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TESTIMONY.

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Jennie Repetti Nobile,

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Frank J. Bartletta,

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New Jersey State Library

Notice of Appeal.

(Filed 10/20/30.)

IN CHANCERY OF NEW JERSEY.

77-279

Between	}	10
JENNIE REPETTI NOBILE, Complainant, and		On Bill for Accounting and Counter- claim.
FRANK J. BARTLETTA and DANIEL REPETTI, Defendants.		

The defendants, Frank J. Bartletta and Daniel Repetti, executors under the last Will and Testament of Angelo Nobile, deceased, hereby appeal from the Final Decree made in the above entitled cause on the 9th day of October, 1930, by the Chancellor on the advice of Vice-Chancellor John J. Fallon, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

ANTHONY P. LA PORTA,
Solicitor for and of Counsel
with the Defendants.

Dated, October 20th, 1930.

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

ANTHONY P. LA PORTA,
Solicitor for and of Counsel
with the Defendants.

Petition of Appeal.

(Filed 10/20/30.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

(77-279)

10

Between

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK J. BARTLETTA and DANIEL
REPETTI,
Defendants-Appellants.

20

On Appeal
from the Court
of Chancery.

TO THE HONORABLE COURT OF ERRORS AND APPEALS
IN THE LAST RESORT IN ALL CAUSES.

The petition of Frank J. Bartletta and Daniel Repetti, appellants in the above entitled cause respectfully says that :

30

1. Your petitioners find themselves aggrieved by a Final Decree made in the Court of Chancery of New Jersey by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor John J. Fallon, bearing date the 9th day of October, 1930, in a certain cause wherein Jennie Repetti Nobile was complainant, and Frank J. Bartletta and Daniel Repetti were defendants and counter-claimants, in this respect :

40

Under and by virtue of said Final Decree it was "ORDERED, ADJUDGED and DECREED that there is due and owing to the complainant from

the estate of the said Angelo Nobile, deceased, the sum of \$577.83.

“And it is further ORDERED, ADJUDGED and DECREED that the defendants’ counterclaim insofar as it seeks to require complainant to discharge a bond and mortgage held by the Jefferson Building and Loan Association of Hoboken, or to give security to save the estate of the said Angelo Nobile harmless from any liability thereon, be and the same is hereby dismissed, and 10

“It is further ORDERED that the said defendants, Frank J. Bartletta and Daniel Repetti, as executors of the estate of Angelo Nobile, deceased, within twenty days after the service upon them or either of them, of true but uncertified copies of this decree pay to the said complainant the sum of \$577.83 due to her as aforesaid, and that, in default of such payment, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate held by the said defendant, Frank J. Bartletta and Daniel Repetti, as executors under and by virtue of the last Will and Testament of the said Angelo Nobile, directed to the Sheriff of the County of Hudson to make said sum of \$577.83 according to the practice of this Court.” 20

And from that part of the Decree which says:

“And the Court being of the opinion that the aforesaid radio mentioned in the counterclaim of the defendants is the property of the estate of the said Angelo Nobile and that the claim of \$74 made by the defendants against the complainant should be disallowed.” 30

And from that part of the Decree which says:

“And the Court being of the opinion that the complainant is entitled to contribution from the estate of Angelo Nobile, a sum equal to one-half of the sum of \$1,955.86, so paid by her as aforesaid to the 40

Petition of Appeal.

Jefferson Building and Loan Association of Hoboken, and to the City of Hoboken; and that she is entitled to receive from said estate one-half of the sum of \$498.36 collected by the said Angelo Nobile as rents aforesaid, amounting in all to \$1,227.10."

10 2. The petitioners humbly appeal from the whole and every part of the decree of the Chancellor, which decreed as aforesaid, upon the ground that the same is erroneous in that:

20 (1) The said complainant, Jennie Repetti Nobile, was a joint owner with her husband, Angelo Nobile, deceased, in the lands and premises described in the Bill of Complaint, being an estate by the entirety, and she having survived him took the estate cum onere, that is, with the encumbrance which was a Bond and Mortgage jointly made, executed and delivered both by her and her deceased husband of whom the defendants are the executors under his last Will and Testament, which Bond and Mortgage was given to secure \$10,000 which was raised for part of the purchase price of the lands and premises owned by the entirety.

30 (2) That Jennie Repetti Nobile, complainant, and Angelo Nobile, deceased, were tenants in common of said property during his lifetime and that the whole estate became hers upon his death with the encumbrance aforesaid.

