
	Feb. 7	Reserve Mortgage Corporation, Int. on mtg.,	67.08
	May 2	Reserve Mortgage Corporation, Int. on mtg.,	112.50
20	Aug. 2	Reserve Mortgage Corporation, Int. on mtg.,	108.00
	Nov. 1	Reserve Mortgage Corporation, Int. on mtg.,	103.50
	1929		
	Feb. 2	Reserve Mortgage Corporation, Int. on mtg.,	99.00
	1925		
	Oct. 17	F. Pring (Catherine Waldron) Int. on mtg.,	225.00
30	1926		
	May 1	C. J. Pring (Catherine Waldron) Int. on mtg.,	225.00
	Oct. 2	Frederick Pring (Catherine Waldron), Int. on mtg.,	225.00
	1927		
	May 2	Frederick Pring, (Catherine Waldron), Int. on mtg.,	225.00
	Oct. 27	Frederick Pring, (Catherine Waldron), Int. on mtg.,	105.00

Schedule A

1928			
April 7	Frederick Pring, (Catherine Waldron), Int. on mtg.,	105.00	
1921			
June 2	City of Orange, N.J. Taxes,	676.50	
Nov. 1	City of Orange, N.J. Taxes,	587.58	10
1922			
Oct. 31	City of Orange, N.J. Taxes,	1354.55	
1923			
Nov. 9	City of Orange, N.J. Taxes, pd. by Fid. Un. Tr.	1262.77	
Nov. 9	City of Orange, N.J. Taxes,	159.52	
1924			
May 28	City of Orange, N.J. Taxes,	669.60	
Ap. 24/25	City of Orange, N.J. Taxes,	74.42	
Apr. 20	City of Orange, N.J. Taxes,	613.37	20
1926			
June 15	City of Orange, N.J. Taxes,	807.17	
1927			
Apr. 8	City of Orange, N.J. Taxes, pd. by Fid. Un. T.& Mtg. Co.	3494.80	
Apr. 8	City of Orange, N.J. Taxes,	238.62	
Nov. 1	City of Orange, N.J. Taxes,	781.75	
1928			
Nov. 17	City of Orange, N.J. Taxes,	791.56	
Feb. 11	City of Orange, N.J. Taxes,	770.27	30
1925			
June 30	George A. Taylor, Fire insurance,	34.13	
July 23	George A. Taylor, Fire insurance,	65.19	
Oct. 12	George A. Taylor, Fire insurance,	36.56	
Nov. 30	George A. Taylor, Fire insurance,	69.38	40

Schedule A

1926		
Jan. 20	George A. Taylor, Fire insurance	16.19
June 5	George A. Taylor, Fire insurance,	32.38
10 June 19/28	George A. Taylor, Fire insurance,	31.50
July 19/28	George A. Taylor, Fire insurance,	69.69
Oct. 30/28	George A. Taylor, Fire insurance,	105.86
Feb. 2/29	George A. Taylor, Fire insurance,	16.19

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Testimony

10 corporation known as the Muller-Fox Brokerage Corporation, and a judgment was obtained. The complainant sued upon the judgment here in New Jersey in the Supreme Court and obtained a judgment here also,—all of which is admitted, except we are to prove the assignment. The judgment is quite a large judgment, \$251,000. The conveyance which we attack was made in September, 1920, and conveys property in Orange.

THE COURT: What is the date of the respective judgments?

20 MR. OCKFORD: The first judgment was recovered in 1924, in an action where suit was started in 1920. The conveyance was just prior to the commencement of the suit after the complainant's claim existed and demand had been made—just prior to the commencement of suit October, 1920. It is a judgment against the defendant Winter, appeals were taken, etc. The title is still in the wife, subject to certain encumbrances, and in addition to the ordinary situation I understand, in fact, it is shown by the pleadings, that the burden is shifted to the wife's grantee, and we claim fraud in the conveyance between the husband and wife. There is no contention that at the time the conveyance was made and executed no money passed. The contention is that part of the money was paid prior, and a part later; that at the time of the conveyance there was no consideration, so that it was a voluntary conveyance. Of

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Testimony

course, the parties have a perfect right to show that it was a real sale between husband and wife and her separate estate.

JUDGE CARRICK: If Your Honor please, the answer admits all the formal allegations with the exception that we put the complainant to the proof of the assignment. This judgment was recovered by the Muller-Fox Brokerage Corporation, which was a company which had a contract to deliver 500 tons of White Java Sugar. The contract was made some time in the summer, I believe in May, and the sugar arrived some time in August, and then after some samples had been taken by the Muller-Fox Company there was a dispute. They had given credit only as to 95 per cent. of the full amount and there was a balance due us of about \$10,000, or 5 per cent. The contract was something like \$250,000. Mr. Winter was a member of a large firm of importers at that time, and it was a case where the sugar was bought at 22 cents, but when it arrived it was after the great boom following the war and the price was on the decline, so that by the time the sugar arrived I think it was 14 or 15 cents, and later on when they rejected the sugar and made a sale of it, I think it was sold for less than 6 cents—5¼ cents. They brought suit against us for the difference, and in that suit they got a judgment, which was taken to the Court of Appeals and affirmed.

Now, we are admitting all the formal

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Charles G. Carluccio—For Complainant—Direct

10 parts, with the exception of the assignment, which we ask them to prove. We say a judgment was obtained in or about the month of May. Of course, there was no claim of any kind that arose after the rejection of the sugar. I will read the 14th section of the answer: (Reads).

MR. OCKFORD: Now, I offer in evidence an exemplified copy of the original judgment obtained in New York.

(Admitted and marked Exhibit C-1.)

MR. OCKFORD: I offer in evidence Assignment of Judgment to the complainant in this action.

20 JUDGE CARRICK: I want you to prove it. I'm not going to ask you to make strict proof of the subscribing witnesses, but at least to connect the complainant in this case with it.

MR. OCKFORD: I will then call the complainant.

CHARLES G. CARLUCCIO, the complainant, sworn in his own behalf, testified as follows:

30 *Direct Examination by Mr. Ockford:*

Q. You reside where, Mr. Carluccio? A. In Hoboken, New Jersey.

Q. And you are an attorney in this state? A. I am.

Q. With office in Hoboken? A. Yes, sir.

Q. You are the complainant in this case? A. I am.

40 Q. I show you a paper and ask you from whom you received that? A. I received this from Garfield & Seligman, my attorneys in New York.

Charles G. Carluccio—For Complainant—Cross

Q. And they represented the Muller-Fox Brokerage Corporation? A. They were substituted as attorneys after Max D. Steuer obtained the judgment in this case in New York, and I received this from them, Garfield & Seligson, 285 Madison Avenue, New York City. 10

MR. OCKFORD: I now offer this assignment in evidence. It is duly acknowledged before a Notary Public, with the County Clerk's certificate endorsed thereon.

(Admitted and marked Exhibit C-2.)

Q. Mr. Carluccio, you brought suit on this judgment in the New Jersey Supreme Court? A. Yes. 20

Q. And recovered a judgment? A. Yes.

MR. OCKFORD: For convenience only, I offer in evidence a statement of the judgment.

(Admitted and marked Exhibit C-3.)

Q. Has any part of this judgment obtained by you in the New Jersey Supreme Court been paid? A. No. 30

Cross-Examination by Judge Carrick:

Q. Mr. Carluccio, wasn't there \$5,000 paid by Mr. Ross? A. Oh, I beg pardon; it wasn't paid to me.

Q. To whom was that paid? A. I think \$5,000 was paid before I got into this case. It was paid to Garfield & Seligson.

Arthur E. Winter—For Complainant—Direct

Q. It was before you began suit in the Supreme Court? A. Yes.

10 MR. OCKFORD: Yes, we gave credit for that \$5,000 from Mr. Ross, or Garfield & Seligson did.

Q. Of course, you gave no consideration for this; you were representing the Muller-Fox Brokerage Corporation? A. Yes.

Q. They are the real beneficial owners, or somebody that they represent that obtained the judgment? A. That's right.

20 MR. OCKFORD: I desire to offer in evidence the interrogatories and the answers to the interrogatories in the case.

(The interrogatories are marked Exhibit C-4, and the answers Exhibit C-5.)

ARTHUR E. WINTER, one of the defendants, sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. Ockford:

30 Q. Where do you live, Mr. Winter? A. In Orange, New Jersey.

Q. What is the street address? A. No. 501 Berkeley Avenue.

Q. How long have you lived there? A. Since May, 1919.

Q. Private residence, is it not? A. Private residence.

Q. And the house is a part of the premises described in the bill of complaint in this case?

40 A. Yes.

Arthur E. Winter—For Complainant—Direct

Q. You are, of course, quite familiar with this Muller-Fox Brokerage Company transaction? A. Very.

Q. The original agreement with your firm and the Muller-Fox Brokerage Company was entered into in the month of May, 1920? A. It was. 10

Q. And in September, 1920, there were telegrams back and forth, were there not, from the Muller-Fox Brokerage Company to Winter, Ross & Co., with respect to this particular contract? A. There were.

Q. Have you here any of the original telegrams, Mr. Winter? A. No.

Q. You have here a copy of the printed record on appeal in New York, have you not? A. I have, yes. 20

Q. And it was agreed, was it not, by both sides, that the printed record would be evidence of any of the documents in that printed record?

JUDGE CARRICK: You are now asking the witness whether that was agreed to. You and I have had no correspondence.

MR. OCKFORD: Well, may I have the printed record? 30

JUDGE CARRICK: If it can be used by both sides.

MR. OCKFORD: It is the most convenient way to refer to it in this printed book.

THE COURT: Do I understand now that it is stipulated now that the printed record of the New York case shall be available to either party in this proceeding? 40

Arthur E. Winter—For Complainant—Direct

10 JUDGE CARRICK: For the purpose of showing the contents of correspondence or telegrams between the parties relating to the Muller-Fox Brokerage Company contract for the purchase of sugar, as if the originals were produced.

THE COURT: And limited to that?

MR. OCKFORD: Yes, excluding the testimony.

Q. Judge Carrick has just handed me the printed copy on appeal, Mr. Winter; you are familiar with this book? You have seen it before?
A. Yes.

20 Q. I call your attention, on page 397 of this printed record, to a copy of a telegram sent your firm by the Muller-Fox Brokerage Company; that is there, is it not? A. Yes.

Q. And you recall that telegram? A. I do.

Q. And your reply to that telegram was a telegram dated September 8, which is found on page 398? A. Yes.

30 MR. OCKFORD: I request the other side to produce the deed, if they have it here.

JUDGE CARRICK: On the call of the complainant I produce a deed made by Arthur Winter to Katharine H. Winter, dated September 11, 1920.

MR. OCKFORD: I offer the deed in evidence.

(Admitted and marked Exhibit C-6.)

40 Q. In September, 1920, at the time this conveyance which is just marked in evidence Exhibit

Arthur E. Winter—For Complainant—Direct

C-6 was made, your firm, of which you were one of the partners, had numerous creditors, I suppose; is that right? A. (Witness pauses).

Q. —besides this Muller-Fox Brokerage Company transaction? A. It always had creditors.

10

Q. Yes, that is a very good answer. Have you yourself ever made any payment on account of the judgment obtained in New York, and subsequently in this state, on the Muller-Fox Brokerage Company transaction? A. I never made any payment, no.

Q. This deed, Mr. Winter, Exhibit C-6, was drawn where; at whose office? A. Drawn in the office of Mr. Colie, in Newark, N. J.

Q. Mr. Runyon Colie? A. Yes.

20

Q. Your attorney at that time? A. For that particular transaction.

Q. That is what I mean; you employed him for this transaction? A. Yes.

Q. And you acknowledged your signature in that office? A. No, Spring Lake, New Jersey.

Q. And when you signed that, Mr. Winter, and acknowledged it, what did you do with it; do you recall? A. Handed it to Mrs. Winter.

30

Q. Where? A. Spring Lake, N. J.

Q. And at that time no money passed? A. Money had passed before.

Q. Well, at the time the deed was handed by you to Mrs. Winter no money passed? A. At that immediate moment, no.

Q. At any time thereafter did you do anything with this deed? A. I took it to Newark and had it recorded for Mrs. Winter.

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Arthur E. Winter—For Complainant—Direct

Q. You yourself did that? A. I took it—my recollection is that I took it to Colie's office and they had it recorded.

Q. And then subsequently you obtained it from Mr. Colie, or his office? A. Either from them
10 or the Register's Office; I don't know which.

Q. At the time this deed was signed by you you received a mortgage of \$10,000, did you not? A. Purchase-money mortgage for Mrs. Winter.

Q. Which was subsequently paid to you? A. Subsequently it was paid off by Mrs. Winter.

Q. You received the money? A. I received the money.

Q. This deed, Mr. Winter, covered the house where you and your wife resided at the time? A.
20 Yes.

Q. And still reside? A. Yes.

Q. And from the time the deed was made there has been no change, has there, so far as your maintaining that as your home and residence? A. I have lived there ever since.

Q. You recall recently, Mr. Winter, answering interrogatories in this cause? A. I do.

Q. There are one or two matters I would like
30 to have you explain here: You recall, with respect to the \$20,000 cash which you say you received September 1, 1920; are you sure of that date? A. Absolutely sure.

Q. And the \$5,000 you received partly in October and partly in December, 1920; you are unable to be more specific with respect to that, I take it? A. I received four thousand and odd dollars in October and the smaller balance to make up the \$35,000 purchase money.

Arthur E. Winter—For Complainant—Direct

Q. You can't give us the date in October of the four thousand and some odd dollars? A. Around October 20th; I don't know exactly.

Q. About October the 20th? A. Yes, sir.

Q. Have you anything here that will enable you to fix the date exactly? A. I'm not certain. I know I had the check voucher there for the last payment for the \$400. 10

Q. Suppose we waive that for the present. The \$10,000 mortgage was paid off and you received the money at the time you and Mrs. Winter executed a new mortgage to Mr. Humes; is that correct? A. Yes.

JUDGE CARRICK: Mrs. Winter hands me the check which is the last payment making up the extra \$5,000. 20

Q. The check now in your hands, just handed me by Judge Carrick, is the check you referred to as being the final payment? A. That is the final payment of December 6, 1920, for \$456.15.

MR. OCKFORD: I offer it.
(Admitted and marked Exhibit C-7.)

Q. A mortgage given by Mrs. Winter and yourself to Mr. Humes on the date of December 27th, 1920, for the sum of \$10,000, produced the money to pay off the mortgage that you held at that time? A. That is correct. 30

Q. Do you recall how that money was paid to you, whether by cash, or check, or how? A. Paid by check—Mrs. Winter's check for \$10,000.

Q. Is that check here? A. That check is here. 40

Arthur E. Winter—For Complainant—Direct

Q. May I see it? A. (Judge Carrick produces check.)

Q. Judge Carrick hands me this check; please look at it and see if that's the check. A. That's the check.

10

JUDGE CARRICK (addressing the witness): You said it was Mrs. Winter's check.

A. Yes, Mrs. Winter's check.

JUDGE CARRICK: Well, look at it.

A. Oh, this is a check made out by A. L. Humes to Katharine Humes Winter, my wife, and endorsed over by her to me and I, in turn, endorsed it over to Winter, Ross & Co., my firm. I made a mistake in saying she paid the check.

20

MR. OCKFORD: I offer that.
(Admitted and marked Exhibit C-8.)

Q. Mr. Humes is in Europe at the present time, is he not? A. He is, yes.

Q. Do you know when he is expected to return? A. Not until the very end of the summer.

30

Q. Do you recall, Mr. Winter, the purpose of the execution of two mortgages to Mr. Humes for the same amount, one made by you and the other made by Mrs. Winter and yourself? A. I know nothing of that sort.

Q. You don't recall executing a mortgage separately, as well as one jointly? A. No.

Q. You had nothing yourself to do with paying back Mr. Humes, did you? A. Paying back Mr. Humes?

40

Arthur E. Winter—For Complainant—Direct

Q. Paying off the mortgage given to Mr. Humes? A. No.

Q. You know that it was eventually paid off and cancelled, do you not? A. Oh, yes, I know it was.

Q. But you didn't supply the money to pay it off? A. No, I did not. 10

Q. After the conveyance of the property by yourself to your wife in December, 1920, what further, if any, charge did you take of the property so far as its management, financing it and carrying it? A. I paid whatever amounts I could towards the running expenses of the family, and that's all.

Q. You had no definite agreement with Mrs. Winter about that? A. No definite agreement about what? 20

Q. You had no definite agreement with Mrs. Winter as to what sum you were to contribute for the use of the premises for yourself or your family? A. No agreement whatever.

Q. And this transaction whereby you conveyed the property to Mrs. Winter,—there never was any written contract about it between you and her? A. Merely a verbal agreement.

Q. And that agreement was first discussed between you and her in September, was it? A. No, prior to that. 30

Q. August? A. Latter part of August.

Q. Do you recall just what was said when you first talked about this matter? A. Yes.

Q. What was said? A. I can't recall the exact words, but if you will let me repeat it in my own way—

Q. Yes. A. I told Mrs. Winter that I wanted 40

Arthur E. Winter—For Complainant—Direct

10 to raise some ready cash, and I have my house free and clear, and I proposed to mortgage the house and get a mortgage loan; and, in reply to that, she suggested that instead of borrowing the money on the house she purchase the house from me. And I said, "That's all right," and I agreed to sell it to her for \$35,000, which is the price I paid for the house, plus the improvements on it, at that time.

Q. Was there anything said about giving her a mortgage instead of a deed? A. Nothing was said about a mortgage at the time at all.

20 Q. And at the time a conveyance was drawn up and signed by you at Mr. Colie's office, do you recall who in that office took charge of the matter? A. I couldn't. I couldn't recall that at all now.

Q. You simply went there and told them the kind of a deed you wanted. Between the time of your first talk and the time of the deed there was no informal memorandum in writing or agreement? A. No.

30 Q. And at the time you received the \$20,000 you gave no receipt for that? A. No, I gave no receipt.

Q. This \$20,000 on September 1st, 1920, was received by you from a broker's house in New York, wasn't it? A. It was.

Q. And the name of that concern? A. Pritchett & Co.

Q. They are out of business now? A. Yes.

Q. Do you recall whether the money was turned over to you by a check of that company? A. Pritchett & Co. made out a check to my order.

40 Q. And that check was deposited by you to

Arthur E. Winter—For Complainant—Direct

your firm account? A. It was endorsed over by me to my firm and deposited by my firm.

Q. In the National City Bank? A. In the National City Bank. That is my recollection.

Q. How is it you are so positive of this date of September 1st; is there anything here that fixes that, any document? A. Yes. 10

Q. What is it; let's have it. A. The receipt of Pritchett & Company for the securities.

JUDGE CARRICK: I produce, on call of the complainant, receipt of Pritchett & Company.

Q. The paper in your hand produced by Judge Carrick is what? A. Is the receipt from Pritchett & Company, New York, dated September 1st, 1912, in which they— 20

THE COURT: 1912?

A. 1920—in which they acknowledge receipt from A. E. Winter for K. H. Winter account of 608 shares of Texas Oil Company stock, giving the various numbers, eight shares Atlantic Refining Preferred, with numbers, and ten shares of Union Tank Cars Preferred, giving the numbers. 30

MR. OCKFORD: I offer it.
(Admitted and marked Exhibit C-9.)

A. There is something else.

Q. Go ahead. A. There is a notice from Pritchett & Company, dated September the 1st, that they debited me \$20,000 (Document is produced by Judge Carrick and handed the witness). This document is their notice of \$20,000. 40

Arthur E. Winter—For Complainant—Direct

MR. OCKFORD: I offer it in evidence.
(Admitted and marked Exhibit C-10.)

Q. The certificates of stock referred to in Exhibit C-9 were delivered by you to Pritchett & Company? A. They were.

Q. And from Pritchett & Company you received the receipt Exhibit C-9, and on the same day you received a check to your order for \$20,000? A. Yes.

Q. Where did you get the certificate of stock? A. Mrs. Winter gave it to me.

Q. On the same day? A. That I couldn't say positively; it might have been the day before.

Q. Do you know where she got it from? A. In Orange—she had them in Orange.

Q. At your home? A. At home in the safe.

Q. Did you take charge of redeeming this stock from Pritchett & Company? A. No, I did not.

Q. You know that was done? A. I do.

Q. And do you know when that was done? A. I can't say positively, but it was within a very short time afterwards.

Q. At the time you received these certificates of stock from Mrs. Winter nothing was said to her at that time as to what you were going to do with the stock? A. Yes.

Q. What did you tell her? A. I told her I was going to borrow \$20,000 from Pritchett & Company and take that money as part payment for the house.

Q. And she said "All right"? A. Yes.

Q. And she had these certificates of stock in the safe, or your safe—the safe used commonly? A. Yes.

Arthur E. Winter—For Complainant—Direct

Q. Did any of these certificates of stock ever belong to you? A. Yes, they did.

Q. Which ones? A. Atlantic Refining Preferred and the Union Tank Car Preferred.

Q. None of the Texas Oil? A. None of the Texas Oil belonged to me. 10

Q. I show you a bank memorandum, showing certification of check, also certified check, handed to me by your counsel; just explain briefly—

A. This, of course, was a transaction that was carried on by Mrs. Winter and I only know from my knowledge of what was going on, that Mrs. Winter arranged a loan of \$26,000 with the Orange National Bank against the Texas Company stock held by Pritchett & Company, and they got Mrs. Winter to make out a check—that is, the bank got Mrs. Winter to sign a check which they certified,—so that they could get the check certified. 20

Q. The amount of the check is what? A. The amount of the check is \$20,000 and this is simply their form of notification that they had certified it.

