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SUBSTITUTION OF ATTORNEY.

Filed February 18, 1932.

New Jersey Supreme Court

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO, *Defendant.*	*Action at Law.* *Substitution of Attorney.*

I, T. Mancusi-Ungaro hereby consent to the substitution of Arnold Mancusi-Ungaro, in my place and stead as the attorney of record of the above-named defendant, Arcangelo De Fronzo.

T. MANCUSI-UNGARO.

Dated February 15, 1932.

New Jersey State Library

SUMMONS.

The State of New Jersey to: Arcangelo De Fronzo and Elvera De Fronzo.

(SEAL)

YOU ARE SUMMONED to answer the annexed complaint of Vito Stassi, in an action at law in the New Jersey Supreme Court, Bergen County.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 22nd day of October, 1930.

FRED L. BLOODGOOD,
Clerk.

SAMUEL B. FELD, Esq.,
Attorney of Plaintiff,
8-10 Lexington avenue,
Passaic, N. J.

To Arcangelo De Fronzo and Elvera De Fronzo, defendants:

PLEASE TAKE NOTICE that you are hereby required to file an affidavit of merits with the Clerk of the Supreme Court at Trenton within ten days after service of the within summons and complaint upon you, and an answer within twenty days after such service, and upon failure to do so, judgment by default may be entered against you.

SAMUEL B. FELD,
Attorney for Plaintiff.

COMPLAINT.

Filed November 8, 1930.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO and ELVERA DE FRONZO, (or Elvira), *Defendants.*	*Action at Law.* *Complaint.*

FIRST COUNT.

Plaintiff, residing in the County of Bergen and State of New Jersey, respectfully alleges as follows:

1. That he did receive by an assignment from Victorio Cangialosi, a claim against the above-named defendants upon which there is due the sum of Twenty-five Hundred and Ninety-five ($2,595.00) Dollars, as hereinafter alleged.

2. That the said Victorio Cangialosi did render services for and in behalf of the said defendants under and by virtue of an agreement wherein and whereby the said defendants agreed to pay to the said Victorio Cangialosi the sum of One Hundred Twenty ($120.00) Dollars per week for as many weeks as the said Victorio Cangialosi will be occupied in the performance of his duties as model artist, while the said Victorio Cangialosi was decorating the

defendants' residence with various models made by the said Victorio Cangialosi. That the said work *work* was commenced November 1, 1928 and continued up to and including May 11, 1929. That the said Victorio Cangialosi spent twenty-three (23) weeks and three (3) days in the performance of the said work.

3. That it was agreed that while the said work continues, the said Victorio Cangialosi would receive his board and lodging from the said defendants at the agreed price of $15.00 per week. That the said Victorio Cangialosi remained with the said defendants for a period of fifteen weeks so that the said defendants would be entitled to a credit of $225.00. That there is due to the said Victorio Cangialosi for said work, labor and services, the sum of $2,820.00, and after deducting $225.00 for board and lodging as herein stated, that there is due to said Victorio Cangialosi the sum of $2,595.00.

WHEREFORE, plaintiff demands a judgment against the defendants in the sum of $2,595.00 plus interests and costs of court.

SECOND COUNT.

1. Count 1 is hereby made a part of this count.

2. Plaintiff states that the reasonable value of said services covering a period of twenty-three weeks and three days, is $2,820.00 being at rate of $120.00 per week. That the said work by the said Victorio Cangialosi consisted of the placing, installing and constructing all artificial marble and ornamental plaster work by hand for the interior of the defendants' residence.

3. Plaintiff states that the said Victorio Cangialosi received board and lodging from defendants for fifteen weeks at $15.00 per week so that the said defendants are entitled to a credit of $225.00.

4. That there is a balance due of $2,595.00, no part of which has been paid.

WHEREFORE, judgment will be demanded in the sum of Twenty-five Hundred and Ninety-five ($2,595.00) Dollars, plus interest and costs of court.

SAMUEL B. FELD,
Attorney of Plaintiff.

ANSWER OF ELVIRA De FRONZO.

Filed December 11, 1930.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO and ELVIRA DE FRONZO, *Defendants.*	*Action at Law.* *Answer.*

Defendant, Elvira De Fronzo, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. She denies the truth of the allegations contained in the first and second counts of the complaint.

DAVID M. KIRSCH,
Attorney of Defendant, Elvira De Fronzo.

ANSWER OF ARCANGELO De FRONZO.

Filed December 13, 1930.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO and ELVIRA DE FRONZO, *Defendants.*	*Action at Law.* *Answer.*

FIRST COUNT.

Defendant, Arcangelo De Fronzo, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. He denies each and every allegation contained in the first count of the bill of complaint filed herein.

SECOND COUNT.

1. He denies each and every allegation contained in the second count of the bill of complaint filed herein.

FIRST SEPARATE DEFENSE.

1. On or about December 6, 1928 an oral agreement was entered into between Victorio Cangialosi and Arcangelo De Fronzo to do decorating work in the premises located at No. 71 Hazelwood avenue, Newark, New Jersey, accord-

ing to a schedule hereto annexed and made part hereof and marked "Schedule A."

2. On or about the 11th day of June, 1929 the defendant did pay to Victorio Cangialosi the sum of $108.00 which was the balance due to the said Victorio Cangialosi for the work done, as above stated, which said $108.00 was in full payment of the amount due to said Victorio Cangialosi for the work done, and an additional $13.00 for carfare and expenses to and from the premises, as requested by Victorio Cangialosi, although not in consideration of the oral agreement.

Wherefore defendant prays that the bill of complaint herein be hence dismissed with the costs and charges most wrongfully sustained.

T. MANCUSI-UNGARO,
Attorney of Defendant, Arcangelo De Fronzo.

"SCHEDULE A."

Pantry—96 sq. ft. artificial marble @ $1.25 per sq. ft.	$ 120.00
Living Room—Artificial plaster at the agreed price of $200.00	200.00
Dining Room—Artificial plaster at the agreed price of $200.00	200.00
Foyer & Stair Siding from hall to roof of artificial marble 300 sq. ft. @ $1.25 per sq. ft.	375.00
Extra work on hall foyer and ceilings of the hall from second floor to the roof at the agreed price of $400.00	400.00
Total	$1,295.00

REPLY.

Filed December 10, 1930.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO and ELVIRA DE FRONZO, *Defendants.*	*Action at Law.* *Reply.*

REPLY TO FIRST COUNT.

1. Plaintiff does hereby join issue with the allegations contained in paragraph 1, of the first count.

REPLY TO SECOND COUNT.

1. Plaintiff does hereby join issue with the allegations contained in paragraph 1, of the second count.

REPLY TO FIRST SEPARATE DEFENSE.

1. Plaintiff does hereby deny each and every allegation contained in paragraphs 1 and 2 of the first separate defense, and does hereby join issue with same.

SAMUEL B. FELD,
Attorney for Plaintiff.

REPLY TO ANSWER OF ELVIRA De FRONZO.

Filed December 10, 1930.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO and ELVIRA DE FRONZO, *Defendants.*	*Action at Law.* *Reply to Answer of Elvira De Fronzo.*

1. Plaintiff does hereby join issue with each and every allegation contained in paragraph 1, of the answer.

SAMUEL B. FELD,
Attorney for Plaintiff.

POSTEA.

Filed February 13, 1932.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

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VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO, and ELVERA DE FRONZO, *Defendants.*	*Action at Law.* *Postea.*

This case was tried before Judge Edwin C. Caffrey, with a jury at the Bergen Circuit, on February 9, 1932, the Court directed a verdict in favor of the defendant Elvera De Fronzo.

20

The jury rendered a general verdict against the defendant, Arcangelo De Fronzo, and in favor of the plaintiff for Twenty-one Hundred Eighty-two Dollars and 95/100 ($2,182.95) Cents.

EDWIN C. CAFFREY,
Judge.

30

Damages	$2,182.95
Costs	71.44
	$2,254.39

Judgt. for Deft. Mar. 5, 1932 David M. Hisch, Atty.

Costs $

R. to S. C. dischgd. & Judgt. final May 23, 1932 as of Feb. 13, 1932.

40

Certificate of Clerk.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fifteenth day of September A. D. nineteen hundred and thirty-two.

(SEAL)

FRED L. BLOODGOOD,
Clerk.

JUDGMENT.

NEW JERSEY SUPREME COURT.

VITO STASSI, *Plaintiff,* vs. ARCANGELO DE FRONZO, *Defendant.*	*Action at Law.* *On Postea.*

$2,182.95
71.44

$2,254.39

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of Two Thousand One Hundred Eighty-two Dollars and Ninety-five Cents, besides costs to be taxed nisi.

On Motion of
SAMUEL B. FELD,
Attorney.

Entered February 13, 1932.

RULE TO SHOW CAUSE.

Filed February 18, 1932.

NEW JERSEY SUPREME COURT.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO, *Defendant.*		*Action at Law.* *Rule to Show Cause Why New Trial Should Not Be Granted.*

This matter being opened to the Court on motion of Arnold Mancusi-Ungaro, attorney of defendant, above named, made within six days after the trial of the said cause at Circuit,

IT IS, on this 15th day of February, 1932, ORDERED, that the plaintiff show cause before the on the Friday of 4th day of March, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the verdict entered should not be set aside, and a new trial granted.

EDWIN C. CAFFREY,
Judge.

Entered Feb. 18, 1932.

On Motion of
ARNOLD MANCUSI-UNGARO,
Attorney for Defendant.

NOTICE.

Filed September 20, 1932.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO and ELVIRA DE FRONZO, *Defendants.*	*Action at Law.* *Notice.*

To Samuel B. Feld, attorney of the plaintiff.

Sir:

TAKE NOTICE, that on Friday, the 8th inst., at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, upon the coming on of the hearing upon the Order to Show Cause granted by this court in this cause on February 15, last, I shall call the attention of the court to the fact that the contract established by the plaintiff in said cause was illegal in violation of Section 71 of an Act concerning Building and Loan Assocations, revision 1925, Chapter 65, Pamphlet Laws of New Jersey, 1925, page 189, at page 222, and in controversion of the public policy of the State of New Jersey, and will move for the entry of judgment for the defendant, notwithstanding the verdict of the jury in favor of the plaintiff.

Or, in the alternative, that a new trial be had between the parties on the following grounds:

Notice.

1. That the verdict is against the weight of evidence.

2. That fresh evidence has been newly discovered.

3. That the Judge wrongly received evidence, particularly Plaintiff's Exhibit P. 2 (see page of transcript of testimony).

4. That the defendant was surprised upon the trial by proof of contract in no wise referred to in the pleadings.

5. That the Judge misdirected the jury in that he did not direct a verdict for the defendant upon the plaintiff's proof of an illegal contract, but on the contrary, stated to counsel and to the jury, that "The Jury heard it. (Testimony as to illegal contract.) They have a right to draw their own inferences." (Page 89 of transcript of testimony.)

6. That the conduct of plaintiff's trial attorney rendered the trial unfair. From the very commencement of the trial to the close thereof, the attorney for the plaintiff persistently injected into the case prejudicial statements; asked improper questions upon both direct and cross examinations, and pursued a course of conduct calculated to arouse hostility toward the defendant and obtain a verdict based on prejudice instead of reason. Among other numerous instances of such improper conduct appearing throughout the transcript, the following are noted: Pages 3 and 4; all questions and statements in re building and loan association, and the defendant's connection therewith. Page 13 (paging of copy of transcript). In re Exhibit P. 2, witness testified—"Yes, I sent one copy to

Notice.

him," which was followed by the attorney for the plaintiff in affecting himself, testifying through the statement rather than question asked "You gave it to him, Mr. De Fronzo?" followed on page 14 (copy of transcript), with, "I show you this statement. Did you give him the original of which this is a copy?" and again on page 15 (copy of transcript), upon the request of the Court to plaintiff's attorney to establish whether it was mailed or personally delivered, the attorney improperly, if not impertinently, stated to the witness—"Now, Mr. Congialosi, can you tell us how you gave the original of this statement to the defendant?"

7. Upon the cross examination of Mr. De Fronzo, the attorney for the plaintiff improperly again pursued from the beginning to the end of the cross examination the matter of the building and loan association subject and Mr. De Fronzo's connection therewith. On page 43, the Court itself ruled that the examination being conducted by the plaintiff's attorney was improper, but regardless of this admonition, the plaintiff's attorney persisted in pursuing the same tactic, and at page 50 (copy of transcript), the Court ruled that questions were inappropriate and had the same stricken from record, followed in form by an apology from the plaintiff's attorney.

8. Two instances of impropriety and misconduct which could not have failed to have influenced the jury against the defendant, may be particularly noted: In relation to Plaintiff's Exhibit P. 2, question page 52 (copy of transcript), "Do you remember being in my office concerning this question of paying Mr. Congialosi for his work?" Answer: "No, sir."

Notice.

Question: "Do you remember seeing that paper in my office, too?" Answer: "No, sir." Question: "What? And didn't Mr. Congialosi, at that time, charge you that you promised him to pay his bill as soon as this mortgage went through; isn't that a fact?"

The above allegations and implications were not only assertions against fact but against the sworn testimony of Mr. Congialosi himself, and there is not a scintilla of evidence in the whose case to warrant or justify the questions, but that of course, had their vital effect upon the jury. The same tactics were pursued in relation to defendant's exhibit of figures made by Mr. Congialosi upon an envelope (Defendant's Exhibit , page 56, copy of transcript). Mr. De Fronzo testifying in relation to said matter, said: "That is his, see. What do I know? He wrote it." Question: "Did you see him write this?" Answer: "Yes, sir." Question: "You are sure about it?" Answer: "Positive." Question: "No mistake about it?" Answer: "No." Question: "Is there any mistake about it?" Answer: "No mistake." "Give you another chance." "No, sir."

Plaintiff's attorney knew of his own personal knowledge that the WATSON BUILDING & LOAN ASSOCIATION, of which Mr. De Fronzo was the president, had granted a loan upon the theatre property referred to in the testimony and that the mortgage was not consummated solely because of the defective title of the theatre property, and that among other defects in the title, was a judgment in ejectment in which plaintiff's counsel had appeared as attorney for the defendant in the ejectment action, and he

also knew of his own personal knowledge that the Court of Chancery had, in the year 1930, issued a mandatory injunction to compel the removal of the encroachment of a part of the theatre building upon the land of the plaintiff in the ejectment suit, and that Vice-Chancellor Bigelow, in an opinion reported in 107 N. J. Equity, page 281, had advised a decree granting his injunction commanding the defendants to remove the encroachment of one of the principal walls of the theatre building upon a strip 2 feet 5 inches wide by 100 feet long, upon which was located the most southerly part of the theatre, as will more fully appear by said report, but with this personal knowledge of the facts and with the intent and purpose to mislead the Court and the jury, on page 56 (copy of transcript), he asked Mr. De Fronzo the question: "And the fact is, this loan was never granted; isn't that true?" "Could not grant it, Mr.—" Question: "No, pardon me." The Court: "Answer that yes or no, isn't it a fact it was never granted?" Answer: "It never were granted." Question: "And it was not granted because your building and loan finally determined it would not give any further loans until a subsequent date. Isn't that true?" Answer: "No, sir;" and again on page 54, with this personal knowledge of the facts in relation to said bad title, the plaintiff's attorney insulted the defendant before the Court and jury, by saying: page 54 (copy of transcript), "And the fact is, Mr. De Fronzo, that it was the pretense that you showed, that you were going to get him this loan and save the theatre for him, that you got him to do this work and made him

Notice.

wait for his salary; for his wages; for the time that he spent every day; isn't that so?"

ARNOLD MANCUSI-UNGARO,
Attorney of Defendants.

A True Copy.

FRED L. BLOODGOOD,
Clerk.

Service of a copy of the within Notice is hereby acknowledged this day of April, 1932.

Attorney of Plaintiff.

ORDER DISCHARGING RULE TO SHOW CAUSE.

Filed May 23, 1932.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

VITO STASSI, *Plaintiff,* *vs.* ARCANGELO DE FRONZO, *et al.,* *Defendants.*	*Action at Law.* *Order Discharging Rule to Show Cause.*

A rule to show cause having been granted in the above-entitled cause why the verdict should not be set aside and a new trial granted; and argument having been heard thereon in behalf of the plaintiff and the defendants;

It is, on this 20th day of May, 1932, ORDERED that the said rule to show cause be and the same is hereby discharged, with costs to be taxed against the said defendant.

EDWIN C. CAFFREY,
Judge.

Entered May 23, 1932.

On Motion of
SAMUEL B. FELD,
Attorney.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

Bergen County.

Vito Stassi, *Plaintiff,* *vs.* Arcangelo De Fronzo, *Defendant.*		*Action at Law.* *Notice of Appeal.*

To Samuel B. Feld, attorney of plaintiff, 8 Lexington avenue, Passaic, New Jersey, or to whom it may concern:

Sir:

Please Take Notice that the defendant, Arcangelo De Fronzo, in the above-entitled cause, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause.

Yours truly,

ARNOLD MANCUSI-UNGARO,
Attorney for Defendant.

ALGERNON T. SWEENEY,
Of Counsel for Defendant.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

VITO STASSI, *Plaintiff-Appellee,* *vs.* ARCANGELO DE FRONZO, *Defendant-Appellant.*	*Action at Law.* *Grounds of Appeal.*

The following are the grounds of appeal to this court filed herein by the defendant from the whole of the judgment entered in this cause against him in the New Jersey Supreme Court.

1. Because the Supreme Court erred in proceeding to judgment in favor of the plaintiff against the defendant instead of entering a nonsuit against the plaintiff.

2. Because the evidence adduced by the plaintiff in support of the claim made by him at the trial shows conclusively that the contract alleged by him upon which said judgment in the court below was predicated, was illegal and in controvention of the public policy and the public law of New Jersey, in that according to such testimony plaintiff's assignee entered into a contract with defendant whereby plaintiff's assignee was to be paid for certain work performed by him for defendant, out of certain commissions defendant was to receive from plaintiff's assignee for services to be rendered by him as president of a building and loan association in procuring a certain building and loan association mortgage

loan upon the property of plaintiff's assignee from a building loan association of New Jersey, of which defendant was president at the time said contract was made and has continued since so to be contrary to the provisions of the positive statute of New Jersey, known as "An Act concerning building and loan associations, revision of 1925, Pamphlet Laws 1925, Chapter 65, Section 71 at page 222."

3. Because as soon as the illegal character of the contract sued upon was made to appear by the testimony, the trial judge should have refused to permit the trial of the cause to proceed further and should have directed a nonsuit to have been entered and his failure so to do was judicial error.

4. Because of the failure of the trial court in its duty to turn the plaintiff out of court coupled with an erroneous ruling that the jury had a right to draw their own inferences from the testimony adduced by the plaintiff showing the illegality of the said contract as established by plaintiff which omission of duty and judicial error in ruling followed a colloquy between the Court and counsel upon an objection offered by the defendant's attorney to statements being made to the jury by plaintiff's attorney upon his summation at which time the testimony showing conclusively the illegality of the contract sought to be established by the plaintiff was brought directly to the Court's attention, although the defense of illegality was not then raised by the defendant's attorney, which objection, colloquy and erroneous ruling was as follows:

"Mr. Kuvin: If the Court please, I want to enter an objection and ask the jury be instructed. Mr. Feld has summed up to the jury to the effect that the defendant in this case had an interest in the building and loan mortgage granting, due to the fact that he was getting a commission, and I respectfully submit that there is no testimony in the case on that score."

"The Court: Well, he can argue only facts, but he can draw all proper inferences from the evidence, and the assignor said that this money was to be paid when he received his commission from the building and loan."

"Mr. Feld: That is right."

"Mr. Kuvin: Well, now, that, if the Court please, in Italian, and their idiomatic expressions, and so forth—commission may also mean the money which he gets from the building and loan, and I do not see that that would infer or raise—

"The Court: It is not for me to sit down and become etymological."

"Mr. Kuvin: I grant that, if the Court please, but the testimony in the case is absolutely—"

"The Court: He can argue whatever is in the evidence."

"Mr. Feld: Certainly."

"The Court: That is the language used. The jury heard it. They have a right to draw their own inferences."

5. Because it was judicial error to proceed to judgment in this cause on account of the illegality of the contract upon which it was predicated.

Grounds of Appeal.

6. Because the conduct of the plaintiff's trial attorney rendered the trial unfair.

7. Because the judgment is contrary to law.

ARNOLD MANCUSI-UNGARO,
Attorney of Defendant-Appellant.

ALGERNON T. SWEENEY,
Counsel for Defendant-Appellant.

TESTIMONY.

NEW JERSEY SUPREME COURT.

Bergen County.

Vito Stassi, *Plaintiff,* *vs.* Arcangelo De Fronzo and Alvera De Fronzo, *Defendants.*	*Action at Law.*

Hackensack, N. J.,
February 9, 1932.

Before Honorable Edwin C. Caffrey, Judge, and a jury.

Appearances:

For the plaintiff, Samuel B. Feld, Esq.

For the defendant Arcangelo De Fronzo, T. Mancusi-Ungaro, Esq., by Herbert A. Kuvin, Esq.

For the defendant Alvera De Fronzo, David M. Kirsch, Esq., by T. Mancusi-Ungaro, Esq.

(Mr. Feld opened the case to the jury.)

(Mr. Kuvin opened the case to the jury.)

(Mr. Mancusi-Ungaro opened the case to the jury.)

VICTORIO CONGIALOSI, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Feld.

Mr. Feld: I offer in evidence, if your Honor please, an assignment made by Victorio Congialosi to the plaintiff, Vito Stassi. I understand there is no objection by either counsel.

(Paper marked Exhibit P. 1.)

Q Mr. Congialosi, where do you live? A 9 Moore street, Lodi.

Q Lodi, New Jersey? How long have you lived there? A About 26 years.

Q What is your occupation, business? A Marble.

Q What kind of work do you do? What kind of work do you do? A All kind of marble work.

Q During that time have you done any work in the public buildings or— A Oh, yes. I did about 15 years, in these courts, this work I done.

Q Did you have any occasion at any time to do any work for Mr. and Mrs. De Fronzo of Newark? A Yes.

Q On or about November 1st, 1928 did you know Mr. and Mrs. De Fronzo? A Yes.

Q Where was it you became acquainted? A Because we have make application for the building and loan, for $35,000, and this property, the people foreclose, and I go to Mr. De Fronzo, and he insisted on the truth, like the son. "All right," I said, "if you think would give me the mortgage for $35,000."

Q Was he the president of that building and loan at that time? A He is the president. He said what he can do nobody else can do.

Q Did he promise that he would get this mortgage for you? A Yes. And he wanted to give him a commission, to him, building, $35,000.

Q Was there any arrangment made between you and him about getting this loan? A We made arrangement nothing for the present time. At that time, make no arrangement, but he said, "I know you, because"—

Q Let us get down to the facts. When you arranged about the building and loan mortgage, did you have any arrangement as to the payment of any moneys for securing this loan? A Yes; we have a hundred dollars.

Q Get down to it.

Mr. Kuvin: I object as highly immaterial to the issue in this case.

The Court: There is no written contract, and if this is part of the formation of a contract, I will allow it.

Mr. Kuvin: So far I have not heard anything about any contract for work. It is merely about a building and loan application for a mortgage.

The Court: Maybe it is leading up to the contract.

Mr. Feld: That is what it is, your Honor.

Mr. Kuvin: Exception.

Q When you talked to Mr. De Fronzo about securing this mortgage for this theatre, did you have any arrangement as to how much was to be paid to Mr. De Fronzo for securing this money?

Mr. Kuvin: I object to that, unless that was taken as part consideration for the contract.

The Court: Where is that in issue? That is not in issue.

Mr. Feld: No, your Honor, but it is leading up to the—

The Court: No, no.

Mr. Feld: I won't press it.

The Court: I permitted the previous question on the belief that it would be part of the agreement for the doing of the work.

Mr. Feld: Yes.

The Court: Now you are setting up by this question a distinct case of action for commissions.

Mr. Feld: No, your Honor; we are leading up as to how the payment—I may not make myself clear.

The Court: No; I will exclude the question until I have something definite.

Q In the course of your dealing with Mr. De Fronzo did you ever make any contract or have any agreement with Mr. and Mrs. De Fronzo, concerning any work to be done in their home? A Yes.

Q Can you tell me when that was? A Mr. De Fronzo come to see theatre many time.

The Court: Mr. who?

The Witness: Mr. De Fronzo. And he like my work, and especially, he said, the architect, Mancusi, know that very well, and he said, "I have the best recommendation from you," and we do some work at his

house. All right. I go one day to his house, and he show me what want do. He show me two rooms.

Q When you got to his house did you have any talk with anybody? A Yes.

Q To whom did you talk? A With Mr. De Fronzo.

Q With whom did you talk? Was it Mr. or Mrs., or both? A The two in the same place; no other place; and make a little arrangement; go back on the job to do the best I can.

Q What was said at that time? What talk did you have? A Just I make a little sketch. I said, "To do this and to do this."

Q A sketch of what? A The sketch of the work to be done.

Q In what room? A In the parlor room, in the dining room, and that is all.

The Court: Two rooms?

The Witness: Parlor room. Two rooms Dining room. And the stairs supposed to be marble.

Q Marble stairs? A And marble wainscot to the stairs and lobby.

Q What else? A That is all.

Q Was there anything done with the stair? A No, sir. After, coming all different things.

Q After? A After.

The Court: The first conversation?

Mr. Feld: Yes.

Q Then after that did you have any conversation with this defendant? A After, another

conversation, because sometime I said, "We want to do what we have in the agreement," and he says to me, "You leave it to my wife's satisfaction," And she asked me, and want Naples, French, Viennese, and so forth. The work is a big job, and the ceiling, all different altogether, and the wall, rooms, everything is different altogether.

Q Did you follow her instructions? Did you do what she wanted you to do? A Sure. Certainly.

Q As a result of that conversation tell us just what kind of work you did? A I do the parlor room, all the ceiling.

Q Just a minute. What did you do in the parlor room? A All the ceiling, panelled ceiling, and in the middle of the panel, a figure, day and night.

Q Different figures? A Different figures.

Q What else did you do there? A And the scenery in the cornice, and the wall side, all the scenery, see, and all the ornament.

The Court: What is that, ornaments on the wall?

The Witness: Yes.

Q What else did you do in that room? A That is all in that room.

Q What did you do in the dining room? A In the dining room, put in the same thing.

Q Same thing there? A Only different work.

Q What is that different work? A You know, different style.

Q Did it represent anything? A It represented single ceiling.

The Court: What is it?

The Witness: Single ceiling, panel, single, and six, eight, octagonal ceiling; and in the middle raised, and another, same thing, a figure, L'Amour, and a figure.

Q Is there anything else you did in the dining room? A Why, yes.

Q What else? A I did the wall, the same as the parlor.

Q Also different scenes, different cities? A Yes.

Q What did you do in the hallway? A Hall, panel, the same thing. What place you said?

Q In the hall? A All panel. All side and marble wainscot.

Q Did that go all the way upstairs to the roof? A To the roof. Well, downstairs, on the second floor, and—

The Court: What was that, marble wainscoting?

The Witness: Marble wainscot and ornament, panel, with all different scenes.

Q You mean that the wainscoting had different scenes in it? A Yes.

Q As it went upstairs? A Yes, in the ceiling, and the side, up to the bottom of the stair, was like this, ornament.

Q Just like this room here? Did you do anything else? A After he want to put in the ice box—what you call it?

Q Pantry? A Pantry, with the marble.

Q Did you do that too? A Yes.

Q When you did that work did you get paid any money on account?

The Court: Let us find out what the agreement was.

Mr. Feld: Yes.

Q What was the agreement? Now, how were you to get paid for this? A No, the agreement is in this way: I make application of the building and loan, and he is supposed to be my father, the way he consider it. (Witness weeps.)

Q Come on, come on. Let us not do that.

By the Court.

Q All right. How much did he agree to pay you? A And I got to—he said he give me—

Q Just keep quiet. Just take your time. What is that you have there? A This is the check of the building and loan.