40 (3) The real estate by the entirety aforesaid is primarily liable for the payment of the Bond and Mortgage and until the security of the Bond and Mortgage at least fails there can be no action on the Bond or Mortgage by complainant against her husband's estate for contribution.

Petition of Appeal.

(4) That the doctrine of contribution does not apply to an estate by the entirety because it is not an estate of inheritance or a joint tenancy.

(5) The court erroneously allowed the complainant contribution of one-half of \$1,397.50, which was decreed to be paid by the defendants as executors of the estate of Angelo Nobile, deceased, there being no express agreement between her and her husband made at any time in the lifetime of the decedent that he should contribute towards the reduction of the mortgage or the payment of the interest, the said sum of \$1,397.50 being arrears of principle, interest, premiums and fines on the Bond and Mortgage jointly executed by the complainant with her husband in his lifetime and given in part payment of the purchase price of the premises held by the entirety aforesaid. \$650 of said sum went towards the reduction of the principle of said Bond and Mortgage and the rest towards interest, fines, premiums, etc., which became due in the lifetime of the complainant's husband but was not paid by the complainant until after his decease.

(6) The Court also erroneously allowed contribution to the complainant against the estate of her husband of which the defendants are executors, for the taxes and water rents being liens against the estate by the entirety, equal to one-half of \$577.83, which were paid by her after the decease of her husband.

(7) The Court erroneously found as a fact without any basis and contrary to the weight of the evidence, that the radio mentioned in the counterclaim of the defendants is the property of the estate of Angelo Nobile, deceased, and that the claim of \$74 made by the defendants against the complainant should be disallowed, whereas the truth of the

Petition of Appeal.

matter is, as is evidenced by the record in the case, that she is the owner of the radio and that the \$74 advanced to her upon her special instance and request by the defendants should be allowed against her claim.

10 (8) The Court erroneously dismissed the defendants' counterclaim insofar as it seeks to require complainant to discharge the Bond and Mortgage held by the Jefferson Building and Loan Association of Hoboken against the entirety estate, or to give security to save the estate of the said Angelo Nobile harmless from any liability thereon. This Bond and Mortgage was given by the complainant and her deceased husband, as tenants by the entirety, on the lands and premises of which she
20 now is absolutely seized in fee by reason of her having survived him and should be assumed and paid by her, she taking the land by the entirety, with the burden.

(9) The Court erred in decreeing that there is due and owing to the complainant from the estate of Angelo Nobile, deceased, the sum of \$578.83. It should have decreed a money decree in favor of the defendants and against the complainant on the complainant's bill for accounting and the counter-
30 claim of the defendants.

The petitioners therefore pray that the said Final Decree of the Chancellor may be reversed, rescinded and for nothing holden; and that a decree may be made in favor of the petitioners on their counterclaim and against the complainant; and that your petitioners may have such other relief in the premises as to this Court shall seem proper.

40 ANTHONY P. LA PORTA,
Solicitor for and of Counsel with
the Defendants-Appellants.

Answer to Petition of Appeal.

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

ANTHONY P. LA PORTA,
Solicitor for and of Counsel with
the Defendants-Appellants.

10

Answer to Petition of Appeal.

(Filed 10/21/30.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between,

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK J. BARTLETTA and DANIEL
REPETTI,
Defendants-Appellants.

On Appeal
from Court
of Chancery.

20

The answer of Jennie Repetti Nobile, the above named respondent, to the petition of appeal of Frank J. Bartletta and Daniel Repetti, above named appellants.

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This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto nevertheless admit that a decree was on the 9th day of October, 1930, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes

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Bill of Complaint.

therein mentioned and set forth, but as to the substance and form of said decree this respondent begs leave to refer thereto when the same shall be produced.

10 This respondent is advised and believes that the said decree is agreeable to equity and she prays that the same may be affirmed, with costs to be taxed in favor of this respondent.

MEANEY & LIFLAND,
Solicitor for and of Counsel with Respondent.

Bill of Complaint.

(Filed 2/4/30.)

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IN CHANCERY OF NEW JERSEY.

TO THE HONORABLE EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

Complainant, Jennie Repetti Nobile, residing in the City of Hoboken, County of Hudson and State of New Jersey, respectfully shows that:

30 1. On or about the 7th day of March, 1916, complainant was married to Angelo Nobile, in the City of Hoboken, and resided with her husband until the day of his death.