Q. What is the date of the transaction? A. September 15, 1920. 30

Q. And the bank took up the stock and then held the stock as security for the money advanced for the \$26,000? A. Yes.

Q. And eventually that was paid off at the bank? A. No.

Q. At any rate, you never paid it off? A. I never paid any of it off, no. 40

Arthur E. Winter—For Complainant—Direct

MR. OCKFORD: I offer these two papers as one exhibit, the check with the certification.

(Admitted and marked Exhibit C-11.)

10 Q. Mr. Winter, you didn't negotiate the loan with the Orange Bank, did you, for your wife?
A. I did not.

Q. Had nothing to do with that? A. No.

Q. There wasn't any particular reason for borrowing the money on September 1st of Pritchett & Company and then paying them off September 15th, rather than borrowing the money from the bank in the first instance? A. I didn't have any bank account with the Orange National Bank myself; I never have had an account there, and I had business dealings regularly with Pritchett & Company and it was the first place I thought of going to get money on the securities, and afterwards Mrs. Winter said she would rather have the loan with the Orange National Bank, and she arranged to make the loan, particularly as she wanted more money on the securities.

20

Q. That was around September 15th, 1920?

A. Yes.

30 Q. You had no account in Orange at that time yourself? A. I never had any account in the Orange Bank.

Q. At that time did you have any account with the National City Bank? A. I never had a private bank account in my life.

Q. Do I understand, Mr. Winter, that at the time of the conveyance there were no mortgages on the property? A. There were not.

40 Q. The mortgages placed upon the property

Arthur E. Winter—For Complainant—Direct

subsequent to the conveyance by you to Mrs. Winter from time to time were negotiated by you for Mrs. Winter? A. That is correct.

Q. And did you yourself receive any of the moneys out of any of those mortgages from your brother-in-law? A. Never a cent. 10

Q. Well, prior to the commencement of the suit in New Jersey, Mr. Winter, you received a letter, didn't you, requesting that you pay the claim; do you recall that? A. I don't recall it now.

Q. You recall the commencement of the suit in New Jersey, do you not? A. Very indistinctly.

Q. You paid no attention to it? A. Paid no attention to it. 20

Q. After the judgment was procured, do you recall receiving a letter advising you of the judgment and requesting information as to whether you would pay it or not? A. I have a dim recollection of it. 20

Q. Have you that letter here? A. No.

Q. You remember it, though? A. I have a dim recollection. I couldn't say positively that I received it.

Q. Maybe a copy would refresh your recollection. At any rate, you didn't answer the letter? A. Probably not. 30

Q. Do you recall having any transaction with Pritchitt & Company with reference to this same Texas Oil stock in 1921? A. No.

Q. This stock that you turned over to Pritchett & Company September 1st, 1920, was endorsed in blank, I suppose, by Mrs. Winter? A. I can't answer that positively, but presumably it was. I can't say, because brokers usually require that 40

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it shall be before they will loan any money on it.

Q. And the other shares of stock that belonged to her were endorsed in blank also? A. That I couldn't say.

10 *Cross-Examination by Judge Carrick:*

Q. Mr. Winter, the firm of Winter, Ross & Co. was composed of whom besides yourself? A. Mr. Frank B. Ross.

Q. When was that firm formed? A. On January 1st, 1919.

Q. Now, prior to January 1st, 1919, what had been your business? A. My business? I was a partner of the firm of Winter, Son & Company, in New York City, importers, bankers.

20 Q. And when you formed this partnership on the first of January, 1919, with Mr. Ross, what was the contribution of the two partners toward the firm account? A. I can't give it to you exactly, but during the year 1919 I contributed about \$250,000, and Mr. Ross contributed about the same amount.

30 Q. And you carried on the same kind of business, that is, it was an importing business that you had conducted when you were in partnership with your father? A. Exactly the same.

Q. Mr. Ross had been in a similar business for several years? A. He had, yes.

Q. And was the year 1919 a profitable year or the reverse? A. Very profitable.

Q. Will you state approximately what the profits of your firm were in 1919? A. Over \$500,000.

40 Q. Now, when did the trouble in the importing business become acute? A. I can't answer for all importing businesses.

Q. I mean the business you did. A. It started

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in about September, 1920, and got worse and worse as the years went on.

Q. And this particular contract that you had with the Muller-Fox Brokerage Company related to a consignment of 500 tons of Java sugar? A. Not consignment, a shipment of 500 tons of Java white sugar from Java. 10

Q. And that you had purchased in Java by cable? A. Purchased in Java by cable.

Q. What was the price that was contracted for by the Muller-Fox Brokerage Company? A. Winter, Ross & Co. sold it for 22 cents a pound, plus freight, and insurance, in New York.

Q. And it arrived in August of that year? A. The steamer arrived on the 28th day of August, 1920. 20

Q. What was the condition of the sugar market at that time? A. From 13½ to 14 cents a pound.

Q. There has been a drop of 8 cents a pound? A. From 8 to 8½ cents a pound drop.

Q. Now, what were the terms of the sale to Muller-Fox Brokerage Company? A. The terms were that the buyers, the Muller-Fox Brokerage Company, should furnish the sellers, Winter, Ross & Co. with a confirmed banker's letter of credit for 100 per cent. of the invoice amount. 30

Q. Did they do that? A. No.

Q. What did they give? A. They gave a letter of credit for 95 per cent. of the invoice.

Q. And that 95 per cent. was accepted by you? A. Eventually, after several protests.

Q. You permitted them to take the sugar on the payment of 95 per cent? A. Yes. When the sugar was finally weighed up and the final bills made out, it showed a loss to Winter, Ross & Co. of over \$10,000. 40

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Q. And you sent a bill for that amount? A. We sent a bill for that amount.

10 Q. I show you what purports to be a copy of a letter written upon your letterhead to the Muller-Fox Brokerage Company of Chicago, Illinois, under date of September 17th, 1920, shown on pages 402 and 403 of the printed book on appeal in the New York case; is that a copy of a letter that you wrote to them at that time? A. That is a copy of the letter.

JUDGE CARRICK: I think I had better read that, Your Honor:

September 17th, 1920.

The Muller-Fox Brokerage Co.

20 Chicago, Illinois.

Dear Sirs:

Referring to contract of May 28th, 1920, thru Jas. S. Connell & Son, we hand you enclosed final invoice in duplicate, dated September 15th, 1920, covering 5008 bags of Java White Sugar ex SS "West Calumb," showing a balance due us of \$10,266.96, for which please let us have your check promptly.

30 There is a total shortage from the steamer of 56 bags, and since our sale to you was "C. I. F. New York" and since you hold the bill of lading, and have made Customs entry, it is your duty to lodge claim immediately against the steamer for the shortage, basing your claim on the average weights.

40 For your information, we point out that according to report received from our representative on the pier, the steamer has 56 bags of Sugar, which, according to their

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statement, is quite the equal of your Sugar in quality and weight of the bags. The mark, however is entirely different. It frequently occurs that in delivering Sugar from the steamer, a certain number of bags will be wrongly delivered, and therefore, it happens that there is a shortage on one mark which is made up by a surplus on another. So far as we are concerned, we are quite willing if you accept the 56 bags on the dock against your shortage, as this would be our policy were we handling the claim upon the steamer for our own account. 10

However, being without authority, we have neither accepted nor declined this Sugar, and the matter is entirely up to you. 20

You will note from our invoice that we have taken the average weight for the 56 bags short delivered, calculating upon the actual outturn of the lots from which the shortage occurred.

Yours very truly,
WINTER, ROSS & CO.

Q. Now, I call your attention to page 404 of the printed record on appeal in the New York case, and ask you if that is a copy of the invoice which was sent to the Muller-Fox Brokerage Corporation, and included in the letter which I have just read? A. It is. 30

MR. OCKFORD: What is the date of that?

JUDGE CARRICK: That is dated September 15, 1920, and they refer to it in the 10

Arthur E. Winter—For Complainant—Cross

letter of September 17, 1920, as of the date of September 15, 1920.

10 Q. I call your attention to a copy of a telegram under date of September 30, 1920, which is shown in the printed book on appeal in the New York case, and ask you whether that is a copy of the telegram sent by you on that date to the Muller-Fox Brokerage Corporation of Chicago? A. It is.

JUDGE CARRICK: I will read that:

September 30, 1920.

The Muller-Fox Brokerage Co.
326 West Madison St.
Chicago, Illinois.

20 Referring our final invoice September fifteenth consider you have now had sufficient time check figures and therefore ask you remit balance due immediately in accordance with your telegram August twenty-seventh.

WINTER, ROSS & COMPANY.

30 Q. I call your attention to a copy of a letter under date of September 30, 1920, from Winter, Ross & Company to the Muller-Fox Brokerage Co., shown on page 400 of the printed book on appeal of the New York case; is that a copy of a letter written by you to the Muller-Fox Brokerage Co.? A. It is.

JUDGE CARRICK: I will read that:

September 30, 1920.

The Muller-Fox Brokerage Co.
326 W. Madison Street, Chicago, Ills.

40 Dear Sirs:

We confirm telegram as per copy en-

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closed, in which we called your attention to our final invoice dated September 15th, 1920, for the Java Sugar recently delivered to you, showing balance due us of \$10,266.96.

We consider that you have now had sufficient time to check the weights and figures on this invoice, and also satisfy yourselves on any other questions which may have arisen in your minds. We therefore asked you to remit the total amount due immediately, and trust remittance has by this time gone forward. 10

Yours very truly,
WINTER, ROSS & COMPANY. 20

Q. I call your attention to a copy of a letter from the Muller-Fox Brokerage Company, addressed to Winter, Ross & Co. under date of October 1st, 1920, which is printed on page 405 of the book on appeal in the New York case, and ask you if that is a copy of a letter which was sent by the Muller-Fox Brokerage Company to you.
A. It is.

JUDGE CARRICK: I will read that: 30
October 1st, 1920.

Winter, Ross & Co.,
50 Broad Street, New York, N. Y.
Gentlemen:

With reference to your letter of September 17th enclosing final invoice in duplicate No. 2958, covering delivery of 5,008 bags Java White Sugar, ex Steamer West Calumb for \$10,266.96, beg to advise that we are returning this invoice to you herewith 40
for the following reasons:

Arthur E. Winter—For Complainant—Cross

10 Samples just received from our representatives show lot marked BSK, 2,400 Bags, is not White Java Sugars and will not be considered by us as a delivery against your contract and by your failure to have delivered to us this quantity within the contract period, are holding subject to your orders the 2,400 Bags in question.

20 With reference to the 56 bags short on steamer, note that there were 56 bags of other sugars with other marks and if they grade according to the original specifications in the contract and are approved by us after samples are submitted, we will accept them in lieu of this shortage. Otherwise we will also have to refuse to entertain payment of the 56 bags short, due to the fact that the freight on this lot had been prepaid in Java. Therefore, any shortage on the shipment is a matter between Winter Ross and the steamship company.

Kindly advise us what disposition you desire made of the bags in question, and oblige

30 Yours very truly,
MULLER-FOX BROKERAGE CO.

Q. Now, after the receipt of that letter of October 1st, 1920, which I presume reached you a day or two later, what did you next hear from the Muller-Fox Brokerage Co. in regard to the sugar? A. About the middle of October, I think about the 15th, representatives of the Muller-Fox Brokerage Co. came in my office and handed me a warehouse receipt for a certain number of bags

40

Arthur E. Winter—For Complainant—Cross

of sugar, which they said was the same sugar which we had sold them ex SS West Calumb, and they demanded that we take it back and give them a check for the full purchase price.

Q. What did you say to them? A. I rather laughed and told them I wouldn't do anything of the kind. 10

Q. What was the price of sugar at that time? A. Approximately 10 cents a pound.

Q. When did you next hear from them? A. We were served with a summons and complaint, some time in October. My recollection is that it was around the 20th of October.

Q. And the suit proceeded until judgment was entered in 1924? A. That is my recollection. 20

Q. Now, after the suit was begun by the Muller-Fox Brokerage Co. against Winter, Ross & Co. did Winter, Ross & Co. go on with the business? A. Oh yes, for three years.

Q. And during that time were there any further contributions made to the resources of Winter, Ross & Co. besides this \$35,000 that you put in? A. Yes, there were several contributions. I hardly know what you mean by "contributions."

Q. Well, loans. A. Loans? Yes, we borrowed money from various people wherever we could. 30

Q. In December, 1920, did you borrow any money from your father? A. Yes, a large amount.

Q. How much? A. My recollection is that it was \$150,000.

Q. And you assigned accounts to him? A. Assigned various accounts.

Q. And you also had loans with the National City Bank and other banks? A. Yes. 40

Arthur E. Winter—For Complainant—Re-Direct

Q. A good many of these contracts you had outstanding were dealings with rubber? A. Yes.

Q. What was the condition of the rubber market at that time? A. In very bad shape. The market had gone from 50 odd cents a pound to 30.

10 Q. Under those conditions you and Mr. Ross went on until 1923? A. Yes.

Q. And then you dissolved? A. Yes.

Q. At the time this conveyance was made did Mrs. Winter know about the arrangement concerned with the subject matter of this suit? A. It is very difficult to say that, because we had no balance sheet made out just at that time, but at the end of December we started to get our accounts into shape, but at that time we were amply solvent. Our worst losses were between September 1st and the 31st of December.

20

Q. The closing months of the year were the very worst you had known for years? A. Yes.

Re-Direct Examination by Mr. Ockford:

Q. The dispute with the Muller-Fox Brokerage Co. as to whether they would or wouldn't take the shipment arose as early as September 9th, in which they said in a telegram that they were going to hold it for your account? A. The first intimation we had was a telegram received September 8th, saying that one-half of the lot was not up to grade, or 2,400 bags.

30

Q. Perhaps you can find that more readily than I. This is the telegram of September 8th. A. September 7th is the date; received September 8th.

Q. But the telegram dated September 7th, and received by you September 8th, was the first

40

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breach between you? A. I would say that the first intimation we had that there was anything wrong with the quality of the sugar.

Q. Prior to September 8th you had no argument on the subject? A. The samples hadn't been drawn. 10

Q. And this telegram of September 8th reads as follows:

Have just received sample of Java sugar which you took payment of against our letter credit stop our contract calls for white Java sugar and one lot containing twenty-four hundred bags stipulated as superior head sugar marked BSK is only equal to Turbinado sugar stop upon arrival of sugars at warehouse will have samples drawn by public sampler and if sugars show only equal to sample drawn from boat will be forced to reject same stop pending sampling will hold sugar for your account until grading approved stop are willing to arbitrate in Newyork kindly acknowledge 20

Prior to that date, Mr. Winter, the price of sugar had been going steadily down, had it not? A. Sugar started to go down in June or July very shortly after we had sold it. 30

Q. And from July down to September the price had been on the decline? A. On the decline.

Q. No agreement to arbitrate was ever entered into? A. No.

Q. Now, you say, Mr. Winter, that in September the condition of your firm's business was better than in December? A. Very much. 40

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Direct*

Q. In December it was all right; that is, it was solvent and showed a good margin; is that right? A. Right.

Q. And in 1919 you made large profits? A. Very large profits.

10 Q. But about September 1st, 1920, you were hard pressed for cash, weren't you? A. Yes.

Q. And that is why you raised this \$20,000? A. That is why I sold my house to Mrs. Winter, to get the cash.

Q. You wanted ready cash? A. Yes.

Q. Your share of the profits for 1919 were drawn, were they, by you? A. No.

Q. What became of them? A. Left in the business.

20 Q. Can you give us any idea of what your withdrawals were, approximately, in the year 1919? A. Approximately \$30,000.

Q. And the September prior thereto they had been about the same amount? A. 1919 was the first year of the business.

Q. But prior to that time you had a very considerable income right along, had you not? A. I had.

30 Q. And in 1919 you actually withdrew about \$30,000? A. That is my recollection.

(Mrs.) KATHARINE H. WINTER, sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. Ockford:

Q. Mrs. Winter, can you tell us when you first received this deed, Exhibit C-6? A. You mean exactly?

40 Q. Oh, approximately, as near as you can tell us. A. September 11th.

Q. From whom? A. Mr. Winter.

*Mrs. Katharine H. Winter—For Complainant—
Cross*

Q. I am speaking now of the physical paper; you actually had this in your hand on the day it was signed? A. I presume so; I signed it.

Q. You didn't sign any yourself? A. The deed? Yes, I presume I did. 10

Q. You are not very sure? A. Of course, I had it in my hand.

Q. What did you do with it? Whom did you give it to to take care of it? A. I kept all my papers in my safe in my house.

Q. The deed was registered; you know that? A. Yes.

Q. Whom did you leave that to? A. Mr. Colie.

Q. Mr. Runyon Colie? A. I don't know his name. 20

Q. And where were you when this deed came into your possession, at your home or where? A. I presume I was; I don't know where else I could have been. I was either in Spring Lake or Newark.

Q. You are not sure about that. At the time you received this deed no money passed? A. No. 30

Cross-Examination by Judge Carrick:

Q. Mrs. Winter, during the summer of 1920—during August and a portion of September—where were you living? A. Spring Lake, New Jersey.

Q. And whose home was that? A. My mother's.

Q. Were you there at the time of the deed on September 11th? A. Yes. 40

*Mrs. Katharine H. Winter—For Complainant—
Cross*

Q. Had you been to see Mr. Colie about the deed prior to that time? A. Yes.

Q. And prior to that time arrangements had been made by Pritchett & Company to turn over
10 \$20,000 on the security of your stock? A. Yes.

Q. Did you pay the remaining amount of \$5,000? A. I did.

Q. And subsequently, a purchase-money mortgage for \$10,000 which had been given by Mr. Winter was paid off through some transaction you had with your brother? A. Yes.

Q. When was it that you first heard from Mr. Winter that he proposed mortgaging or selling the home in Orange? A. Some time in August.
20

MR. OCKFORD: This is testimony on behalf of the defendant. I don't think Judge Carrick should lead until there is some necessity for it.

THE COURT: That is hardly leading. You mean that she hasn't said anything yet about giving the mortgage?

MR. OCKFORD: That's it exactly. As long as it is cross-examination I have no
30 objection to it.

JUDGE CARRICK: Question withdrawn.

Q. Tell us, Mrs. Winter, when you first heard of any transfer or mortgaging of the house in Orange where you were living. A. In August Mr. Winter spoke of mortgaging the house and I objected to that, and I said, "I can buy it if I had the opportunity," and he agreed to it, as he
40 wanted the cash.

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

Re-Direct Examination by Mr. Ockford:

Q. Did he tell you why he wanted cash at that particular time? A. No; he said he needed cash. I understood that a great many of their things were tied up and they needed cash. 10

Q. Was there ever any agreement prepared, in writing, between you and your husband, respecting this transaction? A. No, not at all.

Q. And who paid Mr. Colie for the deed? A. That I do not know.

Q. Well, you didn't, did you? A. No.

Q. Has Mr. Colie ever acted as your attorney? A. We had no attorney at all.

Q. Your brother in New York is an attorney? A. Yes. 20

Q. Prominent attorney in New York City? A. Yes. He probably suggested Mr. Colie, but I can't say positively that he did.

Q. At any rate, you rather look to your brother for advice? A. Yes.

Q. When you turned over these certificates of stock on the first of September to Mr. Winter, you took no receipt for the stock? The stock was in the safe at home? A. It was. 30

Q. Do you recall whether those shares of stock were endorsed in blank? A. No, I do not.

Q. Where are those shares of stock now? A. In the Orange National Bank.

Q. About the middle of September, on the 15th of September, did you personally negotiate a loan with the Orange National Bank? A. I wrote a letter to Mr. Holmes, a personal friend of mine, Vice-President of the bank, and he said he would be very glad to arrange that. 40

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

Q. The purpose of the loan was to secure some additional funds? A. Well, to pay off Pritchett & Company and to get more money, as I had to pay \$5,000.

10 Q. And you gave Mr. Winter the cash at that time? A. Yes.

Q. Did you personally go to the Orange National Bank? A. I wrote Mr. Holmes a letter. I don't remember whether I went there or not. I think I must have gone there and taken the certificates.

Q. You had an account in that bank for a long time, hadn't you? A. I had an account there for a year or two; before that I had an account in another bank.

20 Q. Prior to September 15th was there any talk between Mr. Winter and yourself as to the possibility of raising the money at the Orange National Bank? A. I said I would prefer to have it in the bank because I didn't like to have things in a broker's office.

Q. Was that the time you gave him the certificates of stock? A. No, it was not. I was at Spring Lake and that was arranged later.

30 Q. At the time you delivered the shares of stock to Mr. Winter did he tell you what he was going to do with that stock? A. Of course; take it to Pritchett & Company to get the money.

Q. Did you know Pritchett & Company? A. I didn't know them personally; I knew who they were.

Q. Did you ever have any business with them? A. No.

40 Q. You knew them by hearing your husband speak of them? A. Yes.

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

Q. Did you have an account with Pritchett & Company? A. No, Pritchett & Company didn't take accounts of women at that time.

Q. After September 15th did you give Mr. Winter any money besides this check? A. Yes, 10
I gave him another check in October.