Q How much for this work? A No, having nothing.

Q Now, just listen. Were you to be paid in a lump sum or so much a week? A No, he is supposed to pay the wages of the people, and the material, and for my wages, supposed to be paid off the—give the mortgage, because Mr. De Fronzo says—

Q How much were you to get a week? A $120. My wages. $150 a week.

Q You agreed for $120? A Yes.

Q Were you paid it? A He paid for the material and the labor men, what we use in the shop.

Q I am only interested in you. You were not to buy the labor or material, were you? You were not going to buy the material? A No, sir. I bought the material.

Q You bought it? A Yes, but he paid.

Q He paid? A Yes.

Q Did he pay the workmen? A The workmen.

Q And you were to receive how much a week? A Nothing; I don't receive nothing.

Q How much were you to get? A Supposed to take $120 a week.

Q Then you were to live at his house? A Yes.

Q Were you to pay board? A Yes.

Q How much? A $15 a week for the board.

Q And the difference between $120 a week and $15 a week was to be your wages? A Yes.

Q $105 a week wages? A Yes.

The Court: All right. Go on.

By Mr. Feld.

Q And you finished the work all right? A Yes, I finish the work to his satisfaction.

Q And when you finished the work you asked him for the money due you? A I ask—he said, "At the present time I have no money." I said, "All right. You pay the bill."

Q Pay what bill? A What I can bill to him.

Q The bill for what? A The cost of the material and labor, and I think it is $1,308, see.

The Court: How long did you work there?

The Witness: I worked one month in the shop, preparing the model, and after three months—23 weeks steady in the job, and worked until 8 o'clock, and 10 o'clock, and sometimes 11 o'clock at night.

Q When you stayed in his house what time in the morning did you start? A 8 o'clock, at the most.

Q What time did you stop in the afternoon or in the evening? A We can't say; we come to no time, because I have so much trust that man, he take me off of the street—(witness weeps).

Q Don't do that. Now, take it easy. Let us have the thing right. You worked every day. You started 8 o'clock in the morning. What time did you stop? A 8 o'clock.

Q 5 o'clock or 6 o'clock? A 8 o'clock. I start 8 o'clock in the morning, and after starting, 11 o'clock, stop 11 o'clock, sometime 9 o'clock.

Q At night. A At night. And sometime, and I—I charge. For that extra work I no charge nothing.

Q When you got through with all that work you said you asked him for the money; is that right? A Yes.

Q And what did he say? A He said he would pay me this bill and the wages, and the material.

Q The wages for whom? A For the material.

Q Was it your wages? A For my work, and for work I used over there, for the labor and the material. My wages—I said, "What are you going to do with my wages?" "After," he said, "the building and loan, we give the commission, we go square." That is all.

Q The building and loan what? A The commission on account, what do you call it, the $30,000, the $35,000, he is supposed to get the commission.

Q You mean to say, he said if he gets his commission from the building and loan— A He would pay me.

Q —that he would pay you? A That is all right.

Q Did you ever get the money? A No, sir.

Q Was that mortgage ever given? A Never.

Q Did you ever make up a statement, Mr. Congialosi, showing the labor and the material that you spent from time to time? A Yes. I sent one copy to him.

Q You gave it to whom, Mr. De Fronzo? A Mr. De Fronzo, yes.

Mr. Feld: May I have the original statement?

Mr. Kuvin: We have not any especial one mentioned in the notice to produce.

Mr. Feld: Well, I have a copy of it.

Mr. Kuvin: Never received it.

Q I show you this statement. Did you give him the original of this statement, of which this is a copy? A Yes. This is the copy.

Q What does that statement show? A Well, it show all the material what I spent for the labor and the material, in the shop.

Q And how much was spent for labor? A I spent $1,300, $1,308.70.

Q $1,308.70. Now, can you tell us how much of that was for labor? A For labor, $935.

Q And how much of that was for material? A $375.70.

Q $373.70? A Yes. One minute. And here this is.

Q Anything said on the bottom of that paper? A Yes.

Q What does it say; what does it mean in English? A Total amount, $1,308.

Mr. Kuvin: I object to any further testimony on that paper unless it is proved that the original of that was actually received by either one of the defendants, as being a self-serving declaration.

The Court: No; he said that is a copy of the original he gave to the defendants.

Mr. Kuvin: I didn't understand him to say he gave it. I understood him to say he sent.

The Court: We may presume, unless you want to inquire how he sent it.

Mr. Kuvin: I would like to have the right to do that.

The Court: All right. Mr. Feld, suppose you establish whether it was mailed or personally delivered.

Mr. Feld: Surely.

Q Now, Mr. Congialosi, can you tell us how you gave the original of this statement to the defendants? A I go, find him home, because I want the wages, and the men want to be paid.

Mr. Kuvin: I withdraw the objection.

Q On the bottom of this statement you have something written in Italian. Just tell us what it is, without reading it in Italian. Tell us what it means in English. A It says total amount; total for the wages amount to $1,308.70.

Q Give it to us in English.

The Court: He has to think in Italian first.

Q Go ahead.

The Court: Read it in Italian; then translate it.

Q What does that say? A Not included in this is my wages for the work I do, in November, '28, to March 11th.

Q Of what year? A 1929.

Mr. Feld: I offer this in evidence.

(Paper marked Exhibit P. 2.)

The Court: Did Mr. De Fronzo pay that?

The Witness: Yes, sir. The last check he gave me, $108, and he bring it to my home.

The Court: He paid for the labor and material?

The Witness: Yes.

Q So everything has been paid with the exception of your work, Mr. Congialosi? A Yes.

Q Did you ever ask him for the money after that? A Sure.

Q What did he say? A He come to my house, I think in June, and bring me the check, $108; and come with him, Mancusi, that Mr. Mancusi, the architect, and telling me to sign a receipt of the money—I said, "All right. I will make a receipt." But he sent me, showed me the paper. He said, "You read it." I said, "No read it. I got plenty of trust in that people."

Q And you signed the paper showing you received it? A Yes. I said, "I can't deny that money."

Q Did you ask him about your money? A No, sir. At the time, he said Mr. Mancusi was there. I no say nothing.

Q After that did you ever ask him for the money? A At his house.

Q When was that? A I think in June, 20th or 25th. He said, "I can't bother, because I want to take the wife to the country, and the sister-in-law, to the country," and he said,"I can't do nothing. After I come from the country we give you the mortgage and settle everything."

Q Did you ever hear from him after that? A Well, after I go again. I can't find him. I go to Mr. Fox, the lawyer, and I ask him.

Q The lawyer from whom? A For the building and loan.

Mr. Kuvin: I object to that conversation.

Q No, we are not asking any conversation. A And Mr. Fox says to me—

The Court: No, no.

Q Do not tell us what Mr. Fox said. Did he ever get the mortgage from the building and loan? Did Mr. De Fronzo ever get the mortgage? A Yes.

Q Did he ever get the mortgage? A No, sir.

Q Did you ever get your money? A No, sir.

Mr. Feld: That is all.

The Witness: Besides, Mr. De Fronzo—excuse me—

The Court: No, no.

Mr. Feld: That is all.

Victorio Congialosi, for Plaintiff, Cross.

Cross examination by Mr. Kuvin.

Q When was the first date that you started to work on this job? A The first I started, in November, to my shop.

Q What day in November? A What I can remember, what day?

Q Was it the first part of the month or the last part of the month, in November? A I think the first week or second week, I started to work. As soon as I had the agreement from Mr. De Fronzo, in November.

Q As soon as you had the agreement with Mr. De Fronzo, you then started work right away? A In the shop.

Q When did you have your first conversation with Mr. De Fronzo? A I think in October.

Q In October? A After I be through with the mortgage.

Q What part of October, the last part of October or the first part? A I can't remember.

Q Who started the subject to you, about doing this work in Mr. De Fronzo's house? A I suggest and he suggest.

Q Now, you couldn't both suggest at the same time. Who was the one who started it, the suggestion? A Listen, listen. I told first Mr. De Fronzo, he is glad to see the decoration in the theatre, and Mr. De Fronzo said, "And Mr. Mancusi knows you, and give the best recommendation," and this way come to start the work.

Q When was that, that Mr. De Fronzo saw the decorations in the theatre? A September—July, July.

Q Of 1928? A Yes.

Q And you are sure; there is no question in your mind that your first conversation with Mr. De Fronzo was in November?

The Court: No, he said October.

Q The last part of October? A Listen; you take it good in your mind.

Mr. Feld: Oh, wait a moment.

The Court: Just answer the question.

Q It was in the last part of October that you had the first conversation with Mr. De Fronzo about doing work in his house? A Yes, that is right.

Q And did you start around the early part of November? A November.

Q 1928. I show you a letter and ask you if that is your signature? Is that your signature, and is that your handwriting? Is that your handwriting? A Yes, it is my handwriting.

Q And it is your signature? A That is right.

Q You sent that letter. This is also your handwriting on the envelope, isn't it? A Yes.

Q And that is your name, with the return address, on the envelope? A Yes.

Mr. Kuvin: I ask that they both be marked for identification.

(Paper marked Exhibits D. 1 and D. 2 for Identification.)

Q And this is the sketch which you enclosed with that letter? A Yes.

Mr. Kuvin: I ask that that be marked.

The Witness: But the work is different from the sketch.

Mr. Feld: Wait a minute.

(Sketch marked Exhibit D. 3 for Identification.)

Q I show you nine or ten checks and ask you if that is your signature on the back of each and every one of those checks? A This is Mr. De Fronzo. He paid—

Q Just answer the question. I said is your signature on the back of each and every check? A This is my nephew, the artist, worked over there.

Mr. Kuvin: I withdraw that one.

The Witness: (Continuing.) This is, too.

Q What is your name? A Victorio.

Q Here are two more. A Mr. Victorio.

Q Is that your signature on that check (indicating) A Yes.

Mr. Kuvin: I ask that they all be marked for identification, as one exhibit, if the Court please.

Mr. Feld: How many checks are there?

Mr. Kuvin: You count them.

(Ten checks marked Exhibit D. 4 for Identification.)

Q I show you two other checks, which you had identified before as your nephew's signature? A Yes. He pay.

Q Do you know that those were your nephew's signatures? Did you see your nephew sign those? A Yes.

Q You know that they are your nephew, Tony Congialosi's signatures? A Yes.

Mr. Kuvin: I ask that they be marked for identification.

Mr. Feld: I object to them. I will let them go in.

(Two checks marked Exhibit D. 5 for Identification.)

Q Just a few moments ago you testified that you received $108, and that was in the presence of Manfred Mancusi. You mean Manfred Mancusi-Ungaro, the architect? A Yes.

Q You then signed a receipt, you said? A Yes, I signed a receipt.

Q Is that your signature, and is that the receipt you have testified to having signed in his presence? A No, sir. I signed the receipt. I no see this paper, no read it, and no see it.

Q Is that your signature on the paper? A Yes.

Q That is your signature? A Yes. But I no read it.

Q I did not ask you that. I asked you if you signed that? A Oh.

Mr. Kuvin: I ask that that be marked for identification also.

(Paper marked Exhibit D. 6 for Identification.)

Q When was it? A In June. I remember it was in June, he gave me the last check, a hundred dollars.

The Court: What date is on that?

Mr. Kuvin: June 11, 1929.

Q As a matter of fact, Mr. Congialosi, wasn't it on Sunday morning, in December, 1928, that you had this conversation with Mr. De Fronzo in his house about doing the work? A No, sir, before. It was before that.

Q I mean the time when you had your agreement to do the work? A I don't remember what day.

Q Was it on a Sunday? A On Sunday? Maybe. I don't remember, because it was a conversation. I can't remember nothing.

Q You testified to having one agreement, one understanding, rather, with him as to what kind of work you were to do, and then you testified that that was changed? A Sure, it was changed.

Q Now, will you tell us when that first understanding was had? A The time start the work, in January.

Q You started to work in January? A Start to work at his house in January, but in the shop I started to work, to prepare the model, in November.

Q You started to work in November, in your shop? A Yes.

Q And you started work in his house in January? A In January, yes.

Q Do you remember about what date it was in January you started to work? A No, sir.

Q Now, when was this second understanding had which changed the first? A As soon as we started to work he started to make a change.

Q When you started to work in his house, then he started to change? A Yes.

Q Now, as I understand you, you say that Mr. De Fronzo paid all the labor and paid all the material himself? A Yes.

Q The only thing you are claiming for now is your work? A Yes.

Q Is that right? A Yes.

Q Now, this marble that you talk about in the hallway was artificial marble? A Artificial marble, yes.

Q And that was merely painting work, artist's work, for you to make it look like artificial marble? A Yes.

Q Isn't that so? A What do you say, painter?

Q Yes. A No, sir, no paint.

Q What then? A Is artificial marble, like this here, the same.

Q Then that is artificial marble? A This is artificial marble, in this way; he had it in his house; no paint. Painting is one thing, and artist is another thing, to make it look real marble.

The Court: Did you do this work (indicating in Court Room)?

The Witness: No, sir. I figure. But I do the same work in Somerville.

The Court: How is that made, a composition?

The Witness: Composition.

The Court: Plaster?

The Witness: No, sir; King cement, German cement.

Mr. Kuvin: That is all.

Mr. Feld: We rest.

I will just call one witness.

DIMITRIO STASSO, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Feld.

Q Did you work on this job together with Mr. Congialosi? A I started to work over there.

Q How long? A I can't speak very well, you know.

Q That is all right. You are doing fine. How long did you work on this job? A About sixteen weeks. I can't figure out, you know.

Mr. Feld: That is all.

Cross examination by Mr. Kuvin.

Q Did you say you worked in the house of Mr.— A I finish the work in the shop, and working two weeks over there.

Q You worked— A Two weeks.

Q Did you also board at Mr. De Fronzo's house? A I can't say myself.

Mr. Feld: Do you know what he says?

Q Did you live in Mr. De Fronzo's house, eat there? A Oh, yes.

Q You ate there? A Yes.

Q And you slept there? A Yes.

Q With him? A Yes.

Q For the two weeks? A With Mr. Congialosi, for two weeks.

Q What work did you do there; what kind of work? A Over there?

Q Yes. A Fixing up the marble, and shine, and the imitation marble.

The Court: Did you say you fixed it up, and shined it up?

The Witness: The stain and the marble, and the base, and everything.

The Court: And you worked there for two weeks?

The Witness: Two weeks in the same house.

Q As a matter of fact, aren't you the one who made the figures that went into the ceiling in the house? A I can't understand everything. I told you before.

Q How did you talk to the lawyer here? You spoke to him out in the hallway this morning?

The Court: Do not argue. We will try to get along. That will not help you.

A He asked me; he is going to school.

Mr. Kuvin: No further questions.

By the Court.

Q Did you make the models? A I don't make the marble.

Q The models. A The models? What is the model?

Q Model? A Model? I don't make the model.

Re-direct examination by Mr. Feld.

Q Did Mr. Congialosi make the models? A He make. He make all the designs, all forms, and everything.

Dimitrio Stasso, for Plaintiff, Re-direct.

Q You say you worked for two weeks in Mr. De Fronzo's house? A I finish the work up.

Q And the other time you spent in Mr. Congialosi's house? A Yes, the other work inside, you know, the cleaning, you know.

Mr. Feld: We rest, if your Honor please.

DEFENDANTS' CASE.

Mr. Kuvin: At this time, if the Court please, I offer in evidence a translation made by Judge Ungaro, of the letter which was identified as D. 1 for Identification, and ask if you have any objection to that translation by the Judge. Does your Honor want me to qualify him?

The Court: No. We do translating ourselves. Let me see the original.

Mr. Feld: I have no objection. It is a translation. There is no doubt in my mind that Judge Ungaro certainly will translate that in accordance with what is stated there.

Mr. Mancusi-Ungaro: Your Honor, I tried to translate it word for word.

The Court: Are you following the idioms or taking the language itself?

Mr. Mancusi-Ungaro: The language itself, in the Latin.

Mr. Kuvin: In the meantime, if the Court please, may I, for the purpose of the record, offer these checks, while your Honor is reading that?

Mr. Mancusi-Ungaro: The letter, if your Honor please, is a Sicilian dialect. It is not in the Italian language.

Offer of Exhibits.

It is a mixture of languages. Some words apparently were tried to be made in English.

Mr. Kuvin: I want to offer the letter and the envelope and the translation, together with the accompanying sketch, into evidence, which have previously been identified as exhibits.

(D. 1, D. 2 and D. 3 for Identification were marked as D. 1, D. 2 and D. 3 in evidence.)

(The letter, envelope and translation were marked Exhibit D. 7.)

Mr. Kuvin: I also offer in evidence the ten checks marked D. 4 for Identification.

The Court: What is the aggregate of those?

Mr. Kuvin: $1,158.

The Court: Beginning at what date and ending what date?

Mr. Kuvin: Beginning December 21, 1928, and ending June 11, 1929.

(Checks marked Exhibit D. 4.)

Mr. Kuvin: I also offer in evidence two checks, one in the sum of $44, and the other in the sum of $40, which are marked D. 5 for Identification.

The Court: Are those the checks endorsed by the nephew?

Mr. Kuvin: In the presence of this man.

The Court: Who is the payee?

Mr. Kuvin: The nephew is the payee; to be connected up later, if the Court please.

The Court: You better hold them out until you connect them.

Mr. Kuvin: Then I will waive these until later.

I offer in evidence at this time D. 6 for Identification, which is the statement of June 11, 1929, signed by the plaintiff.

Mr. Feld: I object to the offer of that particular paper at this time, your Honor. I think I would like to have the opportunity of cross examining the person to whom that paper, at the time of signing, was given.

The Court: Signed by the plaintiff.

Mr. Feld: That is true, but, under certain circumstances. I think I can—

The Court: What circumstances?

Mr. Feld: I think I would like to cross examine the defendant. At the time the paper was handed over to him.

The Court: No. We are only interested in the assignor's signature.

Mr. Feld: O. K.

(Paper marked Exhibit D. 6.)

Mr. Kuvin: If your Honor please, may I read the letter, or the translation, to the jury?

(Mr. Kuvin reads Exhibit D. 6 to jury.)

ARCANGELO De FRONZO, one of the defendants, called as a witness on behalf of defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Kuvin.

Q Mr. De Fronzo, you are one of the defendants in this action being used by Mr. Stassi, the assignee of Mr. Congialosi? A Yes, sir.

Q And you are the person in whose house this work was performed? A Yes, sir.

Q Will you please tell us the first conversation you had with Mr. Congialosi concerning the arrangement for the doing of the work, and any subsequent conversations which ultimately resulted in a contract, and what the terms of that contract or agreement were between you and him? A In the year 1928, it was on Thanksgiving Day he came to see me in my house, and he found us there, having a conversation with a painter, decorator, that wanted to fix up the house for Christmas.

Q Pardon me for interrupting you. I will interrupt now and then to bring out certain details. What was the occasion of his coming to your house around that time? A Well, he came to inquire whether we had deliberated upon a loan which he had made an application to the Watson Building and Loan, of which I was president, and I am today.

Q We will come back to that building and loan proposition later. A Well, we might as well—

Q Just tell us now what happened on that day, when he found you home with this painter, talking about redecorating your home? A Well, he said very calm, and my children were getting a little bit excited, because they wanted to go to a moving picture. They were small at the time. And they said, "Pop, let us go home." So he called me on the side. He said, "What is the use of talking to painters?"

Q When you say "He," whom do you mean? A Mr. Congialosi. He said, "What is the use of talking to painters? I am a man in that line." I have been in Italy recently, and I have

seen Italian work which is done. "I am a decorator, and a plastic artist, Paris plaster artist."

I said, "Well, I didn't know that."

So he said, "I will come in another day and talk to you."

So, meanwhile, he sent me a sketch of what he could do.

Q When was it you received that sketch? A I received the letter on December 6th.

Q I show you— A December 7th, rather, the next day.

Q I show you Exhibit D. 7.

The Court: Mr. De Fronzo, was this sketch sent as the result of the conversation on Thanksgiving Day?

The Witness: Yes, to show me what he could do.

Q And that is this sketch, this Exhibit D. 3? A Yes, sir, including the letter.

Q Which is Exhibit D. 1? A Yes, sir.

Q And had you at that time, before, or at the time you received that letter, made any arrangements or agreement with him as to the doing of the work and the price for the work? A No, sir. But on December 9th, which fell on a Sunday again, he came to see me, and then we discussed prices. He agreed to make me a room at $200 each, and he asked me what the painter wanted. I told him the painter asked me $400.00. He said, "Well, this old work here, I will remodel your living room, your dining room. I will take care of your pantry and the foyer. If it will cost you $800.00, it pays to do it, because, instead of painting every other year or three years, this will last about ten years."

Q At the time you were having this discussion was he figuring anything, by making any figures? A Yes, sir. He started to measure around.

Q Did he put his figures upon any paper? A Well, he started scribbling around. He never gave me a contract, but he started to draw sketches of what he could do, even on the envelope here that I had received.

Q That was received three days after, or two days after you received it? A Yes, sir, three days after.

Q Had he drawn any figures as to the approximate amount, or the amount that he would charge you for the rooms? A Well, $200 a room.

Q I show you a paper and ask you to tell me what that paper is? A This is the—his figures of $200.00 per room, and $275.00 for the hall, for the foyer and the hall.

Q Were those figures made by him? A On that sketch.

Q On that sketch? A Yes.

Q Did you see him make those figures? A Yes, sir.

Q Was that made in the presence of anyone else? A In my house, in the presence of my wife.

Q Continue on with this conversation that happened on Sunday, and what was said by him on December 9th? A That same Sunday?

Q Yes. A He wanted to know whether he could go ahead with it or not. So I said, "Well, it is going to be Christmas. It is no use to start. Are you going to make any dust around, or are you going to make any dirt here?" He said, "No. It will take me one month, and I will get through."

I said, "If it will only take you a month, you come around after New Year, because we will get through with the holidays, and we can stand a little excitement after."

On December 25th, Christmas night, I didn't see him come around, and I went to take my wife and children, because they had a moving picture in Lodi. I said—

Q That was a moving picture theatre? A He used to have a moving picture.

Q Congialosi? A Yes. So I took my children over there to see him this day. I found the man did not feel right. He was sick; in fact, in bed. He said, "I could not come around. I am sick. But will you please advance me $200.00, because I have been foreclosed from this moving picture?" I hate to mention nationalities, you know, but he said, "These people, they put me on the street," and he started to tell me all these hard luck stories, and I fell for it, and give him the $200.00, which I dated the check for the 24th of December.

Q Is this the check you have reference to, the $200.00? A Yes, sir. On December 24th. I couldn't date it on Christmas, so I dated it the day before, which he cashed, and be able to go out in January some time.

Q After giving him the $200.00 advance, while he was sick in bed, and after this story he had told you, what happened after that? A Well, he kept on being in bed, and I went to see him again, and he came in on— and started to work; he gave me an order, I should get some Paris plaster, some wire lathing, which I did, that you have a bill for, January 2nd, but he didn't show up until January 14th, if I am not mistaken, and we went out to buy some

tile, little tiles, you know, that you use in ordinary—

Q Whom do you mean, "We"? A With him. I took him in my car, and took him out, with Mr. Congialosi, on January 14th. We went and bought a box of tile, in order to put it on the floor of the pantry; and on the walls he was to make this sort of marble here, that he called marble. It is only Paris plaster. And we agreed to pay him $1.25 a foot, a square foot.

The Court: Now, is that considered in addition to the—

The Witness: To the $400.00 for the foyer.

Then he decided—

The Court: Do I take it, Mr. Kuvin, your Schedule A should include the extra, $1.25 a foot?

Mr. Kuvin: No, if the Court please. Schedule A sets forth the whole thing, the $375.00, the foyer and stair siding, which is Exhibit D. 6, which I have here, which is a copy of that. It includes the $375.00, $1.25 per square foot, for 300 square feet.

Q All right. You went out and bought this small tile, and then did he start work? A Well, he couldn't start work, because he caught cold again, and he got sick for about four weeks, and he turned up on February 11th. Meanwhile, I visited him, and he hit me again for some money again, and I seen poverty in this house—

The Court: Never mind that.

Q On January 14th, when you went out to see the tile, did you give him any more money? A Well, he asked me for some money because he was sick.

Q And you gave him this check of $150.00? A Is that the next check, or I gave him some right after December 24th, I think.

Q Did you ever receive a statement from him dated November 19th, 1928? A No, sir.

Q In fact, you hadn't received this letter until December, 1928? A December 6th, yes, sir. The only conversation we had previous to that was the regarding of his foreclosure, which on the 11th of June I brought in the papers, which I tried to do my best. I went to an expert lawyer, to give him, grant the loan.

Q We will come to that building and loan towards the end of the direct. I want to get this issue straightened out first, as to the work and the payments. A All right.

Q We will come down to the last payment. He did work and stayed at your house? A Yes, sir.

Q And you paid all materials and labor? A Well, no, I didn't pay material and labor. I paid him as he asked me for money, because I contracted with him so much a room. I never paid any material except put in my house, and plaster up this, just like this; occasionally I had to buy three or four barrels of Paris plaster or stuff, or glue, in order to make some plaster, to paste it up.

Q Was his contract a flat figure, including labor and material, or just the labor alone? A Including everything.

Q In other words, you had agreed to pay him $200.00 per room, for the dining room and the living room? A Living room, yes, sir.

Q And the foyer? A Yes, sir.

Q And the hall was to be at $1.25 per square foot? A Yes, sir; part of it; that is, about three feet from the floor.

Q For the wainscoting. A Yes, sir, wainscot.

Q Of artificial marble? A Marble, yes.

Q And the extra work on the floor and foyer? A We calculated, having three landings, the same as two rooms.

Q Did he calculate it at the same time? A Yes, sir.

Q Did he agree to it? A Yes, sir, he agreed to it, $400.00.

Q When did he complete his work? A On May 11, 1929.

Q May 11th. A But he only worked a few hours a day, my dear sir. And I never ran a boarding house. I only took it—I liked that man as much as I liked my own father, at the time, being that he was a pretty good actor, and he could get the best out of me, even my shirt.

Mr. Feld: I object to that.

The Court: Strike that out.

Mr. Feld: Maybe he is the actor.

Q What happened after May 11th? How much had you paid him up to then, on account? A $1,200.00.

Q Did he make any demand on you for any payment after May 11th? A He never made no demands, but he made inquiry regarding that search, that it was—

Q What search? A In order to get his loan.

Q From the building and loan? A And when I told him we would have an expert work

on it, he started to make demands. So I said, "What do I owe you?" He said, "$108.00." He said, "And give me that, and you can go to the dickens." And I brought in all the papers to Mr. Feld. I brought them up to his office.

Q What papers? A The papers, all three searches that we had made, because I thought some lawyer was not making a right search on his property.

Q And you delivered those searches to Mr. Feld? A I delivered those searches, which you will find a letter there.

Q On what day? A On the 11th of June, 1929.

Mr. Kuvin: That is admitted. There is no question about that, is there, Mr. Feld?

Mr. Feld: Oh, no.

Mr. Kuvin: That is admitted.

Q Did he sign this receipt at the time you paid him $108.00? A Yes, sir.

Q Who was present? A Mr. Mancusi-Ungaro, and Manfred, the architect.

Q Let me ask you something: Do you speak the same Italian dialect that Mr. Congialosi speaks? A Well, no, sir. I am from the Napoleon. But we understand each other. It is a different dialect, but we understand each other.

Q You do understand each other? A Because we mingle around them.

Q There is no question what you meant when you spoke to him and what he meant when he spoke to you? A Because when he speaks to me, he speaks my dialect. He tries to speak the Napoleon.

Mr. Kuvin: That is all. Cross examine.

Cross examination by Mr. Mancusi-Ungaro.

Q Mr. De Fronzo, did your wife have anything to do with this agreement with Mr. Congialosi? A No, sir, nothing at all. My wife don't bother in my affairs.

Cross examination by Mr. Feld.

Q Mr. De Fronzo, at that time you were the president of the Watson Building & Loan Association, I take it? A Yes, sir.