2. On or about the 5th day of July, 1927, and during the lifetime of the said Angelo Nobile, there was conveyed by Horace L. Allen and Frederick C. Kruse, executors under the last Will and Testament of Julius H. Kruse, deceased, premises commonly known as No. 415 Grand Street, Hoboken, New

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Bill of Complaint.

Jersey, to Angelo Nobile and Jennie Nobile, the complainant herein, as husband and wife.

3. On or about the 18th day of September, 1928, said Angelo Nobile departed this life, and at the time of his death he, together with his wife, the complainant herein, were still seized of the said premises as tenants by the entirety as aforesaid. 10

4. The said Angelo Nobile left a last Will and Testament dated May 20th, 1928, by the sixth clause of which Frank J. Bartletta and Daniel Repetti, the defendants herein, were appointed executors, and the said Frank J. Bartletta and Daniel Repetti, as executors, have taken upon themselves the burden of the execution of the estate of the said Angelo Nobile, deceased. 20

5. In the fifth paragraph of said will, a provision was made for the benefit of complainant in lieu of her dower, but on March 16th, 1929, complainant caused to be filed in the office of the Surrogate for Hudson County a dissent, executed under her hand and seal, to receive said legacy in lieu of dower.

6. On or about the day of the death of the said Angelo Nobile, deceased, there was due and owing to the Jefferson Building & Loan Association of Hoboken, New Jersey, the sum of Fourteen hundred and ninety-seven Dollars (\$1,497.00) on principal and interest, representing arrears on a certain mortgage covering premises aforementioned. 30

7. On or about the date of the death of the said Angelo Nobile, there was due and owing to the City of Hoboken the sum of Sixty-five Dollars and Ninety-five Cents (\$65.95) for water rents charged 40

Bill of Complaint.

against said premises known as No. 415 Grand Street, Hoboken.

8. On or about the date of the death of the said Angelo Nobile, there was due and owing to the City of Hoboken for taxes for the second half of the
10 year 1927 upon said premises the sum of One hundred and ninety-eight Dollars and Twenty Cents (\$198.20).

9. On or about the same date there was due and owing to the City of Hoboken the sum of Two hundred and ninety-four Dollars and Twenty-one Cents (\$294.21) which sum represented taxes for the year 1928.

10. Plaintiff was compelled to pay each of the
20 items mentioned in paragraphs 6, 7, 8 and 9 in order to avoid proceedings of foreclosure and sale upon the said liens; and complainant has demanded of the executors, Frank J. Bartletta and Daniel Repetti, the defendants herein, contribution equivalent to one-half of the payments made by her, but the said executors have refused to make said payment as demanded, and no part thereof has been paid by them.

30 11. From the 5th day of July, 1927, the day upon which title to the premises aforesaid were conveyed to Angelo Nobile and Jennie Nobile, the complainant herein, as tenants by the entirety, until the day of his death, said Angelo Nobile collected the rents, issues and profits of the said premises and appropriated the same to his own personal use and benefit.

40 12. No part of the rents, issues and profits collected as aforesaid have been paid to complainant

Bill of Complaint.

herein by the said Angelo Nobile during his lifetime or by the executors of the estate of said Angelo Nobile, although demand for same has been made.

13. No demand for her share of the rents, issues, and profits was made by complainant during the lifetime of her husband, due to the fact that it was mutually understood and agreed between them that the same was to be applied toward paying off principal and interest on the liens aforementioned. 10

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

(a) That Frank J. Bartletta and Daniel Repetti, executors of the Estate of Angelo Nobile, deceased, who are the defendants to this suit, may answer this bill of complaint and each statement therein made. 20

(b) That the said defendants, Frank J. Bartletta and Daniel Repetti may be compelled to pay your complainant the sum of One thousand and twenty-seven Dollars (\$1,027.00) as her contributive share of the payments made by her as aforesaid.

(c) That the defendant, Frank J. Bartletta and Daniel Repetti, may be ordered and decreed to make a full and true discovery of the rents, issues and profits collected by the said Angelo Nobile during his lifetime and appropriated by him for his use as aforesaid. 30

(d) That the said defendants, Frank J. Bartletta and Daniel Repetti, may be required to account for the rents, issues, and profits of the said premises collected by their testator, the said Angelo Nobile, from the 5th day of July, 1927, until the day of his death on September 18th, 1928, and appropriated by him for his own use as aforesaid, 40

Answer and Counterclaim.

and that they may be ordered and decreed to pay to complainant a rightful share of the moneys which may be found owing by them on such accounting.

10 (e) That complainant may have such other and further relief as the nature of the case may require.