Q. You haven't that check? A. No.

Q. Do you recall the amount of it? A. Over \$4,000—four thousand and some dollars; I don't remember now.

Q. And that check was drawn against moneys that were obtained on this loan? A. Yes.

Q. Did you arrange with your brother, Mr. Augustine L. Humes, for a loan placed December, 1920? A. I did. 20

Q. Did you have anything to do with that transaction besides endorsing over the check you received? A. That is all. I spoke to him.

Q. After you took title to this property there wasn't any change, was there, in managing the property and taking care of it and paying taxes? A. I paid all the taxes.

Q. You attended to that personally? A. I signed the checks, if that is what you mean. 30

Q. Was the money supplied by your husband? A. The money supplied by my husband? No.

Q. Did your husband pay the insurance premiums? A. He paid one or two small ones on it, and that's all.

Q. Of course, he has paid no rent to you for the use of the property? A. No.

Q. What did your family consist of? A. I have two children, a son and a daughter.

Q. Both of age? A. 20 and 21. 40

Q. Both in college? A. No, they're not.

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

- Q. Are they home? A. Yes, they live home.
- Q. Who represented you and who had charge, Mrs. Winter, of the negotiations whereby you and your husband executed mortgages to the Fidelity Union Trust Company? A. Who represented me?
- 10 Q. Who took charge of your business affairs in connection with this mortgage? A. Mr. Winter helped me handle it; I took charge of most of it.
- Q. Did you have any attorney in this matter? A. No.
- Q. Who is Katharine Waldron? A. I have no idea.
- 20 Q. You recall a mortgage to Katharine Waldron for \$7,500, April 9, 1925? A. Yes.
- Q. You have no idea who she is? A. No; I got that mortgage through a real estate agent.
- Q. Who was the agent? A. Edward P. Hamilton & Co.
- Q. Edward P. Hamilton & Co.? A. Yes.
- Q. Orange? A. Yes.
- Q. The title to the premises in question is still in your name? A. Yes.
- 30 Q. The certificates of the Atlantic Refining and Union Tank still with the Orange National Bank? A. No, I didn't send those to the Orange National Bank; it wasn't necessary.
- Q. They were returned to you? A. Yes.
- Q. Where are they now? A. Sold.
- Q. Do you recall at the time they were given by you to your husband, November 1st, 1920, how they were endorsed? A. No, they weren't given me then; they were given me as a Christmas
- 40 present.

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

Q. I mean at the time you turned them over to your husband to go and borrow money on?

A. Oh, I don't remember.

Q. Do you remember your name appearing on the back? A. I don't, no. 10

Q. I think I asked you before: Was the Texas Oil stock endorsed in blank by you? A. I don't know; I presume it was. That's the usual form.

Q. Was a part of that stock turned over to you some time before by your husband? A. You mean the Texas? No, he never turned any of it over to me.

Q. In answer to interrogatory No. 24, you say: "Said securities included 50 shares of the Texas Company, which had been given to me by Mr. Winter." A. Yes, he gave me that as a wedding anniversary present in 1918. 20

Q. And you don't recall the endorsement on that certificate? A. I don't. It never belonged to him; he bought it and gave it to me.

Q. It was always in your name? A. It was always in my name.

Q. The mortgage given by you to your brother, Mr. Humes, was prepared by some attorney, was it not? A. I presume so. 30

Q. Do you recall where those papers were drawn—where that transaction took place? A. No, I don't. I lived at Spring Lake and it may have been there. I don't remember at all.

Q. Did you have any other transaction with your brother of any kind? A. No.

Q. Do you recall where the money came from to discharge that mortgage? A. Oh, yes.

Q. Where? A. Fidelity Union Trust Company. 40

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

Q. Who was the attorney who represented you in that matter? A. I had no attorney.

Q. And you left it to the Trust Company? A. Yes.

10 Q. This mortgage has been paid off, has it? A. Yes.

Q. Where did the money come from? A. Came from the Fidelity. I think it came from the Fidelity Union Trust Company, or the Fidelity Title—

Q. Fidelity Union Title & Mortgage Guaranty Co.? A. That's it.

20 Q. Your transaction with respect to the Waldron mortgage was apparently had with this real estate office; is that right? A. No, not entirely. I think there was an attorney there on the other side by the name of—I can't remember his name. (Witness pauses.) No, I don't remember his name.

Q. Do you remember where you paid the interest on that Waldron mortgage while it was in force? A. Where I paid it?

30 Q. Yes. A. I sent checks to Mr. Frederick Quinn.

Q. Where is he? A. Lives in Orange.

Q. Attorney or real estate? A. Neither.

Q. How did you come to send it there? A. His son was in a real estate office. I don't exactly understand that. The mortgage was gotten from Quinn I think, and it was put in that name for some reason or other; I never knew.

Q. At any rate, you paid the interest to Mr. Quinn? A. Yes.

40 Q. And the mortgage was paid off and it was paid to Mr. Frederick Quinn? A. Yes.

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

Q. Do you know what became of the check for \$4,020? A. I didn't have the checks.

Q. Where did you keep these shares of the Texas stock before September 1st, 1920? A. In our safe in the house. 10

Q. For how long a period of time prior to that had they been there? A. Ever since I bought them.

Q. And you never raised money on them before? A. No.

Q. The other shares of stock that your husband had given you had been in the safe from the time—— A. He gave it to me.

Q. ——until the time you left on September 1st? A. Yes. 20

Q. Who suggested, do you recall, the preparation of the deed on September 11th? In other words, how did it happen that this deed was prepared on this particular date rather than on September 1st? A. I don't remember that.

Q. Who first spoke to you about the deed?

THE COURT: About having it prepared?

Q. Yes, about having the deed prepared? A. I don't remember. 30

Q. Do you know how it came to be prepared and signed on that particular day? A. No, I don't.

Q. ——rather than some other time? A. I do not know. I guess I came back from Spring Lake to Newark to have it done. I lived there that summer and I came up to Mr. Colie to have him prepare it. That was the day I came up and I suppose it happened on that day. 40

*Mrs. Katharine H. Winter—For Complainant—
Re-Direct*

Q. Had you been to Mr. Colie's office prior to that time? A. No, not that I know of.

10 Q. What, if anything, was said by you to your husband or by him to you between September 1st and September 11th in respect to preparing the deed? A. I can't remember what was said.

Q. Was there anything said? A. I don't remember, no, that anything was said.

Q. What was said, if anything, about the deed on September 1st when you turned this stock over? A. I don't remember what was said. I simply know he deeded the house and that's all.

20 Q. You never asked him for it? A. I presume my brother asked him for it and arranged for me to go up. He is very careful about those things.

Q. Did your brother know about this transaction on September 1st? A. Oh yes.

Q. When had you spoken to him about it? A. I don't know when I had spoken to him. He lives right next door to us in Spring Lake.

30 Q. What, if anything, did your brother have to do with it? A. Nothing at all, only I think he suggested Mr. Colie as a good lawyer.

Q. And then Mr. Winter went to Mr. Colie's office, so far as you know? A. I don't know what arrangement was made except to go there. That's all I know.

Q. Who asked you to go there to Colie's office? A. Nobody asked me to go, only the arrangement was made for me to go there that day, and I went.

40 Q. Do you recall this deed being prepared and signed? A. Yes.

Harold E. Lapp—For Complainant—Direct

- Q. And you signed the mortgage for \$10,000?
 A. Yes.
- Q. And that is all that happened? A. That is all that happened.
- Q. And your brother wasn't present? A. No.
- Q. Do you remember which one it was of the Colies that was present? A. No, I don't. 10
- Q. Was it the elder man? A. Young man.
- Q. And then you went back to Spring Lake?
 A. I went back to Spring Lake.
- Q. And you had been there all summer? A. Yes.
- Q. No particular reason why September 11th was the day? A. No reason that I know of.

HAROLD E. LAPP sworn on behalf of the complainant, testified as follows: 20

Direct Examination by Mr. Ockford:

- Q. Mr. Lapp, you are here in response to a subpoena from the Texas Company, are you? A. Right.
- Q. Have you produced the record in the Humes account? A. Account of Katharine H. Winter.
- Q. These are the original records? A. Those are the originals. 30
- Q. You have photostatic copies? A. Yes.
- Q. This is the stock ledger? A. That's right.
- Q. Let Judge Carrick see it; probably we can agree on it. This is a photostat copy of the original record which you have here; is this the stock book or stock ledger? A. Stock ledger of the Texas Company. The first sheets are of the Texas Company and the other sheets are the Texas Corporation. 40

Harold E. Lapp—For Complainant—Direct

JUDGE CARRICK: The same corporation but a different name?

A. It is really a continuous record.

10

MR. OCKFORD: This is the original and that is the original and this is a photostat copy. I offer the record in evidence, asking leave to substitute a photostat copy for the original, because it shows the transfers of this Texas stock that has been referred to in the testimony. Here is Pritchett & Co., and undoubtedly the number of shares correspond, and it shows what was done with the stock.

20

By Judge Carrick:

Q. When is this shown to have been transferred? A. August 19, 1921.

JUDGE CARRICK: That hasn't anything to do with this original transfer then. What has that got to do with this case?

30

MR. OCKFORD: Well, it tends to contradict the claim made that the stock was pledged.

Q. Isn't this really, at the time shown there, August 19, 1921, that that stock was sent over to you to be transferred from the Texas Company to the Texas Corporation? A. No, that 65 shares was part of the 723. The 65 shares were transferred to Pritchett & Co. August 19, 1921, and

40

Harold E. Lapp—For Complainant—Direct

then the balance of 658 shares were exchanged for the stock of the Texas Corporation.

Q. In whose name does that stand? A. Mrs. Katharine H. Winter.

Q. I don't understand your getting it in 1921. Is the original here? A. Yes, sir (witness refers to it). Here is the original ledger sheet showing the transfer, August, 1921. 10

MR. OCKFORD: Suppose we let the witness testify to what the record shows, because I don't think it is very intelligible.

JUDGE CARRICK: This is what it shows, the stub of the transfer, 658.

By Mr. Ockford:

20

Q. May I ask the witness what is the first transfer of stock; what is the date? A. The first transfer of stock was seven shares to Miss Katharine H. Winter. It evidently was an error. That was on August 19, 1918. Those seven shares were transferred out of the name of Miss Katharine H. Winter and transferred to Mrs. Katharine H. Winter, and it was no doubt a correction in title.

Q. All right. A. Subsequently, October 4, 1918, 50 shares were transferred to Mrs. Winter's name; June 18, 1919, 11 shares were transferred to Mrs. Winter's name, and on April 27, 1920, the 50-share certificate, the 11-share certificate, and the 7-share certificate were exchanged for \$25 par value stock, making a total of 68 \$100 par value stock, exchanged for 272 shares \$25 par value stock. 30

On August 4, 1920, 336 shares of stock were transferred to Mrs. Katharine H. Winter.

40

On August 18, 1920, 50 shares were transferred to Mrs. Winter's name.

Harold E. Lapp—For Complainant—Direct

On April 1, 1921, 65 shares were transferred to Mrs. Winter, and on

August 19, 1921, 65 shares were transferred out of the name of Mrs. Winter, leaving a balance of 658 shares.

10 On November 18, 1926, the 658 shares of stock of the Texas Company were exchanged, share for share, for 658 shares of the Texas Corporation, which is a Delaware corporation.

On April 2, 1927, 65 shares were credited to Mrs. Winter.

On April 29, 1927, 65 shares were transferred out of the name of Mrs. Winter.

On May 3, 1928, a net of 10 shares were transferred out of Mrs. Winter's name.

20 On July 19, 1928, a net of 20 shares were transferred out of the name of Mrs. Winter.

On August 14, 1928, 28 shares were transferred out of Mrs. Winter's name.

On November 12, 1928, 100 shares were transferred out of the name of Mrs. Winter.

On March 20, 1929, 100 shares were transferred out of the name of Mrs. Winter.

30 On April 8, 1929, 100 shares were credited to Mrs. Winter, and

On May 7, 1929, 100 shares were transferred out of her name.

Q. Now, do these records show from whom the stock was received by Mrs. Winter in August, 1920? A. Yes.

40 Q. Where is that? A. A credit of 336 shares on August 4, 1920, represents subscriptions, and the subscription list shows that Mrs. Winter was entitled to subscribe to 34 shares, and also shows that she purchased the right to subscribe to 50

Harold E. Lapp—For Complainant—Direct

shares. So that this subscribed to by Mrs. Winter wasn't transferred by anybody; it was original issue.

Q. When was the stock issued? A. August 4, 1920.

Q. Any record to indicate where they were delivered? A. No, not now. 10

Q. Are there any transfers from stock already issued and outstanding to Mrs. Winter, in this account? A. Well, with the exception of the subscription, they have always been transferred from various names to her and from her to various names.

Q. Now, let us see the stock acquired in August, 1920; that is all by subscription? A. The 336 shares represents by subscription. 20

Q. I see there is a transfer on August 18, 1920; can you tell us from whom that stock was transferred? A. August 18, 1920, it was transferred from the name of DeCoppet & Doremus.

Q. A brokerage house? A. Brokerage house.

Q. And was issued to Mrs. Katharine H. Winter, care of Winter, Ross & Co., 54 Beaver Street, New York? A. Yes.

Q. You don't know where it came from? A. Delivered to us by a messenger. 30

Q. Now, this transfer in August, 1921, from Mrs. Winter's name to the name of Pritchett & Co., have you any detail on the delivery of that?

A. We have no evidence of where it was delivered; it was merely presented to us for transfer at the time by Pritchett & Co.

Q. A brokerage house? A. Yes, brokerage.

Q. Have you any record of the subscription itself as to whose care the right was issued? In 40

Harold E. Lapp—For Complainant—Cross

other words, the address or the name of the person who turned in the subscription? A. No, no record.

Q. No subscription record here at all? A. Just a description of the record slip.

10 Q. What is the date of that subscription? A. November 1, 1919, and payment was due January 9, 1920.

Q. The subscriptions were evidenced by certificates issued? A. Yes.

Q. And then the certificates were turned in and the stock issued? A. No, subscription certificate evidencing payment. The original certificate was mailed by a warrant.

20 Q. And then a subscription certificate is issued when the payment is made? A. Yes.

Q. And they are turned in after the stock is issued? A. After final payment.

Q. What is the record of your delivery of the stock as issued on those subscriptions? A. No record at all.

Q. Or to whom delivered? A. No, no record as to that.

Q. Or what address? A. No.

30 Q. You have no record of that? A. No.

MR. OCKFORD: I offer in evidence photostat copies in lieu of the originals, and the original typewritten transcript of account, all as one exhibit.

(Admitted and marked Exhibit C-12.)

Cross-Examination by Judge Carrick:

40 Q. Now, Mr. Lapp, as to the 336 shares of the Texas Company, which is down as having been

Harold E. Lapp—For Complainant—Re-Direct

issued to Mrs. Winter on August 4, 1920, if it had been subscribed for in November, 1919, and paid for, this would be the date of the actual issue of the stock, would it not? A. The actual issue of the stock is August 4, 1920.

Q. If it had been subscribed in 1919 and paid for in installments? A. Properly, the first payment was due in January, 1919. 10

Q. On a subscription made in 1919? A. Yes.

Q. Then subscriptions payable in installments begin in January? A. Yes.

Q. And on the completion of the full payment of those installments of August 4, 1920, the stock was issued to Mrs. Winter? A. Yes.

Re-Direct Examination by Mr. Ockford: 20

Q. Will you tell us what your connection with the company is? A. I am stock transfer agent.

By the Court:

Q. Do these records show what became of the 65 shares August 19th? A. These records show that the certificates were transferred to Pritchett's name, but the 65 shares were cancelled.

Q. It doesn't show what ever happened to the 65 shares that came into the possession of Pritchett? A. No. 30

By Judge Carrick:

Q. Weren't those 65 shares, or some portion of it, stock dividend? A. Yes, those 65 shares comprise a stock dividend.

MR. OCKFORD: I would like to recall Mrs. Winter. 40

*Mrs. Katharine H. Winter—For Complainant—
Recalled—Direct*

(Mrs.) KATHARINE H. WINTER recalled on behalf of the complainant, testified as follows:

Direct Examination by Mr. Ockford:

10 Q. Mrs. Winter, did you ever have a brokerage account with DeCoppet & Doremus? A. I think I did do business with them.

Q. Do you know when? A. No, I don't. I think I bought some stock of them at some time, but I don't remember when.

20 Q. Did you have any transaction with Pritchett & Co., in August, 1921? A. I didn't remember it, but I understand there was some,—a stock dividend that was some rights on the subscription.

Q. That is all you know about that? A. That is all I can remember about it.

Q. I think I asked you before, Mrs. Winter, about the shares of stock you took out of the safe at your home and gave to Mr. Winter the first of September, 1920? A. Yes.

30 Q. Those were all of the shares that you let Mr. Winter have at that time, the 608 Texas, 8 Atlantic Refining, and 10 Union Tank? A. That's right.

Q. Can you tell how long those certificates of stock had been in your possession? A. No, I can't.

Q. Can you tell how long those certificates had been in the safe at that time? A. Ever since I bought them.

40 Q. You told us that before, but how long, in days, weeks, or months? A. I think it was bought in 1918. I don't remember the dates without referring to that list.

Arthur E. Winter—For Defendants—Direct

Q. Who took charge of that purchase for you?

A. I don't remember the broker.

Q. You don't know? A. No, I don't.

Q. Do you recall specifically receiving any of those shares of stock? A. I received it all.

Q. All were received? A. I received them 10
from a brokerage concern, I think.

Q. You don't know? A. I don't know.

MR. OCKFORD: I endeavored to subpoena Mr. Humes, but he is in Europe and I couldn't get him. But I think, however, we will rest.

THE DEFENSE

ARTHUR E. WINTER recalled in his own behalf, testified as follows: 20

Direct Examination by Judge Carrick:

Q. Mr. Winter, some question has been raised during the examination of Mr. Lapp from the Texas Company as to 65 shares of stock of that company which apparently were transferred to Pritchett & Company in August, 1921; do you know anything about that? A. Yes, I recall that very distinctly. 30

Q. Tell us about that. A. Mrs. Winter received a stock dividend from the Texas Company of 65 shares, and she asked me to sell it for her because she wanted to get the money, and I sold it through Pritchett & Co.

Q. What were the proceeds used for? A. Given to me.

*Arthur E. Winter—For Defendants—Cross**Cross-Examination by Mr. Ockford:*

Q. Didn't you tell us before there was not any transaction with Pritchett & Company after September 1, 1920? A. It was in respect to the 608 shares.

10 Q. You didn't manage these stock transactions for Mrs. Winter, did you, with respect to any purchase of the stock? A. I often purchased stock for her and sold it. That is, she asked me to do it for her.

Q. How about this Texas stock; did you ever act for her? A. Which Texas stock? Yes, I acted for her.

20 Q. Did you receive any for her? A. I presume I did.

Q. At your office in New York? A. I don't know whether I carried them direct from the broker's office or not.

Q. In August, 1920, did you receive any? A. I don't know.

30 Q. Do you remember now handling any stock certificates of the Texas Company in August, 1920, in the name of Katharine H. Winter? A. I have a recollection of having received some stock of the Texas Company which was purchased in August 18th.

Q. And from whom did you receive it? A. That I don't know.

Q. And did you sign for it? A. I don't know whether I did or not.

Q. You don't remember anything more about it than you have testified? A. No.

40 Q. You do recall, however, that you received \$20,000 on September 1, 1920? A. I do, absolutely.

Frank B. Ross—For Defendants—Direct

Q. And that the stock came out of your safe in the house? A. Yes.

FRANK B. ROSS sworn on behalf of the defendants, testified as follows:

Direct Examination by Judge Carrick:

10

Q. Mr. Ross, you live where? A. Jersey City.

Q. What is the address? A. 151 Garrison Avenue.

Q. You are in business in New York City as an importer? A. Yes.

Q. What is the name of your business now? A. Frank B. Ross Company, Inc.

Q. You were a partner of Mr. Winter at one time? A. Yes.

20

Q. When was your partnership with Mr. Winter formed and what was the name of it? A. Why, January 1st, 1919, Winter, Ross & Co.

Q. And what was that business? A. Importers principally, and exporters.

Q. Had you been in that business before? A. Yes.

Q. For how long? A. Since 1902.

Q. Under what name had you been doing business prior to your association with Mr. Winter? A. Frank B. Ross & Co.

30

Q. When that partnership with Mr. Winter was formed, what did you each contribute to the partnership assets? A. Originally, I think we put in about \$250,000 apiece.

Q. Afterwards, was there more put in? A. Yes, at different times.

Q. Was the year 1919 a profitable year? A. Very profitable year.

40

Frank B. Ross—For Defendants—Direct

Q. What were the profits about? A. I don't remember exactly, but I think \$600,000.

Q. You know about the contract that was made with the Muller-Fox Brokerage Company for the delivery of 500 tons of White Java sugar? A. Yes.

10 Q. You know when the steamer arrived that brought that sugar into port, do you? A. Yes, approximately. As I remember it now, it was about the end of August.

Q. 1920? A. 1920.

Q. What was the price of sugar at the time that delivery was made;—that is, when the steamer came into the port of New York? A. I think it was around 13 to 14 cents.

20 Q. The contract had been 22 cents? A. 22 cents.

Q. When did you first learn that there was any claim on the part of the Muller-Fox Brokerage Company,—that they were entitled to any money from Winter, Ross & Co.? A. I think it was September 17th. You have the telegram in the record there.