Q An application was made to that building and loan, through you, was it? A No, sir.

Q It was made to that association, at any rate? A Through one of its brokers.

Q Yes. And you were the president of that association? A Yes, sir. I am today.

Q And your association has, I assume, a regular Building Committee, or a committee that goes out and investigates? A Yes, sir.

Q The fact is that they did not investigate this at all, did they? A Who, the committee?

Q Yes. A Positively. I had ten men on a committee.

Q Did you, too? A Yes, sir. I supervise every committee.

Q The fact is that you personally had a greater interest in this thing than probably your committee had; isn't that a fact? A I never had no interest.

Q No interest at all? A No.

Q Sure about that? A The only interest I had was to place the funds of the building and loan in safe investments.

Q Yes. And the fact is that you came to see Congialosi several times concerning this loan, and told him that you can guarantee to him this mortgage of thirty or thirty-five thousand dollars; isn't that true? Did you say that? A Well—

Mr. Kuvin: One moment.

A (Continuing.) In fact, it was passed.

The Witness: Let him go on.

Mr. Kuvin: One moment. I think you are far afield from the issue here—

The Court: This is not cross examination.

Mr. Kuvin:—the guarantee of a building and loan.

The Witness: It is all right.

The Court: No, it is not all right. This is not cross examination.

Q And the fact is that you were interested in getting this loan for him because of a commission that you were to get for the securing of the loan; isn't that a fact? Yes or no? A No, sir. I never work on commission.

Q But you did talk about a commission on this loan if you were to get it? A No, sir.

Q And the fact is, as the result of your acquaintanceship with the theatre proposition, and Mr. Congialosi, you became acquainted with him, and it resulted in this work being done in your home; isn't that true? A It was he that run after me. That is the way he got acquainted.

Q Supposing that is so; the work was done, wasn't it? A Yes, sir.

Q Prior to December 6, 1928, Mr. Congialosi was in your home; isn't that a fact? A Yes, sir.

Q And while he was talking about this particular work he at that time, in your home, made various sketches and outlines of the kind of work that could be placed in your home; isn't that so? A He never spoke of his work—

Q Didn't he, in your presence, and also in the presence of your wife, draw and then make sketches of the ceilings and the walls, what they could be made of, and how they could be made, and so forth? A He made sketches.

Q Wasn't that done at that time?

Mr. Kuvin: Let him answer.

A Which time?

Q The time he was in your house? A I can't understand your question.

Q I will make it clear.

The Court: Which time? What date?

Mr. Feld: Prior to December 6th, and and when this discussion took place concerning the making of these various ornamental works.

The Witness: He only started—

Q Pardon me. Wait a minute. Didn't he at that time, in your presence, and in the presence of your wife, make a sort of rough sketch showing what could be done with the walls? A No, sir. The only time he started to talk to me about what he could do was in Thanksgiving

Day, in November; the last of November he came; I believe on the 28th of November.

Q Did he at any time prior to December 6th, and before the day he sent you this sketch here— A No, sir.

Q —make any kind of a sketch in your home? A Nothing at all.

Q Well, he did on December 6th make this particular sketch, didn't he? A Yes, sir.

Q And the fact is that you did not like this particular design, and he had other designs made for you? A I did like it, but he said he couldn't make it, because this would require hand painting, and it was for painting, and not for that. When I questioned him, if he could paint it, I would be satisfied, he said, "I can't do it." It goes to show you that he left me the work—

Q Never mind. That is your opinion. A It is my opinion. I had the experience.

Q The fact is, he said he did other work, and not work shown on this sketch; is that what you said; he did not do this work? A He made plaster work, which he made a mold, and plastered it on.

Q Yes. And you had no objections to him putting in that particular work that he did put in, did you? A We had enough objections.

Q It was put in; you did not stop him from putting it in, did you? Yes or no? A (No answer.)

Q What is your answer? A What do you mean, I did not stop him?

Q And did you say to him, "Don't put in this kind of work?" A Well, he had agreed to do something for me, for my money.

Q The fact is, you, from time to time, advanced money for materials? A No, sir.

Q Delivered on your job, lumber, tiling, and so forth? A I advanced him money only for the work which he had to do on contract.

Q On contract? A Yes, sir.

Q The fact is that you personally took him to lumber yards, as you stated before, and also to tile people, and paid for the lumber and tile; isn't that a fact? A No, sir; just what he needed in Newark, what he did not have over there.

Q Yes, that is true, and you paid for it? A What? For it?

Q Didn't you pay for the material he purchased in Newark? A Well, he could not pay for it. I advanced him on account.

The Court: Just answer.

Q You paid for it? A I paid for it, yes, sir.

Q And whatever money you gave him, as shown by these two checks that were paid, was for material and labor that he bought somewhere else; isn't that true? A (No answer.)

Q These checks here, Exhibit—Exhibit D. 4, this went to buy the material and labor that went in that job; isn't that so? A No, sir. He agreed to furnish material and labor, so I gave that to him, because he needed the money, that is all.

Q You knew he was a man who needed money, he was a poor fellow, and all.

The Court: Just a minute. Do I understand, Mr. De Fronzo, that most of this money, as represented by the checks, was

paid during the progress of the work, in advance of the time of its completion?

The Witness: Yes, sir. Some was advanced.

Q Now, your first check, as I see it—the first check you advanced him was December 24th, 1928, paid $200.00? A Yes, sir.

Q On June 11, 1929, was the last check you gave him, $108.00; is that correct? A Yes.

Q That was the time when he finally finished the work; is that correct? A He finished on May 11th.

Q On May 11th? A And on the 11th of June I got—

Q Just a minute. A And prior to the—

Q Well, when did he start with reference to December 24, 1928? A He asked me for this—

Q When did he start his work prior to December 24th; could you tell us? A He never started prior to the 24th. He started February—he really started to work January 14th, and came back—

Q What year? A 1929. And he came back February 11th.

Q Did you have any writing with him? Why did you give him $200.00 at that time, when he didn't earn it? A Why?

Q Yes. A I gave it to him on good faith, that he would perform his duty, and I advanced the money because I seen him in bad shape.

Q And you are a pretty careful business man, aren't you? A Yes, sir.

Q Dealing in building and loans, and president of this building and loan for years? A Why? I shouldn't advance a loan to him?

Q I am not asking—don't argue with me, sir. Isn't it a fact you are a president of a building and loan for many years? A Yes, sir.

Q And you were pretty careful when you gave him this last check of $108.00, to make him sign this paper; isn't that the fact; you did not trust him then, did you; you did not have good faith in him then, did you? Why did you make him sign this paper? A Well, Mr. Feld, you know your client.

Q Do not ask me any questions. A You know your client.

The Court: No, that is not an answer.

Mr. Kuvin: There are really two questions there, if the Court please. The first question is, "You did not trust him then?"

The Court: Strike that out.

Mr. Kuvin: Then the second question following that—

The Court: Read the last question.

(Last question read as follows: "Why did you make him sign this paper?")

A Well, in order to have a receipt, that it is paid, because in the end I make people sign receipts.

Q Why didn't you make him sign a paper that this was given to him as a loan, and to be accounted for when the work was finished? A This check is a receipt for me.

Q Why didn't you have him sign a paper showing why it was given to him? There was not $200.00 worth of work done? A He didn't want to sign no papers. He did not want to make no contracts.

Arcangelo De Fronzo, for Defendants, Cross.

Q In spite of the fact that he would not sign any papers, you were so good-hearted that you gave him a check of $200.00; is that what you want us to believe?

Mr. Kuvin: I object to the question as not being proper cross examination, asking "Is that what you want us to believe?"

The Court: That is not appropriate.

Mr. Kuvin: I object to it and ask that it be stricken from the record.

Mr. Feld: I apologize for it.

The Court: Strike it out.

Q The fact is also, Mr. De Fronzo, that when this work was finally completed, he did hand you the original of this, did he not? A No, sir, he never gave me anything like that.

Q You mean to say you never got it? A No, sir.

Q This is the first time you ever saw this paper? A Yes, sir.

Q Do you remember being in my office, and concerning this question of paying Mr. Congialosi for his work? A No, sir.

Q Do you remember seeing that paper in my office, too? A No, sir.

Q What? And didn't Mr. Congialosi at that time charge you, that you promised him to pay his bill as soon as this mortgage went through; isn't that a fact? A It is not true, because I was in your office only on the 11th of June, and I had a witness with me, and you signed a paper there. You never seen me hence.

Q And wasn't it a fact that on the 11th of June, or thereabouts, when these papers were turned over— A No, sir.

Q Wait a moment. I did not ask the question yet—you finally said you could not get the building and loan to advance the money on account of some flaw there in the title; isn't that true? A Well, I was trying to get it.

Q Isn't that true? A No, sir.

Q Weren't there a lot of difficulties concerning the granting of this loan of this theatre company; isn't that a fact? A There were difficulties, yes, sir, but—

Q And it required a very careful examination and search at that time; isn't that a fact, Mr. De Fronzo? A Well, yes, it required, but—

Q And it took many, many months until finally you brought these papers back on June 11, 1929, after you had them examined by somebody else; isn't that true? A Yes, sir, I brought them in.

Q And the fact is this loan was never granted; isn't that true? A Could not grant it, Mr.—

Q No. Pardon me.

The Court: Answer that yes or no.

Q Isn't it a fact it was never granted? A It never was granted.

Q And it was not granted because your building and loan finally determined it would not give any further loans until a subsequent date; isn't that true? A No, sir.

Q Did you ever send him any written rejection of the application? A The building and loan did; not I. The secretary of it.

Q Under your direction? A No, under the board's direction.

Q The fact is that you even promised to make good because of your intended commission, that you intended to make, by giving this mortgage; isn't that true? A Now, you—

Q Isn't that true, Mr. De Fronzo? A It is not true, absolutely not true.

Q Didn't you come down many a night and examine this particular theatre with the idea of becoming even a partner in the proposition; isn't that so? A It is not true. This man wanted to give me a deed because he has been in difficulty, and he could not hold the deed, whether this loan would have been granted.

Q We are not interested in that. And the fact is, Mr. De Fronzo, that it was this pretense that you showed, that you were going to get him this loan, and save that theatre for him, that you got him to do this work, and made him wait for his salary, for his wages, for the time that he spent every day; isn't that so? A I did not get him to do this work. I never knew the man until he came in with his broker for a loan.

Q Yes. When this paper was signed, Exhibit D. 6, did you tell him at that time that it covered everything, or just for the labor and material on the— A I told him—

Q Does it cover everything, or just labor and material? A I told him that I paid him $1,200.00 up to May 11th, and he was all paid up, at the price agreed, for labor and material, but he insisted on extracting from me $108.00 more.

Q He extracted it? A Well, sure.

Q You gave it to him? A I had to give it to him.

Mr. Kuvin: Is that a question, Mr. Feld?

Q Now, who put these figures on there, Mr. De Fronzo? A Mr. Congialosi.

Q And did you see him put it there? A Yes, sir.

Q You are sure about that? A Yes, sir.

Q No explanation after, around those figures? A No.

Q Just mere figures. Total of 7—

The Court: What is the name on the envelope?

Mr. Feld: An envelope with the name of Victorio Congialosi, with an address of Mr. A. De Fronzo, Newark, New Jersey, on it.

Q It simply says 775 there? A 775.

Q It does not say $775, does it? A That is his, see? What do I know. He wrote it.

Q Did you see him write this? A Yes, sir.

Q You are sure about it? A Positive.

Q No mistake about it, is there? A No.

Q Is there any mistake about it? A No mistake.

Q Give you another chance. A No, sir.

Mr. Kuvin: If the Court please, I object to counsel's tactics. He is asking a question on the record—

Mr. Feld: There is nothing wrong in that. That is all.

Mr. Kuvin: I offer that envelope in evidence, if the Court please.

Mr. Feld: That is all right. Go ahead.

(Envelope marked Exhibit D. 8.)

Re-direct examination by Mr. Kuvin.

Q Now, Mr. De Fronzo, tell us all about the building and loan transaction, since counsel has dragged it out. A I want it dragged out, because that infringes upon my honor.

Q Tell us all about it. A During the summer of 1928 this man came in with an ex-director of the board of directors.

Q Of what building and loan? A Of the Watson Building and Loan, a man that we had thrown out from the door.

The Court: Never mind that.

A (Continuing.) Well, he was acting in the capacity of a broker.

Q He came in with that man? A He came in with the man and brought in an application. We submitted it to the board of directors, and I appointed a committee to come out. When I seen this man—there is a little store next door to the theatre, to the Lodi Theatre. He seen that I was an Italian. He started to tell me—he said, "I wish—" I did not know— "I wish I had come to you, direct to you, because this agent is robbing me of a thousand dollars for our commission."

I said, "Well, I think it is a little bit too much, but you can't help it now, because you signed an option, that this man should get you the loan, the commission." I said, "Nevertheless, I do not like to see this man get it. I would like to see it thrown to your account, if the committee grants the loan." I believe at the time he asked for $35,000.00, and the board, on the recommendation of the committee, granted him

$30,000.00. He received notification from the secretary of the building and loan, and he went to see our lawyer, Jacob Fox, the building and loan lawyer. There he brought the necessary papers, and he started a search, and in about ninety days after that time he brought in the report to the board.

Q Did you convey the report to him? A He brought the report to the board, and I conveyed the report to him, that there was trouble in the search, that the loan could not be granted.

Q When was that, that you conveyed this information to him? A Three months—about three months after, because he done it in the—I am not accurate with the dates, when it was, but it was about three months after, because it took him a long time to make that search; then finally turned it down.

Q Now, on June 11, 1929, was that the receipt you received from Mr. Feld, the attorney of Mr. Congialosi, for the search? A Yes, sir.

Q Notes which you returned to him? A I returned to him, for further searching, and I brought in to him, from an expert searcher, another abstract.

Q Who, to Mr. Feld? A To Mr. Feld, showing that that property was not marketable.

Q How many times had you seen Mr. Feld before this date of June 11, 1929? A I seen Mr. Feld once before, when he had another case in—Mr. Congialosi had a case in Paterson, I think it is, or Passaic. That is the big court there in Paterson.

Q Paterson. A And on that June 11th. I never have seen him no more.

Q You have never seen Mr. Feld since then? A Just once, he took me down to Jersey City,

because he made me understand it was in Chancery Court, in the Chancery Court, in Jersey City. There he said, "Oh, we made a mistake." I only told him to come over, and they took me over to Paterson.

Q Did Mr. Feld ever present to you any statement of an amount due? A No, sir.

Q To Congialosi, from you? A No, sir.

Mr. Kuvin: I offer this in evidence, if the Court please.

By the Court.

Q Mr. De Fronzo, before you talked to the assignor of this claim had you contemplated the painting of those rooms by painters? A Yes, sir.

Q Were the painters there when this gentleman called? A A painter contractor, a paint contractor, was there.

Q Was there some discussion about the painting, as to the price of the painting? A Yes, sir.

Q How much was the painting? A Was supposed to pay $400.00 for painting the whole three rooms, foyer and pantry.

Q Then he said he would do the plaster work, supply the material? A Yes, sir.

Q All the material and all labor necessary? A For double the money, yes, sir.

Q For double? A For double the amount.

Q For double the amount? A Yes, sir.

Q In other words, instead of four— A Instead of four, it was eight. But, your Honor, I had to paint the house anyway.

Mr. Kuvin: I offer this letter in evidence.

(Letter marked Exhibit D. 8.)

Mr. Kuvin: With the Court's indulgence, I want to identify these two checks which were given to Tony Congialosi, that they were two checks, both marked for identification, D. 5.

By Mr. Kuvin.

Q I ask you whom you gave those checks to, and in whose presence? Whom did you give those checks to? A To Mr. Congialosi's nephew. He brought in this man as a working man in my house. He said he needed some help.

Q Who was there at the time you gave him those checks? A My wife, one of my workmen, that helped him throughout on the job. But he wanted to have this man to fill in all the little cracks that he had on the side of the walls. Then his nephew would not trust him with the money. He wanted me to make him out a check.

Mr. Feld: If your Honor please,—

The Witness: Well, I am under oath.

Mr. Feld: I ask that it be stricken out.

The Court: Strike it out.

Q Was Vito Stassi there at the time you gave these checks to Tony? A Yes, sir. That was in one week—

Q What was said between you or Victorio or Tony while the three of you were all together, at the time these checks were made out? A That that was paying him his wages.

Q Whose wages? A Congialosi, was paying his wages, by my advancing these checks.

Q And they are dated when? A April 13th and April 19th.

Mr. Feld: What year?

The Witness: 1929.

Q April 13, 1929, when you gave Tony Congialosi the check, did you give one to Victorio Congialosi at the same time? A Yes, sir. He said he needed $50.00 also, and he took $6.00 in cash—took off the $56.00, from the $44.00, from his own nephew.

Q Took off the $6.00 that was to make up the $50? A Yes, because he had promised—

Q And these checks were made out by you to Mr. Congialosi? A Yes, yes, Mr. Congialosi.

Q Which Congialosi? A Victorio.

Mr. Kuvin: I offer them in evidence, if the Court please.

Mr. Feld: No objection.

(Checks marked Exhibit D. 5.)

RECESS.

AFTER RECESS.

MANFRED MANCUSI-UNGARO, called as a witness on behalf of the defendants, being duly sworn testifies as follows:

Direct examination by Mr. Kuvin.

Q Mr. Ungaro, what is your business? A Civil engineer and architect.

Q How long have you been a civil engineer and architect? A Twenty years.

Q Have you, during your twenty years' experience, ever had occasion to supervise, plan and recommend work involving the kind of work that was put into the home of Mr. De Fronzo, if you know what kind of work was put into his home? A I do, and I have had various occasions.

Q What was the occasion of your knowledge of the kind of work that was put into Mr. De Fronzo's home? Will you tell us how you came to know what work was being put in there, and how much you know about the work being in there? A Why, I had met Mr. De Fronzo in the building and loan, and—the first time we had gone to appraise the property of Mr. Congialosi, in Lodi, I met Mr. Congialosi. And afterwards I met him in Mr. De Fronzo's house.

Q When was that, that you first met Mr. Congialosi? A Oh, in the latter part of 1928.

Q Do you remember about what time? A I do not. I cannot remember.

Q Had you known, Mr. Congialosi, or his work, or the type of work, prior to the time you speak of, when you first met him? A No, I had not.

Q Had you ever recommended him or his work to Mr. Fronzo? A I didn't know the man at all; never recommended him.

Q After your meeting Mr. Congialosi at the time you mentioned, will you please tell us what you know about the work that Mr. Congialosi did for Mr. De Fronzo? A Mr. De Fronzo hired Mr. Congialosi to do what we call ornamental plastering in his home, and Mr. De Fronzo called me to inspect the work, and super-

vise it, and to see that the work was done correctly.

Q Did you, in fact, supervise it, and see that it was done correctly? A I did.

Q As the work progressed? A I did.

Q Did you have any conversations with Mr. Congialosi while that work was in progress, with relation to the work? A I did.

Q Will you please tell us the dates and the conversations that you had with him? A I don't know that I can give you the exact dates, but I do know it was after Christmas, in 1928, I think, and I went to supervise the work, and I criticized it somewhat. I thought it was too heavy in places, and I thought that it was not art, and I told him so, in the presence of Mr. De Fronzo; but Mr. De Fronzo thought that he liked it, so I let it go at that.

Q What type of work is this? A Why, just—

Q Is it unusual work, requiring unusual skill in art? A No. It does not require unusual skill in art.

Q Well, does it require more than the ordinary skill in art? A Well, it is what we call a skilled trade.

Q And what is the name of that particular trade? A Ornamental plastering.

Q And what was, during the months, or during the time of the latter part of 1928, and the early part of 1929, if you know, the usual trade salary per day for the ornamental plaster worker?

Mr. Feld: I object to that, sir.

The Court: Sustained.

Q Had you had experience during that period of time? A Yes, sir.

Q In hiring and firing?

The Court: This is based upon a contract.

Mr. Kuvin: The man testified on direct examination that his service was worth $150.00 a week.

The Court: He is only asking for a contract price of $120.00.

Mr. Kuvin: To affect his credibility, if the Court please, to show that his statement of his worth was in excess.

The Court: He is not suing on that. That is not material.

Mr. Kuvin: I think there is a second count, if the Court please, on quantum meruit.

The Court: Well, he is not suing on the quantum meruit, I take it.

Mr. Feld: It is on direct contract.

Mr. Kuvin: All right. Then they have practically abandoned the proof on the quantum meruit.

Q Now, were you present at any time when payments were made to Congialosi by Mr. De Fronzo? A Just the last time.

Q Will you tell us the occasion of your being present at the last time that payments were made? A Why, Mr. Congialosi came to my office about four times, and begged me to get Mr. De Fronzo to make his last payment to him.

Q Did he designate at that time what the amount was that was due him? A I think it

was the amount that was paid in the last payment. I think it was $108.00. That is, the reason Mr. De Fronzo was not paying it, was because—

Mr. Feld: I object.

The Court: No.

Q Now, wait a minute. A I think that was it. That was what Mr. Congialosi—

Mr. Feld: I object to what he thinks.

The Court: Strike it out.

Q Did Mr. Congialosi tell you what amount he was claiming from De Fronzo as the last payment? A He did.

Q Did he tell you how much? A He did.

Q What was that amount that he told you? A The amount that was made to him in the last payment. I don't remember the dollars and cents.

Q Were you present at the time the last payment was made to him? A Yes, sir.

Q I show you Exhibit D. 6, dated June 11, 1929, and ask you if that is your signature as witnessing that? A Yes, sir.

Q Were you present at the time Mr. Victorio Congialosi signed that? A I was.

Q What if anything was said by you or by Mr. De Fronzo or by Congialosi at the time that payment was made and that paper was signed by him and witnessed by you? A We went over each and every item.

Q Whom do you mean by "we?" A Mr. De Fronzo, Mr. Congialosi, and I, and Mrs. Congialosi.

Q She was present? A She was present. We were in Mr. Congialosi's home. And I explained each and every item to all present, and asked them whether that was the final settlement of the bill, and they all agreed that it was the final settlement, and Mr. De Fronzo paid the money, and—

Q How did he pay it at that time? A He paid it by a check.

Q Check dated what date, do you remember? A I don't remember the date. I suppose it was on the same date as this.

Mr. Kuvin: It is an admitted fact that it was $108.00.

Q Was anything said at the time about the difference between the amount set forth in that statement and the amount of the check that was given by Mr. De Fronzo to Mr. Congialosi? A Why, Mr. De Fronzo claimed that it was only ninety-five, and Mr. Congialosi insisted it was 108, and I just told him, to get it over with, to give him a check and forget it, and that is the way it came.

The Court: You say that there was a dispute over $3.00?

The Witness: Yes, sir. Whatever it was. I don't know whether it was three or—

Mr. Kuvin: Thirteen, if the Court please; 95 and 13 is 108.

The Court: I thought it was 105 and 108.

Mr. Kuvin: No, sir; 95 and 108.

Q Was anything further said after the payment was made? A Not that I remember; nothing in regard to this.

Q Where was that paper executed? A In Mr. Congialosi's home.

Q In Mr. Congialosi's home? A Yes, sir.

Q When you explained that to Mr. Congialosi, did you explain it to him in English, or in Italian? A In Italian. I read him in English, and translated it to him in Italian.

Q Did he see the paper? A Yes, sir.

Q Did he look at it? A Yes, sir.

Mr. Kuvin: Cross examine.

Cross examination by Mr. Feld.

Q Where was this check given, Mr. Ungaro? A In Mr. Congialosi's home.

Q You went there with him? A I went there with Mr. De Fronzo.

Q Was that in your professional capacity? A I went as an arbitrator there.

Q As an arbitrator? A Yes.

Q Over $13.00? A I suppose so, Mr. Congialosi had asked me to do it.

Q You were an architect. Where did he ask you to intercede as an arbitrator? A In my office.

Q In your office? A Yes. At least that—

Q How long have you been an architect and civil engineer, Mr. Ungaro? A Twenty years.

Q Twenty years? A Yes, sir.

Q As such I assume that you have records of any such transaction that you made? A I don't get your question.

Q In that capacity, where you go out and supervise various jobs, you make the memoran-

dums of it for your own records? A Sometimes, yes. It is according to the importance of the job.

Q Yes. And was this job important? A I didn't think so.

Q You didn't think so? A No.

Q Did you get paid for your supervision? A No, I didn't.

Q You did not? A I didn't ask to be paid.

Q You did not ask for payment? A No, sir.

Q You volunteered your services? A Yes, sir.

Q You went there how often, Mr. Ungaro? A Once or twice a week.

Q Once or twice a week? A Yes, sir.

Q You are sure you supervised this job? A Absolutely.

Q You have no record at all of the visits that you made at this home? A No. I didn't think they were important.

Q And you said you criticized this job? A Yes, sir.

Q And although you made some severe criticisms about the work, yet De Fronzo liked the way it was made? A Yes, sir.

Q And he preferred to have it that way? A Yes, sir.

Q And, of course, you will admit, in the course of your experience, that Mr. Congialosi's type work does require some real skill and knowledge of the work; isn't that so? A Well, I wouldn't say unusual skill.

Q Not unusual, but it does require skilled knowledge of this work? A I should say skilled labor, yes.

Q Not every plasterer could do this kind of work? A No.

Manfred Mancusi-Ungaro, for Def'ts, Cross.

Q It is an art in itself; isn't that true? A Well, I wouldn't call it an art, no.

Q That is your opinion. But it is generally considered as an art in itself? A No, it is not.

Q Do you mean that, Mr. Ungaro? A I do.

Q Now, on June 11, 1929, when you called at Mr. Congialosi's home— A You mean the last—

Q Yes. A Yes.

Q Did you present this check? A No, no. De Fronzo presented it.

Q And after you left Mr. Congialosi's home, did you go anywhere else from that point? A We went home.

Q Went home? Sure about that? A Well, I do not—just a minute, until I think. That is quite a question.

Q Did Mr. De Fronzo go home with you to Newark? A I eventually got home.

Q Whose car was it that you traveled in to Lodi? A Mr. De Fronzo's.

Q And I presume he took you back to Newark in his car too? A Yes.

Q Did he have any papers? Did he return in the form of a search—you know what I mean by a search? Did he have those papers with him too? A I don't remember. He may have had.

Q You don't remember? Did you ever see this paper, Mr. Ungaro? This receipt is Exhibit D. 8 (handing paper to witness). A I can't remember.

Q You don't remember that? A No.

Q You would not say that after you left Congialosi's home, when De Fronzo gave him the check of $108.00, that he went down to my office and turned over the searches, and said he

can't do anything with the loan; you would not say that, would you? A No, I would not. I don't remember.

Q You would not say that the fact is that there was an argument, not over the $108.00, or $13.00, but because he said he could not give a mortgage, and that was the argument, and when the man asked for the balance of his money; isn't that true? A There was not any arguament about the mortgage at all. That was a settled fact.

Q Yes. Isn't it strange that on the same day, June 11th, when he made that same check for $108.00, that he turned back the searches and said he was through with the mortgage proposition; isn't that strange?

Mr. Kuvin: One moment. I object, if the Court please.

The Court: Sustained.

Mr. Kuvin: Argumentative.

Q How long did you stay at Mr. Congialosi's home? A Oh, about an hour and a half or two hours.

Q An hour and a half? A Yes.

Q What took up that period, Mr. Ungaro? A Oh, we drank some wine and talked of old times.

Q You are sure about that? A Positive.

Q Anything else you did at that time? A Why, we discussed things in general. I can't remember.

Q Do you know what you discussed? A We may have discussed that mortgage. I don't know. I don't remember.

Q You are not sure about it? A Well, it was not—

Q Is there a possibility that you did discuss this mortgage? A If we did discuss it, Mr. De Fronzo just told him it couldn't be done, and nothing else could be done.

Q You would not say you did not discuss it, would you? A No, I wouldn't. I don't remember.

Q Do you know whether it was in the morning or in the afternoon that you made this visit? A It was in the afternoon.