(f) That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

MEANEY & LIFLAND,
Solicitors of Complainant.

THOMAS F. MEANEY,
of Counsel.

20

Answer and Counterclaim.

(Filed 3/4/30.)

IN CHANCERY OF NEW JERSEY.

Between

30

JENNIE REPETTI NOBILE,
Complainant,
and

FRANK J. BARTLETTA and DANIEL
REPETTI,
Defendants.

On Bill for
Accounting.

40

The answer of the above named defendants, as executors of Angelo Nobile, deceased, to the Bill of Complaint say that:

(1) They admit paragraph 1 of the Bill of Complaint.

(2) The defendants admit so much of paragraph 2 which alleges a conveyance of premises known as 415 Grand Street, Hoboken, New Jersey, to Angelo Nobile and Jennie Nobile, complainant herein, as husband and wife, but deny that the conveyance was made on or about the 5th day of July, 1927.

10

(3) They admit paragraphs 3, 4 and 5 of the Bill of Complaint.

(4) They deny paragraph 6 and say that on the 15th day of August, 1927, a building and loan mortgage and bond were made, executed and delivered to the Jefferson Building & Loan Association of Hoboken, New Jersey, by the complainant and the defendants' testate, Angelo Nobile, deceased, for the sum of \$10,000, which covers the premises held by the entirety and described as 415 Grand Street, in the City of Hoboken, in the County of Hudson and State of New Jersey; that this mortgage and bond were given to raise money in payment of part of the purchase price for said lands and premises; that on the 18th day of September, 1928 (being the date of the death of the said Angelo Nobile), there was due and owing to the Jefferson Building & Loan Association of Hoboken, New Jersey, from both the complainant and the said Angelo Nobile, deceased, the sum of \$1,397.50, consisting of the following items: As principal towards the reduction of the mortgage, \$650; as interest from August 15th, 1927, to September 18th, 1928, \$650; as premium for the same period, \$65; as fines for the same period, \$32.50.

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(5) They admit paragraphs 7, 8, 9 and 10 of the Bill of Complaint.

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Answer and Counterclaim.

(6) They admit all of paragraph 11 of the Bill of Complaint except that part which says that the said Angelo Nobile appropriated the rents to his own personal use and benefit. And say that the truth of the matter is that the said Angelo Nobile by the consent and acquiescence of his wife, the complainant herein, solely and exclusively managed and controlled the premises; that he was never fully reimbursed for some \$4,400 which he paid out of his own funds in taking title to the premises aforesaid by the entirety; that the rents collected and used by him were insufficient to reimburse himself; as he was obliged and did expend for the upkeep of the entirety property in keeping the same in repair and in a tenantable condition the sum of \$1,225.48. Besides, the complainant, out of the rents collected received from her husband, through his agent and executor, Frank J. Bartletta, the sum of \$723.27. This includes an item for a radio in the sum of \$74.00. She was to all intents and purposes overpaid, which an accounting will show.

(7) They deny the truth of the matters and things alleged in paragraph 12 of the Bill of Complaint, and say that the truth of the matter is that the complainant was paid the sum of \$723.27 either by the executor, Frank J. Bartletta, or to others at her request, both in the lifetime of the decedent and since his death.

(8) They deny the truth of the matters and things alleged in paragraph 13 of the Bill of Complaint and say that the property was managed by the decedent exclusively with her consent and acquiescence and the rents, issues and profits thereof were expended and applied as aforesaid.

WHEREFORE these defendants pray that the Bill of Complaint be dismissed with costs for the

reason that there is nothing due and owing to the complainant from the executors representing the estate of the decedent aforesaid.

COUNTERCLAIM.

By way of counterclaim against Jennie Repetti Nobile, the complainant, the defendants, Frank J. Bartletta, and Daniel Repetti, as executors of the Last Will and Testament of Angelo Nobile, deceased, say that: 10

(1) In or about the month of March, 1916, the complainant, Jennie Repetti Nobile, was married to Angelo Nobile, who departed this life on the 18th day of September, 1928.

(2) Some time prior to the 15th day of August, 1927, the complainant's husband, Angelo Nobile, had contracted to buy the house and premises known as No. 415 Grand Street, in the City of Hoboken, County of Hudson and State of New Jersey, from the estate of Julius H. Kruse, deceased for the sum of \$14,000. 20

(3) On or about the 15th day of August, 1927, the complainant's husband caused the title to the aforementioned house and premises to be conveyed by deed to himself and his wife, the complainant, as tenants by the entirety. 30

(4) The \$14,000 purchase money was all paid on the delivery of the deed; \$10,000 of it was raised jointly by the complainant with her husband on the 15th day of August, 1927, by procuring a building and loan mortgage from the Jefferson Building & Loan Association of Hoboken, New Jersey, which is still unpaid and a lien on the property. The 40

Answer and Counterclaim.

balance of the purchase price with the incidental expenses incurred at the closing of the title, which amounted to about \$4,400 was paid by the complainant's husband out of his own funds.