30 Q. When was the first demand, if there was ever any placed upon the contract, to rescind the contract? A. That was later, in October some time.

Q. Were you there when the messenger came with notice to rescind the contract? A. I was.

Q. How long prior to the beginning of the suit was that? A. Just a few days, I believe.

Q. In October? A. In October some time.

40 Q. Did the firm of Winter, Ross & Co. continue to do business, and if so how long? A. Continued until about October, 1923.

Frank B. Ross—For Defendants—Cross

Q. And then it dissolved? A. It dissolved.

Q. What was the occasion for the losses which happened in 1920 and subsequently? A. Well, I think our principal losses were due to a falling market in rubber. There was a decline in rubber.

Q. How was the decline unprofitable to your firm? A. It had declined from 55 cents a pound down to 30 or 35 cents a pound. 10

Q. And you couldn't get people to pay the price? A. We couldn't dispose of the rubber.

Q. And was that also so with sugar? A. Yes. I think we had another lot on the same steamer.

Q. Now, at this time, around the first of September or October, 1920, was the firm of Winter, Ross & Co. able to meet its obligations; that is, did you have more assets than liabilities at that time? A. We did have, yes. 20

Q. Did you know of loans that were made to the firm by Mr. Winter's father? A. Oh, yes.

Q. That was in December, 1920? A. I think it was.

Cross-Examination by Mr. Ockford:

Q. In September, 1920, the firm needed cash, didn't it? A. Yes. 30

Q. Do you recall the day the telegram came on September 8th? A. Some time around there.

Q. For how long prior to that time had the rubber market been falling? A. It had been falling practically after we sold the sugar. The market began to go down and we were saddled with a loss.

Q. In August you had no trouble with the sugar? A. No. 40

Frank B. Ross—For Defendants—Cross

Q. What did you fear as the result of the falling market? A. We didn't fear anything excepting the amount we had sold.

10 Q. This dispute between you and the Muller-Fox Brokerage Company was a case where each side was making a case against the other? A. Yes.

Q. There was a dispute and they were making a claim against you as early as September the 8th, and they were claiming a breach of contract on your part? A. After that telegram, yes, but that was only on a part of the lot; that wasn't on all the lot.

20 Q. But the matter, whatever it was, was a controversy between the Muller-Fox Brokerage Company and your company? A. Yes.

Q. And when suit was started you put in a counter-claim or cross-bill? A. We were claiming the balance of the bill due us.

Q. They said there had been a breach and you said there hadn't? A. Yes.

Q. And the case came to trial and was tried? A. Yes.

30 Q. When was the firm dissolved? A. October, '23.

Q. You testified in that case? A. No, I did not.

Q. You knew about it? A. I knew about the suit, certainly.

Q. This firm was a partnership between Mr. Winter and yourself? A. That's right.

Q. September, 1920, the firm had creditors? A. Many of them.

Frank B. Ross—For Defendants—Cross

Q. Did you hear around about the first of September, 1920, of Mr. Winter's contributing \$20,000 to the firm account? A. Yes.

Q. Do you know where he got the money? A. Well, I put a mortgage on my own house at the same time and raised all the cash I could. 10

Q. You knew that Mr. Winter contributed \$20,000? A. Yes.

Q. You had nothing at all to do with that deed of September 11th? A. No. I knew he was selling the house he lives in or some person was going to take a mortgage, and he was going to put the money in his business.

Q. Do you know when he said that to you? A. When he got the money.

Q. Was it after he had given the deed? A. I never heard about the deed. 20

Q. He never told you about that? A. I presume I heard about it.

Q. But he never mentioned it to you? A. No, he did not.

Q. Did Mr. Winter ever say anything to you about paying this judgment, or making any arrangements about it, or to pay his share? A. We talked about it. We considered it a very unjust thing, but it was beyond us to take care of the judgment at that time. We had lost practically everything we had. 30

Q. Ever since that, Mr. Winter has seen you and you have seen him frequently, haven't you? A. Off and on.

Q. At any time since that judgment was obtained was there any talk between you about taking care of it or paying it or disposing of it in 40

Frank B. Ross—For Defendants—Cross

any way if it could be done? A. I don't recollect anything of that kind.

Q. Prior to the trial of the case did Mr. Winter talk over the possibility of the case going against you and if it did what should be done about it?

10 A. We didn't think it was going against us.

Q. You weren't present at the trial? A. I was not, no.

Q. Did you talk with Mr. Winter while the case was pending? A. It was in the hands of Mr. Winter.

Q. In October, 1920, were there any other suits against this company? A. October when?

Q. 1920, or September, 1920. A. No, nothing that I know of.

20 Q. You had trouble in meeting obligations during this time? A. We had considerable merchandise thrown at us when we weren't moving it.

Q. And there were claims being made and people were asking for their money? A. No, they weren't asking for money; they were delivering goods.

30 Q. And you didn't have facilities for meeting those requirements? A. We were pretty well tied up.

Q. Did you ever see the letters that came to the office care of Winter, Ross & Co.? A. Yes.

Q. What disposition was made of those letters? A. Always put on his desk.

Q. After the dissolution Mr. Winter continued to come to your office? A. Yes.

40 Q. And do I understand you carried on the business alone after that? A. I formed another company.

*Arthur E. Winter—For Complainant—
Rebuttal—Direct*

Q. With which Mr. Winter had no connection?
A. No connection, no.

Defendants rest.

COMPLAINANT'S REBUTTAL 10

ARTHUR E. WINTER recalled on behalf of the complainant, in rebuttal, testified as follows:

Direct Examination by Mr. Ockford:

Q. Mr. Winter, you were examined in New York in supplemental proceedings, were you not, after judgment? A. Yes, to some extent; not very much. 20

Q. But you did testify in New York? A. I have recollection of having gone to Mr. Steuer's office a couple of times and being questioned there by somebody.

Q. Do you remember being asked a question with respect to the house in Orange and whether you sold it to your wife, and your answering: "She paid me \$35,000 for it"? A. I don't recall it now.

Q. Then you were asked: "In cash?" and your answer was "Yes." Do you recall that? A. No, I couldn't recall that; it is too long ago. 30

Q. Do you recall answering this question:

Q. What did you need the \$35,000 for?

A. To carry on the business I needed a lot of money and needed a great deal more than that; we owed over half a million dollars at the time.

*Arthur E. Winter—For Complainant—
Rebuttal—Direct*

Do you remember that? A. No, I don't.

Q. Is that a fact? A. We owed probably a great deal more than a half million.

10 Q. And you were asked if you were indebted at that time, and your answer was "Yes." Do you recall that? A. I don't know what you mean by "indebted"; we always owed money.

Q. I am asking you if you remember testifying to that. A. I don't remember testifying at all.

20 Q. Do you recall testifying with respect to this property: "I received \$35,000 cash, \$25,000 down on the transfer of the property and \$10,000 at a later date"? A. I don't remember anything about that at all. The only thing I remember is he asked me if I had a watch. I knew he was trying to collect on the judgment and that is all I remember.

Q. You wouldn't say that you didn't so testify? A. I wouldn't say.

Q. It is not the fact that you received \$25,000 down on the transfer and \$10,000 later? A. I got some money; I don't recall.

30 Q. Do you recall testifying in the U. S. District Court before the referee in New York City bankruptcy proceedings? A. I did testify, yes.

Q. Do you recall testifying:

Q. What consideration did you receive for the conveyance? A. \$25,000 in money and a mortgage for \$10,000.

Do you recall testifying to that? A. I don't recall testifying to that, but if it is in the record I suppose I did. I don't recall it.

40 Q. ———

*Arthur E. Winter—For Complainant—
Rebuttal—Cross*

Q. The money part of the consideration was in the form of a check, was it not? A. Several checks.

A. That would have been my answer, but I can't say that I did say it. 10

Q. Do you recall testifying:

Q. Are there any other documentary evidence of the transaction, that you know of? A. The money part of the transaction?

Q. Showing the payment of money. Do you know whether your wife has the cancelled checks? A. Well, I know she has. There is a certification of \$20,000. That was the first payment. Certification by the bank. 20

Do you remember testifying that the first payment on account of this purchase price was September 15th, as evidenced by the bank certification slip? A. I don't remember testifying to that. I tried to find the checks and that is all I could find.

Q. This check C-11 you didn't have at that time; you had only the slip attached to it? A. Yes, I didn't have the check. Mrs. Winter found it afterwards. 30

Cross-Examination by Judge Carrick:

Q. You have been asked whether at the time that this transfer was made to your wife your firm was not indebted in the sum of a half million dollars; what was the nature of your business? 40

*Arthur E. Winter—For Complainant—
Rebuttal—Cross*

How much credit did you have to use and what were you doing in business? A. I think on an average we had a credit of a million and half dollars all the time.

10 Q. Credit at the bank? A. Yes.

Q. What bank? A. National City Bank of New York, Guaranty Trust Co., Equitable Trust Co., Irving National Bank, and Bank of New York. Between them we very often had a credit of two or three million dollars.

Q. And you would have outstanding accounts due you of how much? A. Millions.

20 Q. This business that you were doing was done upon quite long terms of credit, was it not? A. No, sir; we made long-term contracts but payment would be made in cash when the goods were delivered.

Q. And when you entered into these contracts, relying upon the performance of the contracts, you would obtain from the bank the necessary accommodations? A. Yes.

Q. So that you could import the goods? A. Exactly.

30 Q. So that you had all the outstanding accounts at the bank and you had large sums due you upon the maturity of the contracts? A. Yes.

Q. So that a half million dollars, referred to in the testimony, would be a very small amount due from your firm at any time? A. Yes.

CASE CLOSED

Decision of Vice Chancellor John Bentley

Filed June 20, 1929

IN CHANCERY OF NEW JERSEY

Between:

CHARLES G. CARLUCCIO,
Complainant,

AND

ARTHUR E. WINTER AND
KATHARINE HUMES WINTER,
Defendants.

(Not for
Print) 10
On Bill, Etc.,
69-565
Memorandum
of Opinion.

June 17, 1929.

JOHN OCKFORD, Esq.,
For the Complainant.

20

CARRICK & WORTENDYKE, Esqs.,
Solicitors.CHARLES L. CARRICK, Esq., *of Counsel,*
For the Defendants.

MEMORANDUM OF OPINION

(This memorandum is not for publication in the
official or unofficial reports.)

30

BENTLEY, V. C.:

On creditors' bill.

In May, 1920, the defendant husband (who will hereafter be referred to as the defendant), was a member of a partnership engaged in the export and import business in the City of New York, which entered into a contract with Muller-Fox Brokerage Company, a corporation of the State

40

Decision of Vice Chancellor John Bentley

of Illinois, to sell to it a large quantity of sugar at the price of 22 cents a pound. This cargo arrived in America late in August of the same year when the price of sugar had receded to approximately 14 cents a pound. There was a great deal
10 of correspondence between this company and the defendant's firm, but eventually the former secured a judgment in the New York Supreme Court against the latter in the sum of \$213,183.73, which judgment has been affirmed on appeal. On that judgment a further judgment has been entered in the Supreme Court of this state. The complainant sues as the assignee of Muller-Fox Brokerage Company.

20 On September 11th, 1920, the defendant was seized of a parcel of real estate in Essex County wherein he and his wife maintained their home. On that day, and for an alleged consideration of \$35,000 he conveyed the said land to his wife, the other defendant, by a regular deed of warranty, which was recorded on the 4th day of October, 1920. It is to set aside this conveyance that the bill is filed, so as to reach the land on execution.

30 Without going into an extensive review of the correspondence and controversy between the defendant and Muller-Fox Brokerage Company, it is not without significance that on September 8th, 1920, the defendant received a telegram indicating a probable rejection of the sugar upon the ground of inferior quality and a declaration by the vendee that it was holding the same for the account of the defendant's firm. At this time the defendant and his wife were occupying a summer home at Spring Lake. Three days thereafter, on Saturday, in the

Decision of Vice Chancellor John Bentley

City of Newark, the defendant executed the conveyance to his wife.

At the time it was made the defendant's business was in great need of additional funds. In common with so many similar businesses, the condition of trade had caused great losses. The defendant was obliged to borrow large sums of money and his partner has testified that he was obliged to do likewise. The firm, however, did not fail and it does not appear that it was insolvent although it became so later on and was wound up about three years thereafter.

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The defendant's account of the transaction between him and his wife is, that late in August he remarked to her that to sustain his share of the financial burden of the firm he contemplated applying for a loan upon their home which then stood free and clear of any incumbrance; that she thereupon remarked that she would like to purchase the same and would prefer that to a mortgage being given; whereupon they agreed upon a price of \$35,000. Almost immediately, he says, she delivered into his hands corporate stock of several corporations and he, on September 1st, secured a loan from a financial house named Pritchitt & Company in the sum of \$20,000, secured by the hypothecation of the stock certificates. He and Mrs. Winter further testified that she paid the remaining \$15,000 by the execution of a purchase-money mortgage in the sum of \$10,000 and \$5,000 more in cash by means of checks. The subsequent proofs do not coincide with the defendant's original testimony as to how and when these payments were made. His testimony, as I recall was at first that this final sum was paid in September and

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Decision of Vice Chancellor John Bentley

October by means of a number of checks. Only one check has been produced and that was for the comparatively insignificant figure of \$456.15, dated December 6, 1920, or two months following the time the defendant says that payment had been
10 completed. For the remaining item of more than \$4,500 nothing has been produced to corroborate this testimony. The testimony of his wife practically coincides with that of the defendant.

Counsel for the defendants argues with great earnestness that all of the proofs support the defense. I regret that I am not able to agree with him. It is true that the testimony of the defendant and Mrs. Winter on its face meets the bill, but every undisputed fact and circumstance makes
20 out a case requiring a more robust defense than has been shown here. If they had gone a step further and had proved the acquisition by Mrs. Winter of the various stocks with which she dealt, the complainant's task would be a more difficult one. Some of this stock the defendants say was a gift to Mrs. Winter by her husband, but there has been no attempt to explain her subsequent acquisition of the great mass of it, and no proofs, which should be available, to corroborate them.

30 Again, there is the glaring absence of the check Mrs. Winter says she delivered to her husband for an amount exceeding \$4,500 as the final payment on the purchase price of the real estate. It appears strange that she should have carefully preserved the smaller check and be unable to produce the larger, unless, in fact, she is, as I judge her to be, a refined lady whose time has been taken up with her attention to the members of her family and who has nothing but the slightest knowledge
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Decision of Vice Chancellor John Bentley

of the business world. Her conduct upon the stand did not impress me as that of a woman whose traits and character had been sharpened by any intimate contact with business methods. This case is one of such importance to Mr. and Mrs. Winter that it was upon that consideration only that I took it under advisement so that I could leisurely review it, to see whether or not my original impression would remain. It is no banal flattery to say that they were represented by a most astute, experienced, loyal and thorough counsel, and yet no effort of any kind has been made to close the gap presented by the failure to corroborate in any way the testimony of these highly interested parties as to the payment of more than 90 per cent. of the cash that is said to have passed between them. No transcript of the bank account of Mrs. Winter has been offered, or even the production of her check book with the counterfoil of this large check. Not only have they failed to present such supplementary proof but they have failed to even attempt an explanation of its absence.

As a trier of facts, I cannot pass over the conduct of the defendant in the courtroom without comment thereon, when the transfer agent of the Texas Company proved the account of Mrs. Winter, showing her holdings of the stock of that company which represented the great bulk of the securities hypothecated with Pritchitt & Company on September 1st, 1920. Until that time the appearance of the defendant was one of complacent assurance, as if his position were an impregnable one. The appearance of this record transferred him instantly into one giving every evidence of the

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Decision of Vice Chancellor John Bentley

most intense excitement and alarm. The testimony of this agent came as a surprise, and the only inference I can draw from the defendant's conduct is that he feared a chink in his armor that until then he had thought was unknown to his adversary.

10 The account of Mrs. Winter commenced with a comparatively small holding which has grown to a very large amount as the result of the exercise of her rights upon subsequent issues of the capital stock of the Texas Company and its predecessors. No effort has been made to explain where she secured the funds with which these subscriptions were paid.

20 Finally, because it would be intolerable to attempt to review all of the testimony, there is the failure to produce a word of evidence from the office of the attorney where the transaction now under attack was consummated. Mr. Colie is not only a reputable lawyer but he is available and I am convinced would have testified to what transpired in his office and would have produced his records, upon a mere request. This, like the other particulars already examined, is powerful evidence against the defendant, because it is trite to say that a strong presumption is raised that one who could have produced evidence to support his defense and fails to do so fears that such evidence will, in fact, imperil his defense.

30 Disagreeable as it is, there remains no doubt in my mind that the complainant should succeed, when there is taken into consideration the relationship of Mr. and Mrs. Winter, which is peculiarly regarded by the law as distinguished from other relationships of blood or marriage, in con-

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Decision of Vice Chancellor John Bentley

nection with the well established badges that appear in this case.

I realize the burden cast upon one who charges another with fraud of the character alleged in this bill, but I think the burden has been sustained by clear and convincing evidence of the surrounding facts and circumstances which the defense has failed to overthrow. It seems to me that complainant's counsel is entirely right when he says that this lady did what might be expected of her in her effort to assist the man with whom she had lived so long. In his embarrassment, she came to his rescue, so far as she was able, and the undoubted transaction with Pritchitt & Company was subsequently seized upon to give an appearance of verisimilitude to the subsequent transaction of September 11th, 1920. A partial substantiation can be made of almost any alleged dealing between people by picking out here and there some undoubted record which tends to confirm one or more of the elements of the transaction attempted to be proved.

I will advise a decree in conformity with the prayer of the bill.

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Notice of Application to Vice Chancellor
Bentley for Final Decree

IN CHANCERY OF NEW JERSEY

69-565

10	Between: CHARLES G. CARLUCCIO, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;">AND</div> ARTHUR E. WINTER AND KATHARINE HUMES WINTER, <div style="text-align: right;"><i>Defendants.</i></div>	} On Bill, Etc. Notice.
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20 SIRS:

PLEASE TAKE NOTICE that the proposed Final Decree herein, a copy of which is herewith served upon you, will be presented to his Honor, John Bentley, the Vice-Chancellor to whom this cause has been referred, at Chancery Chambers, in the Court House at Paterson, on Monday, July 1st, 1929, at 10 A. M. daylight saving time, or as soon thereafter as counsel can be heard, and application will then and there be made for the entry of such Final Decree, and at the same time and place, complainant will apply for a counsel fee to be included in the taxed bill of costs.

Dated June 26th, 1929.

Yours, etc.,

JOHN W. OCKFORD,

Solicitor for Complainant.

TO: CARRICK & WORTENDYKE, Esqs.,

Solicitors for Defendants.

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**Proposed Final Decree As Presented to
Vice Chancellor Bentley**

IN CHANCERY OF NEW JERSEY

69-565

Between:

CHARLES G. CARLUCCIO,
Complainant,

AND

ARTHUR E. WINTER AND
KATHARINE HUMES WINTER,
Defendants.

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On Bill, Etc.
Final Decree.

This cause coming on to be heard in the presence of John W. Ockford, solicitor for and of counsel with complainant and Messrs. Carrick & Wortendyke, solicitors for and Charles L. Carrick of counsel with the defendants, and the evidence on behalf of the respective parties having been taken, and the pleadings and proofs having been read, and the arguments of the respective counsels having been heard and considered, and it appearing to the Court that the complainant, Charles G. Carluccio is entitled to the relief sought and prayed for by him in the Bill of Complaint, and the Court having filed its conclusions;

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It is, on this 8th day of July, 1929, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED and DECREED that the conveyance made by Arthur E. Winter and Katharine Humes Winter, dated September 11, 1920, and recorded in the office of the Register of

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*Proposed Final Decree as Presented to
Vice Chancellor Bentley*

Essex County on October 4, 1920, in Book I 64, page 53 of Deeds for Essex County, and whereby said Arthur E. Winter conveyed to the said Katharine Humes Winter, the following described

10 property:

First Tract:

BEGINNING at the northwesterly side of Berkeley Avenue at the easterly corner of land of Ambrose M. Matthews, which point is distant one hundred and thirty-six feet and eighty-four one-hundredths of a foot northeasterly from the northeasterly line of Hillside Avenue, running thence
20 along said Berkeley Avenue north thirty-eight degrees nine minutes east two hundred and two feet and seventy-three one-hundredths of a foot to a new street fifty feet in width recently opened, called Fairview Avenue; thence along the line of said Fairview Avenue north forty-two degrees twenty-six minutes west two hundred feet, thence at right angles to said Fairview Avenue south forty-seven degrees thirty-four minutes west two hundred feet to land
30 of said A. M. Matthews; thence along said land south forty-two degrees twenty-six minutes east two hundred and thirty-three feet and seventeen one-hundredths of a foot to Berkeley Avenue and the place of beginning.