Q It was in the afternoon? A Yes, sir.

Q Who made up this paper? A I don't know. Here it is.

Q Did you make that up, Mr. Ungaro? A No, sir.

Q You did not make this up? A No, sir.

Q And you say you explained to this man in detail? A Item by item. I read it to him and translated it.

Q How long did it take you to explain the details of this? A Oh, I didn't count the minutes.

Q You didn't count the minutes? A No.

Q Why didn't you have him sign a paper that everything is paid in full, they have no claim against each other, or words to that effect? A I was not interested in that.

Q Oh, you were not interested? A No.

Q Did you go over there as a witness for Mr. De Fronzo, or something? A No.

Q You did not go there— A I knew both of them.

Q —just to save him about $13.00, whatever it was? A I went. Mr. Congialosi asked me to get Mr. De Fronzo to give him some money.

Q And so, because he asked you, you had to leave your business and go to Lodi and ask for a check to be handed over of $108.00? A Yes. I do those things lots of times.

Re-direct examination by Mr. Kuvin.

Q A question was asked you, whether you did not think this job was important. Important to whom?

Mr. Feld: I object to that.

The Court: It is immaterial.

Mr. Kuvin: I did not want counsel to make a point of it in summation. I wanted to bring it out, who the job was important to.

The Court: Important is a relative term.

Mr. Kuvin: That is why I wanted to show to whom it was important. It might not have been important to him.

The Court: No; he was expressing his opinion. We are not elaborating on that.

Mr. Kuvin: That is all.

ALVERA DE FRONZO, one of the defendants, called as a witness on behalf of the defendants, being duly sworn testifies as follows:

Direct examination by Mr. Kuvin.

Q Mrs. De Fronzo, were you present on or about Thanskgiving, 1928, when Mr. Congialosi came to your house to speak about doing the work in the house? A Yes, sir.

Q Will you tell us what took place, who was there, and what was said, and by whom? A Was my children, in my house, and my husband, and Mr. Congialosi, and they speak about, he wanted to do some work. He said, "Don't make them paint. I do some plaster work nice." And my husband, "All right. How much you think it cost me?" He said, "Well, $200.00 a room."

Q $200.00 a room? A Yes, and they make it two rooms for $400.00. And he said the hall, that make for two room.

Q They considered the hall— A Consider it two room.

Q How much to charge for it? A Well he said everything cost $800.00.

Q Did he say anything about any other work, or what kind of work? A Well, marble work, you know, artificial marble, in the hall, and the plaster work.

Q So your husband told him all right, he would accept that; he told him to go to work on that day, on Thanksgiving? A Well, he said, "I want to do the work on Thanksgiving." My husband said, "To much trouble. You start after the holidays."

Q What holidays did he say? A Christmas; after Christmas.

Q And when, in fact, did Mr. Congialosi come to the house and start work? A On the 11th of January.

Q 1929? A 1929, yes.

Q Did he stay at the house and sleep at the house and eat at the house? A Sometime it was raining, you know, and we feel sorry for him; make sleep; and I cook. I said, "Do you want to stay to eat?" He stayed. He said, "I like you, eat; you cook fine." I said, "All right.

Eat," all the time. You know, we never had people—he said he pay me. I never give somebody else a thing, you know, to pay. I said, "All right, eat, if you like." That is all.

Q Did you personally agree to pay him for any work in the house? A No, sir. I don't talk to him at all. My husband, he do everything. I never butt in, in business.

Q How many hours a day did Mr. Congialosi work while he was in your house doing this work? Did he work every day, from 8 o'clock until 6 o'clock, or 10 o'clock; until what time? A He come from Lodi in late, sometime 10 o'clock, 9 o'clock, and work a couple of hours, and then start to sing and holler, you know, all the time. I said, "Keep quiet." You know, "It is too much noise around here." And he started to sing all day around, and sleep, and smoke cigar. I said, "Get through with your work," all the time. I was mad.

Q Who helped him in his work around the place? A We had a man, and he watched the shop. You know, we got a factory, and this man, before, he work on plaster work.

Q Oh, he was a plasterer before? A The last man, and my husband says, "This man takes long, two hours a day, three hours. But it takes this man, help," and this man helped all the time.

Q What is that man's name? A Frank.

Mr. Kuvin: Cross examine.

Cross examination by Mr. Feld.

Q What day was it that he started to work in your house, Mrs. De Fronzo? A On the 11th of January.

Q 1929? A 1929.

Q What makes you remember January 11th? A Well, because I remember when he come I take a calendar and I mark it when he come in the house.

Q Yes. Have you got the calendar here? A Home. I ain't got it here.

Q What kind of a mark did you make on it? A What kind of mark?

Q Yes. A With the pen.

Q Did you make a cross or circle, or what did you do? A I remember I make.

Q What kind of mark did you make? What? A I marked it in the date, that is all.

Q Did you put a circle around that day or a cross? What did you do? A Well, I don't make a cross. I know I write.

Q What did you do? You do not know what you did; isn't that true? A No, never mind.

Q What is that? A The same day.

Q What day of the week is it? Let us go to the next question. What day of the week was it, Monday, Tuesday, Wednesday? A Well, he no come on Monday.

Q What day of the week was it, the 11th; do you remember that? A I don't remember.

Q You don't remember that either. You are only guessing it was January 11th; isn't that so? A Well, on the 11th, because I remember he was sick, and I said, "When you start, I want everybody to start to work in my house"—I mark it when they start work.

Q You do not know whether or not he did any work in his own shop before he got started in your place, do you? A I don't know.

Q You do not know that either. Sometimes when he stayed in your house overnight, he did

work there until 9, 10 or 11 o'clock at night, didn't he, sometimes? A He never worked at night. 4 o'clock he finish work.

Q In the afternoon? A Sure. And he no work all day, only two or three hours a day.

Q Do you remember that, too? A Sure, I remember it.

Q Did you mark that down? A Well, this I don't have to mark, because this was no day's work.

Q What is the name of the painter that you talked about, that you had there? A Paint?

Q Yes. You said you had a painter that wanted $200.00, or whatever it was? A Well, the painter talk to my husband. I don't know the name. I don't butt in on this business affairs.

Q You don't butt in? A No, sir.

Q Do you know that man? A Sure, if I see, I know.

Q What is his name, do yon know? A I don't know the name. I never talked to him at all.

Q Do you know where he lives? A My husband know.

Q Do you know? A What do you mean, I know? I don't know him.

Q Do you know how much that man asked for painting this house of yours? A $400.00.

Q Did he tell you what it covers? A Cover the thing, make nice job.

Q Sure about that? A Sure.

Mr. Feld: That is all.

Re-direct examination by Mr. Kuvin.

Q Is this the calendar that you spoke about, Mrs. De Fronzo (handing calendar to witness)?

A I think it was like that. Yes, this is the calendar.

Q That is the calendar? A Yes.

Q Will you point out on that the marks that you made when he started? A Over here.

Q Did you make that mark yourself or is that by your husband? A Myself. I make this.

The Court: What date is it, pointed to?

Mr. Kuvin: Pointed to February 15th, if the Court please.

Mr. Feld: That is not correct, sir.

Q All right. Will you point again, Mrs. De Fronzo, where you have just pointed? A 16.

Mr. Kuvin: She pointed to March 16, 1929. My mistake.

Re-cross examination by Mr. Feld.

Q Do you read English? A No.

Q Do you read Italian? A Yes.

Q Does this "January" in English look like "January" in Italian? Do you know what this is? A Yes, January.

Q January? A Yes.

Q Do you remember testifying that on January 11, 1929, you made a mark that he started his work? Look at that. Is there any mark on January 11th? Look at it. Look at January 11th, please. Now, just wait a minute. Please excuse me. Look at January 11th. Any mark there, on January 11th? Yes or no. A Well, I mark—

Q Is there any mark there laid, on January 11, 1929? Yes or not. A There is no mark.

Q No mark, no. A I put it down here.
Q Is there any mark here on March 16th?

The Court: What is that mark on February?

Q What is this mark on February 11th? Here, do you see February 11th? A Yes.
Q What is that mark there? Did you write that? A This I don't.
Q You do not know who made that, do you? A This maybe my husband make, because he knows he come on the same day sure.
Q Yes. You did not make that at all, did you? A Not this one, no.
Q Why did you say before that you made a mark on a calendar? A Well, one mark I make only.
Q On January 11, there is no mark there at all; isn't that so?

Mr. Feld: Are you offering that in evidence?

Mr. Kuvin: Yes. Go ahead.

Mr. Feld: That is all.

Re-direct examination by Mr. Kuvin.

Q Is this the calendar you marked on, or did you have another? A I don't know. It was a calendar just like that. Who bring this calendar? I don't remember.

The Court: Just a minute. She pointed out some mark in that calendar as her having made.

Mr. Kuvin: I grant you that, if the Court please, but I have just found out that it was

not the one. The sheet is ripped off the month of February, as it is apparent.

The Witness: Sure. That is why I can't see.

Mr. Kuvin: The month of February is in the center, the previous month and the following month is on. The month of January is ripped off.

The Court: I see January, February and March.

Mr. Kuvin: That is true, if the Court please, but there was a prior sheet which had January in the center.

The Court: Turn the next sheet over.

Mr. Kuvin: February and March and April; then January, February and March. In other words, each sheet carries the month prior.

The Court: That can be explained, but the witness identified a mark on there.

Mr. Kuvin: That is true.

The Court: So, if she said that was the calendar she marked, why—

Mr. Kuvin: I will offer the calendar in evidence and rest on that.

Mr. Feld: That is fine.

(Calendar marked Exhibit D. 9.)

FRANK DINOSI, called as a witness on behalf of the defendants, being duly sworn testifies as follows.

Direct examination by Mr. Kuvin.

Q Where do you live, Frank? A Newark.

Q You live in Newark? A Yes.

Q Do you remember the time Mr. Congialosi worked for Mr. De Fronzo in the house? A I was help work with him after. I don't know the day he start. I was help all the time.

Q You were helping him all the time? A Sure.

Q When did you start to help him and when did you finish helping him? A When I finish the job.

Q When was that? A I don't know. I don't mark that.

Q Do you remember what month it was in? A What?

Q Do you remember what month it was you helped finish the job? A I don't know.

Q How long was it that you work with him, helping him; how many days, weeks or months? A I no count weeks. I counted when I started to work. I worked all the time over there. I go nine o'clock, ten o'clock. I go home five o'clock, because I got to watch the shop down there.

Q When you went home five o'clock, he would go on, keep working? A Well, I don't know after, he work, because he make the stuff. Every day he make something, sometimes. I don't know.

Q But during the time you were working, from nine to five, did he work all the time? A Sometime he started to talk, go down the stairs,

up the stairs. Me carry all the plank up and down. He says, "Come on upstairs, come on downstairs," and I do nothing. One day I quit. I told the boss I did not want to stay any more. "Well, help a little bit; help a little bit." I don't want to work no more. He make me twenty times go down. Me carry. Me go for nothing, up and downstairs.

Mr. Kuvin: All right. You cross examine.

Mr. Feld: That is all.

Mr. Kuvin: That is the defendants' case, if your Honor please.

The Court: Is there any rebuttal?

PLAINTIFF'S REBUTTAL.

VICTORIO CONGIALOSI, recalled, in rebuttal, testifies as follows:

Direct examination by Mr. Feld.

Q Mr. Congialosi, Mr. Ungaro said that he called at your house and was there an hour and a half, and explained to you in detail every word on the receipt known as D. 6.

Mr. Kuvin: I object, if the Court please, as to what some other witness said during the course of the trial, as improper redirect examination.

The Court: It is directed particularly to this man's course of conduct. I will allow that.

Mr. Kuvin: But it is not what the man said, if I understand it, if the Court please; it is what was done. He may re-examine this man as to what actually happened, as to whether or not it was so, but not what one witness said, and then direct his question as to that particular witness' statement.

The Court: I overrule your objection.

Mr. Kuvin: May I have an exception, if the Court please?

Mr. Feld: Will you ask the question?

(Question read.)

Q Is that correct? A No, sir. Mr.—

Q How long was he there? A About a half an hour. Mr. Ungaro can say anything he wants, but—

Q Wait a minute. Do not talk too fast. Did Mr. Ungaro or Mr. De Fronzo explain anything on this paper, D. 6, to you? A No, sir.

Q Was there any thing said about this paper before you signed it? A I said for the money, what you receive, according to my list.

Q And did Mr. Ungaro supervise that job at any time you were there? A No, sir. He came every time, nighttime, about 10 or 11 o'clock, to have a little bit of pastime, drink, or eat, that is all.

Cross examination by Mr. Kuvin.

Q How many times did Mr. Ungaro come to the house while you were there? A Some time come once a week, sometimes two week, with his wife, that is all.

Q How many times had you seen Mr. Ungaro, the architect, after you finished the work? A I go two times to his office.

Q To his office? A Yes.

Q And the third time he came to your house with Mr. De Fronzo? A I go after that. I told Mr.—"You be a good man; go around to Mr. and Mrs. De Fronzo, to make him pay or give me the mortgage." That is all what I said. And if you want to know some other thing I can tell it.

The Court: Never mind.

Q I do not want to know some other thing. I got enough. A Promise, promise, every—

The Court: Is that your case?

Mr. Feld: We rest, your Honor.

Mr. Mancusi-Ungaro: If your Honor please, on behalf of Mrs. Alvera De Fronzo, I respectfully move for a direction of a verdict.

The Court: There is no evidence as to Mrs. De Fronzo.

Mr. Mancusi-Ungaro: No evidence as to Mrs. De Fronzo.

Mr. Feld: I think that is quite correct.

The Court: Motion will be granted as to Mrs. De Fronzo.

Mr. Kuvin: As to Mr. De Fronzo, if the Court please, I ask for a directed verdict on the ground that the proof of accord and satisfaction is shown by documentary evidence in the case. I think the receipt and the check should be taken together as part and parcel of the same transaction.

The Court: No, this is not a release. It is evidence, that is all.

(Mr. Kuvin summed up the case to the jury.)

(Mr. Feld summed up the case to the jury.)

(During Mr. Feld's summation the following occurred:)

Mr. Kuvin: If the Court please, I want to enter an objection and ask the jury be instructed. Mr. Feld has summed up to the jury to the effect that the defendant in this case had an interest in the building and loan mortgage granting, due to the fact that he was getting a commission, and I respectfully submit that there is no testimony in the case on that score.

The Court: Well, he can argue only facts, but he can draw all proper inferences from the evidence, and the assignor said that this money was to be paid when he received his commission from the building and loan.

Mr. Feld: That is right.

Mr. Kuvin: Well, now, that, if the Court please, in Italian, and their idiomatic expressions, and so forth—commission may also mean the money which he gets from the building and loan, and I do not see that that would infer or raise—

The Court: It is not for me to sit down and become etymological.

Mr. Kuvin: I grant that, if the Court please, but the testimony in the case is absolutely—

The Court: He can argue whatever is in the evidence.

Mr. Feld: Certainly.

The Court: That is the language used. The jury heard it. They have a right to draw their own inferences.

Mr. Kuvin: May I have an exception?

(Mr. Feld concluded his summation.)

(The Court charged the jury as follows:)

CHARGE TO THE JURY.

The Court: Ladies and gentlemen of the jury, this is a suit by the assignee of a claim of Vittorio Congialosi, who is suing Mr. De Fronzo, asking for damages as the result of a contract which he claims he made with the defendants. The first question we will have to solve is, in the absence of specific language, as would ordinarily be set forth in a written contract, from all of the evidence, precisely what the agreement was between the parties. And in view of the fact that it is a conflict of testimony, the determination of that question, as to really what the terms of the contract were, lies in your province as jurors.

Now, briefly stated, the assignor of the plaintiff claims that he made an agreement with Mr. De Fronzo for the doing of certain work in his home, for the decorating, in his language, of the parlor room and the dining room; and then the work was to be done in the foyer, and he described the nature of the decorations. I think in the parlor room there would be figures to

indicate day and night, and the ceiling was to be done with panels; and there was work to be done on cornice; and the work was to be ornamental on the wall, and, in addition to that, there was to be marble wainscoting.

There seems to be no dispute with respect to the place where the work was to be done, nor does there seem to be any question as to the kind of work that was to be done. The difficulty arises with respect to the payment.

Now, Mr. Congialosi said that he made this agreement, and he was to receive $120.00 a week for his services, and out of that had to pay $15.00 a week board to Mr. De Fronzo, leaving the amount due him $105.00 a week, which represented his services. He said that Mr. De Fronzo was to pay for the labor and the wages of the workman who had prepared this work, and done part of it at his home.

Now, according to Congialosi, not only was there considerable work done at the home, but work was done at his shop, by way of the preparation of models or molds necessary and preliminary to the placing of the plaster work at the De Fronzo home. He said he started to work in his shop when the agreement was made, and after he had worked there—I think he started to make the models some time in November, shortly after the conversation alleged to have been had in October, and that he went to work in the house in January, and worked for 23 weeks; I think those are the claims; and as the result of that agreement he is entitled to 23 weeks, at the rate of $105.00.

The defendant, on the other hand, denies this agreement, and said that prior to entering into

any negotiations at all with Mr. Congialosi, he had intended to have the house painted, and Mr. Congialosi prevailed upon him to have ornamental work done rather than ordinary painting, and that the painting job was to cost some $400.00; and then he entered into an agreement with Congialosi for the doing of this work for $800.00, and then there was some subsequent work to be done, which brought the price up to $1,295.00.

Mr. De Fronzo has offered in evidence certain checks; the last one, I take it, is the one which Mr. De Fronzo claims was in full settlement, with the exception of $95.00, which is marked on this paper as the balance due.

Mr. De Fronzo has offered several checks in evidence, including two made out to Congialosi's nephew, and said that those checks represented the payment to Congialosi, in keeping with the terms of the agreement that he made with him.

On the other hand, Congialosi said these checks represent the payment to the workman, and for the materials which were used in the doing of this work.

So you see it is very important to determine precisely the effect of these checks. Do they bear out the contention of Mr. De Fronzo, in that the total job was to be done for a stipulated sum, and these checks are in payment of the entire amount, or do the checks bear out the contention of Mr. Congialosi, that the defendant agreed to pay for the labor and the materials necessary, and, in addition to that, to pay Congialosi for his services rendered at the house?

Mr. Congialosi said that he went to work at 8 o'clock in the morning, and worked all day,

and very often he worked until late at night. On the other hand, the defendant contends, by his own evidence, and his wife's and other witnesses', that Congialosi only worked a few hours a day. Now, of course, those are fact questions which you, sitting as jurors, are charged with determining.

Now, as I indicated, it is a fact question, and the two theories have been presented to you by the respective sides. Of course, if you conclude from the testimony that Mr. Congialosi has been paid in full, and that Mr. De Fronzo's theory, as advanced by himself, and as shown, was in keeping with the terms of the contract, then, of course, under the law, a man cannot be paid for any more than he is entitled to.

On the other hand, if you conclude that Mr. Congialosi's contention is correct, that, in addition to the amount set forth by Mr. De Fronzo, there was the added amount, that is, for his own personal service, and you believe that has made out a case in that respect, of course he ought to prevail.

Now, under the law, the one who charges another, as in this case, the assignee is charging Mr. De Fronzo, with a debt, has the burden of establishing to your satisfaction, by a fair preponderance of the evidence, that he has made out a case. Sitting as jurors, you are the sole judges of the fact, and that carries with it a right to draw all proper inferences from the evidence. You have in your keeping the determination of the value of evidence. You have a right to gauge, not only from the language of a witness, but from his manner of testifying, what value you are going to attach to that evidence.

You have a right to consider all of the statements, determine any contradictions, if there be any, and, in the main, decide all questions of fact.

Now, as I indicated, if the plaintiff has failed to sustain his burden, then your verdict ought to be in favor of the defendant. On the other hand, if you believe from the evidence that the plaintiff has established his claim by a fair preponderance of the testimony, then, of course, in that event, your verdict ought to be in favor of the plaintiff for such amount as he has proved.

(The jury retired at 3:22 P. M.)

The following note was received by the Court from the jury: "Do we have to allow for $105 a week or a less amount?"

(The jury returned to the court room at 4:04 P. M.)

The Court: He is claiming 23 weeks. Of course, you have a right to decide from the testimony whether he worked as much as that or less. Of course, he cannot claim more. But you heard all the evidence, and it is entirely within your keeping to decide, if you are satisfied the plaintiff is entitled to recover, and to determine from the evidence what he is entitled to. In other words, the fact that he said 23 weeks at $105.00, if you are satisfied he worked less than that, of course, that is entirely in your keeping. I have not anything to say about that.

A Juror: But, your Honor, can I say something? I want to know whether they can decide, or, if they want to, give him $60.00 a week, or, $75.00 a week.

Charge to the Jury.

The Court: No, there is no evidence of that. In other words, with respect to the agreement, if you are satisfied that that was the agreement, we have no right to change the agreement. You may determine the number of weeks. Of course, there is no evidence to justify the change with respect to his agreement. He either made that agreement or he did not.

(The jury again retired at 4:06 P. M.)

Exhibit P. 1.

PLAINTIFF'S EXHIBITS.

Exhibit P. 1.

Plaintiff's Exhibit P. 1 was a simple assignment of the claim sued upon by VICTORIO CONGIALOSI, to the Plaintiff, VITO STASSI. Appellant has not copy of the same. The record in relation to the same reads as follows: State of the case p. 28. "Direct examination by Mr. Feld. Mr. Feld: I offer in evidence, if your Honor please, an assignment made by VICTORIO CONGIALOSI, to the plaintiff, VITO STASSI. I understand there is no objection by either counsel."

(Paper marked Exhibit P. 1.)

Exhibit P. 2.

Exhibit P. 2.

Artistic decoration of plaster papiermache & artificial stone imitation cain stone and marble. Also ornamental cement work.

Models for stone, bronze, wood and iron. Carving on stone, wood, marble and scald model.

VICTORIO GRASSO CANGIALOSI
ARCHITECTURAL SCULPTOR
9 NEW ST. LODI, N. J.

Tel. Passaic

Lodi, N. J. 19 Novebre 1928

Nota di Materiali & Manodopera

Per illavoro dornato e Marmo Artificiale circa 525 Pieri Quadrati Per laresidenza del Signor A. De fonzo in Newark, N. J.

Manodopera

Demitrio Stassi	16 Settimani 3 4 giorni	@ $30.00	per Sett..	$500.00
Scibetta	6	@ $30.00	.....	$180.00
Polacco	6	@ $ 8.00	.....	$ 48.00
Negro	6	@ $ 8.00	.....	$ 48.00
Negro	3	@ $ 8.00	.....	$ 24.00
Fracese	2	@ $ 8.00	.....	$ 16.00
Negro	1	@ $ 9.00	.....	$ 9.00
Antonino	1 Giornata	@ $ 5.00	.....	$ 5.00
Antonino Cangialosi	9 Giorni.....	@ $10.00	.....	$ 90.00
Francesco Cangialosi	3 giorni.....	@ $ 3.00	nonpagati	$ 15.00

$935.00

Exhibit P. 2.

per Manodopera totale
Materiale

Colla 150 Panti	$ 45.00	
Gesso	$ 17.80	
Cimento per il Marmo	$ 72.00	una Tonellata
Cimento	$ 36.00	Meza Tonellata
Gesso	$ 38.00	
Gesso	$ 50.00	
Gesso	$ 55.00	
Colori per il Marmo	$ 9.60	
Tela e Sacchi	$ 28.00	
Spirito 6 galloni	$ 6.00	
Shialacca	$ 5.00	
Grasso Caro e Cera	$ 5.30	
Pietri per il Marmo 1 dozina	$ 6.00	
Totale spese	$373.70	

Tutto il totale a Monta.....$1308.70
Senza la Mano dopera del Signor Vittorio Cangiaslosi incluse tutte lespese da Novembre 1928 a Maggio 11—1929

Exhibit D. 1.

DEFENDANTS' EXHIBITS.

Exhibit D. 1.

VICTORIO GRASSO CANGIALOSI
Architectural Sculptor
9 New St. Lodi, N. J.

Lodi, N. J. Decem 6, 1928

Gentilissimo Signor D. Fronzo.

Glia cludo labozetta della due silliche per Soue stanzi non di mostrano i pareti esendo modellati e diaspetto sua venuta apene lie e lasua Signora sitrova comida il bozetto apena in dica loscompartimento della silica la decorazione verra tranta con piu gusto e arte il ver Stile Italiano.

Per ora sono in casa esendo ilavari sospesi causa dei Pagamenti che vengono meno ai patti cio sono in teramente asuo disposizione per servillo come ella merita.

Facento gellosi ai sui intimi amici cosi io possi avere qualche alltro lavoro da uno dei sui amice servendomi come una riclamo il lavoro che saro nella sua casa.

Invio cordili salut.

Suo D. Victorio Cangialosi.

Exhibits D. 2, D. 3.

Exhibit D. 2.

EXHIBIT D. 2 consists of a legal sized envelope bearing upon the address side, the following writing:

Victorio Cangialosi
N 9 New St.
Lodi, N. J.

Fr. A. De Fronzo
71 Hazelwood Avenue,
Newark, N. J.

(Sketch)

Upon the reverse side three different sketches appear in pencil.

Exhibit D. 3.

EXHIBIT D. 3 consists of a translation of Exhibit D. 1, by Judge T. MANCUSI-UNGARO. (note) These three exhibits were first marked for identification D. 1, 2 and 3, and when offered in evidence appeared to have been marked as 1-D. 7, State of the case page 50.

Lodi, N. J. December 6, 1928

Dear Mr. D Fronzo.

I enclose herewith the sketch for the two ceilings for your rooms, they do not show the walls they being modelled, and I await your coming. As soon as you and your Mrs. find it convenient the sketch only shows the division of the ceiling and the decoration will be done with more taste and the art in true Italian style.

No I am home not having any work on account of payments not being made as per contracts

Exhibit D. 4.

therefore I am entirely at your disposal to serve you as you reserve.

Making your friends jealous so that I can get other work from some of your friends, the work that I will do in your house serving me as an advertisement.

Cordial greetings.

Yours truly,

VICTORIO CANGIOLOSI.

Exhibit D. 4.

EXHIBIT D. 4 consists of ten checks made by ARCANGELO DE FRONZO to VICTORIO CONGIALOSO, the assignor and endorsed by him beginning December 21, 1928, and ending June 11, 1929, aggregating $1,158 (State of the case p. 50), of which the following is a correct list.

December 24, 1928	$200.00
January 14, 1929	150.00
February 16, 1929	200.00
February 18, 1929	50.00
March 2, 1929	150.00
April 13, 1929	50.00
April 20, 1929	50.00
April 27, 1929	100.00
May 11, 1929	100.00
June 11, 1929	108.00

Exhibit D. 5.

Exhibit D. 5.

EXHIBIT D. 5 consists of two checks made by ARCANGELO DE FRONZO to the order of TONY CONGOLOSI and endorsed by him, as follows:

Newark, N. J. April 13, 1929 #3

FIDELITY UNION TRUST COMPANY,
AMERICAN BRANCH

Pay to the order of Tony Cangolosi..$44 00/100
Fourty Four 00/100.....Dollars

A. DE FRONZO.

(Endorsement)

TONY CONGIOLOSI
JACOB J. MONTANA

Newark, N. J. April 19, 1929

FIDELITY UNION TRUST COMPANY
AMERICAN BRANCH

Pay to the order of Tony Cangilosi..$40 00/100
Fourty 00/100 .....Dollars

A. DE FRONZO.

(Endorsement)

TONY CONGIALOSI

Exhibit D. 6.

Exhibit D. 6.

STATEMENT

Pantry—96 sq. ft. artificial marble @ $1.50 per sq. ft.	$ 120.00
Living Room—artificial plaster at the agreed price of $200.00	200.00
Dining Room—artificial plaster at the agreed price of $200.00	200.00
Foyer and Stair siding from hall to roof of artificial marble 300 sq. ft. @ $1.25 per sq. ft.	375.00
Extra work on hall foyer and ceilings of the hall from second floor to the roof at the agreed price of $400.00.	400.00
TOTAL	1,295.00
June 11, 1929. Paid on account to date.	1,200.00
BALANCE DUE	95.00

MM UNGARO

VICTORIO CANGIOLOSI

EXHIBIT D. 7 (see note above).