10 (5) Annexed hereto and made a part hereof is "Schedule A," which is a complete itemized statement of the title closing.

(6) The house and premises of the entirety estate by and with the consent and acquiescence of the complainant were solely and exclusively managed and controlled by her husband from the time of its purchase to the time of his death.

20 (7) The rents collected by the complainant's husband from the house and premises of the entirety estate and through his agent and executor, Frank J. Bartletta, from September 1, 1927, to October 1st, 1928, amount to \$1,723.84. Annexed hereto and made a part hereof is "Schedule B," showing an itemized statement thereof.

30 (8) Towards the management and control of the entirety property aforesaid, and in the preservation thereof, by keeping it in repair and in a tenable condition, the complainant's husband incurred, expended and paid, out of his own funds and estate, the sum of \$1,225.48. Annexed hereto and made a part hereof is "Schedule C," which contains an itemized list thereof.

(9) Out of the rents collected by the complainant's husband in his lifetime or by Frank J. Bartletta, his agent and executor, and also as her agent, the complainant was paid the sum of \$723.27.

40 (10) Annexed hereto and made a part hereof is an itemized list marked "Schedule D," showing

Answer and Counterclaim.

the sum of \$723.27 received by the said complainant.

(11) The complainant has not contributed or paid any part of the \$4,400 paid by the defendants' testate towards the purchase price of the house and premises bought and owned by them by the entirety; nor has she contributed or paid any part of \$1,225.48 incurred and paid by the defendants' testate and his estate for repairs towards the upkeep of the house in a tenantable condition. 10

(12) The defendants charge that the complainant has been overpaid out of the rents collected and the estate of her husband.

(13) The complainant has failed to pay off the building and loan mortgage and the bond in the sum of \$10,000 executed and delivered by her and her husband to the Jefferson Building & Loan Association of Hoboken, New Jersey, on a loan in the sum of \$10,000, which is mentioned in paragraph 4 of the answer and paragraph 4 of this counterclaim; by reason thereof the estate of the defendants' testate might become obliged to pay the same in the event of a foreclosure with a possible deficiency or insolvency of the complainant; and they cannot wind up the affairs of the estate of their testate without great prejudice to their rights, until the same is paid off by her or until they are sufficiently assured and secured by the complainant's bond of indemnity with some financially sound surety. 20 30

(14) The defendants are without an adequate remedy in the courts of law and therefore pray:

(1) That complainant may answer each and every allegation of this counterclaim. 40

Answer and Counterclaim.

(2) That an account may be taken to ascertain what money is due and owing from the complainant, Jennie Repetti Nobile, to the defendants herein; and if it be found that she owes them any money then that she be ordered or decreed to pay the same forthwith to the defendants.

10

(3) That the complainant may be ordered or decreed to pay off the building and loan mortgage and bond in the sum of \$10,000 held by the Jefferson Building & Loan Association of Hoboken, New Jersey, against the premises described in paragraph 4 of the counterclaim and in the event that she cannot do so, then, that an order or decree be made requiring complainant to substitute said mortgage lien so that the estate may be released from any liability on the bond or lien, or to indemnify the defendants by her bond with some sufficient surety against any financial loss by reason of any money deficiency arising out of a foreclosure of the mortgage lien or because of her insolvency and inability to pay the same.

20

(4) That such further relief may be awarded to the defendants that may seem reasonable and just under the circumstances.

30

(5) And the defendants will ever pray, etc.

ANTHONY P. LA PORTA,
Solicitor and of counsel with Defendants.

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Schedule "A."

August 15, 1927.