Second Tract:

Beginning at a point in the southwesterly line of Fairview Avenue distant two
40 hundred feet northwesterly from the north-

*Proposed Final Decree as Presented to
Vice Chancellor Bentley*

westerly line of Berkeley Avenue and running thence at right angles to Fairview Avenue South forty-seven degrees thirty-four minutes west two hundred feet; thence parallel with Fairview Avenue North forty-two degrees twenty-six minutes west seventy-five feet; thence at right angles to Fairview Avenue North forty-seven degrees thirty-four minutes east two hundred feet to Fairview Avenue; and thence along Fairview Avenue South forty-two degrees and twenty-six minutes east seventy-five feet to the point of beginning. 10

is null and void and of no effect as against complainant Charles G. Carluccio, and the judgment of the said Charles G. Carluccio against the said Arthur E. Winter rendered in the New Jersey Supreme Court on July 20, 1927, for the sum of Two hundred fifty-one thousand seven hundred eighty-two and 93/100 (\$251,782.93) Dollars and as against the execution issued on said judgment to the Sheriff of the County of Essex on July 20, 1927, and 20

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said lands and premises may be sold free, clear and discharged of and from the said conveyance under a Writ of Execution upon said judgment or under this Decree as hereinafter provided, and 30

IT IS FURTHER ORDERED that the complainant do recover his costs of this suit to be taxed, and that the defendants do pay to the complainant said costs of this suit to be taxed, in- 40

*Proposed Final Decree as Presented to
Vice Chancellor Bentley*

cluding a counsel fee of _____ Dollars,
which is hereby allowed to said complainant.

IT IS FURTHER ORDERED, ADJUDGED
and DECREED that unless the said defendants,
10 Arthur E. Winter and Katharine Humes Winter,
shall within _____ days after service upon them of
true but uncertified copies of this Decree and of
said taxed bill of costs, pay to the complainant
the amount due to him upon the said judgment,
together with interest thereon, and the said taxed
costs, execution shall issue for said taxed costs
against the goods and chattels, lands, tenements,
hereditaments and real estate of the said defend-
20 ants according to the practice of this Court, di-
rected to the Sheriff of the County of Essex, and
that the said Sheriff also proceed to sell the lands
and premises hereinabove described under and
by virtue of the execution heretofore issued out
of the New Jersey Supreme Court, dated July
20, 1927, and recorded in the office of the Clerk
of the Supreme Court in Book A-50 of Process,
page 293, free, clear and discharged of and from
the said deed made by the said defendant Arthur
30 E. Winter to the said Katharine Humes Winter,
as aforesaid, and of and from all claims of the
said defendants Arthur E. Winter and Katharine
Humes Winter, thereunder or by virtue thereof.

Respectfully advised,

C.

V. C.

Decision of Vice Chancellor J. O. Bigelow

Filed May 2, 1930

IN CHANCERY OF NEW JERSEY

Between:

CHARLES G. CARLUCCIO,

Complainant,

AND

ARTHUR E. WINTER and wife,

Defendants.(Not for
Print)
On Bill, Etc.
69-655.

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April 28, 1930.

JOHN OCKFORD, Esquire,

For the Complainant.

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CARRICK & WORTENDYKE, Esquires,

For the Defendants.(This memorandum is not to be published in
the official or unofficial Reports.)

MEMORANDUM

BIGELOW, V.-C.:—

The late Vice-Chancellor Bentley heard this case and filed a memorandum setting forth his opinion. Thereafter, the case was re-argued before him and remained undecided at the time of his death.

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The bill was filed September 18, 1928, to set aside a conveyance of real estate in Orange made by Arthur E. Winter to his wife, Katharine H. Winter, September 11, 1920, on the ground that the conveyance was made without consideration

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Decision of Vice Chancellor J. O. Bigelow

in order to delay, hinder and defraud Mr. Winter's creditors.

10 Complainant is a judgment creditor having recovered judgment in the New Jersey Supreme Court against Mr. Winter July 20, 1927, for \$251,782.93.

20 The transactions out of which this judgment arose began in the spring of 1920. Mr. Winter, at that time, was a member of the firm of Winter, Ross & Co., importers. On May 28, 1920, this firm agreed to sell to Muller-Fox Brokerage Company of Chicago a large quantity of sugar, to be shipped from Java and to be paid for upon presentation of shipping documents in New York. Payment pursuant to the contract was made before the purchasers had an opportunity to examine the sugar. Thereafter, early in September, the sugar arrived in New York and the purchasers began examination of it. On September 8, 1920, they telegraphed Winter, Ross & Co. that they had just received a sample of the sugar and that it was not of the quality specified in the contract and that upon arrival of the sugar at the warehouse they would have other samples drawn.

30 On October 1 they wrote Mr. Winter's firm that 2,400 bags, or about half the sugar, was of inferior quality, and that they would hold these 2,400 bags subject to the seller's orders. Shortly thereafter, the purchasers elected to rescind the entire sale, and on October 19, 1920, began an action for the recovery of the purchase price in the New York Supreme Court. Judgment in this action was recovered January 23, 1924, and was assigned to the plaintiff. On this judgment he

Decision of Vice Chancellor J. O. Bigelow

recovered the judgment above mentioned in the New Jersey Supreme Court.

Complainant's assignor was a creditor of Mr. Winter at the time of the conveyance of the real estate in controversy. *Uniform Fraudulent Conveyance Act of 1919*, Sec. 1; *Washington National Bank vs. Beatty*, 70 N. J. Eq. 252, 76 Atl. 442; *Conway vs. Raphael*, 141 Atl. 804. 10

There is no evidence of any express fraud in the making of this conveyance. If the complainant is entitled to relief, it must be because no fair or adequate consideration was paid. The defendants maintain that the consideration was \$35,000, an amount which is conceded to be ample. \$10,000 of this consideration was satisfied by the execution of a purchase money mortgage. About three months later this mortgage was paid off by the proceeds of a new mortgage in the same sum given to Mrs. Winter's brother. His check for \$10,000 was then endorsed by Mrs. Winter to her husband and re-endorsed by the latter to Winter, Ross & Co., and deposited in their account. 20

\$5,000 of the consideration, according to the testimony of Mr. and Mrs. Winter, was paid in several installments after the execution of the deed. They produced as evidence of the final payment a canceled check for \$456.15, dated December 6, 1920, drawn by Mrs. Winter to the order of her husband and deposited to the credit of Winter, Ross & Co. Beyond this, there is no corroboration of their testimony as to the payment of this \$5,000. But this failure by defendants to prove satisfactorily this item of the consideration is not sufficient ground for setting the 30

Decision of Vice Chancellor J. O. Bigelow

conveyance aside, since payment of \$30,000 for the property is established.

10 On September 1, 1920—eleven days before the execution of the deed—Mr. Winter borrowed from his stock brokers \$20,000 on the security of shares of corporate stock standing in his wife's name. These securities, the defendants testified, were lent to him by Mrs. Winter for that purpose. Two weeks later she borrowed \$26,000 from the Orange National Bank, pledging as collateral therefor the greater part of the same stock, namely, 608. shares of the Texas Company. Through the agency of the bank, the loan at the brokerage house was immediately paid off and the collateral recovered. Mrs. Winter had had
20 an account at the Orange National Bank for some time.

The defendants say that they agreed upon the sale of the property before September 1 and that the payment of \$20,000 was made on account of the purchase price. Whether this is the fact or whether the transaction of September 1 be regarded as a loan by the wife to her husband, later repaid by the conveyance of the property, is immaterial. A creditor is at liberty to prefer one debtor as against another, even though the preferred creditor be his wife. *Reed vs. Tilton*, 90 N. J. Eq. 42, 105 Atl. 597; *Carnahan vs. Carnahan*, 92 N. J. Eq. 442, 112 Atl. 736; *First National Bank vs. Mooney*, 98 N. J. Eq. 137, 129 Atl. 748. *Uniform Fraudulent Conveyance Act*, Sec. 3(a).
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Complainant urges that the stock in the Texas Company belonged in fact to Mr. Winter and in this manner seeks to establish the voluntary
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Decision of Vice Chancellor J. O. Bigelow

character of the transaction. He produced the records of the Texas Company which showed, after giving effect to a split-up of shares, that 228 shares of this stock were transferred to Mrs. Winter in 1918. A stock dividend of 44 shares was issued to her June 18, 1919. In the fall of that year, stockholders were given the right to subscribe to additional shares. Mrs. Winter purchased certain rights and subscribed to them, in addition to the rights on her own shares, November 1, 1919. The total so subscribed was 336 shares. The first payment on account of these was January 9, 1920. When the other payments were made does not appear. The stock was actually issued to her August 4, 1920. Both Mr. and Mrs. Winter testified that this stock belonged to her. The fact that the certificates stood in her name corroborates their testimony. No proof is introduced to the contrary.

Whether Mrs. Winter purchased with her own funds her original shares or whether Mr. Winter presented them to her is of no consequence, since complainant's assignor was not then a creditor of Mr. Winter, and Mr. Winter was then amply solvent. Mr. Winter was in partnership with his father prior to January 1, 1919, when the firm of Winter, Ross & Co. was organized. Mr. Winter contributed \$250,000 to the firm's capital. 1919 was a profitable year, the firm clearing over \$500,000. About September, 1920, trouble started, brought about principally by sharp breaks in the prices of sugar and rubber. The firm, however, did not then become insolvent but remained in business until 1923. Gifts made by Mr. Winter to his wife in 1918 and 1919 cannot successfully be attacked by complainant.

Decision of Vice Chancellor J. O. Bigelow

10 Complainant urges that the testimony of the defendants be disregarded. Of course, they are deeply interested in the controversy, but on the other hand they were both called to testify by the complainant himself. By so doing he impliedly represented that they were worthy of some credit. Their testimony is not in any way contradicted. Neither is there as much corroboration of it as might be desired, but complainant is perhaps responsible in part, since he delayed attacking this conveyance for more than four years after the judgment was obtained in New York.

I will advise a decree dismissing the bill.

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Order of Re-Reference

To Vice Chancellor Bigelow

Filed May 2, 1930

IN CHANCERY OF NEW JERSEY

Between:

CHARLES G. CARLUCCIO,

Complainant,

AND

ARTHUR E. WINTER and Wife,

Defendants.

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On Bill, Etc.

The above-stated cause having been duly referred to the Honorable John Bentley, formerly one of the Vice Chancellors of this Court, and the same remaining unheard,

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It is, thereupon, on this second day of May, A. D. Nineteen Hundred and Thirty,

ORDERED, that said cause be now referred to the Honorable John O. Bigelow, one of the Vice Chancellors of this Court, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein and that such hearing be had at the time and place already designated therefor.

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E. R. WALKER,
Chancellor.

Filed May 2, 1930.

J. O. B.,
V. C.

Received in Office May 8, 1930.

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*Complainant's Notice of Application to the
Chancellor for Final Decree*

formal application for a re-hearing cannot be
heard by anyone other than the Chancellor.

Dated, May 7th, 1930.

Yours, etc.,

JOHN W. OCKFORD, 10

Solicitor for Complainant.

TO: CARRICK & WORTENDYKE, Esqs.,
Solicitors for Defendants.

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**Complainant's Proposed Final Decree As
Presented to the Chancellor**

Subject to Objection As Forming No Part of Case
IN CHANCERY OF NEW JERSEY

69-565

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Between:

CHARLES G. CARLUCCIO,
Complainant,

AND

ARTHUR E. WINTER AND
KATHARINE HUMES WINTER,
Defendants.

} On Bill, Etc.
} Final Decree.

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30 This cause coming on to be heard in the presence of John W. Ockford, solicitor for and of counsel with complainant and Messrs. Carrick & Wortendyke, solicitors for and Charles L. Carrick of counsel with the defendants, and the evidence on behalf of the respective parties having been taken, and the pleadings and proofs having been read, and the arguments of the respective counsels having been heard and considered, and it appearing to the Court that the complainant, Charles G. Carluccio, is entitled to the relief sought and prayed for by him in the Bill of Complaint, and the Court having filed its conclusions;

It is, on this day of May, 1930, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED and DECREED, that the conveyance made by Arthur E. Winter and

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*Complainant's Proposed Final Decree as
Presented to the Chancellor*

Katharine Humes Winter, dated September 11th, 1920, and recorded in the office of the Register of Essex County, on October 4th, 1920, in Book I 64, page 53 of Deeds for Essex County, and whereby said Arthur E. Winter conveyed to the said Katharine Humes Winter, the following described property: 10

First Tract:

Beginning at the northwesterly side of Berkeley Avenue at the easterly corner of land of Ambrose M. Mathews, which point is distant one hundred and thirty-six feet and eighty-four one-hundredths of a foot northeasterly from the northeasterly line of Hillside Avenue, running thence along said Berkeley Avenue north thirty-eight degrees nine minutes East two hundred and two feet and seventy-three one hundredths of a foot to a new street fifty feet in width recently opened, called Fairview Avenue; thence along the line of said Fairview Avenue north forty-two degrees twenty-six minutes west two hundred feet, thence at right angles to said Fairview Avenue south forty-seven degrees thirty-four minutes west two hundred feet to land of said A. M. Matthews; thence along said land south forty-two degrees twenty-six minutes East two hundred and thirty-three feet and seventeen one-hundredths of a foot to Berkeley Avenue and the place of beginning. 20 30

*Complainant's Proposed Final Decree as
Presented to the Chancellor*

Second Tract:

10 Beginning at a point in the southwesterly line of Fairview Avenue distant two hundred feet northwesterly from the northwesterly line of Berkeley Avenue and running thence at right angles to Fairview Avenue South forty-seven degrees thirty-four minutes west two hundred feet; thence parallel with Fairview Avenue North forty-two degrees twenty-six minutes West seventy-five feet; thence at right angles to Fairview Avenue north forty-seven degrees thirty-four minutes East two hundred to
20 Fairview Avenue; and thence along Fairview Avenue South forty-two degrees and twenty-six minutes East seventy-five feet to the point of beginning.

is null and void and of no effect as against complainant, Charles G. Carluccio, and the judgment of the said Charles G. Carluccio against the said Arthur E. Winter rendered in the New Jersey Supreme Court on July 20, 1927, for the sum of
30 Two Hundred Fifty-one Thousand Seven Hundred Eighty-two and 93/100 (\$251,782.93) Dollars and as against the execution issued on said judgment to the Sheriff of the County of Essex on July 20, 1927, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said lands and premises may be sold free, clear and discharged of and from the said conveyance under a Writ of Execution upon said judgment or under this Decree as
40 hereinafter provided, and

*Complainant's Proposed Final Decree as
Presented to the Chancellor*

IT IS FURTHER ORDERED, that the complainant do recover his costs of this suit to be taxed, and that the defendants do pay to the complainant said costs of this suit to be taxed, including a counsel fee of

Dollars (\$), which is hereby allowed to said complainant. 10

IT IS FURTHER ORDERED, ADJUDGED and DECREED that unless the said defendants, Arthur E. Winter and Katharine Humes Winter, shall within days after service upon them of true but uncertified copies of this Decree and of said taxed bill of costs, pay to the complainant the amount due to him upon the said judgment, together with interest thereon, and the said taxed costs, execution shall issue for said taxed costs against the goods and chattels, lands, tenements, hereditaments and real estate of the said defendants according to the practice of this Court, directed to the Sheriff of the County of Essex, and that the said Sheriff also proceed to sell the lands and premises hereinabove described under and by virtue of the execution heretofore issued out of the New Jersey Supreme Court, dated July 20, 1927, and recorded in the office of the Clerk of the Supreme Court in Book A-50 of Process, page 293, free, clear and discharged of and from the said deed made by the said defendant, Arthur E. Winter, to the said Katharine Humes Winter, as aforesaid, and of and from all claims of the said defendants, Arthur E. Winter and Katharine Humes Winter, thereunder or by virtue thereof. 20

Respectfully advised, 30

C.

V. C.

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**Defendants' Notice of Application to Vice
Chancellor Bigelow for Final Decree**

IN CHANCERY OF NEW JERSEY

69-565

10	Between: CHARLES G. CARLUCCIO, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;">AND</div> ARTHUR E. WINTER AND KATHARINE HUMES WINTER, <div style="text-align: right;"><i>Defendants.</i></div>	} On Bill, Etc. Notice.
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20 TO:
 John W. Ockford, Esquire,
 Solicitor of Complainant.

30 PLEASE TAKE NOTICE, that on Monday, the ninth day of June, instant, at ten o'clock in the forenoon (Daylight Saving Time) or as soon thereafter as counsel can be heard, at the Chancery Chambers in Jersey City, we shall present for signature to the Honorable John O. Bigelow, the Vice Chancellor to whom the same has been referred, a final decree in the above-entitled cause, a copy of which is herewith served upon you, and we shall then and there ask for a counsel fee to be allowed to the solicitors of the defendants, and included in and taxed with the costs.

CARRICK & WORTENDYKE,
Solicitors for Defendants.

Dated June 2, 1930.

Final Decree

Filed June 9, 1930 with Vice Chancellor
 Filed June 10, 1930, with Clerk

IN CHANCERY OF NEW JERSEY

69-565

Between:

CHARLES G. CARLUCCIO,
Complainant,

AND

ARTHUR E. WINTER AND
 KATHARINE HUMES WINTER,
Defendants.

On Bill, Etc.
 Final Decree.

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This cause coming on to be heard before the Chancellor in the presence of John W. Ockford, Esquire, solicitor and of counsel with the complainant, and of Messrs. Carrick & Wortendyke, solicitors and of counsel with the defendants, and the pleadings having been read and the proofs submitted by the respective parties, and the arguments of the respective counsel having been heard, and the court having duly considered said pleadings, proofs and arguments, and it appearing to the court that the complainant is not entitled to the relief sought and prayed by him in his bill of complaint.

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It is thereupon, on this ninth day of June, 1930, ordered, adjudged and decreed that the complainant's bill of complaint be, and the same is hereby dismissed, with costs to the defendant to be taxed, including in such costs a counsel fee of seven hundred and fifty dollars to the solicitors of the de-

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Final Decree

endants; and that the defendants have execution for such costs, in accordance with the practice of this court.

Respectfully advised,

E. R. WALKER,
C.

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JOHN O. BIGELOW,
V. C.

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**Order of Chancellor Denying Complainant's
Application for Final Decree**

Filed June 10, 1930

IN CHANCERY OF NEW JERSEY

Between:

CHARLES G. CARLUCCIO,

Complainant,

AND

ARTHUR E. WINTER AND

KATHARINE HUMES WINTER,

Defendants.

On Bill, Etc.
Order Deny-
ing Applica-
tion.

10

This matter being opened to the court by John W. Ockford, Esquire, solicitor and of counsel with the complainant in the above-entitled cause, who now applies to the Chancellor for the entry of a final decree, for the reason that the late Vice Chancellor John Bentley, to whom said cause was referred, died before affixing his signature to the final decree proposed by the complainant; and it being represented to the court by Messrs. Carrick & Wortendyke, of counsel with the defendants, that after the filing of his conclusions, the cause had been re-argued before said Vice Chancellor, by his leave, and that briefs had been submitted by the respective parties, and that after the death of said Vice Chancellor, an order was made re-referring the cause to Honorable John O. Bigelow, Vice Chancellor, who has reheard said cause and has filed his conclusions directing that the complainant's bill be dismissed, and has also advised a decree in conformity to said conclusions.

20

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It is thereupon, on this tenth day of June, 1930, ordered that the complainant's application be, and the same is hereby denied.

40

E. R. WALKER,

C.

Notice of Appeal

Filed June 28, 1930

IN CHANCERY OF NEW JERSEY

10

Between:

CHARLES G. CARLUCCIO,
Complainant,

AND

20

ARTHUR E. WINTER AND
KATHARINE HUMES WINTER,
Defendants.

On Bill, Etc.
Notice of
Appeal.
Appeal from
the Court of
Chancery.
From a decree
advised by
Vice Chan-
cellor John O.
Bigelow and
signed by his
Honor the
Chancellor,
and from an
order of the
Chancellor.

SIRS:

30

PLEASE TAKE NOTICE, that the complainant appeals to the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey from the final decree entered in this cause, advised by Vice Chancellor John O. Bigelow, signed by his Honor the Chancellor, and from the order of the Chancellor denying complainant's application for a final decree in accordance with the decision of the late Vice Chancellor John

40

Notice of Appeal

Bentley and from the whole of said decree and order.

Yours, etc.,

JOHN W. OCKFORD,

Solicitor for and of Counsel with Complainant.

Dated: June 20th, 1930.

10

I conceive the foregoing Appeal to be well taken upon the merits thereof, and that the Complainant has a good and meritorious Appeal from the decree and order above recited.

JOHN W. OCKFORD,

Of Counsel with Complainant.

TO: Messrs. Carrick & Wortendyke, Esqs.,
Solicitors for Defendants, and the
Clerk of the Court of Chancery.

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Petition of Appeal

Filed July 15, 1930

NEW JERSEY COURT OF ERRORS AND APPEALS

10

Between:
 CHARLES G. CARLUCCIO,
Complainant-Appellant,
 AND
 ARTHUR E. WINTER AND
 KATHARINE HUMES WINTER,
Defendants-Respondents.

On Appeal
 from the
 Court of
 Chancery.

20

TO THE HONORABLE COURT OF ERRORS AND APPEALS in the last resort in all causes.

The Petition of Appeal of Charles G. Carluccio, appellant in this cause, respectfully shows:

30

1. Your petitioner finds himself aggrieved by a decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 10th day of June, 1930, which said decree was advised by Vice-Chancellor John O. Bigelow, and by an Order of his Honor the Chancellor, bearing the same date, in a cause wherein petitioner was complainant, and the above named respondents were defendants, in this respect, to wit:

That the said decree ordered, adjudged and decreed that the Bill of Complaint in said cause be dismissed.

That the said Order denied complainant's application for a final decree, in accordance with

40

Petition of Appeal

the decision filed by Vice-Chancellor John Bentley.