Exhibit D. 8.

Exhibit D. 8.

EXHIBIT D. 8 consists of a letter sized envelope bearing upon the address side the words following:

VICTORIO GRASSO CANGIALOSI
Architectural Sculptor
9 New Street, Lodi, N. J.

Mr. A. De Fronzo
NEWARK, New Jersey.

On the reverse side the following figures appear:

	200.	164.
	200	
20	375	200
	775.	

Another exhibit a receipt was marked also D. 8, reading as follows:

Passaic 840

SAMUEL B. FELD
COUNSELLOR AT LAW
8-10 Lexington Ave
Passaic, N. J.
Suite 3-4
Old Y. M. C. A. BUILDING

June 11, 1929.

Received from Mr. De Fronzo two searches on yellow pad paper; also three chancery abstracts, together with a lengthy letter from Mr. De Camp.

SAMUEL B. FELD

Exhibit D. 3.

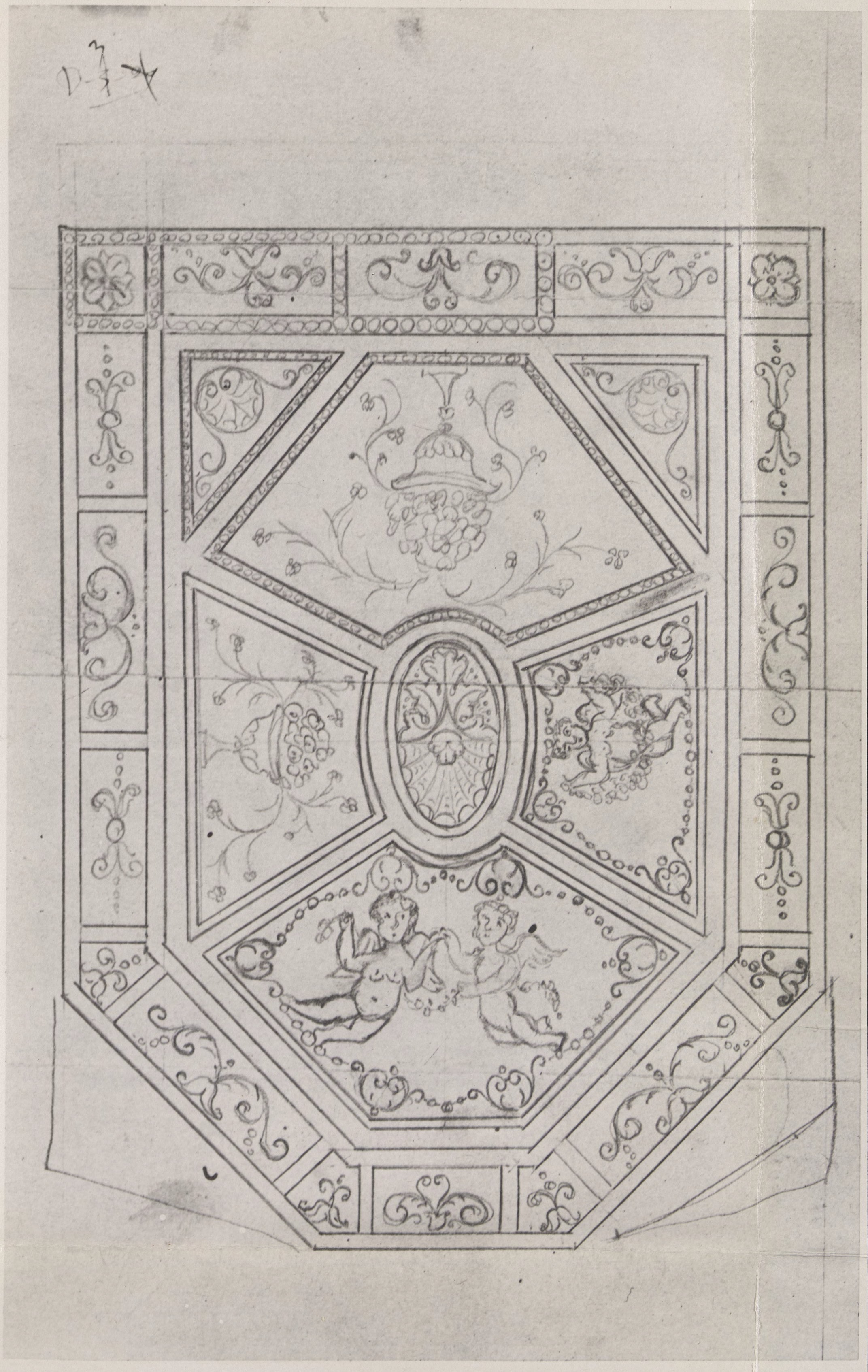


Exhibit D. 9.

1929 FEBRUARY 1929

SUN.	MON.	TUE.	WED.	THU.	FRI.	SAT.
Last Quarter	New Moon	First Quarter	Full Moon			
1st	9th	16th	23rd		1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28		

1929 MARCH 1929

SUN.	MON.	TUE.	WED.	THU.	FRI.	SAT.
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24 31	25	26	27	28	29	30

NOW IS THE TIME TO PLAN THIS SUMMER'S OUTING


Bertrand Islan
PICNIC PARK
The Ideal place for your outing
LAKE HOPATCONG, N. J.
1929 JANUARY 1929
SUN. MON. TUE. WED. THU. FRI. SAT.
1 2 3 4 5
6 7 8 9 10 11 12
13 14 15 16 17 18 19
20 21 22 23 24 25 26
27 28 29 30 31
1929 FEBRUARY 1929
SUN. MON. TUE. WED. THU. FRI. SAT.
Last Quarter 1st
New Moon 9th
First Quarter 16th
Full Moon 23rd
1 2
3 4 5 6 7 8 9
10 11 12 13 14 15 16
17 18 19 20 21 22 23
24 25 26 27 28
1929 MARCH 1929
SUN. MON. TUE. WED. THU. FRI. SAT.
1 2
3 4 5 6 7 8 9
10 11 12 13 14 15 16
17 18 19 20 21 22 23
24 25 26 27 28 29 30
31
NOW IS THE TIME TO PLAN THIS SUMMER'S OUTING

New Jersey Court of Errors and Appeals

VITO STASSI, *Plaintiff-Appellee,* *vs.* ARCANGELO DE FRONZO, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court, Bergen County.*

BRIEF OF DEFENDANT-APPELLANT.

Concise Statement of the Case.

A.

The questions involved lie within a very narrow field. All involve questions of public policy. The first question relates to the invalidity of the contract proved as being in controvention of the statutes and public policy of the State; the second, as to the legal accuracy of the trial judge in not non-suiting the plaintiff when the facts establishing invalidity of the contract sued upon were established by the plaintiff and his refusal after verdict upon motion to arrest the judgment, notwithstanding the verdict on the ground that the contract sued upon was proved by the plaintiff to be illegal, and third, the contention of the defendant that he did not have a fair trial on account of the impropriety of the conduct during the trial of plaintiff's attorney.

B.

Summons was issued by plaintiff on the 22nd day of October, 1930, in an action in the New Jersey Supreme Court, Bergen Circuit, to re-

cover $2,995.00, on a claim assigned to plaintiff by Victorio Congialosi, against the defendant and Alvira De Fronzo, his wife. The complaint alleged that Victorio Congialosi had been engaged by them to decorate their residence and was to be paid $120.00 per work, which work commenced under that agreement November 1, 1928, and continued for 23 weeks and 3 days to May 11, 1929, but plaintiff alleged that defendants were to board and lodge Victorio Congialosi during the performance of work, at the agreed price of $15.00 per week, and that they did board him for 15 weeks, giving them a credit of $225.00, reducing the wage amount of $2,820.00 due for work to $2,595.00, the actual amount due Victorio Congialosi, May 11, 1929, nearly a year and a half before this action was started. Defendant, Alvira De Fronzo, in her answer to the complaint, denied making any such contract, and at the end of plaintiff's case upon the trial a judgment of non-suit was enteerd as to her. The defendant herein, by his answer (state of the case page 7), denied each and every allegation in the first and second count of the complaint, and in a first separate defense said that on or about December 6, 1928, he, Arcangelo De Fronzo and Victorio Congialosi, made an agreement for the latter to do decorating work in defendant's home, 71 Hazelwood avenue, Newark, New Jersey, as set out in schedule A, State of the Case, page 8, and that on June 11, 1929, the balance due Victorio Congialosi, on account of his work under that agreement was $108.00 which he paid him in full on that date.

Upon the trial, Victorio Congialosi admitted that he had received $1,308.00 as claimed by defendant and testified to by defendant's architect, State of the Case, page 39, but testified

that this covered only expenses and disbursements for which he was to be paid outside of his own personal service, for which he testified he never had been paid anything.

In this situation, the story of Congialosi, plaintiff's principal and only important witness, testified that the arrangement made between him and the defendants about payment for his personal work was succinctly stated as follows:

(a) Victorio Congialosi was interested in a theatre property in Lodi, New Jersey, which had been foreclosed.

(b) He had already applied for a loan thereon of $35,000.00 to one of the larger building and loan associations of Newark, of which defendant was president.

(c) Victorio Congialosi agreed to pay the defendant commissions for procuring this loan from his building and loan association, and

(d) that the defendant agreed to obtain the same for him.

(e) Defendant promised to pay Victorio Congialosi for his work out of these commissions.

(f) That the loan was not consummated and

(g) That defendant had not paid for his personal work.

All of this testimony was categorically denied by the defendant, who testified and proved by the autographed letter of Congialosi, Exhibit D. 1, translation Exhibit D. 3, State of the Case, p. 109, that the work was not solicited until December 6, 1928, and that the work did not begin until January and was paid for partly in advance, and as the work progressed, by a series

of checks, Exhibits D. 4, and D. 5, State of the Case, 108, 109, and that when the work was completed, a final settlement was made between the parties in the presence of the defendant's architect, Manfred Mancusi-Ungaro, on June 11, 1929, and a receipt taken in connection with the last payment of $108.00, State of the Case, 110, 111, which testimony on the part of the defendant was corroborated by the architect, Manfred Mancusi-Ungaro, State of the Case, pages 79 and 80, but the jury apparently gave credence to the story of Victorio Congialosi.

Tersely, accurately, clearly and neatly, the whole matter is revealed in a brief episode which occurred during the trial at which time the trial judge summarized the evidence as to this arrangement between the defendant and Victorio Congialosi, in one sentence; which summary was forthwith expressly approved in open court by the plaintiff's attorney, all of which appears concisely from the following brief excerpt from the record, State of the Case, page .

(During Mr. Feld's summation, the following occurred):

> Mr. Kuvin: If the Court please, I want to enter an objection and ask the jury be instructed. Mr. Feld has summed up to the jury to the effect that the defendant in this case had an interest in the building and loan mortgage granting, due to the fact that he was getting a commission, and I respectfully submit that there is no testimony in the case on that score.
>
> The Court: Well, he can argue only facts, but he can draw all proper inferences from the evidence, and the assignor said that this money was to be paid when he received his commission from the building and loan.
>
> Mr. Feld: That is right.

Mr. Kuvin: Well, now, that, if the Court please, in Italian, and their idiomatic expressions, and so forth—commission may also mean the money which he gets from the building and loan, and I do not see that that would infer or raise—

The Court: It is not for me to sit down and become etymological.

Mr. Kuvin: I grant that, if the Court please, but the testimony in the case is absolutely—

The Court: He can argue whatever is in the evidence.

Mr. Feld: Certainly.

The Court: That is the language used. The jury heard it. They have a right to draw their own inferences.

Mr. Kuvin: May I have an exception?

Mr. Feld concluded his summation.

That the trial judge and plaintiff's attorney was right and Mr. Kuvin in error as to the testimony, appears in an amplified statement of fact herein, *infra.*

After the verdict and after the granting of the rule to show cause but before the hearing upon the rule, a motion was made upon notice to the trial judge to arrest the judgment notwithstanding the verdict on the ground that the contract as before set forth and proved by the plaintiff, was invalid and void in controvention of the statute and public policy, which motion was heard upon the same day and in connection with, but preceding the argument upon the rule to show cause, which motion, in the matter of the arrest of the judgment, was as follows (State of the Case, page 15):

Sir: Take notice, that on Friday, the 8th inst., at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, upon

the coming on of the hearing upon the Order to Show Cause granted by this Court in this cause on February 15, last, I shall call the attention of the Court to the fact that the contract established by the plaintiff in said cause is illegal in violation of Section 71, of an Act Concerning Building and Loan Associations, Revision 1925, Chapter 65, Pamphlet Laws of New Jersey, 1925, page 189, at page 222, and in controversion of the public policy of the State of New Jersey, and will move for the entry of judgment for the defendant, notwithstanding the verdict of the jury in favor of the plaintiff.

C.

Amplified statement of facts showing the complete justification of the Judge of his summary of the evidence as aforesaid, and establishing the fact that the contract between the parties as testified to by the assignor, Victorio Congialosi, was, in fact, as the trial judge stated.

The statement made by the trial judge in his summary above referred to, State of the Case, page 98, is, of course, not disputed, because, as the record shows, the plaintiff's attorney, forthwith, upon the statement of the Judge being uttered, exclaimed "That is right." State of the Case, page 98, and in any event, the ruling of the Court became the law of this case.

Victorio Congialosi was the first and only witness of importance called in the presentation of plaintiff's case. At the very opening of his testimony, before a word of testimony was taken to establish the contract set out in the complaint, the witness, under direct examination by plaintiff's attorney, testified as to his arrangement with the defendant as to commissions until

stopped by the Court who interrupted and said, "Now you are setting up by this question a distinct cause of action for commissions." State of the Case, page 30. Previously and at the very beginning of the examination (State of the Case, page 28) Victorio Congialosi was asked about commissions as shown by the following excerpt from State of the Case, pages 28, 29 and 30.

> Q On or about November 1st, 1928 did you know Mr. and Mrs. De Fronzo? A Yes.
>
> Q Where was it you became acquainted? A Because we have make application for the building and loan, for $35,000, and this property, the people foreclose, and I go to Mr. De Fronzo, and he insisted on the truth, like the son. "All right," I said, "if you think would give me the mortgage for $35,000."
>
> Q Was he the president of that building and loan at that time? A He is the president. He said what he can do nobody else can do.
>
> Q Did he promise that he would get this mortgage for you? A Yes. And he wanted to give him a commission, to him, building, $35,000.
>
> Q Was there any arrangement made between you and him about getting this loan? A We made arrangement nothing for the present time. At that time, make no arrangement, but he said, "I know you, because"—
>
> Q Let us get down to the facts. When you arranged about the building and loan mortgage, did you have any arrangement as to the payment of any moneys for securing this loan? A Yes; we have a hundred dollars.
>
> Q Get down to it.
>
> Mr. Kuvin: I object as highly immaterial to the issue in this case.

The Court: There is no written contract, and if this is part of the formation of a contract, I will allow it.

Mr. Kuvin: So far I have not heard anything about any contract for work. It is merely about a building and loan application for a mortgage.

The Court: Maybe it is leading up to the contract.

Mr. Feld: That is what it is, your Honor.

Mr. Kuvin: Exception.

Q When you talked to Mr. De Fronzo about securing this mortgage for this theatre, did you have any arrangement as to how much was to be paid to Mr. De Fronzo for securing this money?

Mr. Kuvin: I object to that, unless that was taken as part consideration for the contract.

The Court: Where is that in issue? That is not in issue.

Mr. Feld: No, your Honor, but it is leading up to the—

The Court: No, no.

Mr. Feld: I won't press it.

The Court: I permitted the previous question on the belief that it would be part of the agreement for the doing of the work.

Mr. Feld: Yes.

The Court: Now you are setting up by this question a distinct case of action for commissions.

Mr. Feld: No, your Honor; we are leading up as to how the payment—I may not make myself clear.

The Court: No; I will exclude the question until I have something definite.

Q In the course of your dealing with Mr. De Fronzo did you ever make any contract or have any agreement with Mr. and Mrs.

De Fronzo, concerning any work to be done in their home? A Yes.

Q Can you tell me when that was? A Mr. De Fronzo come to see theatre many time.

Again, the Court interrupted at page 34, state of the case, and said "Let us find out what the agreement was?" when Victorio Congialosi testified as follows, pages 34, 35, 36 and 37:

The Court: Let us find out what the agreement was.

Mr. Feld: Yes.

Q What was the agreement? Now, how were you to get paid for this? A No, the agreement is in this way: I make application of the building and loan, and he is supposed to be my father, the way he consider it. (Witness weeps.)

Q Come on, come on. Let us not do that.

By the Court.

Q All right. How much did he agree to pay you? A And I got to—he said he give me—

Q Just keep quiet. Just take your time. What is that you have there? A This is the check of the building and loan.

Q How much for this work? A No, having nothing.

Q Now, just listen. Were you to be paid in a lump sum or so much a week? A No, he is supposed to pay the wages of the people, and the material, and for my wages, supposed to be paid off the—give the mortgage, because Mr. De Fronzo says—

Q How much were you to get a week? A $120. My wages. $150 a week.

Q You agreed for $120? A Yes.

Q Were you paid it? A He paid for the material and the labor men, what we use in the shop.

Q I am only interested in you. You were not to buy the labor or material, were you?

You were not going to buy the material? A No, sir. I bought the material.

Q You bought it? A Yes, but he paid.

Q He paid? A Yes.

Q Did he pay the workmen? A The workmen.

Q And you were to receive how much a week? A Nothing; I don't receive nothing.

Q How much were you to get? A Supposed to take $120 a week.

Q Then you were to live at his house? A Yes.

Q Were you to pay board? A Yes.

Q How much? A $15 a week for the board.

Q And the difference between $120 a week and $15 a week was to be your wages? A Yes.

Q $105 a week wages? A Yes.

The Court: All right. Go on.

By Mr. Feld.

Q And you finished the work all right? A Yes, I finish the work to his satisfaction.

Q And when you finished the work you asked him for the money due you? A I ask—he said, "At the present time I have no money." I said, "All right. You pay the bill."

Q Pay what bill? A What I can bill to him.

Q The bill for what? A The cost of the material and labor, and I think it is $1,308, see.

The Court: How long did you work there?

The Witness: I worked one month in the shop, preparing the model, and after three months—23 weeks steady in the job, and worked until 8 o'clock, and 10 o'clock, and sometimes 11 o'clock at night.

Q When you stayed in his house what time in the morning did you start? A 8 o'clock, at the most.

Q What time did you stop in the afternoon or in the evening? A We can't say; we come to no time, because I have so much trust that man, he take me off of the street—(witness weeps).

Q Don't do that. Now, take it easy. Let us have the thing right. You worked every day. You started 8 o'clock in the morning. What time did you stop? A 8 o'clock.

Q 5 o'clock or 6 o'clock? A 8 o'clock. I start 8 o'clock in the morning, and after starting, 11 o'clock, stop 11 o'clock, sometime 9 o'clock.

Q At night. A At night. And sometime, and I—I charge. For that extra work I no charge nothing.

Q When you got through with all that work you said you asked him for the money; is that right? A Yes.

Q And what did he say? A He said he would pay me this bill and the wages, and the material.

Q The wages for whom? A For the material.

Q Was it your wages? A For my work, and for work I used over there, for the labor and the material. My wages—I said, "What are you going to do with my wages?" "After," he said, "the building and loan, we give the commission, we go square." That is all.

Q The building and loan what? A The commission on account, what do you call it, the $30,000, the $35,000, he is supposed to get the commission.

Q You mean to say, he said if he gets his commission from the building and loan— A He would pay me.

Q —that he would pay you? A That is all right.

Q Did you ever get the money? A No, sir.

Q Was that mortgage ever given? A Never.

and on cross examination of the defendant, state of the case, page 60, the very first question asked of Mr. De Fronzo by plaintiff's attorney was

"Mr. De Fronzo, at that time you were the president of the Watson B. & L., I take it?" and continued the cross examination as follows on pages 60 and 61.

And continued as follows:

Cross examination by Mr. Feld.

Q Mr. De Fronzo, at that time you were the president of the Watson Building & Loan Association, I take it? A Yes, sir.

Q An application was made to that building and loan, through you, was it? A No, sir.

Q It was made to that association, at any rate? A Through one of its brokers.

Q Yes. And you were the president of that association? A Yes, sir. I am today.

Q And your association has, I assume, a regular Building Committee, or a committee that goes out and investigates? A Yes, sir.

Q The fact is that they did not investigate this at all, did they? A Who, the committee?

Q Yes. A Positively. I had ten men on a committee.

Q Did you, too? A Yes, sir. I supervise every committee.

Q The fact is that you personally had a greater interest in this thing than probably your committee had; isn't that a fact? A I never had no interest.

Q No interest at all? A No.

Q Sure about that? A The only interest I had was to place the funds of the building and loan in safe investments.

Q Yes. And the fact is that you came to see Congialosi several times concerning this loan, and told him that you can guarantee to him this mortgage of thirty or thirty-five thousand dollars; isn't that true? Did you say that? A Well—

Mr. Kuvin: One moment.

A (Continuing.) In fact, it was passed.

The Witness: Let him go on.

Mr. Kuvin: One moment. I think you are far afield from the issue here.

The Court: This is not cross examination.

Mr. Kuvin: —the guarantee of a building and loan.

The Witness: It is all right.

The Court: No, it is not all right. This is not cross examination.

Q And the fact is that you were interested in getting this loan for him because of a commission that you were to get for the securing of the loan; isn't that a fact? Yes or no? A No, sir. I never work on commission.

Q But you did talk about a commission on this loan if you were to get it? A No, sir.

Q And the fact is, as the result of your acquaintanceship with the theatre proposition, and Mr. Congialosi, you became acquainted with him, and it resulted in this work being done in your home; isn't that true? A It was he that run after me. That is the way he got acquainted.

and at page 67, plaintiff's attorney asked the witness:

"Do you remember being in my office concerning this question of paying Mr. Congialosi for his work?"

Answer: "No, sir."

Question: "Do you remember seeing that paper in my office too?"

Answer: "No, sir."

Question: "What? and did not Mr. Congialosi, at that time, charge you that you promised him to pay his bill as soon as this mortgage went through? Isn't that a fact?"

Answer: "It is not true, because I was in your office only on the 11th of June, and

I had a witness with me and you signed a paper there. There you never seen me hence."

And again, at page 69, the plaintiff's attorney continued the drive about commissions as follows (State of the Case p. 69):

Q The fact is that you even promised to make good because of your intended commission, that you intended to make, by giving this mortgage; isn't that true? A Now, you—

Q Isn't that true, Mr. De Fronzo? A It is not true, absolutely not true.

Q Didn't you come down many a night and examine this particular theatre with the idea of becoming even a partner in the proposition; isn't that so? A It is not true. This man wanted to give me a deed because he has been in difficulty, and he could not hold the deed, whether this loan would have been granted.

Q We are not interested in that. And the fact is, Mr. De Fronzo, that it was this pretense that you showed, that you were going to get him this loan, and save that theatre for him, that you got him to do this work, and made him wait for his salary, for his wages, for the time that he spent every day; isn't that so? A I did not get him to do this work. I never knew the man until he came in with his broker for a loan.

ARGUMENT UPON THE LAW.

For convenience, the grounds of appeal 1, 2, 3, 4, 5 and 6 will be considered together, as the reasons overlap and only legal principles are involved and no specific reference to the testimony will be necessary, we think, in their consideration, other than that already stated in the concise and amplified statements of fact, *supra*.

POINT I.

THIS COURT WILL NOT ENFORCE AN ILLEGAL CONTRACT

In the following discussion of the law, it is assumed as the record irrefragably shows, we think that the alleged agreement as established by the plaintiff's case was that the plaintiff's assignor had entered into an agreement with the defendant whereby plaintiff's assignor was to pay the defendant commissions for procuring him a loan from a building and loan of which the defendant was president, and that out of the commissions so derived by the defendant from such loan from a building and loan association, of which he was president, he would pay the plaintiff's assignor for certain ornamental plaster work which plaintiff's assignor did in the defendant's house in the City of Newark.

Ground of Appeal 1. Because the Supreme Court erred in proceeding to judgment in favor of the plaintiff against the defendant instead of entering a non-suit against the plaintiff.

Ground of Appeal 2. Because the evidence adduced by the plaintiff in support of the claim made by him at the trial shows conclusively that the contract alleged by him upon which said judgment in the court below was predicated, was illegal and in contravention of the public policy and the public law of New Jersey.

Ground of Appeal 3. Because as soon as the illegal character of the contract sued upon was made to appear by the testimony, the trial judge should have refused to permit the trial of the cause to proceed further and should have directed a non-suit to have been entered and his failure so to do was judicial error.

Ground of Appeal 4. Because after the illegal character of the contract had been made to appear by the testimony adduced by the plaintiff

and the trial judge in ruling upon an objection during the trial had said: "And the assignor said that this money was to be paid when he (the defendant) received his commission from the building and loan association," it then and there became the duty of the trial judge upon his own motion to declare the illegality of the contract; but instead, erroneously ruled: "That is the language used. The jury heard it. They have a right to draw their own inference."

Ground of Appeal 5. Because it was the duty of the trial judge upon his own motion, to raise the objection of illegality of the contract although not raised by the defendant as soon as the testimony adduced by the plaintiff showed the illegality of the contract established by the testimony of the plaintiff, and his failure so to do was judicial error.

Ground of Appeal 6. Because it was judicial error to proceed to judgment in this cause on account of the illegality of the contract upon which it was predicated.

The contract sued upon as established by the plaintiff upon the trial, was illegal and void, being in contravention of the public policy of New Jersey, as established by our Legislature and in direct contravention of two statutes, first: Section 37 of the Crimes Act and Section 71 of an act of the Legislature, "An act concerning building and loan associations (revision of 1925, Chapter 65, Pamphlet Laws, 1925).

Section 37 of the Crimes Act (an act for the punishment of crimes, revision of 1898, Compiled Statutes, Volume 2, page 1757, provides as follows:

> Any two or more persons who shall combine, unite, confederate, conspire or bind

themselves by oath, covenant, agreement or other alliance to commit any crime, or falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime, or falsely to move and maintain any suit, or to cheat and defraud any person of any property by any means which are in themselves criminal, or to cheat and defraud any property, by any means which, if executed, would amount to a cheat, or to obtain money by false pretences, or to conceal or spread any contagious disease or to commit any act for the perversion or obstruction of justice or the due administration of the laws, shall, on conviction, be deemed guilty of a conspiracy, and be liable to the same penalty as persons convicted of a misdemeanor; but no agreement to commit any crime other than arson, burglary, manslaughter, murder, rape, robbery or sodomy shall be deemed a conspiracy, unless some act in execution of such agreement be done to effect the object thereof by one or more of the parties to such agreement.

Section 71: "An Act concerning Building and Loan Associations, revision of 1925, Pamphlet Laws, 1925, at page 222, provides as follows:

Penalty for accepting unlawful fees, etc.

Any officer, director, employee, agent or attorney of any such association who shall in anywise directly or indirectly, as for, demand, exact, require, receive or accept, for his personal use, benefit or advantage, any sum of money, or any property or other thing, or any credit, or any promissory note, bill of exchange, check or other evidence of debt, or any security, promise, contract, covenant, agreement or obligation, express or implied, for the payment, delivery, alienation or transfer of any money, property or other thing, or for the performance of rendering of any act or service, as a bribe, present, reward, inducement, com-

mission or fee for loaning any funds of or giving any credit on behalf of such association or for recommending, approving, voting for or consenting to the making of any loan or the giving of any credit by such association shall be guilty of misdemeanor and punished by a fine not exceeding one thousand dollars, or by imprisonment, with or without hard labor, as the court may direct, for any term not exceeding three years, or both; *provided,* that nothing in this act contained shall be construed to prevent the attorney of any such association, such attorney being a member of the bar of New Jersey, charging fees for professional services, nor shall this act be construed so as to prevent a charge of the fees for covering the expense of a committee of such association appointed to examine and appraise property offered as security.

The above statutes are equivalent to the declaration that such contracts proved by plaintiff in this case shall be illegal. Chief Justice Beasley, in *Gregory* ads *Wilson,* 36 N. J. Law, at page 316, said, *inter alia:*

> "It is not, at this day, open to any question that a provision in a Statute declaring that the doing of an act shall be visited by a prescribed penalty, equivalent to an announcement that such act, if done, shall be illegal, so that if the borrower in this case had refused to pay the unlawful commission agreed upon, no action could possibly have lain against him for such default."

Chief Justice Ewing, in *Sharp* v. *Teese,* at page 354, said, *inter alia:*

9 N. J. Law Reports, 352, at page 354:

> "Was such consideration legal? * * * The attempt to contravene the policy of a public statute is illegal. Nor is it necessary to render it so that the statute should contain an express prohibition of such attempt.

It always contains an impleid prohibition; and to such attempt the principles of the common law are invariably and deadly hostile, not always by an interference between the parties themselves, or by enabling the one to recall from the other, where in *pari delicto* what may have been obtained; but by at all times refusing the aid of the law to carry into effect or enforce any contract which may be the result of such intended contravention."

Mr. Justice Matthews, speaking for the U. S. Supreme Court, in *Ewell* v. *Daggs,* 108 U. S. 143, S. C. 27 Lawyers' Edition 682, at page 684, said, "and the effect is the same, if the contract is, in fact, illegal, as made in violation of a statute, whether the statute declares it to be void or not." *Bank* v. *Owing,* 2 Peters 527. "There can be no civil right," said Mr. Justice Johnson in that case, "when there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

THE COURTS OF THIS STATE WILL NOT ENFORCE AN ILLEGAL CONTRACT.

Chief Justice Gummere, in *Wychoff* v. *Weaver,* 66 N. J. Law, 648, at page 651, said, *inter alia:*

"The Courts of this state have steadfastly refused to lend their aid to enforce contracts which are directed to the accomplishment of a fraudulent purpose, or to entertain suits to recover damages for a breach thereof. Church *v.* Muir, 4 Vroom 318; Watson *v.* Murray, 8 C. E. Gr. 257; Gregory *ads.* Wilson, 7 Vroom 315, 320; Todd *v.* Rafferty, 3 Stew. Eq. 254, 260; Hope *v.* Linden Park Association, 29 Vroom 627; Minzesheimer *v.* Doolittle, 15 Dick. Ch. Rep. 394. And this they do, not out of regard for the defendant in such an action, but because of their unwillingness to use the powers, which were

granted to them for the furtherance of lawful ends, in aiding schemes which are, in their nature, venal. As was said by Chief Justice Beasley, in Gregory *ads.* Wilson, *supra,* a court can scarcely be said to perform either a very respectable or a very useful function when it assists a fraud-doer in obtaining from his associate in the fraud his share of the profits of the corrupt scheme. As soon as the fraudulent character of the contract sued upon was conclusively made to appear by the testimony, the court below should have refused to permit the trial of the cause to proceed further, and have directed a nonsuit to be entered. The judgment under review should be reversed."

Again in *Prindiville* v. *Johnson, et als.,* 93 New Jersey Equity 425, Chief Justice Gummere, speaking for this court, at page 428, said, *inter alia:*

"The courts of this state have steadfastly refused to lend their aid to a wrong-doer either by the enforcement of an illegal contract or by relieving the wrong-doer from the obligations thereof; and this they do, not out of regard for the defendant in the action, but because of their unwillingness to use the powers which were granted to them for the furtherance of lawful ends in aiding schemes which are in their nature venal, or for the purpose of relieving parties from the liabilities which such schemes create." Watson *v.* Murray, 23 N. J. Eq. 257; Todd *v.* Rafferty, 30 N. J. Eq. 260; Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394; Gregory *ads.* Wilson, 36 N. J. Law 315; Hope *v.* Linden Park Association, 58 N. J. Law 627; Wyckoff *v.* Weaver, 66 N. J. L. 648.

In both the above cases, Chief Justice Gummere cites *Gregory* ads *Wilson,* 36 N. J. Law 315, in which case the great jurist, Chief Justice Beasley, at page 317, said, *inter alia:*

"It is the general rule of the law, always admitted, whenever the subject has been dis-

cussed, that a court of justice will not lend its aid to the enforcement of a contract, the making of which is prohibited or which is directed to the accomplishment of an unlawful purpose."

Chief Justice Gummere also cited in both of the above cases, *Hope* v. *Linden Park Blood Horse Ass'n,* 58 N. J. L. 627, in which Chancellor McGill, speaking for this court, at page 630, said, *inter alia:*

"The rule is that in an action in which either party to such a contract seeks redress from the other, for his own benefit, he will be left by the courts in the position in which he has placed himself. Church *v.* Muir, 4 Vroom 320; Prive *v.* Polluck, 8 *Id.* 44; Shallcross *v.* Deats, 14 *Id.* 177, 182.

"That rule is the application of the maxim *ex turpi causa non oritur actio.* The maxim has its foundation in the public policy of discouraging illegal and corrupt agreements, by holding them to be void and refusing all judicial aid between the parties to them.

"In Den *v.* Shotwell, 3 Zab. 465, 474, Chief Justice Green used this language: 'But in dealing with illegal contracts, courts do not and cannot look to the interest of those who are parties to the illegal transaction. The law regards the welfare of society as paramount, and, in enforcing the law, courts cannot impair its efficiency or cripple its operation by considerations affecting the interest of those who are *particeps criminis.*'

"In Holman *v.* Johnson, 1 Cowp. 343, Lord Mansfield said: 'The objection that a contract is immoral or illegal as between the plaintiff or defendant, sounds at all times very ill in the mouth of the Defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the Defendant has the advantage of, contrary to the real justice between him and the Plaintiff, by accident, if I may say so. The

principle of public policy is this—*ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the Plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa,* or a transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes, not for the sake of the Defendant, but because they will not lend their aid to such a Plaintiff, so if the Plaintiff and Defendant were to bring his action against the Plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.'*

"In Marlatt *v.* Warwick, 4 C. E. Gr. 454, Mr. Justice Depue said: 'The objection is rather that of the public, speaking through the courts, than of the Defendant as a party to the contract. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the relative position and rights of the parties, but upon grounds of public policy.'

"It appears to me to follow from this view of the foundation of the rule with respect to illegal and corrupt contracts, that the policy which constrains the courts to deny all relief to the parties, demands that when either of those parties shall offer to show that the cause of action springs from an illegal or corrupt agreement, the courts shall admit and consider the legal proofs offered to that end. It certainly does not further the salutary effect of the rule, that neither party will be aided by the courts, or satisfy as to its impartiality, to exclude proof of some of the facts essential to show the entire transaction and thus exhibit its illegality, merely because they are offered by a *particeps criminis* against whom a *prima facie* case is made by one equally corrupt, who has gained an advantage by presenting to the court garbled and partial proofs,

which suppress part of the truth and impose a mutilated state of facts upon the court, in place of the real transaction.

"It was said by Chancellor Kent (2 Kent Com. 467) that 'the courts of justice will allow the objection that the consideration of the contract was immoral or illegal, and be made even by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy.'

"In 2 Stark. Ev. 86, it is said: 'Where the illegal consideration is set forth upon the record, the objection may be taken either by demurrer or in arrest of judgment. But where it does not appear on the record, the Defendant may show that the claim is in reality founded upon an illegal and noxious agreement.'

"In Smith *v.* Applegate, 3 Zab. 352, which was a suit upon a promissory note, under a plea of the general issue, the Defendants were permitted to show the illegality of the transaction of which the giving of the note was a part."

THE CONTRACT ESTABLISHED BY THE PLAINTIFF WAS WHOLLY VOID.

Chief Justice Beasley, in *Erie Railway Co.* v. *Union Locomotove and Express Co.*, 35 N. J. Law 240, at page 246, said, *inter alia*:

"The doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for such an ingredient will taint the entire contract, and render it unenforcible in all its parts, by reason of the maxim *ex turpi causa non oritur actio*. Nor will it, in general, apply where any part of the consideration is illegal, so that in the present case, if, upon the trial, it should appear that the plaintiffs have agreed to pay to the defendants more than the charter of the lie. There

> are many decisions to the effect that where there are a number of considerations, and any one of them is illegal, the whole agreement is avoided, this doctrine being put upon the ground of the impossibility of saying how much or how little weight the void portion may have had as an inducement to the contract."

A contract which contemplates one illegal act which the law condemns, will viciate the whole, even though it is also a contract for perfectly legal acts.

Dunham v. *Hastings Paving Co.*, 56 App. Div. 244, s. c. 67 N. Y. Supplement, 632, upon which a motion for re-argument was denied; 57 App. Div. 246, s. c. 68 N. Y. Supplement, 221 also cited in 46 A. L. R. in note page 199.

The fact that the contract had been performed on the part of the plaintiff, is immaterial.

Chief Justice Green, in *Smith* v. *Applegate,* 23 Law, 352, at page 359, said, *inter alia*:

> "This consideration, alone, demonstrates that the contract is illegal, as against public policy. The contract, moreover, to be valid, must be binding upon both parties. If not binding upon one, it is binding upon neither. And if the contract of the caveator is illegal, and by reason of its illegality forms no valid consideration for the contract of the applicants, the execution of the illegal contract constitutes no better consideration. When the note in question was given there was no consideration for the promise on the part of the makers, but a promise upon the part of the payee, illegal, inoperative, and not binding upon him. The contract was void. The fact it has been executed by one of the parties, will not authorize the enforcement of an illegal contract as against the other."

The fact that the illegality was not pleaded is immaterial. (In the instant case the contract actually proved before the jury was not set out in the complaint.)

Mr. Justice Dixon, speaking for this court, in *Minzesheimer, et als,* v. *Doolittle,* 60 N. J. Equity, 394, at page 397, said, *inter alia*:

> "The Court will not for any delinquency of the Defendant, lend its assistance to enforcement of an illegal contract."

Mr. Justice Swayze, speaking for this court in *Munn, etc.* v. *The Americana Company,* 83 N. J. Eqnity, 309, at page 313, speaking to this same point, decided in *Minzesheimer* v. *Doolittle, supra,* at page 313, said, *inter alia*:

> "The failure of the defendants to question in their answer the standing of the Complainants is not material. This very point was made and overruled by this court in Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394, 397. As we there said, the court will not for any delinquency of the defendant, lend its assistance to a violation of law; and so it will not assist one who has joined in an effort to deceive the public to prevent his associate from continuing to do the very thing to which he has previously assented."

Mr. Justice Field, in *Oscanyan* v. *Winchester Arms Co.,* 103 U. S. 261, at page 267, s. c. 26 Law Edi. 539, at page 542, said, *inter alia*:

> "But if we are mistaken in this view of the system of procedure adopted in New York, and of the defenses admissible according to it under a general denial in an action upon a contract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the Judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. As-

suming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. *It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality or the law.* History furnishes instances of robbery, arson and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward, if we may suppose that audacity could go so far, the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. *It would not be restrained by defects of pleading nor, indeed, could it be by the Defendant's waiver, if we may suppose that in such a matter it would be offered.* What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law or condemned by public decency or morality.

This doctrine was applied by this court in Hall *v.* Coppell, reported in 7th Wallace, 542 (74 U. S. XIX., 244). In that case, Coppell was the acting British Consul in New Orleans, and during the late civil war entered into a contract with one Hall, by which the latter agreed to furnish him with sundry bales of cotton, which he was to cause to be protected from the seizure by our forces and transported to New Orleans, and there disposed of to the best advantage, he to receive one third of the profits for his compensation. For breach of this contract, he sued Hall, who set up that the contract was against public policy and void, and also a reconventional demand or counter claim for damages for a breach of the con-

tract by Coppell. On the trial, the court below, among other things, instructed the Jury that if the contract was illegal, the illegality had been waived by the reconventional demand of the Defendant, but this court said, speaking through Mr. Justice Swayne, that the instruction 'Was founded upon a misconception of the law. *In such cases,' he added, 'there can be no waiver.* The defense is allowed, not for the sake of the Defendant, but of the law itself. *The principle is indispensable to the purity of its administration.* It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio,* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. *Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.* No consent of the Defendant can neutralize its effect. A stipulation in the most solemn form, to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.' See also Holman *v.* Johnson, 1 Cowp. 343.

Approving of the doctrine so well expressed in this citation, our conclusion is that the second position of the Plaintiff is not well taken."

(*"Oscanyan" supra.*)

In the same case speaking of the binding effect of material admissions made by an attorney in a case Mr. Justice Field said *inter alia* at page 263. In the trial of a cause, the admissions of counsel, as to matters to be proved are constantly received and acted upon. They may dispense with proof of facts for the proof of which wit-

nesses would otherwise have to be called * * * Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the Courts procedure, equally as if established by the clearest proof, and, if, in the progress of a trial, either by such admissions or proof, a fact is developed which must necessarily put an end to the action, the Court may, upon its own motion or that of counsel act upon it and close the case * * *.

So in a civil action if it *should appear from the opening statement that it is brought to obtain compensation for acts which the law denounced as corrupt and immoral, or declares to be criminal, such as an attempt to bribe a public officer, or to evade the revenue laws, or to embezzle the public funds, the Court would not hesitate to close the case without delay.*"

In this particular case, Justice Field was addressing himself to an opening statement made by counsel, but it is respectfully submitted that the principle of law stated, governs during the whole trial, regardless of the particular time that such admissions may be made.

Such is the common practice in this state and the rule of this Court.

(1853) *Runk* v. *Ten Eyck*, (C. E. Ogden, *J.*), 24 N. J. L. 756, 759, 66 N. J. L. 360, 367;

(1901) *Gallagher* v. *McBride*, (De pue C. J. S. C.);

(1903) *Huebner* v. *Erie R. R.*, (Garrison, *J.* C. E.), 69 N. J. L. 327, p. 329;

(1917) *Christy* v. *N. Y. C. R. R. Co.*, (Trenchard, *C. E.*), 90 N. J. L. 540, p. 543.

Testimony relation commissions pertinent only on theory part of contract.

Besides the admission of plaintiff's attorney *supra*, as shown in the statement of facts, *supra,* and as the record discloses the major part of the cross examination of the defendant by plaintiff's attorney, was directed to this matter of building and loan commissions. In a case on all fours with the instant case, in this partcular, the Court of Appeals in *N. Y. C. Ins. Co.* v. *National, etc.*, 14 N. Y. 85, speaking by *C. J.* at page 90, said *inter alia:*

> "* * * This is not quite satisfactory. The examination went much further than was necessary with a view to disclose the witness' relation to show bias. The evidence was not pertinent except with a view to the ground of defense now insisted upon."

In the instant case, the "Commissions" evidence was not pertinent except that it was a part of the original contract sued upon as the plaintiff to the satisfaction of the jury, proved it was in this case.

The principles above enunciated by Mr. Justice Field in the Oacanyan case, *supra,* have been approved and adopted by this Court, by its reference to the opinion of Mr. Justice Sheldon in *O'Brien* v. *Shea*, 208 Mass. 528, wherein Justice Sheldon, cites the foregoing case of *Oscanyan* v. *Winchester Arms Co.*, as one of the leading cases illustrative of one of the principles of law stated by him in his decision, in the O'Brien *v.* Shea case.

In *Mechler* v. *Faalk*, 84 Law, 406, in a per curiam opinion this Court, said, *inter alia:*

> "The only argument advanced before us that calls for notice is that since the contract

was made on Sunday, the Court was bound to take notice of its illegality without having the point made by the Defendant."

"The question has recently been discussed by Mr. Justice Sheldon of the Supreme Judicial Court Mass. with a thoroughness that makes it unnecessary for us to do more than refer to his opinion."

O'Brien v. *Shea,* 208 Mass. 528.

Mr. Justice Sheldon, in the O'Brien case, *supra*, at page 535, said, *inter alia:*

"It is believed that in an action at law like the one at bar, in which the defense of illegality has not been set up, the court will recognize no absolute duty to interfere and of its own mere motion to sustain a defense not set up by the party, and generally will not so interfere unless, first, the Plaintiff's declaration shows that he relies upon an illegal agreement or violation of law, *or secondly, unless he has been obliged to show his own guilt in fully proving his case.* Under the first of these heads come such cases as Claflin *v.* U. S. Co., 165 Mass. 501; Hazellon *v.* Scheckels, 202 U. S. 71."

In the second class are included such cases as *Oscanyan* v. *Arms Co.,* 103 U. S. 261; *Thomas* v. *Richmond,* 12 Wall 349; *Fowler* v. *Scully,* 72 Penn St. 456; *Alford* v. *Burke,* 21 Ga. 46.

The same principle illustrative of the second class of cases as stated by Justice Sheldon, where the plaintiff has been obliged to show his own guilt in fully proving his case applied by the Mass. Court in *Keown McEvoy* v. *Verlin,* 253 Mass. 374. This was an action at law to recover damages because a carload of potatoes which had been purchased were found partly frozen and affected by dry rot. The last purchaser apparently had entered into an agreement with a "middle-man" whereby they would

adjust their losses upon the agreement that the "middle-man" would furnish evidence at the trial of the action which the defendant in the above suit was to bring against one Crane, the original vendor or producer, which special agreement was referred to by the Court in the following ruling, at page 377.

> "The Third Count not only alleges a breach of the contract of sale, but also declares on the performance of the special agreement of the Plaintiff to furnish evidence at the trial of the action of the Defendant against Crane. If, as we have said, the Jury could find that the special contract was made, and was performed, the Defendant contends that being against public policy and without consideration, it is unenforceable. The Plaintiff could not recover under this contract without proof of its terms; and the defense of illegality although not pleaded, is before us."

Claflin v. *U. S. Credit System Co.*, 165 Mass. 501; *O'Brien* v. *Shea*, 208 Mass. 528. And the Court further said,

> "The special agreement plainly tended to impede the administration of justice by the introduction of purchased testimony. It was a corrupt bargain which the law will not enforce."

In the *Claflin* v. *U. S. Credit System Co.*, 165 Mass. 501, like the instant case, the matter of the illegality of the contract was not noticed by any one in the trial of the action in the superior court, not even notice in arrest of judgment, as in the instant case, nor was the illegality noticed by the counsel upon the argument before the Mass. Supreme Court, until their attention was called to the matter of illegality by the Court itself, and counsel upon each side was given opportunity to file a brief upon that subject; neither of whom according to the statement of Court,

availed themselves the opportunity. In deciding the case for the Supreme Court, Barker, Justice, at page 503, said, *inter alia:*

"The illegality of the contract is not set up in defense nor was it noticed in the superior court, where the Plaintiff had a verdict, but no court will consciously lend its aid for the enforcement of an illegal contract. Snell *v.* Dwight, 120 Mass. 9; Dunham *v.* Presdy, 120 Mass. 285; Riley *v.* Jordan, 122 Mass. 231, 233; Low *v.* Peers, Wilmot 364, 378.

In the present case, the question was brought to the attention of counsel by the court at the argument. * * * One of the exceptions is to a refusal to rule that the Plaintiff cannot recover. The ruling should have been for the reasons we have stated. Again in a late case, in applying this same doctrine, the court held that the illegality of the contract being shown, the defense of illegality was open, although not pleaded. Coughlin *v.* Royal Indemnity, etc., 244 Mass. 317; in which case Carroll, at page 319, said *inter alia:*

"The illegality of the contract is not alleged in the Defendant's answer, but the defense is open. The contract upon which the Plaintiff relies is shown by its own terms to be violated of law, and the court will not its aid in its enforcement."

O'Brien v. *Shea,* 208 Mass. 528; *Noble* v. *Mead, Morrison, etc.,* 237 Mass. 5, 22.

It is respectfully submitted that the instant case is a perfect illustration of the second class of cases designated by Justice Sheldon, illustrated by him by the Oscanyan case, *supra,* and that the English case of *Scott* v. *Brown,* (1892) 2 Q. B. 724, decided by Lord Justice Lindley, and Lord Justice A. L. Smith, *infra,* is also a perfect illustration of the same principle, and that the judgments of Vaughn Williams, *L. J.*

and Lord Justice Farwell, in the Northwestern Salt Case, *infra*, are in accord and that as stated by Lord Sumner, in the house of Lords, in the Northwestern Salt Co., case, upon appeal, "The whole question is whether or not in the condition in which the materials reach your Lordships, illegality has been proved."

It is respectfully submitted that in the instant case, the plaintiff, in order to make out his whole case as in *Scott* v. *Brown, infra* and *Keown McEvoy* v. *Verlin, supra,* was obliged to show his own alleged guilt in fully proving his case.

The fact that the defendant strenuously denied the making of such contract cannot avail the plaintiff who asserted the illegal agreement and proved the same to the satisfaction of the jury, as appears by their verdict.

In *Marlott* v. *Warwick,* 19 N. J. Equity, 439, this exact situation, it is believed, was presented to this court. In that suit, the complainant in his bill set up an agreement which the defendant expressly denied having made but the defendant, on appeal to this court, contended that if any such agreement as alleged by the complainant was in fact ever made, which they did not admit but expressly denied, that it appeared from the allegations of the bill itself that the contract was tainted with fraud and invalid. This court upheld the legal principles contended for there but the Court ruled against them and affirmed the Chancellor upon the facts, that is, that the facts shown did not establish fraud and the invalidity of the contract. In the instant case, on the contrary, the facts constituting the invalidity of the contract as established by the plaintiff, were summarized by the trial judge and stated by him to

the counsel and the jury, and his summary was, before the court and jury, forthwith confirmed as correct by the plaintiff's attorney. State of the Case, page .

In the Marlott caes, Woodhull, Judge, speaking for this court at page 441, said, *inter alia*:

> "The only question in the cause not embraced in the decision of the Chancellor, is the one argued at this term, namely: whether the contract or agreement, as alleged in the Complainant's bill, or as shown by the evidence in the cause, was made in fraud of the Complainant's creditors, and was, for that reason, illegal and void? On the part of the Defendants, it was argued, with great earnestness and force, that such was the real character of the agreement, if any such agreement was in fact ever made, which they do not admit, but expressly deny; and that this appears clearly, as well from the allegations of the bill itself, as from the testimony in the cause; and, further, that this court cannot, and that no court of equity can, consistently with the rules and principles which regulate and govern such courts, either interfere to enforce a contract thus tainted with fraud, or in any way give it sanction or countenance. *The argument is unquestionably sound; and, assuming the contract to have been of the character alleged there is no escape from the conclusion reached by the Defendants' counsel, and their appeal must be sustained.* But in the opinion of a majority of this court, neither the allegations of the Complainant's bill, nor the proofs in the cause, nor the bill and proofs taken together and considered in their proper relations to each other, do, in fact, establish the premises from which that conclusion is drawn."

The disclosure of illegality in the contract sued upon, is fatal to the case.

In *Wyckoff* v. *Weaver, supra,* as already quoted, Chief Justice Gummere, said (66 N. J. Law):

> "As soon as the fraudulent character of the contract sued upon was then made to appear by the testimony, the court below should have refused to permit the trial of the cause to proceed further and have directed a non-suit to be entered."

In *Minzesheimer* v. *Doolittle, supra* (60 N. J. Eq. 394), at page 398, Mr. Justice Dixon in that case said:

> "But, as said before, no failure on the part of the Defendant to claim her personal rights, can blind the court to the intrinsic impropriety, for the court's sake, of the step which it is asked to take."

Hall v. *Coppell,* quoted and followed by Justice Field, *supra,* was cited and followed by Mr. Justice Peckham, in an elaborate opinion in *McMullen* v. *Hoffman,* 174 U. S. 639, s. c. 43 Law Edi. 1117, in which the learned Justice reviewed the leading cases upon this subject as he considered them and at page 1123, said, *inter alia*:

> "Concluding as we do that this agreement between these parties is as a whole of an illegal nature, and that the portion thereof which is reduced to writing cannot be separated from the balance of the agreement, the question then arises as to the result of such conclusion upon the parties to the agreement.
>
> "There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject, and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo-*

non actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio. About the earliest illustration of this doctrine is almost traditional in the famous case of The Highwayman. It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the Plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. 1 Lindley, Partnership, 5th ed.; 94, note n; 9 Law Quarterly Review (London), pp. 105-197."

It is the duty of every court to prevent abuse of its process.

Odger, in his classic work on Pleading and Practice, 9th Edi., page 348, at page 348, says, *inter alia*:

> "But it is the duty of every court to prevent any abuse of its process; hence the Court may at any stage of the proceeding raise of its own motion the question of the illegality of the contract sued on, although the point had not been raised in the argument before it. (Connolly *v.* Consumers' Cordage Co., 89 L. T. 347; North Western Salt Co. *v.* Electrolytic Alkali Co. (1914), A. C. 461; Montefiore *v.* Menday Motor Co. (1918), 2 K. B. 241.)"

In *Montefiore* v. *Menday Motor Co.*, 1918, 2 K. B. 241, the Court said, *inter alia*:

> "In my judgment, this contract sued upon is illegal and void as contrary to public policy. 'It is well settled that when it is

apparent on the face of a contrcat that it is unlawful, it is the duty of the Judge himself to take the objection, and that, too, whether the parties take or waive the objection. This was so decided by Lord Mansfield in Holman *v.* Johnson (1775), 1 Cowper 341, at law and by Lord Eldon in Evans *v.* Richardson (1817), 3 Mer. 469 and has been consistently acted upon ever since.' per Farwell L. J. in Northwestern Salt Co. *v.* Electrolytic (1913), 3 K. B. 422, 424. *The same principle applies to the illegality being disclosed in the evidence.* As early as 1800 Lord Eldon applied it in Norman *v.* Cole, 3 Es, 7253, to which I shall have to refer later.''

* * * p. 246. ''But, applying the words of Pollock C. B. in Egerton *v.* Earl Brownlow, 4 H. L. C. 149, 'I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise. Both action and counterclaim dismissed.''

Lord Justice Lindley, in *Scott* v. *Brown* (1892) 2 Queens Bench, 724, in delivering a judgment upon appeal in an action where it had been clearly revealed by the plaintiff in the proof of his case, that the transaction between him and the defendants involved a fraud upon the public, the learned Justice (whom Lord Haldane once characterized as one of the most accurate judges in England), said, *inter alia*:

> My brother, Smith, has written a judgment in this case, which I have read, and in which I concur. As, however, the case is one of great importance, I will add a few observations on it myself.
>
> *Ex turpi causa non oritur adio.* This old and well known legal maxim, is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. *No court ought*

to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract, or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person involving the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well known judgment of Lord Mansfield in Holman *v.* Johnson, 1 Cowfer 343.

In this case the correspondence put in evidence by the Plaintiff in support of the claim he made at the trial shows conclusively (fraud on public) sole object to cheat and mislead the public. Under these circumstances, the Plaintiff must look elsewhere than to the Court of Justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract.

* * * But his illegal contract confers no rights on him. See Pearce *v.* Brooks L. R. 1 Ex. 213.

* * * I am quite aware that what Plaintiff has done is very commonly done; it is done every day. But this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal. The Plaintiff was not entitled to judgment in the court below, and he has no right to a new trial.

In the judgment of *L. J.* A. L. Smith, referred to and approved by *L. J.* Lindley, *supra* (and which judgment Prof. Williston uses in his selection of contracts as a leading case, illustrative of the law of illegality of contracts), Lord Justice Smith said, *inter alia*:

* * * "And for the reasons above, both Plaintiff and McNab were liable to be in-

dicted for conspiring to cheat and defraud. Now, how does the law stand upon the subject? If a Plaintiff cannot maintain his cause of action without showing as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action. This was decided in Taylor *v.* Chester, L. R. 4 Q. B. 309, where the illegality was pleaded, and also in Begbie *v.* Phosphate etc. L. R. 10 Q. B. 41, where it was not pleaded, but, the fraud, being apparent, the court would interfere.