2. Your petitioner therefore appeals from the said decree and order upon the ground that the same are erroneous for the following reasons:

(a) Complainant was entitled to have a decree in accordance with the prayer of the complaint. 10

(b) Complainant was entitled to have a decree in accordance with the decision of Vice-Chancellor John Bentley, made and filed in the cause, advising a decree in favor of complainant, in accordance with the prayer of the Bill.

(c) The pleadings and the evidence before the Court of Chancery required it to make and render the decree for complainant. 20

(d) Complainant was entitled to have a decree in accordance with the application therefore made, to the Chancellor and the Order denying such application was erroneous.

(e) The decree entered which was advised by Vice-Chancellor John O. Bigelow was erroneous, in that the said Vice-Chancellor did not hear the cause, did not hear the trial of the cause, did not hear the arguments of counsel, and because the cause had already been heard and decided by Vice-Chancellor John Bentley. 30

(f) The evidence established that the conveyance ought to be set aside as fraudulent as against complainant, and there should have been a decree to that effect.

(g) The defendants failed to sustain the burden of proof cast upon them to show the transaction to be bona fide. 40

Petition of Appeal

(h) The decree advised by Vice-Chancellor Bigelow was contrary to the provisions of the Constitution of the United States, and of the Constitution of the State of New Jersey, particularly Articles V and XIV of the Amendments of the Constitution of the United States.

10

(i) The decree and order appealed from are contrary to law.

(j) The decree and order appealed from are contrary to the facts and evidence of the case.

(k) Complainant is entitled to a decree in his favor on the merits of the cause, the evidence of the case and upon the decision of the Court in the conclusions of Vice-Chancellor John Bentley filed in the cause.

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3. Your petitioner therefore prays that the said decree and order of the Chancellor may be in all respects reversed and set aside and that the Court of Chancery be directed to enter a decree in favor of complainant and against the defendants, and that such other and further relief be granted as shall be proper in the premises.

JOHN W. OCKFORD,

*Solicitor for and of Counsel
with Petitioner.*

30

40

Docket Entries

Subject to Objection That It Is No Part of Case

IN CHANCERY OF NEW JERSEY

Between:

CHARLES G. CARLUCCIO,
Complainant,

AND

ARTHUR E. WINTER,
*Defendant.*Copy of
Docket
Entries
69-565.
John W.
Ockford,
Solicitor.

10

1928

Sep. 18, Bill: Subpa ret. Oct. 10, served Essex: 20
 Oct. 30, Answer, Carrick & Wortendyke: Nov. 2,
 Replication: 28, Order Ref., Bentley: Feb. 25,
 Designation: June 20, Memorandum: May 2/30,
 Memorandum: Order Re-ref., Bigelow: June 10,
 Stipulations: Notice: Caveat, John W. Ockford:
 June 9, Notice: Decree: 10, Order Denying Ap-
 plication: 28, Notice of Appeal: July 2/30, Costs:
 Dated, Aug. 15, 1930.

A true copy.

FERD GARRETSON, 30
Clerk.

40

Exhibit C 1

SUPREME COURT—NEW YORK COUNTY

MULLER-FOX BROKERAGE COM-
PANY,

Plaintiff,

Against

10

ARTHUR E. WINTER and FRANK
B. ROSS, co-partners doing
business under the firm name
and style of WINTER, ROSS &
Co.,

Defendants.

20 The issues in the above entitled action having
duly come on for trial before Mr. Justice Jere-
miah T. Mahoney, one of the Justices of this
Court, and a jury, at Trial Term, Part XVII on
the 11th, 14th and 15th, 16th, and 17th days of
January, 1924, and the evidence of the parties
having been duly adduced, and the court having
charged the jury and the jury having returned a
verdict in favor of the plaintiff and against the
defendants in the sum of \$213,045.98, and the
costs of the plaintiff having been duly taxed in
the sum of \$137.75,

30 Now, on motion of GARFIELD & SELIGSON,
Atty. for plaintiff, it is

ADJUDGED that the plaintiff recover of the
defendants the sum of \$213,045.98 together with
the sum of \$137.75 costs of the plaintiff as taxed,
making in all the sum of \$213,183.73, and that
the plaintiff have execution therefor.

Dated, New York, January 23rd, 1924.

JAMES A. DONNEGAN,

Clerk.

40

Exemplification certificate attached.

Exhibit C 2

MULLER FOX BROKERAGE CO.,
TO
CHARLES G. CARLUCCIO.
ASSIGNMENT

Dated *April 22nd, 1927.*

THIS INDENTURE, made the *22nd day of* 10
April one thousand nine hundred and *twenty*
seven BETWEEN *Muller Fox Brokerage Co.,*
party of the first part, and *CHARLES G. CAR-*
LUCCIO, party of the second part, witnesseth:

WHEREAS, *Muller Fox Brokerage Co.* on the
23rd day of January, one thousand nine hundred
and *twenty-four* recovered a judgment in the *Su-*
preme Court, New York County, in the sum of
Two Hundred Thirteen Thousand One Hundred
Eighty-three Dollars Seventy-three cents (\$213,- 20
183.73) against *ARTHUR E. WINTER* and *Frank*
B. Ross, co-partners doing business under the firm
name and style of WINTER, ROSS & Co.,

NOW THIS INDENTURE WITNESSETH,
that the said party of the first part, in considera-
tion of *One Hundred* (\$100.00) Dollars, to *it* duly
paid has sold, and by these presents does assign,
transfer, and set over unto the said party of the
second part, and *their* assigns, the said judgment, 30
and a sum or sums of money that may be had or
obtained by means thereof, or on any proceedings
to be had thereupon.

AND the said party of the first part does
hereby constitute and appoint the said party of
the second part, and *their* assigns or true and
lawful attorney, irrevocable, with power of sub-
stitution and revocation for the use, and at the
proper costs and charges of the said party of the
second part, to ask, demand and receive and to 40

Exhibit C-2

10 sue executions, and take all lawful ways for the recovery of the money due or to become due on the said judgment: and on payment to acknowledge satisfaction, or discharge the same. And attorneys one or more under *them* for the purpose

20 aforesaid, to make and substitute, and at pleasure to revoke, hereby ratifying and confirming all that said attorney or substitute shall lawfully do in the premises. AND the said party of the first part, does covenant that there is now due on said judgment the sum of *Two Hundred Eight Thousand One Hundred Eighty-three and 73/100 (\$208,183.73) Dollars*, and that *they* will not collect or receive the same, or any part thereof, nor release or discharge the said judgment, but will own or allow all lawful proceedings therein, the said party of the second part saving the said party of the first part harmless of and from any costs and charges in the premises.

IN WITNESS WHEREOF, the party of the first part has hereunto *affixed its corporate seal, and these presents to be signed by its duly authorized President, the day and year above written.*

30 SEALED AND DELIVERED IN THE PRESENCE OF

(Seal) *MULLER FOX BROKERAGE CO.,*
By: Harry M. Muller,
President.

STATE OF SS.: County of On the
 day of , nineteen hundred and before me
 came , to me known to be the individual
 described in, and who executed the foregoing instrument, and acknowledged that executed
 the same.

*Exhibit C-2*STATE OF ILLINOIS
COUNTY OF COOK

On the 22nd day of April, nineteen hundred and twenty-seven before me came HENRY A. MULLER, to me known who being by me duly sworn, did depose and say that he resides in Chicago, Illinois ; that he is the President of MULLER FOX BROKERAGE COMPANY, the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporation seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order. 10

(Seal) SAMUEL R. ROSENTHAL, 20
Notary Public.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, ROBERT M. SWEITZER, County Clerk of the County of Cook, and also, Clerk of the County Court of said County, same being a Court of Record, Do HEREBY CERTIFY that, as County Clerk, I am the lawful custodian of the official records of Notaries Public of said County, and, as County Clerk, am by the law of Illinois the duly authorized County Officer to issue Certificates of Magistracy, that *Samuel R. Rosenthal*, whose name is subscribed to the annexed Jurat, was, at the time of signing the same, a Notary Public in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths and to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in 30
40

Exhibit C-2

said State of Illinois, all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said Jurat is genuine.

10 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal as County Clerk, same being the seal of the County of Cook, at my office as County Clerk, in the City of Chicago this 3 day of *May* A. D. 1927.

(Seal) *ROBERT M. SWEITZER*,
County Clerk.

20 IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the County Court of Cook County, at my office as Clerk of the County Court, in the City of Chicago, this 3rd day of *May* A. D. 1927.

(Seal) *ROBERT M. SWEITZER*,
Clerk of the County Court.

30

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Exhibit C 3**NEW JERSEY SUPREME COURT***Statement*

Charles G. Carluccio

vs.

Arthur E. Winter

Impld. etc.,

*Action**at Law**Judg't entered* July 20 , 1927*Damages* \$251,728.83**COSTS**

Attorney 40.00

Disbursements 14.10

\$251,782.93

Edward J. Kelleher

Clerk.

10

20

Exhibit C 6

Warranty Deed.

THIS INDENTURE, Made the eleventh day of September, in the year of Our Lord One Thousand Nine Hundred and twenty. Between Arthur E. Winter of the city of Orange in the County of Essex and State of New Jersey, party of the First Part; and Katherine Humes Winter of the City of Orange in the County of Essex and State of New Jersey, party of the Second Part; WITNESSETH, That the said party of the first part, for and in consideration of One dollar and other good and valuable consideration money of the United States of America, to him in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, there-

30

40

Exhibit C-6

with fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party
 10 of the second part, and to her heirs and assigns forever, ALL those certain tracts or parcels of land and premises, hereinafter particularly described, situate lying and being in the city of Orange in the County of Essex and State of New Jersey

First Tract: BEGINNING at the Northwesterly side of Berkeley Avenue at the Easterly corner of land of Ambrose M. Matthews, which
 20 point is distant one hundred and thirty-six feet and eighty-four one-hundredths of a foot Northeasterly from the Northeasterly line of Hillside Avenue; running thence along said Berkeley Avenue North thirty-eight degrees nine minutes East two hundred and two feet and seventy-three one-hundredths of a foot to a new street fifty feet in width recently opened called Fairview Avenue; thence along the line of said Fairview Avenue
 30 North forty-two degrees twenty-six minutes West two hundred feet; thence at right angles to said Fairview Avenue South forty-seven degrees thirty-four minutes West two hundred feet to land of said A. M. Matthews; thence along said land South forty-two degrees twenty-six minutes East two hundred and thirty-three feet and seventeen one-hundredths of a foot to Berkeley Avenue and the place of beginning.

40

Exhibit C-6

BEING the same premises conveyed by Alice Reamey Moore and Theodore DeWitt Moore, her husband, to Edith Howes Taylor, by deed dated December 30th, 1904, and recorded in Book K-38 of Deeds for Essex County, on pages 1-3.

10

Second Tract: BEGINNING at a point in the Southwesterly line of Fairview Avenue, distant two hundred feet Northwesterly from the Northwesterly line of Berkeley Avenue, and running thence at right angles to Fairview Avenue South forty-seven degrees thirty-four minutes West two hundred feet; thence parallel with Fairview Avenue North forty-two degrees twenty-six minutes west seventy-five feet; thence at right angles to Fairview Avenue North forty-seven degrees thirty-four minutes East two hundred feet to Fairview Avenue; and thence along Fairview Avenue South forty-two degrees twenty-six minutes East seventy-five feet to point of beginning.

20

Being the same premises conveyed to Edith Howes Taylor by William P. Smith and Ella M. Smith, his wife, by deed dated May 12th 1906, and recorded in Book H-40 of Deeds for Essex County of Deeds for Essex County on pages 154-155.

30

This conveyance is made subject to the same restrictions contained or referred to in the above recited deeds and in a subsequent deed from Edith Howes Taylor and Irving Howes Taylor to Ar-

40

Exhibit C-6

thur E. Winter, and recorded in Book M-61 of Deeds for Essex County, on pages 279-281.

10 Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

20 To have and to hold, all and singular the above described land and premises with the appurtenances, unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever:

30 And the said party of the first part does for himself, his heirs, executors and administrators covenant and grant to and with the said party of the second part, her heirs and assigns, that he, the said party of the first part is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever; excepting as aforesaid.

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Exhibit C-6

And also, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

And also, that the said party of the first part will Warrant, secure, and forever defend the said land and premises unto the said Katherine Humes Winter, her heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever, excepting as aforesaid. 10

IN WITNESS WHEREOF, the said Party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) Arthur E. Winter (Seal) 20

Signed, Sealed and Delivered)

in the presence of)

(Signed) Horatio Clayton

Internal Revenue Stamps \$35.00 Attached.

Acknowledgment:—

STATE OF NEW JERSEY }
COUNTY OF MONMOUTH } SS.

BE IT REMEMBERED, That on this eleventh day of September in the year of our Lord One Thousand Nine Hundred and Twenty before me a Notary Public of New Jersey personally appeared Arthur E. Winter who, I am satisfied is the grantor mentioned in the within Indenture, and 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. 30

(Signed) Horatio Clayton 40
Notary Public of N. J.

Exhibit C-6

Seal attached:

Horatio Clayton
Notary Public
Spring Lake, N. J.

Endorsement:—

- 10 ExC—6 — DEED — Arthur E. Winter—to—
Katharine Humes Winter—Dated September
11th 1920. Received in the Register's Office of
the County of Essex, N. J. on the 4th day of
October A. D., 1920, at 1:59 o'clock, in the after-
noon and recorded in BOOK I 64 of DEEDS
for said County, on pages 53-54

Walter A. Evans
Register.

- 20 (Stamped — RECEIVED REGISTERS OF-
FICE OCT 4 1 59 PM 1920 ESSEX
COUNTY.)

Stamped—Compared Book held by 2

Paper held by 21

Read by 21)

Exhibit C 7

Check.

ORANGE NATIONAL BANK

Orange, N. J. December 6th 1920

- 30 No. _____

ExC-7

Pay to the order of A. E. Winter

Four hundred & fifty-six—15/100 Dollars
\$456.15/100 K. H. Winter.

Endorsed: A. E. Winter

(Stamped: FOR DEPOSIT TO CREDIT OF
WINTER, ROSS & CO.)

- 40 Stamp: PAY ANY BANK, BANKER OR
TRUST CO.

OR ORDER

FEDERAL RESERVE BANK

Exhibit C-7

DEC. 8, 1920 (Perforated)
 1-120 OF NEW YORK 1-120 P A I D
 Prior Endorsements Guaranteed
 L. H. Hendricks DEC 9 1920
 Controller of Collections.
 Stamp: PAY TO THE ORDER OF FEDERAL 10
 RESERVE BANK OF NEW YORK
 Prior Endorsements Guaranteed
 Dec 8 1920
 The National City Bank of New York
 New York N. Y.
 1-8 N. C. LENFESTEY, Cashier 1-8

Exhibit C 8

Check.
 No. 25 ExC-8 New York December 27, 1920. 20
 THE EQUITABLE TRUST COMPANY
 OF NEW YORK
 Pay to the order of Katharine Humes Winter
 Ten thousand 00/100—————Dollars
 \$10 000 00/100 A. L. Humes
 Safe Deposit Vaults
 (Perforated)
 P A I D 12 29 20 Stamped (G)
 Endorsement:—Pay to the order of Arthur E.
 Winter Katharine Humes Winter 30
 Arthur E. Winter
 Stamped: For deposit to credit of Winter, Ross
 & Co.
 Stamped: R RECEIVED PAYMENT T
 13050 through the NEW YORK CLEARING
 HOUSE PRIOR ENDORSEMENTS
 GUARANTEED DEC 28 1920
 THE NATIONAL CITY BANK OF
 NEW YORK
 N. C. LENFESTEY, CASHIER 40

Exhibit C 9

ExC-9 NEW YORK, Sept. 1st 1920
 RECEIVED FROM A. E. Winter Special
 (K H Winter account) 368L #8304

72 " #1286
 608 Texas Oil 100 ea #G.42198. 5828/9—42176/7
 8 At Ref Pfd. # P/o-7236
 10 10 Ianon. Farr Pfd. #T.P.O. 1229
 PRICHITT & CO.
 C. B. HOBART

Exhibit C 10

MEMORANDUM ExC-10

From
 PRICHITT & CO.
 Members New York Stock Exchange
 20 60 Broadway
 New York Sept 1 1920

Mr. A. E. Winter

WE Debit your account this day with the
 following items:

Check \$20,000

H

On the reverse side of this memorandum ap-
 pears the following (in lead pencil) :—

Dear Mr. Holmes:

30 I am sending you herewith stock certificates for
 658 shares of the Texas Company also my demand
 note for \$20,000. Kindly credit my account with
 that amount.

I thank you very much for arranging the loan
 for me.

(unsigned)

Exhibit C 11

Check. ExC-11

Orange, N. J. Sept. 15th 1920 No—

ORANGE NATIONAL BANK 55-170

Pay to the order of Prichitt & Co. \$20,000.00

Twenty thousand—00/100—Dollars

(Perforated)

P A I D 9 16 20

K. H. Winter

10

123

Stamped: CERTIFIED at the request of the holder payable at the National Bank of Commerce New York City, N. Y.

Orange National Bank Orange, N. J.

(Signed) WILLIAM F. REDPATH

Stamped: Pay to the order of LIBERTY NATIONAL BANK, Prichitt & Co.

Stamped: Received payment M through New York Clearing House Sep 15 19

20

THE LIBERTY NATIONAL BANK 37

Memorandum slip attached to check as follows:—

Sept 15 1920

Check Certified \$20 000.

P A I D 9 15 20

K. H. Winter

CHARGE.

30

40

Exhibit C 12

Transcript of Account—Mrs. Katherine H. Winter
The Texas Company (Texas)
\$100. par stock

Date of Certificate	Certificate Number	Debit	Credit	Credit Balance	
1918					
Aug. 21	E-39655		7	7	Transferred from the following names: Chas. W. Horan 4 shares Robert B. King 2 shares Charles B. Ackerson 1 share
Oct. 4	E-40802		50	57	50 shares transferred from name of Bamberger Bros.
1919					
June 18	E-50186		11	68*	11 shares represents subscription at par (\$100.)
*68 shares of \$100. par stock were exchanged for 272 shares of \$25. par stock.					

Transcript of Account—Mrs. Katherine H. Winter
The Texas Company (Texas)
\$25. par stock

Date of Certificate	Certificate Number	Debit	Credit	Credit Balance	
1920					
April 27	G-5828		100		
	G-5829		100		
	F-1286		72	272	272 shares received in exchange for 68 shares \$100. par stock
Aug. 4	G-42176		100		
	G-42177		100		
	G-42178		100		
	F-18304		36	608	336 shares represents subscription at par \$25.
Aug. 18	F-21003		50	658	50 shares transferred from name of De-Coppet & Doremus
1921					
April 1	F-45683		5		
	F-45684		60	723	65 shares represents 10% stock dividend
Aug. 19	F-45683	5			
	F-45684	60		658*	65 shares transferred to Prichitt & Co.
*658 shares of stock of The Texas Company were exchanged for 658 shares of The Texas Corporation.					

The above is certified to as being a correct transcript of the ledger and stock records of ownership and transfer of stock of The Texas Company (Texas) by Katherine H. Winter.

H. E. LAPP
Transfer Agent

STATE OF NEW YORK }
COUNTY OF NEW YORK }ss.

Subscribed and sworn to before me this 5th day of June, 1929.
(Seal) JESS W. E. HIGBEE,
Notary Public, Kings County.
Kings County Clerk's No. 442 Register's No. 1036.
York County Clerk's No. 55 Register's No. 1-H.
My Commission Expires March 30, 1931.

Exhibit C-12

Transcript of Account—Mrs. Katherine H. Winter
The Texas Corporation (Delaware)
\$25. par stock

Date of Certificate	Certificate Number	Debit	Credit	Credit Balance	
1926					
Nov. 18	28681		100		
	28682		100		
	28683		100		
	28684		100		
	28685		100		
	28686		100		
	0-20884	58	658	658	658 shares received in exchange for 658 shares of stock of The Texas Company (Texas)
1927					
Apr. 2	0-81941		65	723	65 shares represents 10% stock dividend
Apr. 29	0-81941	65		658	(10 shares transferred to Henry Clews & Co. (50 shares to Francis Dean (5 shares to DeCoppet & Doremus
1928					
May 3	0-20884	58		600)10 shares transferred to name of R.
	0-149157		48	648)Alice Humes
July 19	0-149157	48)20 shares transferred to name of R.
	0-161770		28	628)Alice Humes
Aug. 14	0-161770	28		600	28 shares transferred to name of R. Alice Humes
Nov. 12	28681	100		500	100 shares transferred to name of R. Alice Humes
1929					
Mar. 20	28682	100		400	100 shares transferred to name of John S. Chipman
Apr. 8	122997		100	500	100 shares represents subscription at \$40. per share.
May 7	122997	100		400	100 shares transferred to name of R. Alice Humes.

The above is certified to as being a correct transcript of the ledger and stock records of ownership and transfer of stock of The Texas Corporation (Delaware), by Katherine H. Winter.

H. E. LAPP,
Transfer Agent.

STATE OF NEW YORK }
COUNTY OF NEW YORK }^{ss.}

Subscribed and sworn to before me this 5th day of June, 1929.

(Seal) JESS W. E. HIGBEE,
Notary Public, Kings County.

Kings County Clerk's No. 442 Register's No. 1036.

York County Clerk's No. 55 Register's No. 1-H.

My Commission Expires March 30, 1931.