* * * "In my judgment, the Plaintiff, when suing the Defendant for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the Plaintiff sues is put in, the illegality of the conduct of the Plaintiff and of McNab at once becomes apparent. In my opinion, the maxim *In pari delicto, potior est conditio possidentis,* applies, and this court ought not to assist the Plaintiff when he seeks to recover the 432 L. 3s5d back from the Defendants. Upon these grounds and without going further into the case, this appeal must be dismissed and with costs."

Vaughan Williams, Lord Justice, in *Northwestern Salt Co.* v. *Electrolytic, etc.* (1912), C. A., 1913 2 K.B. 422 cited by Odgers, *supra,* in addressing himself to this point at page 424, said, *inter alia*:

"It cannot be denied that both those documents were put in evidence, and put in evidence by the Plaintiffs. It is said in behalf of the Plaintiffs that such documents were by no means essential to, or necessary for, the proof of the case of the Plaintiffs, which was simply a claim for damages for a breach of contract for and in connection with a sale and purchase of salt; and that, even if such

documents disclosed illegality as being in restraint of trade and for the purpose of establishing a monopoly, no such defense was pleaded. I do not think that to raise a question of illegality it is necessary that the defense of illegality should be pleaded, for the court is bound to deal with illegality of its own motion, and it matters not one bit which side puts in the document disclosing illegality; nor does the purpose matter for which the document was put in."

In the same case Farwell, *L. J.*, 424, said *inter alia*:

> "* * * *When it is apparent on the face of a contract that it is unlawful, it is the duty of the judge himself to take the objection, and that, too, whether the parties take or waive the objection.* This was so decided by Lord Mansfield in Holman *v.* Johnson (1775) 1 Cowper 341, at law, and by Lord Eldon in Evans *v.* Kishardson (1817) 3 Mer. 469, and has been consistently acted on ever since, Scoot *v.* Brown & Co. (1892) 2 Q. B. 724, being one of the last cases."

The nature of the pleading was therefore immaterial *and the judge ought himself to have taken the objection.*

Lord Haldane, in the *Northwestern Salt Co. case, supra,* which was appealed to the House of Lords, in giving judgment (1914, A. C. 461, at page 469), said, *inter alia*:

> "My Lords, it is no doubt true that if the claim is illegal, and that it would be contrary to public policy to entertain or, the court, may, and ought to refuse to do so, but, this must only be when either the agreement sued on is on its face of it illegal, *or where, if facts relating to such an agreement are relied on, the Plaintiff's case has been completely presented.* If the point has not been raised by the pleadings so as to warn the Plaintiff to produce evidence which he

may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the court ought not to take a course which may easily lead to a miscarriage of justice. *On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the court ought to dismiss the claim, irrespective of whether the pleadings of the Defendant raise the question of illegality.*''

Lord Moulton, in giving judgment in the same case at page 476, said, *inter alia*:

> ''If the contract and its setting be fully before the court, it must pronounce on the legality of the transaction. * * * One special case should perhaps be noticed.''

It is possible to conceive a case in which a fact comes to light in the course of the trial *which of itself renders an agreement illegal on the grounds which nothing could cure.* Lord Sumner, at page 480, in giving judgment in the same case, said, *inter alia*:

> *''The whole question is whether or not, in the condition in which the materials reach your Lordship, illegality has been proved.''*

The instant case is a signal illustration of the above observation of Lord Moulton, ''It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement on grounds nothing could cure,'' and as observed by Lord Sumner, the whole question is whether the illegality has been established or not in the materials before the court, and as Lord Haldane said, *supra*, ''On the other hand if the action really rests on a contract which on the fact of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the

pleadings of the defendant raise the question of illegality."

CONCLUSION OF ARGUMENT UPON ILLEGALITY.

In preparing the foregoing part of this brief, we have not been unmindful of the statement made by Chief Justice Beasley, in *Church* v. *Muir,* 33 N. J. L. 318, cited by Chief Justice Gummere in *Wyckoff* v. *Weaver, supra,* in applying the principle herein contended for said, "It is not necessary to refer to adjudications in support of a principle so universally admitted" and his latter observation in *Gregory* v. *Wilson,* also cited by Chief Justice Gummere, in *Wyckoff* v. *Weaver,* in which case the great Master concluded an exposition of the law in relation to illegal contracts applicable to the instant case by saying, page 323, "other cases having the same bearing might be cited, but in these days, when legal knowledge is so clearly acquired, and legal learning is so cheaply displayed, a voluminous citation of authorities is apt to look like a petit larceny on the digests," but while we apprehend that *Wyckoff* v. *Weaver, supra,* is dispositive of this whole matter, certainly if not alone then that leading case supplemented by *Minzesheimer* v. *Doolittle, supra,* nevertheless so far as we know there has been no express exposition by this court of the duty of a trial court to take the objection of illegality as the English courts phrase it as soon as the illegality is conclusively established whether the point is raised by the parties or not, except by adoption by reference to *O'Brien* v. *Shea, supra,* although the principle and duty so to do is, in fact, actually so expressed in the opinion of Chief Justice

Gummere in *Wyckoff* v. *Weaver, supra,* wherein he succinctly says, "As soon as the fraudulent character of the contract sued upon was conclusively made to appear by the testimony, the court below should have refused to permit the trial of the cause to proceed further and have directed a non-suit to be entered," but in the light of, and the grave criminal charge lain against the defendant, the president for many years of one of the older and larger building and loans of Newark, and the fact that, upon its merits, this case illustrates, we believe, perfectly, the justness of the observation of the great master, Oliver Wendell Holmes, who, in his collected papers, page 237, says, "I confess that in my experience I have not found juries specially inspired for the discovery of truth," we have, rightly or wrongly, chanced the appearance "of a petit larceny on the digests," however unnecessary it might have been "to refer to adjudications in support of a principle so universally admitted."

POINT II.

Misconduct of the plaintiff's attorney rendering the trial unfair to the defendant.

Ground of Appeal No. 6. Because the conduct of the plaintiff's trial attorney rendered the trial unfair.

As we believe, the illegality of the contract established by the plaintiff upon the trial and argued under Point One, *supra,* is dispositive of this case, we do not deem it necessary to trespass upon the time of the Court in a discussion of this point.

Haman, and his gallows, 50 cubits high, is a very old story. In the instant case, the plaintiff built his building loan commissions 50 cubits high. Let him take the same course as Haman.

POINT III.

The verdict rests on no lawful foundation.

Ground of Appeal No. 7. Because the judgment is contrary to law.

The contract being illegal and void, the relation of debtor and creditor did not exist and there was no legal consideration upon which to ground a verdict.

The language of this court in *Robertson* v. *Bernstein,* 105 N. J. L. 375, at p. 382, is peculiarly apposite to and decisive of the instant case. Mr. Justice Parker in his opinion in that case said, *inter alia:* "The verdict rested upon no lawful foundation and could not stand."

ARNOLD MANCUSI-UNGARO,
Attorney of Defendant-Appellant.

ALGERNON T. SWEENEY,
Of Counsel.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

VITO STASSI, *Plaintiff-Appellee,* *vs.* ARCANGELO DE FRONZO, *Defendant-Appellant.*	*Action at Law.*

REPLY TO PLAINTIFF-APPELLEE'S BRIEF.

Assertions against fact made by the attorney of plaintiff-appellee, in his brief, filed herein, makes a reply thereto imperative for the information of this Court and in all fairness and justice to the defendant-appellant.

The point of the illegality of the contract established by plaintiff by his testimony upon the trial, was made to the Court below upon a motion made by defendant-appellant to arrest the judgment on the ground of the illegality of the contract, notwithstanding the verdict of the jury.

The attorney of plaintiff-appellee, on page 6 of his brief, makes this dogmatic statement:

> "On page 5 of the brief the appellant indicates that after the verdict and after the granting of a rule to show cause, but before the hearing thereon, motion was made upon notice of the Trial Court for arrest of judgment notwithstanding the verdict on the ground that the contract was invalid, etc. It is respectfully submitted that there was no such notice, nor any such argument made in arrest of judgment, and that the statements concerned thereon are absolutely false and untrue. If what the appellant says is true, certainly an order would have been

entered making some disposition of this motion. The fact is that the State of Case does not allege a copy of the order nor was there any order made by the Court below.''

That the statements of the attorney of the plaintiff-appellee are irrefragably assertions against fact is indubitably shown by other statements made by the said attorney in the same brief, and by the notice of the motion appearing in the printed state of the case and printed in full by the said attorney himself in his moving papers on motion to dismiss the appeal, as appears in the original typewritten moving papers page 20. The notice of the motion, as appears in the state of the case, page 15, and shown by the attorney of the plaintiff-appellee in his moving papers on page 20 of his motion to dismiss the appeal, aforesaid, reads as follows:

''To SAMUEL B. FELD, attorney of the plaintiff.

SIR: TAKE NOTICE, that on Friday, the 8th inst. at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, upon the coming on of the hearing upon the Order to Show Cause granted by this Court in this cause on February 15, last, I shall call the attention of the Court to the fact that the contract established by the plaintiff in said cause was illegal in violation of Section 71 of an Act concerning Building and Loan Associations, Revision 1925, Chapter 65, Pamphlet Laws of New Jersey, 1925, page 189, at page 222, and in controvension of the public policy of the State of New Jersey, and will move for the entry of judgment for the defendant, notwithstanding the verdict of the jury in favor of the plaintiff.''

That the motion was made and argued is established by statements made by the attorney of plaintiff-appellee, as appears in the brief as follows, page 4:

"The rule to show cause did not reserve any exceptions taken at the trial for appeal. *Subsequently, the defendant's counsel served reasons upon the plaintiff upon which he based the argument on the rule to show cause. The matter was duly argued before the Trial Court and the various reasons* (State of Case, pp. 15, 16, 17, 18, 19, 20), with the result that on May 20, 1932, Judge Caffrey signed an order discharging the rule to show cause with costs to be taxed against the defendant — ARCANGELO DE FRONZO (State of Case, p. 21)," thereby establishing beyond doubt that said notice was given and that said motion was made, as he himself refers to this very notice printed on page 15 of the State of the Case, cited by himself.

Again on page 5 of his brief, the attorney for plaintiff-appellee, says:

> "The defendant, however, after the case was over for the first time attempted to raise the question of illegality of contract in support of the argument for a new trial. The Trial Court analyzed the testimony carefully and decided against the appellant."

And again in the final paragraph of his brief, page 30, plaintiff-appellee's attorney states the facts as follows:

"The question of illegality was thoroughly argued before Judge Caffrey and a memorandum of law submitting other questions, as shown in the State of Case, and now also urged on appeal, were also thoroughly argued and discussed with the result that

> the learned Judge below discharged the Rule to Show Cause, thereby affirming the decision of the jury."

The statement that the question of illegality was thoroughly argued before Judge Caffrey, and a memorandum of law submitting other questions is accurate, and under the circumstances the attorney of the plaintiff-appellee having raised this question of veracity as to the notice, motion and argument upon the illegality of this contract before the Trial Court upon his motion to arrest the judgment, notwithstanding the verdict upon the ground of the illegality of the contract, as established by plaintiff's own case, we beg leave to file and submit to this Court as an exhibit herein the "memorandum of law" which the attorney of the plaintiff-appellee admits was served upon the Trial Judge, a copy of which was also served upon him, which memorandum will show that nearly all of the cases cited by us in our brief for the defendant-appellant upon the question of illegality of this contract, were cited to the Court along with many others in the original memorandum referred to by the attorney of plaintiff-appellee.

The attorney of the plaintiff-appellee is inaccurate in the last quotation, in saying that other question than that of illegality is now urged on this appeal as the brief of defendant-appellant shows all other questions, other than the matter of illegality are waived.

Another assertion against fact made by the attorney of the plaintiff-appellee, appears on page 5, just below the middle of the page, where the attorney says:

> "They now come into this Court to review the cause on the same ground of illegality

of contract, and say, in substance, that it is in violation of Section 71 of an Act concerning Building and Loan Associations, Revision of 1925, page 222, and also say that although the plaintiff is entitled to recover, that, nevertheless, the contract is an illegal one, because the defendant contends that there was an agreement made to pay for this work out of certain commissions to be received for securing a mortgage loan.''

The latter part of said statement: "and also say that although the plaintiff is entitled to recover, that nevertheless, the contract is an illegal one, because the defendant contends that there was an agreement made to pay for this work out of certain commissions to be received for securing a mortgage loan,'' is a complete reversal of the facts, if the attorney of the plaintiff-appellee means to say that the defendant contends now or admitted on the trial that there ever was such a contract in relation to commissions as testified to by plaintiff's assignor: on the contrary, at page 71, State of the Case, he stated that he wanted the whole story told because the statements made by the plaintiff's assignor infringed upon his honor, and as shown in our brief for the defendant-appellant, page 4, the Court itself stated to the jury, State of the Case, page 98, that it was the assignor of the plaintiff and not the defendant who said: "And the assignor said that this money was to be paid when he received his commission from the building and loan.''

The attorney of plaintiff-appellee is equally inaccurate in saying: "And also say that although the plaintiff is entitled to recover,'' etc., the contention of counsel for defendant-appellant is the contrary; that the plaintiff, by his testimony has established beyond controversy an

illegal contract, which the Courts of this State have steadfastly refused to enforce.

It is the constant practice of this Court to decide questions of public policy residing in records before them without those questions having been raised below.

We have stressed in our original brief and in this reply the fact that the motion was made to arrest the judgment on the ground of the illegality of the contract, etc., because as we understand it that was correct practice, *Hope* v. *Linden Park Assn.*, 58 N. J. L. at p. 632; *Begbie* v. *Phosphate, etc.* (1876), 1 Q. B. D. 6179, S. C. 44 L. J. Q. B. 233, S. C. 29 L. T. 126 L. R. 10 Q. B. 491, but even if the point had not been raised at all below, it would not help the plaintiff-appellee, because this Court has continually and consistently, upon its own motion if necessary, raised questions of public policy residing in the records before them, and refused to enforce an illegal contract or a contract against the public policy of the State, and the fact that the ruling of the Trial Court in refusing the motion to arrest the judgment on the ground of the illegality of the contract, was oral and not reduced to a written order, will not help the plaintiff-appellee in this Court, as the record itself demonstrates that the ruling was against defendant-appellant or ignored, and being a technical matter of procedure, will be waived by this Court where the facts show, as here, a contract violating the statutes and public policy of the State.

In *McMichael* v. *Horay,* 90 N. J. L. 142, at page 145, the late Chancellor Walker, speaking for this Court, said *inter alia.* * * * "The true doctrine is that a Court of Appeals need not, not that it cannot, decide a question arising on

a record before it, which was not raised in a Court below, whether that Court be an intermediate Court of Appeals or a Court of first instance; and it is the constant practice of appellate courts to notice and decide questions of jurisdiction, *and especially questions of public policy*, residing in records before them, without those questions having been raised below." This Court has uniformly followed and applied the above principle.

(1918) *State* v. *Johnson*, 91 N. J. L. 611, page 612;

(1921) *State* v. *Belkota*, 95 N. J. L. 416, page 417;

(1922) *Franklin* v. *Millville*, 98 N. J. L. 262, page 263;

(1923) *Donohue* v. *Campbell*, 98 N. J. L. 755, page 758;

(1923) *Walter* v. *Kenthe*, 98 N. J. L. 823, pages 826-7;

(1923) *Allen* v. *Paterson*, 99 N. J. L. 489, page 490;

(1926) *Latimer* v. *Wilson*, 103 N. J. L. 159, page 161;

(1926) *Dedo* v. *Kuser*, 103 N. J. L. 223, page 225;

(1926) *Wallach* v. *Stein*, 193 N. J. L. 470, page 471;

(1922) *Penrose* v. *Absecon Land Co.*, 94 N. J. Eq. 436, page 439.

In the instant case the question of illegality was raised below before the Trial Court on motion to arrest the judgment as heretofore shown and as set forth in notice included in plaintiff-appellee's original moving papers to dismiss this appeal (typewritten, page 20).

The record itself shows the motion to arrest the judgment must have been denied although no

technical order to that effect was entered. Under such circumstances in a case involving public policy the technicality of procedure may be waived.

Technicalities of procedure may be waived in cases involving public policy.

This Court, in *Penrose* v. *Absecon Land Company, supra* (94 N. J. Eq. 436), speaking by Mr. Justice Parker, at page 439, said, *inter alia:*

> * * * "Complainant alleged this peaceable possession, and defendant in her answer specifically denied it. This put the very jurisdiction in issue; but the Court, apparently without taking any proof on the point, either ignored it or adjudged it against the defendant. *It is true that the point is not specifically presented in the petition of appeal, but it is covered thereby, and where a fundamental matter of jurisdiction is involved, the Court will ordinarily, though not necessarily, waive technicalities of procedure and consider it an appeal.* The practice appears in such cases as *State* v. *Shupe,* 88 N. J. L. 610; *McMichael* v. *Horay,* 90 *Id.* 142, 145; *Kennedy* v. *Coon,* 91 *Id.* 100, affirmed 598; *State* v. *Belkota,* 95 *Id.* 416, and *Franklin* v. *Millville,* 119 At. R. 29, not yet officially reported."

This Court cannot be deprived of its inherent power to refuse its assistance in the enforcement of illegal contracts in controvention of the statutes and public policy of this State and any statute to that end, if any, would be as to that feature, unconstitutional.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

VITO STASSI, *Plaintiff-Appellee,* *v.* ARCANGELO DEFRONZO, *Defendant-Appellant.*	On Appeal.

BRIEF FOR PLAINTIFF-APPELLEE.

Facts.

The plaintiff, Vito Stassi, commenced suit in the Supreme Court of New Jersey against the defendants in the above case for the sum of $2,595.00. Said claim was assigned to him by one Victorio Cangialosi who performed certain type of work for the defendant, Arcangelo DeFronzo, as hereinafter shown.

Mr. Cangialosi was a skilled ornamental plaster mechanic. He made all types and styles of models out of plaster-paris or plaster-cast, such as are ordinarily and usually found in decorative theatres, art galleries and the like. The action was instituted against the defendants for the sum above mentioned, but at the trial, the plaintiff was only successful in proving his claim against the defendant, Arcangelo DeFronzo. There was not sufficient proof as against Elvira DeFronzo, and thereupon a non-suit was entered by consent.

The testimony in the case indicated that Mr. Cangialosi called at the defendant's house and it was there that the defendant agreed to pay for all the wages for workmen on the said job, and also for all material used in connection therewith. In addition the defendant agreed to pay Victorio Cangialosi the sum of $120.00 per week.

The testimony indicated that the defendant paid for the material and labor, but that the said Victorio Cangialosi did not receive one cent for his work. The agreement also provided that Mr. Cangialosi was to board with said defendant and pay for the board and lodging the sum of $15.00 per week. In other words, Mr. Cangialosi was to receive $120.00 per week for his work, of which the sum of $15.00 was deducted for board and lodging, so that the defendant actually became obligated by his agreement to said Victorio Cangialosi in the sum of $105.00 wages per week. Mr. Cangialosi completed all of his work to the defendant's satisfaction, and when he asked the defendant for money, the defendant said, "At the present time I have no money." Mr. Cangialosi worked, as the testimony shows, for a period of twenty-three (23) weeks, steadily on this job, and worked until eight and ten o'clock at night, and sometimes until eleven o'clock at night. To corroborate him, the said plaintiff offered in evidence a statement which the said Cangialosi stated he forwarded to the defendants, and which was offered in evidence and marked Exhibit P-2 (State of Case, pp. 106-107). This statement shows that the said Cangialosi received $1,308.70 covering labor and material provided for the work. The statement specifically states, at the bottom thereof, that it does not include the work provided by said Victorio Cangialosi, which covers a period from November, 1928, until May 11, 1929.

Numerous demands have been made for the money, and finally, on or about June 20th or 25th, of 1929, Cangialosi testified that he again requested his money and the defendant then replied in substance that he does not care to be bothered because he is taking his wife and sister-in-law to the country and he cannot do anything.

Mr. Cangialosi testified that he started in the early part of November, 1928, and continued until May 11, 1929. The defendants on the other hand testified that the said Victorio Cangialosi was entirely in error, particularly as to the commencement date, and attempted to prove that the work was actually started some time in February or March, and not in accordance with the date as testified to by the plaintiff. There was sharp contradiction in the testimony. The defendants attempted to be very positive concerning the dates. The defendant, Mrs. Elvira DeFronzo, stated that she kept track of the work by making certain marks on a calendar. This calendar was offered in evidence and marked Exhibit D-9 (State of Case, p. 115). When the calendar was offered in evidence, and carefully examined by counsel for the plaintiff, it was clearly shown that the testimony as originally given by said defendants was in sharp contradiction and entirely different from the silent and mute evidence of the exhibit known herein as Exhibit D-9, *supra.* Various other points of interesting testimony were offered by the defendants, such as testimony of the defendants' witness, named Manfred Mancusi-Ungaro. The defendant attempted to prove by this witness that there was a controversy between Cangialosi and the defendants of only $13.00. The defendant stated that there was due only $95.00 and the said Cangialosi contended that there was due $108.00. Cangialosi, of course, denied this. In order to straighten out

this very small difference, the defendant attempted to show that he brought Mr. Ungaro from Newark over to Lodi, New Jersey, for the purpose of straightening out this $13.00 item. It is to be noted that Mr. Ungaro is an architect and, although his time as a professional man was considered quite valuable, he nevertheless took the pain and trouble of travelling with Mr. DeFronzo, the defendant, from Newark to Lodi, New Jersey, for the purpose of getting a paper known as a receipt which was offered in evidence and marked Exhibit D-6 (State of Case, p. 112). It is clearly seen that the only purpose in Mr. DeFronzo's mind was to have Mr. Ungaro witness the signature of Victorio Cangialosi as is shown by said Exhibit D-6. The defendants and their witnesses apparently did not make a very good showing before the jury, with the result that the jury brought in a verdict for the plaintiff in the sum of $2,182.95. This judgment, together with the costs, amounts in all to $2,254.39.

After judgment was rendered, and within six (6) days thereafter, the defendant Arcangelo DeFronzo substituted counsel and new counsel made application to the Trial Judge for a rule to show cause why a new trial should not be granted, and on the 15th day of February, 1932, the Honorable Edwin C. Caffrey, sitting as Trial Judge for the Supreme Court, signed a rule to show cause, returnable on March 4, 1932. The rule to show cause did not reserve any exceptions taken at the trial for appeal. Subsequently, the defendant's counsel served reasons upon the plaintiff upon which he based the argument on the rule to show cause. The matter was duly argued before the Trial Court and the various reasons (State of Case, pp. 15, 16, 17, 18, 19, 20), with the result that on May 20, 1932, Judge Caffrey signed an order discharging the

rule to show cause with costs to be taxed against the defendant Arcangelo DeFronzo (State of Case, p. 21).

The defendant then filed a notice of appeal and based his appeal on various grounds (State of Case, p. 23) which in substance are the same as the grounds urged and argued in support of the rule to show cause why a new trial should not be granted to said defendants.

The fact nevertheless remains and it is admitted by the appellant that the said work was fully completed and performed. The jury found as a matter of fact that the said work was done and that the said plaintiff is entitled to recover. The defendant, however, after the case was over, for the first time attempted to raise the question of illegality of contract in support of the argument for a new trial. The Trial Court analyzed the testimony carefully and decided against the appellant. They now come into this Court to review the cause on the same ground of illegality of contract, and say, in substance, that it is in violation of Section 71 of an Act concerning Building & Loan Associations, Revision of 1925, page 222, and also say that although the plaintiff is entitled to recover, that, nevertheless, the contract is an illegal one, because the defendant contends that there was an agreement made to pay for this work out of certain commissions to be received for securing a mortgage loan. Such a contention is a ridiculous one and not based upon or supported by any law whatever. At no time during the trial or after both parties rested their case and submitted to the Court for its charge was the question of illegality raised. The matter was submitted to the jury in the ordinary course, and they were very much impressed with the fact that the defendants did not

tell the truth; that they were contradicting each other, and each was trying to help the other, with the result that the jury found against them. The appellant also states on page 3 of his brief that Victorio Cangialosi agreed to pay the defendant commissions for procuring a certain loan from the defendant's Building & Loan Association. There is no such testimony in the entire case. The fact is that the loan, which was testified to, was never in fact consummated, and this is an admitted fact. This being the case, then why and under what circumstances should the defendant be now privileged to say that even though all the work was performed for the defendant, nevertheless the plaintiff should not be in a position to recover because of an alleged promise made to receive commissions and therefore the contract is illegal? The testimony clearly indicates otherwise.

On page 5 of the brief the appellant indicates that after the verdict and after the granting of a rule to show cause, but before the hearing thereon, motion was made upon notice to the Trial Court for arrest of judgment notwithstanding the verdict on the ground that the contract was invalid, etc. It is respectfully submitted that there was no such notice, nor any such argument made in arrest of judgment, and that the statements concerned thereon are absolutely false and untrue. If what the appellant says is true, certainly an order would have been entered making some disposition of this motion. The fact is that the State of Case does not allege a copy of the order nor was there any order made by the Court below.

ARGUMENT.

Plaintiff-appellee contends that the appeal should be dismissed for the following reasons:

ONE.

That the appeal is in violation of Rule 129 of the Rules of the Supreme Court which say, "Granting to a party a rule to show cause why a new trial should not be granted, shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule (Rule 83, P. R. Act, 1912)," because no exceptions were reserved in the rule to show cause granted in said cause (see State of Case, p. 14).

TWO.

That the reasons upon which the argument on the rule to show cause was based (State of Case, pp. 15, 16, 17, 18, 19, 20) are in substance the same reasons set forth and urged as grounds for appeal (State of Case, p. 23).

THREE.

That all matters now brought for review by this Court have been fully argued and considered by the Court below at the hearing and argument on the rule to show cause why the verdict should not be set aside and a new trial granted. The appellant, therefore, cannot now again reargue the same reasons as grounds of appeal before this Court because all of said matters are now *res adjudicata*.

FOUR.

That the said appeal is in violation of Chapter 356 of the Laws of 1931 in that the decision by the Circuit Court Judge before whom the trial of the Supreme Court issue has been held, has the same effect as if rendered by the Supreme Court; provided, however, that the party applying for the rule to show cause reserves the exceptions taken at the trial by such party as grounds of appeal, but in this cause no exceptions of appeal were reserved (State of Case, p. 14).

FIVE.

That the testimony offered by the plaintiff-appellee as to the contract for hire, and the agreement as testified to by the defendant-appellant, raised a factual question for the jury. At the termination of the testimony counsel for the defendant summed up the case before the jury and counsel for the plaintiff summed up his case before the jury. No motions concerning the cause were made at the termination of the cause, before the defendant rested his case, and therefore the defendant-appellant cannot now appeal unless same is on an exception granted by the Court and taken at the proper time.

SIX.

That the Exhibit D-9 (State of Case, p. 115) was not the same exhibit as was offered in evidence at the time of the trial and marked by the court reporter, and after notice of objection being made as to the said exhibit in said State of Case, the appellant then served a new exhibit alleged to be the proper exhibit and containing the months of January, February, and March of 1929. That

the said new exhibit, as offered, contained certain markings which the appellee contends were not on said exhibit at the time same was offered in evidence. An affidavit to this effect was duly filed in this Court by the court reporter indicating that the words "Exhibit D-9" were made by some one unknown to him, but that he only marked the calendar on the left-hand side with the following marking, "D-9." The affidavit was attached to the notice to dismiss the appeal which notice was returnable before this Court on November 1, 1932.

SEVEN.

That the said contract is not illegal and in contravention of public policy and public law of New Jersey.

EIGHT.

That the testimony offered by the plaintiff and defendant, as to the contract, raised a factual question and this Court should not disturb same.

That it was not the function or duty of the Trial Judge to make any motions or raise any objections to any of the testimony or to make any rulings unless called upon by the litigants in said cause. The Court's charge to the jury clearly indicated that the same involved a factual question and was a proper matter for a jury.

NINE.