11

1880

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

97

New Jersey Court of Errors and Appeals

Between

CHARLES G. CARLUCCIO,
Complainant-Appellant,

and

ARTHUR E. WINTER and KATH-
ARINE HUMES WINTER,
Defendants-Respondents.

On Appeal
From the
Court of
Chancery.

APPELLANT'S BRIEF

This is a complainant's appeal from a dismissal of his bill in a creditor's action to set aside a conveyance by husband to wife as voluntary and fraudulent.

The actual trial had before Vice Chancellor Bentley who decided the questions of fact and law in complainant's favor.

In his written filed decision he advised a decree for complainant.

Before a decree was signed defendants applied, informally, for a reargument. Upon this application for a reargument Vice Chancellor Bentley heard oral argument and received briefs. The matter remained undecided upon the Vice Chancellor's death.

Vice Chancellor Bigelow, to whom the cause was referred, filed an opinion adverse to complainant and the decree of dismissal now appealed from was advised by Vice Chancellor Bigelow.

Complainant applied to His Honor, the Chancellor, in accordance with the practice indicated in

for a decree as advised by Vice Chancellor Bentley.

This application was denied and an order was entered. Complainant's appeal is from both the decree and the order.

With respect to the question of procedure, appellant contends that the questions of fact are to be considered as having been determined by the findings of Vice Chancellor Bentley, subject to a review by this Court.

This Court has before it the meritorious question as to whether complainant is or is not entitled to a decree.

Complainant-appellant contends that there should be a decree in his favor on the merits, on the facts and law. Appellant will argue on the merits for a reversal of the decree and order with a direction to the Chancery Court to enter a decree for complainant.

Facts

The firm of Winter, Ross & Co. of which defendant Arthur E. Winter was a member, carried on an export and import business in New York City. Complainant's assignor, Muller-Fox Brokerage Co., a foreign corporation, in or about 1920 entered into a contract whereby it purchased from defendant's firm about 500 tons of White Java Sugar, at an agreed price of 22 cents a pound. Subsequent to the making of this contract the price of sugar dropped sharply, so that when the same arrived in New York toward the end of August, 1920, the price was less than 14 cents a pound. In the meantime the Muller-Fox Brokerage Co. had paid in full for the sugar and upon its arrival accepted delivery of the same. When

the sugar was brought to Chicago, where Muller-Fox Brokerage Co. had its place of business, samples were taken, and upon inspection it was found that the sugar was of greatly inferior quality. On September 8th, 1920, a telegram was sent by Muller-Fox Brokerage Co. to defendant's firm, stating that the sugar delivered was not of the proper quality and that defendant's firm would be obliged to accept a return of the same, and pay back the moneys taken by them from Muller-Fox Brokerage Co. on account of the purchase price. There was much letter writing and exchange of telegrams in connection with this controversy over the sugar. Finally, and on October 16th, 1920 an action was brought in the Supreme Court of the State of New York by Muller-Fox Brokerage Co. against Winter, Ross & Co. which later resulted in a judgment for over \$200,000 against defendant's firm. Thereafter said judgment was assigned to complainant who brought an action thereon in the Supreme Court of New Jersey against defendant, Arthur E. Winter, and recovered a judgment in this State against said defendant.

While this controversy over the sugar claim was going on, defendant, Arthur E. Winter, on September 11th, 1920, executed a deed conveying property in Orange to his wife, Katherine H. Winter, who is the other defendant in this case. The bill here is for the purpose of setting aside this conveyance as against complainant.

Argument

Point I.

The burden of proof is on defendants to show that the deed under attack was not made to hinder, delay or defraud creditors.

Several occasions have arisen in recent years when the Court of Errors and Appeals of this State has declared the rule to be as follows:

“The burden of proving, when attacked as fraudulent, the consideration of a deed, where no consideration was paid at the time of the conveyance, is upon the grantee.”

Coleman vs. Graff, 94 L. 223, 119 Atl. 280.

Babirecki vs. Virgil, 97 Eq. 315, 127 Atl. 594. Same case—99 Eq. 867, 133 Atl. 292.

In the *Coleman* case, the son conveyed to his mother property after having determined upon a breach of a marriage contract. No valuable consideration was paid by the mother for the conveyance. Even though no action for breach of the marriage contract had yet been started, the court held that a case was established which threw upon defendants the burden of proof of establishing the bona fides of the transaction.

In the present case, defendants claim that the conveyance from Arthur E. Winter to his wife, Katherine H. Winter, on September 11th, 1920, was an honest transaction; that the consideration for the conveyance was the sum of \$35,000.00; and that the money was actually paid by the wife to the husband. The evidence shows that no money was paid on September 11th, 1920, the date when the deed was executed.

Defendants seize upon two transactions to establish the payment of the consideration. The first is the opening of an account on September 1st, 1920 in the name of Arthur E. Winter by the hypothecation of various certificates of stock standing in the name of Katherine H. Winter. The money obtained from this account, \$20,000, was on September 1st, 1920 given by the brokerage firm, Prichitt & Company to defendant Arthur E. Winter. The testimony is that some of the stock pledged in the accounts originally belonged to defendant, Arthur E. Winter. There is no explanation as to where the rest of it came from. There is not one iota of evidence in the entire case that Katherine H. Winter had a separate estate of her own, either before or after her marriage. There is no evidence in the case that said defendant was familiar with stocks and bonds. Much of the stock used for the borrowing of money at this time had recently (less than a month before) been transferred into the name of Katherine H. Winter. There is no explanation as to this. There is no explanation as to why the deed, if it were given for a consideration of \$20,000, was not made on September 1st, 1920 instead of on September 11th, 1920. The undisputed testimony is that in September, 1920, the defendant had creditors to whom he owed upwards of \$500,000. It also appears uncontradicted that the brother of Mrs. Winter is a prominent attorney; that in September, 1920, when the property transaction under attack was consummated, the brother was living next door to defendants. There is no explanation as to why the brother did not offer testimony to support the transaction; there is no explanation as to why the purchase money mortgage was not for \$15,000 instead of \$10,000, which is the amount of the

alleged purchase money mortgage. There is no production of the bank account of either of the defendants, or of the check books of either of the defendants, or of the bank account or check book of Winter, Ross & Co. If the payments were made as alleged by defendants, the bank accounts would certainly show them. If they did not have these accounts, transcripts of the same could be easily obtained from the bank.

The facts and circumstances surrounding this transaction unmistakably show that the defendant Arthur E. Winter was in business difficulties, and was hard pressed financially in September, 1920, when the conveyance was made; that he had owned his home free and clear of mortgages and encumbrances and had desired to protect it against his creditors; that he waited until it was too late, and that when he finally made up his mind to try to place the property beyond the reach of his creditors, he only created a situation which shows his true intention. There is no convincing evidence to support the transaction as being honest. It is apparent that the conveyance was made to hinder, delay and defraud creditors. Finally when the attack is made by a creditor, defendants grasp at two unrelated transactions to show the alleged consideration for the deed. As against these two transactions, there would have been much more important testimony at the disposal of defendants if the property had really been sold by the husband to the wife for a valuable consideration.

Point II.

The deed under attack here was a voluntary conveyance by husband to wife as against existing creditors, and legal fraud is presumed.

This statement of the law is well established by the following cases:

Washington National Bank vs. Beatty,
77 E. 252, 76 Atl. 442.

Eastern Sash & Door Co. vs. Meister, 99
E. 819, 134 Atl. 619.

Adoue vs. Spencer, 62 E. 782, 49 Atl. 10.

Unger vs. Mayer, 105 N. J. E. 253, s. c.
147 Atl. 509.

The Court of Errors and Appeals in Washington National Bank above cited, says:

“The effect of the statute is to make a voluntary deed fraudulent as against existing creditors, without regard to the intention with which it was executed. It is fraudulent in law.”

The statute mentioned is the Statute of Frauds.
2 Comp. St. 1910, p. 2618.

Quoting from the same opinion again, we have the following:

“When an existing creditor attacks the conveyance, and shows that his debt was incurred before, and was existing at the time when, the conveyance was made, *the law, without further proof, raises a conclusive presumption of fraud* so far as that creditor is concerned.”

The second extract from the opinion is followed by this court in the case of *Eastern Sash & Door Co. vs. Meister* above cited, where Vice Chancellor Berry elaborates on the rule.

In the *Unger* case (*supra*) and in *First National Bank vs. Merrick*, 6 A. R. 1113, the presumption is called irrebuttable.

Point III.

Neither insolvency of the grantor nor even existing creditors are prerequisites to the successful attack of a voluntary conveyance by husband to wife.

Defendants stress the fact that at the time of the conveyance to his wife, Winter was solvent, and that he conducted his business for several years thereafter. Even if that were so, the conveyance should be set aside because at the time it was made, defendant was in financial difficulties and unquestionably desired to convey his home to his wife in order to keep it out of the reach of his creditors. The law is particularly helpful to creditors under circumstances where the conveyance is voluntary.

In the *Eastern Sash & Door Co.* case, the rule is cited as follows:

“Neither the existence of a debt, nor the existence of the attacking creditor, at the date of the conveyance complained of, is a prerequisite to equitable relief at the suit of a subsequent creditor. Nor is it necessary to such relief that the attacking creditor should have been in actual contemplation of the grantor at the time of the conveyance. It is sufficient if the conveyance was made with the intent to defraud some creditor, either existing or subsequent.”

Defendants' contentions are:

(a) A pre-existing indebtedness is sufficient to support the transfer.

As authority for this proposition of law, defendants cited the following cases:

- Reid vs. Tilton*, 90 E. 42;
Adoe vs. Spencer, 62 E. 782;
Muirheid vs. Smith, 35 E., 303;
Atlantic Refining Co. vs. Stokes, 78 E. 301;
Hepburn vs. United Co., 87 E. 697.

Complainant admits the law to be as decided by these cases, but the difficulty is, that the doctrine of these cases does not apply here, because there is no believable testimony to show that Arthur E. Winter was indebted to his wife. The court has seen through the camouflage sought to be used in claiming the indebtedness of \$20,000 from the wife to the husband by reason of the stock transaction.

The opinion of Vice Chancellor Leaming in the Hepburn case was quoted at great length by defendants, but that part of the opinion which prevents its application here, is omitted, and is as follows:

“There can be no doubt, I think, in the mind of anyone that Mr. Shaw was indebted to his daughter. No one could well question the fact that he owed her \$35,000 even had he testified to the contrary, in view of the circumstances that upon his own books there is an account in recognition of that indebtedness. So we can proceed, in any event, upon the assumption and with the fixed belief that he was honestly indebted to his daughter in an amount

far in excess of the value of these certificates which are here in question. * * * *
 The fact that he borrowed \$35,000 from his daughter is not only declared against him by his books, but is fully established by the testimony of the witnesses familiar with the transactions.”

It will thus be seen that the father owed to the daughter \$35,000.00 beyond dispute or question. In this case there is no legal proof that Mr. Winter owed his wife anything.

(b) Fraud is never presumed, citing:

Coyn vs. Sayre, 54 E. 702.

There is no doubt about this rule, but in transactions between husband and wife, fraud is very often presumed as above set forth in the argument under Point II, and this presumption is often conclusive.

(c) The testimony of Mr. and Mrs. Winter cannot be eliminated; citing,

Baldauff vs. Russel, 88 E. 303;

Berckman vs. Berckman, 16 E. 122;

Day vs. Hopping, 98 E. 680.

In answer to this contention, complainant cites the case of *Babirecki vs. Virgil*, 99 N. J. E. 867, s. c. 133 Atl. 292, where the court rejects the testimony of *five* witnesses supported by an alleged contract:

“This learned Vice Chancellor thought the testimony of these five witnesses to be controlling, and dismissed the bill. We think in so doing he failed to give full consideration on the one hand to the unre-

liability resulting from self-interest, of the testimony of the members of this one-business family, and, on the other hand, to the circumstances tending to indicate its untruthfulness. The self interest, of course, is manifest. * * * *

This fact in itself gravely discredits the entire testimony of the five interested witnesses upon which the Vice Chancellor relied. If that testimony was untrue in this important respect, it was quite likely equally untrue with respect to the time when this so-called agreement was in fact concocted. At least we think it quite clear, taking all the circumstances to which attention has been called together, that the respondents have failed to successfully bear the burden cast upon them (as decided by this court in the former appeal) by the circumstances of this case of showing that there was in fact a bona fide valuable consideration for the conveyance in question."

In deciding the Babirecki case, the Court of Errors and Appeals commented upon the fact that the attorneys who prepared the deeds and represented the parties, were not called to testify by their clients. Other surrounding circumstances permitted the court, as in this case, to disregard mere statements of interested parties, and to cause the court to decide the case on the evidence of real facts and probabilities as against biased and unreliable testimony of the parties affected.

Point IV.

The conveyance was made to delay, hinder and defraud.

The courts have consistently set aside conveyances and transfers of the kind here involved.

Narrow technical distinctions have been uniformly brushed aside.

Fanciful and improbable stories have not been allowed to deceive.

Probabilities and common experience are safer guides than the testimony of highly interested witnesses.

In *Babirecki vs. Virgil* (99 N. J. E. 867), this Court laid down sound principles and did much to stop an all too frequent abuse.

See also *Service Trust Co. vs. Cohen*, 7 A. R. 28, s. c. 144 Atl. 114; *Ulicsnik vs. Dalrymple*, 6 A. R. 1649, s. c. 143 Atl. 920.

Point V.

There should be a reversal.

The findings and conclusions of Vice Chancellor Bentley are supported by the evidence and the law. The conclusions of Vice Chancellor Bigelow are not so supported. Considered de novo the complainant has made out a case. Without considering the important rule as to the burden of proof being cast upon defendants and being not sustained by them there is a case for complainant. Applying the rule as laid down by this Court the complainant's right to a decree is doubly established.

It is respectfully submitted that there should be a reversal with a direction to the Court below to enter a decree for complainant.

JOHN W. OCKFORD,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

OCTOBER TERM, 1930.

CHARLES G. CARLUCCIO,
Complainant-Appellant,

and

ARTHUR E. WINTER and KATH-
ARINE HUMES WINTER,
Defendants-Respondents.

BRIEF FOR RESPONDENTS.

The appeals in this case question the legal propriety of the final decree advised in this cause in the Court of Chancery, June 9, 1930, by Vice-Chancellor Bigelow (*p. 117*), and of an order made by the Chancellor June 10, 1930, denying the appellant's application to enter a final decree in accordance with the conclusions which had been filed by the late Vice-Chancellor Bentley, who had heard the case, but had advised no decree prior to his death (*p. 119*).

As the appellant does not in his brief elaborate upon, or seem to stress, the practice question raised by his application to the Chancellor for a decree in accordance with the conclusions filed by Vice-Chancellor Bentley, we shall merely call the court's attention to the order made by the Chancellor, after the death of Vice-Chancellor Bentley, referring the cause then undetermined to Vice-Chancellor Bigelow (*p. 109*), and submit that the order

of the Chancellor appealed from was obviously proper and the only disposition of the application which could then be made under the existing conditions. *Beall v. N. Y. Water Co.*, 87 N. J. E. 390, on the appellant's brief, deals with a case in which Vice-Chancellor Howell had filed his conclusions, and died without advising a decree, but in which there had been no re-reference to another Chancery judge.

We shall address this brief to the merits of the controversy litigated in the Court of Chancery.

The creditors' suit was heard orally by Vice-Chancellor Bentley, June 6, 1929, argued and submitted upon the same day. The Vice-Chancellor's conclusions were filed June 17, 1929. On the respondents' application a re-argument was granted, the testimony transcribed and the case again argued orally and briefs submitted.

The facts are not in dispute. The respondents contend that the only legally permissible inferences to be drawn from the testimony do not support the appellant's bill. On the contrary, it is established that the conveyance of the home 501 Berkeley Avenue, Orange, N. J., by Mr. Winter to his wife, was for an adequate legal consideration, that the entire proceeds of the sale were paid into the firm of Winter, Ross & Co., of which the appellant's assignor was a creditor, and used in the conduct of the business of that firm, and that the transaction was bona fide and wholly without fraud.

Except for the formal proof by the appellant of the assignment of the claim to him for the purpose of suit (*p. 34*), and the testimony of Mr. Lapp as to the holdings and transfers of stock in The Texas Company and The Texas Corporation (*pp. 71, 77*), (which correspond with and corroborate

the respondents' answers to the interrogatories (*Ex. C. 4 and C. 5, pp. 15, 30*), the only witnesses examined on the final hearing were Mr. and Mrs. Winter, and Frank B. Ross, a partner in the firm of Winter, Ross & Co. Their uncontradicted story of the transfer of the house, and the surrounding circumstances germane to appellant's charge of fraud, is as follows:

The Facts.

On January 1, 1919, the respondent, Arthur E. Winter, with Frank B. Ross formed the firm of Winter, Ross & Co., to engage in the importing business, in which line of business Mr. Winter had, prior to that time, been concerned, as a partner in the firm of Winter, Son & Company. He contributed \$250,000.00 to the firm during the year 1919 (*p. 50, l. 26*). Mr. Ross since 1902, had been engaged in a similar business, under the name of Frank B. Ross & Co., and he contributed a like sum of \$250,000.00 to the partnership assets (*p. 81, l. 36*). The business prospered during 1919. Mr. Winter states that the profits of the firm for that year were over \$500,000.00 (*p. 50, l. 37*), while Mr. Ross (*p. 82, l. 5*), says he thinks they were about \$600,000.00. Mr. Winter's withdrawals from the business during 1919 were approximately \$30,000.00. Prior to that time he had had a very considerable income right along (*p. 60, ll. 23, 29*). The early part of 1920 showed no marked change in this prosperous business. The trouble in the importing business of Winter, Ross & Co., was part of the great slump after the war, which played havoc with business generally. It started about September, 1920, and got worse as the years went on (*p. 58, ll. 20, 24*).

On May 28, 1920, Winter, Ross & Co., contracted to sell to Muller Fox Brokerage Co., of Chicago, 500 tons of white Java sugar, at 22¢ per lb., "cost, freight and insurance to cover particular average." It was out of disputes concerning the performance of this contract that the suit arose which resulted in the New York judgment against Winter, Ross and Co., which is the basis of the judgment in the New Jersey Supreme Court, now held by the appellant by assignment and upon which his bill of complaint is based. The sugar was purchased in Java by cable (*p. 51, l. 12*). It arrived by steamer August 28, 1920. In the meantime sugar had dropped to 13½¢ to 14¢ per pound, a loss of 8¢ to 8½¢ per pound (*p. 51, ll. 18, 25*). The terms of sale were that the buyers should furnish the sellers with a confirmed banker's letter of credit for 100% of the invoice amount. Although the appellant's brief claims that the sugar was paid for in full, in fact only 95% was paid, and accepted after protest (*p. 51, ll. 25, 36*). The bill for the balance, \$10,266.96, dated September 15, 1920, was sent by Winter, Ross & Co., to the Muller-Fox Brokerage Co. (*pp. 51, l. 36; 52, ll. 3, 4; p. 53, ll. 30, 36*).

In the latter part of August, Mr. Winter needed money to use in his business, and proposed to mortgage his home. Mrs. Winter suggested that she would buy it, and it was agreed that she should have the house for \$35,000.00, which was what he had paid for it, plus the improvements on it (*Mr. Winter, pp. 43, 44; Mrs. Winter, pp. 62, 63*). A purchase money mortgage for \$10,000 was to be given as part consideration. Mr. Winter got the certificates of stock from his wife either the day that he got the \$20,000.00 loan from Pritchitt & Co. (Sept. 1st), or the day before (*p. 46, ll. 15, 19*). The only ones of these certificates of stock which

had belonged to Mr. Winter were the Atlantic Refining preferred, and the Union Tank Car preferred. None of the Texas Company had belonged to him (*p. 47, l. 9*), although on October 4, 1918, he had given 50 shares of The Texas Company to his wife (*See Mrs. Winter's Answer to Interrogatory No. 24; p. 25, l. 33*). There was no account opened as alleged in appellant's brief, "in the name of Arthur E. Winter" on the hypothecation of the stock. Pritchitt & Co., gave their receipt September 1, 1920, for the stock to "A. E. Winter, Special (K. H. Winter account)" (*See Ex. C. 9; p. 138*), and gave their check for \$20,000.00 to Mr. Winter, who endorsed it to his firm (*p. 44, ll. 36, 40; p. 45, ll. 1, 8*). The deed for the property was not actually executed until Sept. 11th, the acknowledgment having been taken on that date before a notary in Mommouth County. It was recorded Oct. 4th (*Ex. C. 6, pp. 131, 136*).

The first complaint of the quality of the sugar is in the purchaser's telegram of Sept. 7th (*p. 58, ll. 26, 40; p. 59, ll. 1, 27*). It questions 2,400 bags of the entire shipment of 5,008 bags, and offers to arbitrate. Winter, Ross & Co., denied inferior quality in telegram, Sept. 8th, and referred to samples taken jointly as basis for arbitration (*N. Y. printed Book, p. 399*). On Sept. 17th, the seller bills the buyer for the balance due under the contract, \$10,226.96, and deals with an alleged shortage of 56 bags, suggesting substitution of other bags (*pp. 52, 53*). On September 30th, the seller again telegraphs the buyer, and writes on same day (*pp. 54, 55*). To this the buyer's letter of Oct. 1st is a reply (*pp. 55, 56*). This was followed about the middle of October by the call of a representative of the buyer, who tendered a warehouse receipt and demanded return of the full purchase price (*p. 56*,

l. 32). This was followed a few days later by the service of summons and complaint in the New York Supreme Court (*p. 57, l. 15*).