That the Court did not commit a judicial error by permitting the matter to proceed to judgment when no question of illegality was involved, nor was any question of illegality raised by counsel for the respective defendants.

ARGUMENT.

POINT ONE.

That the appeal is in violation of Rule 129 of the Rules of the Supreme Court which say, "Granting to a party a rule to show cause why a new trial should not be granted, shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule (Rule 83, P. R. Act, 1912)," because no exceptions were reserved in the rule to show cause granted in said cause (see State of Case, p. 14).

In re Faragasso v. *Introcasso, et al.*, 98 N. J. Law 583, the plaintiff recovered a judgment. A rule to show cause for a new trial was granted and reservations of exceptions were made. The matters specifically reserved in the rule were argued before the Court. The Court discharged the rule and the defendant appealed.

Chief Justice GUMMERE, speaking for the Supreme Court, in his opinion states:

> "For this Court to hear and determine the validity of the exceptions reserved after they have been considered and determined by the Circuit Court on the rule to show cause, would be, in effect, to review the action of that court in discharging the rule. That such judicial action by the trial court is not directly reviewable on error has been so frequently declared by our courts, that citation of authority for the proposition is unnecessary. Can it be thus reviewed by indirection?
>
> "The design of the party applying for the rule in asking reservation of exceptions, and

of the trial court, in directing that they be reserved, as is pointed out in the case of *Ashhurst* v. *Atlantic Coast Electric Railroad Co.*, 66 N. J. L. 16, is, that the questions raised by the exceptions should be heard and decided in a court of review; and it was, consequently there held that so long as the reservations stand, the questions presented thereby should not be considered and passed upon in determining whether a rule to show cause should be made absolute or should be discharged.

"As was indicated in *Gregutis* v. *Steinberg*, 97 N. J. L. 1, 116 A. 780, the prosecutor of the rule may afterward abandon his design and waive the reservation of his exceptions—with the permission of course, of the court allowing the rule—if he considers it advisable to do so; and may submit to that court the consideration and determination of the matters involved in the exceptions, instead of presenting them to the court of review. When, therefore the prosecutor of the rule with full knowledge that, so long as the reservation of exceptions stands, the matters embraced therein will not be permitted to be considered and decided by the trial court upon the return of the rule, argues those matters, and the trial court, with the same knowledge, hears the argument and considers and decides them, the necessary implication is that the purpose of having these matters decided by a court of review has been abandoned by the prosecutor, with the approval of the court, in order that the rule to show cause should be dealt with as if the same had been originally allowed without any exceptions reserved. The prosecutors in the present case having elected to abandon their exceptions, and the trial court having ratified that election, their right of appeal was thereby destroyed, and the appeal sued out by them must therefore be dismissed."

In the case of *Catterall* v. *Otis Elevator Co.*, reported in 103 N. J. L. 381, 135 A. D. 865, Justice

TRENCHARD, speaking for the Court of Errors and Appeals, said:

> "Now the general rule is well settled that where a rule to show cause why a verdict should not be set aside is allowed, with exceptions reserved, and the party obtaining the rule specifies, as his reasons for asking that it be made absolute, the matters upon which the reserved exceptions are based, and, upon the return of the rule, argues those matters, and the court afterwards considers and determines them, the exceptions are to be considered as abandoned, with the approval of the court, and the right to have them reviewed by an Appellate Tribunal is lost. Citing *Margolis* v. *Goldberg* (N. J. Court of Errors and Appeals), 101 N. J. L. 75, also, 127 A. 271; *Goekel* v. *Erie R. Co.*, 100 N. J. L. 279; *Faragasso* v. *Introcasso*, 98 L. 883; *Gregutis* v. *Steinberg*, 97 L. 1; *El Mora Realty Co.* v. *Griffen* (N. J. Supreme), 126 A. 639."

In the case of *Hartman* v. *McClintock Marshall Construction Co.*, 82 N. J. L. 734, 82 A. 874, the Court of Errors and Appeals sustained the *per curiam* opinion of the Supreme Court, stating:

> "The verdict was for the plaintiff, and the rule to show cause was allowed, reserving only the exception taken to the refusal of the trial court to direct a verdict for defendant, which is the only question which this court can consider on error. Citing *Haddon* v. *Bamford Silk Co.*, 73 N. J. L. 308, 63 A. 7, affirmed, 74 N. J. L. 487, 67 A. 107.
>
> "Since the evidence presented by the plaintiff created an issue of fact for the jury to determine, the refusal of the trial court to direct a verdict was entirely proper. The judgment will be affirmed."

See *Gregutis* v. *Steinberg*, 97 L. 1, 116 A. 780, on the same point.

This Court, *in re Goekel* v. *Erie R. Co.*, 100 N. J. L. 279, held that where a party obtains a rule to show cause why a verdict should not be set aside and a new trial granted, reserving exceptions, and afterwards files reasons upon which the motion for a new trial is rested, included in which are the reserved exceptions (and errors of the record not pertinent here), and, after hearing, the Trial Court discharges the rule, error could not thereafter be made a ground for review in an Appellate Court, as all the reasons in support of the rule are, as an effect of the order discharging it, *res judicata,* and also held, in *Margolis* v. *Goldberg,* 101 N. J. L. 75, on appeal from judgments entered after defendant's rule to show cause had been discharged, the Appellate Court will not consider and decide any question which was assigned as ground for setting the verdict aside on the rule to show cause, such questions being *res judicata,* whether argued or not, and although not decided in terms on the rule to show cause. This is but a statement on a familiar rule with reference to judgment *res judicata,* and that is that parties and those in privity with them are precluded, not only as to every matter offered to sustain or defeat a demand, but as to any other admissible matter which might have been offered for that purpose. *Paterson* v. *Baker,* 51 N. J. Equity 49. This case has been repeatedly cited approvingly by the Courts of this State, and is a leading authority. See the cases in this Court *re: Walsh's Estate,* 80 N. J. Equity 565; *McMichael* v. *Horay,* 90 N. J. L. 142; *Margolis* v. *Goldberg,* 90 N. J. L. 75-77.

The following cases are in support of the rules of law laid down in the cases cited *supra:*

Re Walsh's Estate, 80 N. J. E. 565;
Re Cleaves v. *Yeskel* (Court of E. and A.), 104 N. J. L. 497. The opinion by the late Chancellor WALKER;
Fritz v. *Sayre & Fisher Co.*, 77 N. J. L. 236. Opinion by Chief Justice GUMMERE;
Steinert v. *Pennsylvania R. Co.*, 153 Atl. 533, opinion rendered by the late Justice DALY, speaking for the Court of Errors and Appeals;
Balint v. *Stein*, 9 N. J. Misc. 591;
Shotkin v. *Arrow Sanitary Laundry, Inc.*, 155 Atl. 379;
Sleight v. *Board of Education of Paterson*, 10 Misc. R. 523.

In re Freschi v. *Mason*, 156 A. 758, or 108 N. J. L. 272, Justice PARKER, speaking for the Court of Errors and Appeals, held:

> "There is a rigid rule of practice, which was crystallized into a statute, that the granting of a rule to show cause shall be a waiver of the bill of exceptions except on points expressly reserved in said rule.
>
> "There is another rule of appellate practice which is that a party holding a rule to show cause, and arguing alleged errors of law thereunder, will not be permitted to renew his argument to such points on appeal.
>
> "It is now settled by a whole line of recent cases that where, as in this case, the verdict has been attached on a rule to show cause as against the weight of evidence, the consideration and disposition of that claim by the Supreme Court on the rule to show cause covers the ground of a motion to non-suit, and motion to direct, and operates as a bar to the argument of such grounds of appeal."

In re Galand v. *Erie R. Co.*, 156 A. 128, or 108 N. J. L. 7, Chief Justice GUMMERE, speaking for the Supreme Court of this State, held:

> "Where a party sees fit to invoke the discretionary power of a Judge to review the case on a rule to show cause, he waives the right of appeal, excepting so far as the Court sees fit to reserve matters as grounds of appeal."

In re Runyon v. *Monarch Acc. Ins. Co.*, 158 A. 530, or 108 N. J. L. 489, Justice TRENCHARD, speaking for the Court of Errors and Appeals, held:

> "This is the appeal of the plaintiff below from a judgment entered upon a verdict in favor of the defendant at Circuit. She says that the verdict is against the weight of the evidence. But that question is not before us for this reason. On appeals in civil cases at law, as here, the court is concerned only with correcting errors in law, and will not consider a ground of appeal that the verdict is against the weight of the evidence. Citing *Auer* v. *Sinclaire Refining Co.*, 103 N. J. L. 372."

POINT TWO.

That the reasons upon which the argument on the rule to show cause was based (State of Case, pp. 15, 16, 17, 18, 19, 20) are in substance the same reasons set forth and urged as grounds for appeal (State of Case, p. 23).

POINT THREE.

That all matters now brought for review by this Court have been fully argued and considered by the Court below at the hearing and argument on the rule to show cause why the

verdict should not be set aside and a new trial granted. The appellant, therefore, cannot now again reargue the same reasons as grounds of appeal before this Court because all of said matters are now *res adjudicata.*

POINT FOUR.

That the said appeal is in violation of Chapter 356 of the Laws of 1931 in that the decision by the Circuit Court Judge before whom the trial of the Supreme Court issue has been held, has the same effect as if rendered by the Supreme Court; provided, however, that the party applying for the rule to show cause reserves the exceptions taken at the trial by such party as grounds of appeal, but in this cause no exceptions of appeal were reserved.

The arguments under Point One are taken together in support of Points Two, Three and Four of this brief.

POINT FIVE.

That the testimony offered by the plaintiff-appellee as to the contract for hire, and the agreement as testified to by the defendant-appellant, raised a factual question for the jury. At the termination of the testimony counsel for the defendant summed up the case before the jury and counsel for the plaintiff summed up his case before the jury. No motions concerning the cause were made at the termination of the cause, before the defendant

rested his case, and therefore the defendant-appellant cannot now appeal unless same is on an exception granted by the Court and taken at the proper time.

In re Hartman v. *McClintock Marshall Construction Co.*, 82 N. J. Law 734, the Court of Errors sustained the *per curiam* opinion of the Supreme Court, stating:

> "Since the evidence presented by the plaintiff created an issue of fact for the jury to determine, the refusal of the Trial Court to direct a verdict was entirely proper. The judgment will be affirmed."

In re Lembeck v. *Harms, et al.*, Justice BLACK, speaking for the Supreme Court of the State of New Jersey, states:

> "The trouble with the defendants' argument is, it is based upon inferences of fact to be drawn from the evidence. It was the function of the jury to make such inferences. It is not the function of the court or a review of the verdicts, when there is evidence to support the verdicts. The rules to show cause are discharged in each case with costs."

In the case of *Runyon* v. *Monarch Acc. Ins. Co.*, 108 N. J. Law 489, Justice TRENCHARD, speaking for the Court of Errors and Appeals, held that the Court of Errors is only concerned in correcting errors of law and will not consider as a ground of appeal that the verdict is against the weight of evidence; citing *Auer* v. *Sinclaire Refining Co.*, 103 N. J. Law 372.

POINT SIX.

That the Exhibit D-9 (State of Case, p. 115) was not the same exhibit as was offered in evidence at the time of the trial and marked by the court reporter, and after notice of objection being made as to the said exhibit in said State of Case, the appellant then served a new exhibit alleged to be the proper exhibit and containing the months of January, February, and March of 1929. That the said exhibit, as offered, contained certain markings which the appellee contends were not on said exhibit at the time same was offered in evidence. An affidavit to this effect was duly filed with this Court by the court reporter indicating that the words "Exhibit D-9" were made by some one unknown to him, but that he only marked the calendar on the left-hand side with the following marking, "D-9." The affidavit was attached to the notice to dismiss the appeal which notice was returnable before this Court on November 1, 1932.

POINT SEVEN.

That the said contract is not illegal and in contravention of public policy and public law of New Jersey, as the second ground of appeal of the appellant's brief, page 15, alleges.

POINT EIGHT.

That the testimony offered by the plaintiff-appellee and defendant-appellant, as to the contract, raised a factual question and this Court should not disturb same.

That it was not the function or duty of the Trial Judge to make any motions or raise any objections to any of the testimony or to make any rulings unless called upon by the litigants in said cause. The Court's charge to the jury clearly indicated that the same involved a factual question and was a proper matter for a jury.

The plaintiff showed by Mr. Cangialosi's testimony (State of Case, p. 45, lines 30-32) that he commenced to work in his own shop in November of 1928, and that he started to work in the defendant's house in January of 1929. He was corroborated in this respect by one of his workmen named Dimitrio Stassi (State of Case, p. 47). Mr. Cangialosi testified that he made an arrangement with the defendant in the defendant's home wherein and whereby Mr. Cangialosi was to receive from the defendant $120.00 per week (State of Case, p. 34, line 32), also (State of Case, p. 35, lines 8-12). Mr. Cangialosi worked for a period of twenty-three (23) weeks (State of Case, p. 35, line 34). Mr. DeFronzo, the defendant, was supposed to pay the wages for the laborers and also for all the materials, and Mr. Cangialosi was to receive $105.00 on account each week (State of Case, p. 35, line 15). Mr. Cangialosi testified that he submitted a statement to the defendant (State of Case, pp. 106-107) showing all the monies that he re-

ceived and paid out for labor and material, but that it did not include monies due him for his work covering a period from November, 1928, to May 11, 1929. The defendant, on the other hand, contended that he made a definite contract for a definite sum of $800.00 (State of Case, p. 53, line 37), and that, with the additional work, it totaled up to $1,295.00 (State of Case, p. 112). That Mr. Cangialosi did not commence to work on the date that he testified to, but in fact commenced his work at a subsequent date. That he started the work, and did not show up until January 14, 1929 (State of Case, p. 55, line 38). That Mr. Cangialosi again abandoned the work until February 11, 1929 (State of Case, p. 56, line 34). The defendant, however, advanced Exhibit D-4 (State of Case, p. 110), being various sums of money paid to Mr. Cangialosi, to wit: December 24, 1928, $200.00, January 14, 1929, $150.00, February 16, 1929, $200.00, and various other sums, as shown in said exhibit (State of Case, p. 110). Elvira DeFronzo, the defendant-appellant's wife, also contended that Mr. Cangialosi was entirely in error; that her husband never made that contract to pay him $105.00 net per week, but that his agreement was to do the entire work for $1,295.00 as shown by Exhibit D-6 (State of Case, p. 112). The truthfulness of this is clearly attacked by Exhibit P-2 (State of Case, p. 106) which bears out the plaintiff by showing that the labor and material did cost him $1,308.70, and this money was advanced and paid for by the defendant. This statement is borne out by the fact that the defendant, by his own testimony, indicated that on June 11, 1929, he paid $108.00, Exhibit D-4 (State of Case, p. 110), which was the balance due in addition to $1,200.00 already paid to Cangialosi for labor and materials (State of Case, p. 112, Exhibit D-6). Factual questions be-

fore a jury were, therefore, presented. Under these circumstances, it would hardly be possible or reasonable to think that a man would undertake to do all this artistic work for the defendant free of charge. The defendant brought a witness named Ungaro (State of Case, p. 75) to corroborate him for the sole purpose of showing that he purposely travelled from the City of Newark, New Jersey, to Lodi, New Jersey, for the purpose of straightening out a slight discrepancy of $13.00 (State of Case, p. 81, lines 20-27). Mr. Ungaro is an architect by profession. He testified that although he criticized the plaintiff's work (State of Case, p. 82, line 24) that nevertheless Mr. DeFronzo was perfectly satisfied with it. In order to corroborate the defendant Arcangelo DeFronzo, Mrs. Elvira DeFronzo testified that Mr. Cangialosi actually started work on the 11th of January, 1929 (State of Case, p. 87, line 32). That she kept track of the time on a calendar, and made these notations with her pen (State of Case, p. 89, line 13). Your Honors will particularly take notice of the testimony given by her commencing on page 86 of the State of Case, and your Honors will see (State of Case, p. 89) how uncertain this woman's testimony is. Is she telling the truth? This was for the jury to decide. The calendar was not in evidence at this point, but lo and behold, after cross examination of this witness, Mr. Kuvin commenced to re-examine her and showed her a calendar which she identified as the calendar in question, upon which she placed these marks. When again cross examined and confronted with this calendar (Exhibit D-9, State of Case, p. 115) your Honors will note that where Mrs. DeFronzo testified that she made a certain mark on January 11, 1929, in fact the calendar does not indicate any mark on January 11th, whatever, and that al-

though she testified that she personally marked down the dates in her own handwriting with a pen, nevertheless when asked on cross examination who made some of the markings on February 11, 1929, she stated (State of Case, p. 92, line 12) that she did not make that mark, and excused herself by saying that probably her husband made this mark. The jury had the benefit of actually witnessing the conduct and demeanor of each and every witness for the plaintiff as well as the defendants. The jury had the opportunity of seeing and hearing the actual direct and cross examination of the various parties and witnesses. They had a right to weigh the testimony and to credit or discredit any particular witness. When this Exhibit D-9 (State of Case, p. 115) was offered in evidence, and the jury had a right to compare the markings on that calendar with the testimony offered by the defendants, and particularly where the defendant, Mrs. DeFronzo, was unable to connect the markings on the calendar with the testimony which she had already given, then, under those circumstances, the jury had a right to discredit the defendants entirely and to give judgment to the plaintiff.

The defendant, Mr. DeFronzo, was a keen businessman and knew from years of experience how to handle matters of this type. He secured a receipt from Mr. Cangialosi (Exhibit D-6, State of Case, p. 112) and had a witness brought from Neward to deliberately witness Mr. Cangialosi's signature. There was a motive in doing this.

The defendant offered in evidence several checks referred to in Exhibit D-4 (State of Case, p. 110) and your Honors will notice that although Exhibit D-9 (State of Case, p. 115) indicated that the work was actually started on February 11, nevertheless the defendant testified that Mr. Can-

gialosi did the work some time in January, and that he worked prior to January. With all this he offered checks in evidence showing that on December 24, 1928, he paid Mr. Cangialosi $200.00, January 14, 1929, $150.00, and on February 16, 1929, $200.00. Can it be believed that the defendants have told the truth? The jury had a right, when the facts were presented to it, to weigh the defendants' testimony. Are they telling the truth? By their verdict, it was "No." No person, and particularly the type and kind the defendant represents, would pay Mr. Cangialosi over $500.00 out of the will of his good heart when no work was done by him. The fact is that the entire testimony created a factual question and the jury properly decided same in favor of the plaintiff.

POINT NINE.

That the Court did not commit a judicial error by permitting the matter to proceed to judgment when no question of illegality was involved, nor was any question of illegality raised by counsel for the respective defendants.

Reply to Point Two.

Counsel for the appellant as Point Two of his argument alleges that the misconduct of the plaintiff's attorney rendered the trial unfair to the defendant. Appellant urged this reason as one of the reasons in the argument on the rule to show cause for a new trial, and now urges the same reason as the sixth ground of appeal. This he cannot do under cases cited *supra* under Points One, Two and Three. May I respectfully answer this reason

for appeal in only this brief manner: Counsel who now appears for the appellant did not actually conduct the trial of this cause. He does not know what has actually transpired, except from hearsay and also from reading the testimony. He may raise any presumption that he wishes, but the fact is that counsel is making this a personal issue and attempts to attack counsel's conduct. This is certainly unfair and is, in my opinion, most unethical. It was the cross examination of plaintiff's counsel that convinced the jury how false and perjurious the testimony of the defendants was. A true exhibition of the falsity of the testimony was clearly shown when Mrs. DeFronzo was cross examined concerning the dates, and lo and behold, Mr. Kuvin produced at the trial a calendar which she identified as the one in question. She stated that she made certain markings in ink showing the dates when the work was done. When confronted with this calendar, it made her and her counsel feel uncomfortable, because the calendar did actually show something to the contrary. Counsel for the appellant then tried to apologize for his client's testimony, but it did no good.

The following examination appears (State of Case, p. 91, line 31):

> "Q. Do you remember testifying that on January 11, 1929, you made a mark that he started his work? Look at that. Is there any mark on January 11th? Look at it. Look at January 11th, please. Now, just wait a minute. Please excuse me. Look at January 11th. Any mark there, on January 11th? Yes or no. A. Well, I mark—
>
> "Q. Is there any mark there laid, on January 11, 1929? Yes or no. A. There is no mark."

(State of Case, p. 92):

"Q. No mark, no. A. I put it down here.
"Q. Is there any mark here on March 16th?
"The Court: What is that mark on February?
"Q. What is this mark on February 11th? Here, do you see February 11th? A. Yes.
"Q. What is that mark there? Did you write that? A. This I don't.
"Q. You do not know who made that, do you? A. This maybe my husband make, because he knows he come on the same day sure.
"Q. Yes. You did not make that at all, did you? A. Not this one, no.
"Q. Why did you say before that you made a mark on a calendar? A. Well, one mark I make only.
"Q. On January 11, there is no mark there at all; isn't that so?
"Mr. Feld: Are you offering that in evidence?
"Mr. Kuvin: Yes, go ahead.
"Mr. Feld: That is all.

"*Redirect examination by Mr. Kuvin:*

"Q. Is this the calendar you marked on, or did you have another? A. I don't know. It was a calendar just like that. Who bring this calendar? I don't remember.
"The Court: Just a minute. She pointed out some mark in that calendar as her having made.
"Mr. Kuvin: I grant you that, if the Court please, but I have just found out that it was not the one. The sheet is ripped off the month of February as it is apparent."

(State of Case, p. 93):

"The Witness: Sure. That is why I can't see.
"Mr. Kuvin: The month of February is in the center, the previous month and the fol-

lowing month is on. The month of January is ripped off.

"The Court: I see January, February and March.

"Mr. Kuvin: That is true, if the Court please, but there was a prior sheet which had January in the center.

"The Court: Turn the next sheet over.

"Mr. Kuvin: February and March and April; then January, February and March. In other words, each sheet carries the month prior.

"The Court: That can be explained, but the witness identified a mark on there.

"Mr. Kuvin: That is true.

"The Court: So, if she said that was the calendar she marked, why—

"Mr. Kuvin: I will offer the calendar in evidence and rest on that.

"Mr. Feld: That is fine.

"(Calendar marked Exhibit D-9.)"

On direct examination, however, she testified (State of Case, p. 88, line 37):

"Q. What day was it that he started to work in your house, Mrs. DeFronzo? A. On the 11th of January."

(State of Case, p. 89, line 6):

"Q. What makes you remember January 11th? A. Well, because I remember when he come I take a calendar and I mark it when he comes in the house.

"Q. Yes. Have you got the calendar here? A. Home. I ain't got it here.

"Q. What kind of a mark did you make on it? A. What kind of mark?

"Q. Yes. A. With the pen.

"Q. Did you make a cross or circle, or what did you do? A. I remember I make.

"Q. What kind of mark did you make? What? A. I marked it in the date, that is all."

And on State of Case, page 89, I continued the same art of cross examination for the purpose of determining the truth. The Court should bear in mind that at this point of the cross examination, the witness was not confronted with the calendar, and although her own counsel had the calendar in his possession, nevertheless it was not presented until after her cross examination. All this cross examination took place as shown in State of Case, pages 88 and 89, and the upper portion of page 90. At the bottom of the State of Case, page 90, Mr. Kuvin, the defendants' counsel, began redirect examination, and it was at this point that Mr. Kuvin offered the calendar in evidence.

The following redirect examination took place (State of Case, p. 90, bottom, line 35):

> "Q. Is this the calendar that you spoke about, Mrs. DeFronzo (handing calendar to witness)?"

(State of Case, p. 91):

"A. I think it was like that. Yes, this is the calendar.

"Q. That is the calendar? A. Yes.

"Q. Will you point out on that the marks that you made when he started? A. Over here.

"Q. Did you make that mark yourself or is that by your husband? A. Myself. I make this.

"The Court: What date is it, pointed to?

"Mr. Kuvin: Pointed to February 15th, if the Court please.

"Mr. Feld: That is not correct, sir.

"Q. All right. Will you point again, Mrs. DeFronzo, where you have just pointed? A. 16.

"Mr. Kuvin: She pointed to March 16, 1929. My mistake."

And so, because counsel attempted to go into deeper cross examination in order to ascertain the truth, thereupon, the appellant now attempts to attack appellee's counsel by showing that his conduct rendered the trial unfair. How preposterous! I suppose if the case terminated just the other way and the plaintiff would appeal, then counsel for the appellant would have praised plaintiff's trial counsel beyond a question. He probably wanted no cross examination of his clients. It seems that counsel for the appellant should be criticized because he attached to page 115 of the State of Case an exhibit of a calendar representing the months of January, February and March, offered in evidence, and marked D-9 by the court reporter. This true exhibit was not attached to the State of Case. A notice was served upon the defendant's counsel objecting to the State of Case, particularly the exhibit, D-9, because the same was not the true and correct exhibit, and also that the appellee served a notice upon the appellant to dismiss the appeal for various reasons, and attached to the notice was an affidavit by Mr. Meyers, the official court reporter, in which he stated that the marks "Exhibit D-9" on the right-hand side of the supposed exhibit were not in fact there, and were placed there by someone unknown to him.

Another illustration of the defendant's conduct is exhibited when the defendant, Arcangelo DeFronzo, testified that there was a discrepancy of $13.00 between him and the plaintiff's assignor, and it was for that reason that he brought Mr. Ungaro, an architect by profession, with him from the City of Newark, all the way to Lodi, New Jersey, to straighten out this small discrepancy of $13.00. They wanted the Court and jury to believe these facts when in fact the motive was an entirely

different one. Mr. Cangialosi, an ordinary mechanic, has not the ability or the business judgment as the defendant has. In fact, he is a poor Italian sculpturer workman.

Counsel for the appellant refers to the story of HAYMAN AND HIS GALLOWS. It seems to me that it was his clients who acted the part of Hayman. This was brought out clearly by the fact that the jury would not believe their testimony.

Your Honors' attentions are called to the State of Case, page 103, when, after the jury retired, they returned to the courtroom at 4:04 P. M. and desired to receive further instructions from the Court. One of the jurors asked the Court whether they could give the plaintiff $60.00 or $75.00 a week, and the Court advised him (State of Case, p. 104) that if they were satisfied that it was an agreement, that the Court nor the jury has no right to change same and they may determine the number of weeks. He (Cangialosi) either made that agreement or did not.

The result was that they brought in a verdict of $2,182.95. How they calculated this amount does not concern us because the jury had a right to determine whether the number of weeks proved by the plaintiff was correct or not.

On the point of illegality, counsel attempts to refer to many cases, some in this State and some in others, but upon examination of the authorities, the facts and circumstances surrounding the cases which were decided are entirely different than the question before this Honorable Court, and they have no bearing whatsoever to this cause. Mr. Cangialosi did the work, and he was entitled to be paid for it. The references to the Crime Statute certainly have no bearing and it is respectfully urged that this Honorable Court dismiss the appeal, with costs. The defendants had their chance

in court before a jury. They were not satisfied with the decision, and hence they appealed to the discretionary powers of the Supreme Court for a rule to show cause, which was granted. The question of illegality was thoroughly argued before Judge CAFFREY and a memorandum of law submitting other questions, as shown in the State of Case, and now also urged on appeal, were also thoroughly argued and discussed with the result that the learned Judge below discharged the rule to show cause, thereby affirming the decision of the jury.

It is respectfully submitted that the appeal be dismissed, with costs.

SAMUEL B. FELD,
Solicitor for and of Counsel with Plaintiff-Appellee.

in court before a jury. They were not satisfied with the decision, and hence they appealed to the discretionary powers of the Supreme Court for a rule to show cause, which was granted. The question of illegality was thoroughly argued before Judge Carvery and a memorandum of law submitting other questions, as shown in the State of Case, and now also urged on appeal, were also thoroughly argued and discussed with the result that the learned Judge below discharged the rule to show cause, thereby affirming the decision of the jury.

It is respectfully submitted that the appeal be dismissed, with costs.

Samuel B. Fees,
Solicitor for and of Counsel with Plaintiff-Appellee.