Recurring to the purchase of the house; on September 15th, Mrs. Winter shifted the loan to the Orange National Bank, getting \$26,000.00 upon the pledge of the same stock, paying off Pritchitt & Co. (*p. 47, ll. 11, 35*). The balance of \$5,000.00 over the Pritchitt loan and the \$10,000.00 mortgage, was paid to Mr. Winter, \$4,000.00 odd dollars in October, and the balance of \$456.15, December 6th (*p. 40, ll. 28, 40; p. 41, ll. 1, 30*). The check for the latter amount alone is in evidence (*Ex. C. 7; pp. 136, 137*). On Dec. 27th, Mrs. Winter obtained a mortgage loan of \$10,000.00 from her brother, Mr. Humes, and paid off the mortgage which had been given to Mr. Winter in part payment for the property (*p. 41, ll. 30, 40*). The entire Pritchitt loan was deposited in the bank account of Mr. Winter's firm (*p. 44, ll. 30, 40; p. 45, ll. 1, 8*). So was the \$5,000.00 received in instalments, as well as the \$10,000.00 paid when the purchase money mortgage was discharged (*Answers to Interrogatories 1, 3 and 7, Ex. C. 5, pp. 20, 21*).

The action of appellant's assignor proceeded in the New York Supreme Court, resulting in a verdict for the plaintiff in January, 1924, which was affirmed on appeal by the Appellate Division (*p. 126*). The judgment in the New Jersey Supreme Court, founded upon the New York judgment, was entered July 20, 1927 (*p. 131*).

Winter, Ross & Co., continued in business for three years (*p. 58, ll. 10, 13*), until October, 1923, when it was dissolved (*p. 82, ll. 37 40; p. 83, l. 3*). To carry on the business, Mr. Winter borrowed money from various people wherever he could, including, in December, 1920, \$150,000.00 from his father (*p. 57, ll. 32, 38; p. 83, ll. 22, 26*).

POINT I.

The conveyance to Mrs. Winter was not made to hinder, delay or defraud the creditors of Mr. Winter.

The only evidence in the record before the court shows the precise opposite of an intention on the part of Mr. Winter to defraud his creditors. Every dollar of the consideration received from the sale of the property was paid into the firm of Winter, Ross & Co., and was used by that firm in the conduct of its business. How can it be said that the conversion by Mr. Winter of his own property into cash, for a fair and adequate consideration, and the contribution of the entire proceeds of the sale to the business of which it is now claimed that appellant's assignor was then a creditor, was a fraud upon that creditor, or any creditors, of the firm of Winter, Ross & Co.? Fraud consists of diverting the debtor's assets from the discharge of his indebtedness to which it should honestly be applied, and using such assets for the debtor's personal advantage, to the loss and detriment of his creditors. It necessarily imports dishonesty on the part of the debtor, and loss on the part of the wronged creditors. If Mr. Winter had conveyed his home direct to his firm, could any creditors of the firm have impugned the transaction? The firm would then have sold the property in order to raise the cash which they needed to use in the business. How is the transaction essentially different when Mr. Winter sells the property at a fair price and pays the entire proceeds into his firm? The whole foundation for the attack upon Mrs. Winter's title to her home fails, when it is shown that the debtor's

part in the transaction was honest, and that there was no diversion of funds from the creditors of Winter, Ross & Co.

But even if the uncontroverted evidence be disregarded, and it be assumed that it were possible to impute to Mr. Winter in making the conveyance to his wife a purpose to defraud his creditors, that fraud could not be charged to his grantee, who gave a full and adequate consideration for the transfer of title to her.

POINT II.

The consideration was fair and adequate. A pre-existing indebtedness is sufficient consideration to support the transfer.

Mrs. Winter paid \$35,000.00 for the property. The price was arrived at by taking the consideration which Mr. Winter had paid, and adding the cost of the improvements (*p. 44, ll. 10, 14*). No attack has been made upon the adequacy of the consideration. In the memo opinion filed by Vice-Chancellor Bentley, June 17th, 1929, after the conclusion of the oral argument, the court (*p. 97, ll. 16, 22*) says that Mrs. Winter came to the rescue of her husband in his embarrassment, and the "undoubted transaction with Pritchitt & Company was subsequently seized upon to give an appearance of verisimilitude to the subsequent transaction of September 11th, 1920." But the transaction with Pritchitt & Co. made Mrs. Winter her husband's creditor to the extent of \$20,000.00. That the money raised by the pledge of Mrs. Winter's stock was an advance to her husband of part of the consideration is sworn to by Mr. Winter (*Interroga-*

tory 14, and answer p. 17, l. 18; p. 22, ll. 7, 18), and by Mrs. Winter (*Interrogatory 19, p. 18, and answer, p. 24*). This comports with the receipt of Pritchitt & Co. for the stock pledged (*Ex. C. 9, p. 138*) which reads "A. E. Winter, Special (K. H. Winter account)." Moreover the legal presumption is that advancements made by a wife to her husband, in the absence of evidence of a gift, are loans.

Reed v. Tilton, 90 N. J. Eq. (5 B. Stock.)
42 (1919, Leaming, V. C.);
Adoue v. Spencer, 62 N. J. Eq. (17 Dick.)
782 (1900, E. & A. Fort, J.).

It therefore seems indubitable that on September 11th, when the deed to Mrs. Winter was actually executed, she was a creditor of her husband to the extent of \$20,000.00. Such indebtedness will support the transfer, no less than a present advance of the consideration.

Muirheid v. Smith, 35 N. J. Eq. (8 Stew.)
303 (1882, E. & A. Knapp, J.).

(P. 306.) "It is not denied that a creditor may purchase from his debtor, although insolvent, to protect his debt, if the purchase be made in good faith and at a fair valuation."

See also *Atlantic Refining Co. v. Stokes*, 77 N. J. Eq. (7 Buch.) 119 (1910, Leaming, V. C.), affirmed 78 N. J. Eq. 301, in which the court says (*p. 120*):

"It is the right of an individual who is in failing circumstances or insolvent, to prefer one of his creditors; and it is also the right

of any creditor of such an individual, acting honestly and in good faith, to obtain security from his debtor to secure the debt, or to extinguish the debt by purchasing property of the debtor which is of the same value as the credits surrendered," etc.

The court comments upon the fact that when the conveyance is taken to secure an antecedent debt, the creditor is in a stronger position than is one who might have kept out of the situation, but who voluntarily purchases.

Hepburn v. United W. G. & E. Co., 87 N. J. Eq. (2 B. Stock.) 697 (E. & A., 1917, affirming an opinion of Leaming, V. C.).

A transfer of stock by a father to his daughter was attacked by the creditors of the former as a fraud upon them.

Leaming, V. C. "It matters not that Mr. Shaw had originally laid the foundation for or contributed to the fortune which she had, if he in fact subsequently borrowed from her. The fact that he borrowed \$35,000 from his daughter is not only declared against him by his books, but is fully established by the testimony of the witnesses familiar with the transaction. 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. He had like power, if he saw fit, to give her this stock by way of security for the money which he owed her."

(P. 698) * * * "It is not reasonable, under the circumstances then existing, to suppose that Mr. Hepburn would have found it necessary at every or even any stage of the proceedings he was conducting to be careful to declare that this stock was the property of his wife or that it had been transferred to her, although not in her name, upon the books of the stock company. Had he observed special care to make altogether unnecessary declarations of that kind, it 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 infrequently suggests innocence of purpose. He knew, as has been shown, that at the time his father-in-law was pecuniarily embarrassed. The circumstance that he did not carefully guard against any conduct or statement indicating that this stock still belonged to his father-in-law indicates quite as fully his condition of mental security in his own then unchallenged position as a man who knew that the stock had been delivered to him for his wife in payment of a debt as it indicates that the transaction may not have been of that nature.

In a great number of suits of various kinds that have been tried before me where convey-

ances or transfers have been made and an attack upon their bona fides has been pending under a claim that they were only simulated, I have almost uniformly observed that the careful and studied conduct of a fraudulent grantor or grantee to avoid doing anything or saying anything that could by any possibility be urged as an indication of the want of bona fides in the transfer is one of the most powerful badges of fraud that exists. It more 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."

Now as to the rest of the consideration: A purchase money mortgage was taken for \$10,000.00, which was discharged December 27, 1920, when the mortgage for a like amount was made to Mrs. Winter's brother, Mr. A. L. Humes. He gave his check to Mrs. Winter, who endorsed it to her husband, who deposited it to the account of Winter, Ross & Co. It was paid December 29th. The check (in evidence, *Exhibit C. 8, p. 137*) tells the whole story, and corroborates fully the defendants (*pp. 41, 42*).

This leaves \$5,000.00 of the consideration to be accounted for. There is no discrepancy between the evidence as it came out on the hearing and the statements of the answer and of the answers to the interrogatories, as was apprehended by V. C. Bentley in his conclusions, relying upon his recollection of the testimony which had not then been transcribed. The answer (*end of paragraph 14, p. 11, ll. 26, 30*), states that from the surplus of \$6,000.00 remaining from the collateral loan of the Orange National Bank after paying off Pritchitt & Co., Mrs. Winter paid to her husband \$5,000.00

“in several payments,” making up the balance of the consideration. In answer to the first interrogatory, asking the consideration for the conveyance, Mr. Winter replied: “\$20,00.00 cash on September 1, 1920; \$5,000.00 part in October and part in December, 1920, and a purchase money mortgage for \$10,000.00” (p. 20, ll. 23, 25). When Mr. Winter was examined at the hearing, he testified that he was paid “four thousand and odd dollars in October, and the smaller balance to make up the \$35,000.00 purchase money” (evidently the stenographer has omitted the concluding words “in December”) (p. 40, ll. 37, 40). On being shown the check of Mrs. Winter to his order for \$456.15, *Ex. C. 7* (pp. 136, 137), he says, “That is the final payment of December 6, 1920 for \$456.15” (p. 41, l. 25). It is not surprising that the respondents are unable to produce the other checks. After the lapse of so many years they are fortunate in being able to find *Ex. C. 7*. Both respondents testify that the money was paid, that consists with the entire transaction, and there is nothing to controvert it.

POINT III.

The appellant has not borne the burden of proof which the law casts upon him.

Fraud is never presumed. One who charges fraud in a transfer of property must produce proof of the fraud. As was said by the Court of Errors and Appeals in the case of

Coyne v. Sayre, 54 N. J. Eq. (9 Dick.)
702 (1896, E. & A., Hendrickson, J.)

(P. 713) “The bill charges fraud upon the defendants, and it is a well settled principle,

both at law and in equity, that fraud is never presumed and that the burden of proof rests upon the creditors whenever they assail a transfer for fraud. *Bump Fraud Conv.* §611."

See also Trust Co of Orange v Garfield, 107 S. E. 20, 23. (Oct. 20, 1930, E. C. Wells, J.)

The relation of the parties as husband and wife requires that the evidence should be scrutinized with care, and that it should appear that the wife has given adequate consideration for the conveyance to her. The most minute examination of the record in this case fails to raise any reasonable doubt that Mrs. Winter paid for the property what it was fairly worth at the time of the transfer, or that the money was raised on the pledge of securities which were part of her own separate estate. What is the evidence?

That \$35,000.00 was an adequate consideration for the property stands unquestioned (*supra*). The only question is, whose money was it?

The interrogatories and answer of both Mr. and Mrs. Winter have been offered in evidence by the complainant (*pp. 15, 30, Ex. C. 4 & C. 5*).

Mr. Winter, in answer to Interrogatory 13 (*p. 21*), says that no certificates of shares of stock were turned over by him to Mrs. Winter in connection with the transfer of said property, or for the purpose of enabling her to obtain moneys from the Orange National Bank upon said stock certificates; in answer to interrogatory 14 (*p. 22*), he tells of obtaining from Mrs. Winter certain stock certificates, on which he raised the loan of \$20,000.00, part payment for the transfer of the property.

Mrs. Winter, in answer to Interrogatory 19 (*p. 24*), says that she obtained the moneys with which she made a payment for the purchase of the property by negotiating a loan on certain stock certificates which she owned as collateral security

from Pritchitt & Co.; in answer to Interrogatory 23 (*p. 25*), she says that no stock certificates were transferred to her by Mr. Winter in connection with the transaction; in answer to Interrogatory 24 (*p. 25*), she says no moneys were obtained by her for the payment of the consideration of the property, or for the discharge of mortgages thereon, from Mr. Winter; that the securities pledged, naming them, were her property; that they included 50 shares of the Texas Co., which had been given her by Mr. Winter Oct. 4, 1918. These 50 shares were given her as a wedding anniversary present (*p. 67, ll. 18, 23*).

Neither Mr. Winter nor Mrs. Winter was asked directly on the hearing by appellant's counsel, as to the ownership of the securities pledged first with Pritchitt & Co. and later with the Orange National Bank.

POINT IV.

The testimony of the witness Lapp, representative of the Texas Corporation, confirms the information given by the respondents in their answers to the interrogatories.

The appellant's brief says "some of the stock pledged in the accounts originally belonged to defendant Arthur E. Winter. There is no explanation as to where the rest of it came from."

The only shares which belonged to Mr. Winter were the 8 shares of Atlantic Refining preferred, and the 10 shares of Union Tank Car, preferred. None of the Texas Oil belonged to him (*p. 47, ll. 3, 10*).

Mrs. Winter in her answers to the interrogatories, offered in evidence (*p. 36, ll. 18, 24*), by the

appellant (*Ex. C. 4, and Ex. C. 5; pp. 15, 30*), says that the securities pledged were her property. Mr. Lapp, the representative of the Texas Company, supplies the evidence of where the stock came from. The stock which was issued August 4, 1920, had been subscribed for in 1919, and paid for in instalments. The certificates were issued when the payments were completed (*p. 76, l. 38; p. 77, ll. 3, 18*). This obviously disproves the misstatement of appellant's brief that there is "no explanation" of the fact that much of the stock "had recently (less than a month before) been transferred into the name of Katharine H. Winter."

The transcript of the account of Mrs. Winter with The Texas Company (later called The Texas Corporation) Exhibit C. 12 (*pp. 140, 141*), corroborates absolutely the respondent's statements in the answers to the interrogatories. The interest shown on the hearing by Mr. Winter in the testimony of the witness Lapp, representative of the Texas Company, which to V. C. Bentley (*pp. 95, 96*), gave the impression of intense excitement and alarm, was most natural, under the circumstances. Before answering the interrogatories, in order to verify their recollection of stock transactions which had taken place nine years before, by reference to the corporate books, they obtained from the Company a statement of Mrs. Winter's account. The answers, so verified, they knew must be correct. Naturally, they were greatly surprised, as was their counsel also, when Mr. Lapp was produced to show the details of the transactions as exhibited by the Company's books. If the books did not convict them of some substantial errors in their answers, why produce this witness, with the books, from a foreign jurisdiction? It is submitted that some evidence of perturbation was entirely natural. But

its reason was not correctly apprehended by the Court.

The fact is, however, that the evidence so submitted was not an occasion for excitement or alarm, when compared with the answers to the interrogatories. Except that Exhibit C. 12 carries the stock account of Mrs. Winter down to May 9, 1929, whereas the interrogatories answered were directed to the conditions September 1, 1920, when the loan from Pritchitt & Co. was obtained, the account from the Company's books, and the answers to the interrogatories are in entire accord. A comparison of these items of evidence is easily made, and cannot but be convincing.

POINT V.

Not only is the record barren of any evidence of fraud, but the respondents have affirmatively shown that the transaction was fair and honest.

The only direct testimony of the conditions surrounding and leading to the making of the conveyance attacked is that of Mr. and Mrs. Winter. Their account is supported by the testimony of Mr. Ross, the evidence of Exhibits C. 7, C. 8, and C. 9 (*pp. 136, 138*), and the showing of Mrs. Winter's account in the books of The Texas Company. Even if the testimony of Mr. and Mrs. Winter were to be eliminated, there would be no evidence in the record to support a finding of fraud. But their evidence cannot be rejected. It is not incredible, or inherently improbable, nor are these witnesses impeached.

As was said by the Court of Errors and Appeals in *Baldauf v. Russell*, 88 N. J. L. (3 Gum.) 303, 306 (1915, Kalisch, J.):

“The testimony of a competent witness cannot be capriciously rejected. There must appear some good reason for such action, as, for example, that his story was inherently improbable, or that it was contradicted by some other testimony, or by some proven fact or circumstance, or by testimony impeaching his truth and veracity.”

See also *Berckmans v. id.*, 16 N. J. Eq. (1 C. E. Gr.) 122, 127, (1863, Green, Ch.), affirmed 17 N. J. Eq., 453, in which the Chancellor states the legal rule thus:

“Express testimony cannot be rejected on the sole ground of its improbability.”

Also,

Day v. Hopping, 95 N. J. Eq. (10 B. Stock.) 680 (1923, E. & A.)

But the testimony of Mr. and Mrs. Winter is not of such weak character as to need the support of these legal rules limiting the right of the trial judge arbitrarily to reject the sworn statement of competent witnesses. No one seeing these witnesses and observing the candor with which they testified, could believe that they were deliberately falsifying. And yet no other conclusion can be reached if their account of the transfer be not accepted. It is not possible for them to be honestly mistaken. If their story is not true, it must be intentionally false.

The Appellant's Brief.

In considering the appellant's brief, its omissions are quite as significant as its contentions. These are necessary omissions, as there is no evidence whatever to meet the respondents' proofs.

No attempt is made to controvert the fact that every dollar of the purchase price of the home was paid to Winter, Ross & Co., and used in their business.

No attack is made on the fairness and adequacy of the consideration for the deed to Mrs. Winter.

After bringing over from New York the witness Lapp to exhibit Mrs. Winter's complete dealings in the stock of that Company, her statements are fully corroborated.

What is left to the appellant? The evidence, both oral and documentary, being wholly opposed to the allegations of his bill, he has no recourse except to assert that all the witnesses have sworn falsely. If the stock pledged with Pritchitt & Co. September 1, 1920, for the \$20,000.00 loan, was Mrs. Winter's, the transfer of the home to her is unassailable. She testifies that it was her stock, Mr. Winter does likewise, and the receipt from Pritchitt & Co. (*Ex. C. 9, p. 138*) states explicitly that the stock was taken "(K. H. Winter account)." There is no testimony to the contrary. Then the appellant urges that there is no evidence that Mrs. Winter had a separate estate. But the appellant himself supplied the proof, if that were considered essential. The witness Lapp shows that beginning August 19, 1918 (*p. 73, U. 21, 29*), she had stock in the Texas Company which increased by subscriptions and transfers until on September 1, 1920, she owned the 608 shares pledged with Pritch-

itt & Co. for the \$20,000.00 loan. It is true that there is no evidence as to the source from which came the funds to make these acquisitions of stock. Both Mr. and Mrs. Winter were called as witnesses by the appellant, and might have been questioned as to this had he chosen to probe into it. What difference could it make whether the money had been inherited, given by her family or earned by her own exertions? Even if we were to indulge in the surmise that it had all been given her by her husband, the legal position would not be affected. A man of substantial fortune, whose income from his business in 1919 was a quarter of a million dollars (*p. 50, ll. 33, 37; p. 82, ll. 4, 6*) might make a much larger provision for his wife than was necessary to purchase the Texas Company stock, without impairing the claims of creditors. But this is mere imagining. There is no evidence whatever to impeach the direct testimony of Mr. and Mrs. Winter, that the securities pledged belonged to her, the corroboration of the Pritchitt & Co. receipt, *Ex. C. 9 (p. 138)*, and the records of the Texas Company. Together they establish the ownership in Mrs. Winter beyond all peradventure.

The cases cited by the appellant's brief all deal with *voluntary* conveyances. Then all the direct evidence and corroborating circumstances in our case are ignored, and the court is asked to assume that the transfer from Mr. Winter to his wife was without consideration. Only on that assumption have his cases any bearing.

The appellant harks back in his brief to the case of *Babirecki v. Virgil*, 133 Atl. 292 (99 N. J. Eq., 867), which he quoted from at length both on the original argument and on the re-argument below. It is true that no court is required to believe the testimony of witnesses, no matter how numerous,

which is itself incredible, or which is discredited by established facts and conditions surrounding the transaction. A perusal of the opinions in the Court of Errors and Appeals—it went twice to that court—(97 N. J. Eq., 315; 99 N. J. Eq., 867) shows why it was impossible for the court to credit the testimony of the five interested witnesses.

But that case has no parallel here. Mr. and Mrs. Winter were intelligent and candid, though interested, witnesses. Their account of the transaction was credible and natural under proved conditions. They were corroborated by the evidence of the stock records, produced by the appellant himself. They were not impeached, nor was their testimony contradicted by other witnesses, or by facts inconsistent with their story. Under the established rules of law their testimony cannot be disregarded.

The appellant's sole attack is upon the ownership by Mrs. Winter of the stock pledged. It is submitted that by the weight of uncontroverted evidence such ownership is satisfactorily established.

A review of the record convinces, by the great preponderance of the evidence, that the transfer was honest, and for an adequate consideration. Not only was it free from fraud upon creditors, but it is affirmatively shown to have been a fair sale, the entire proceeds of which were paid into the partnership of Winter, Ross & Co., of which the appellant's assignor was a creditor.

The decree of the Court of Chancery should be affirmed.

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CHARLES L. CARRICK,
of Counsel.

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