Frederick C. Kruse and Horace L. Allen, Executors under the Last Will and Testament of Julius H. Kruse, deceased, and Helen A. O. Kruse, widow of Julius H. Kruse, deceased, 10

to

Angelo Nobile and Jennie Nobile, husband and wife. Premises 415 Grand Street, Hoboken, New Jersey,

Purchase price	\$14,000.00	
Insurance	134.49	
		\$14,134.49
Deposit	\$1,400.00	
Taxes July 1 to Aug. 15, 1927	47.88	
Water rents May 12 to Aug. 15, 1927	12.15	
Rents	81.25	
Gas and Electric96	1,542.24
		\$12,592.25
Jefferson B. & L. Check	\$9,744.50	
A. Nobile check	1,962.83	
A. Nobile cash	884.92	\$12,592.25
		\$12,592.25

Jefferson B. & L. checks to A. Nobile and J. Nobile.
 Check \$ 105.50 to B. & L. Ass'n.
 " 150.00 to search etc.
 " 9,744.50 to purchase price.

Loan \$10,000.00 40
 Auctioneer fee \$100.00

Schedule "B."

RENTS COLLECTED FROM SEPT. 1, 1927 TO SEPT. 18,
1928.

415 Grand Street.

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1927.

Month	Amount
September	\$ 159.13
October	135.38
November	116.38
December	134.43
Total	<u>\$ 545.32</u>

20

1928.

January	\$ 134.43
February	134.43
March	136.33
April	118.28
May	123.03
June	135.38
July	118.28
30 August	156.28
September	122.08
Total	<u>\$1,178.52</u>
Rents collected 1927	\$ 545.32
Rents collected 1928	1,178.52
Total Amount	<u>\$1,723.84</u>

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*Answer and Counterclaim.***Schedule "C."**

EXPENSES FOR REPAIRS PAID FROM AUG. 1, 1927, TO
SEPT. 18, 1928.

Name	Amount	
Chas. Lang—Fixed a copper boiler....	\$ 6.00	
Walter Heumann—Electrician	550.55	10
Malatesta & Sons—Iron Works	67.00	
John Dato—Painter	40.00	
Hoboken Metal Ceiling Co.—Metal Ceiling	180.00	
Boitano Brothers—Carpenters	40.00	
Frank J. Bartletta—Insurance	26.00	
C. Muzzi & Company—Hardware	54.54	
Dykes Lumber Company—Lumber	4.96	
P. Giardina & Sons—Carpenter	13.96	
Charles Bach—Plumber	121.35	20
A. A. Daly, Jr.—Roofing Supplies	52.65	
Public Service Electric & Gas Co.	68.47	
	<hr/>	
Total	\$1,225.48	

Schedule "D."

RENTS PAID TO MRS. JENNIE NOBILE BEFORE AND
AFTER THE DEATH OF ANGELO NOBILE, DECEASED,
BY FRANK J. BARTLETTA, HIS AGENT AND EXECU- 30
TOR.

Mrs. Jennie Nobile (Before Death).....	\$ 50.00	
Mrs. Jennie Nobile (Before Death).....	100.00	
Mrs. Jennie Nobile (After Death).....	35.00	
Mrs. Jennie Nobile (After Death).....	35.00	
Mrs. Jennie Nobile (After Death).....	241.37	
Mrs. Jennie Nobile (After Death).....	70.00	
Mrs. Jennie Nobile (After Death).....	117.90	
Greenberg Radio—Radio (After Death)	74.00	40
	<hr/>	
Total	\$723.27	

Replication and Answer to Counterclaim.

(Filed 3/22/30.)

IN CHANCERY OF NEW JERSEY.

77—279

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Between

JENNIE REPETTI NOBILE,
Complainant,
and

FRANK J. BARTLETTA and DANIEL
REPETTI,
Defendants.

On Bill for
Accounting.

20

The complainant joins issue on the answer of the defendants.

As to the counterclaim contained in said answer the complainant says:

30

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is denied, except in so far as it alleges that \$10,000.00 of the purchase price was raised jointly by complainant with her husband, by procuring a Building & Loan mortgage.

40

5. Complainant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5.

Replication and Answer to Counterclaim.

6. Paragraph 6 is admitted. Complainant begs leave to refer to the allegations contained in paragraph 13 of her bill of complaint herein.

7. Complainant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7. 10

8. Complainant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8.

9. Paragraph 9 is denied.

10. Paragraph 10 is denied.

11. Complainant admits that she did not pay any part of \$4,400.00 paid by the defendants' testator as alleged in paragraph 11, but says that the said sum was paid by him towards the purchase price of premises, title to which was taken by complainant and her husband, as tenants by the entirety and says that title was so taken by way of gift to her. Complainant further admits that she did not contribute any part of the sum alleged to have been incurred and paid by defendants' testator for repairs toward the upkeep of the house as alleged in paragraph 11, but says that all of the rents, issues and profits of the said house were collected by said testator during his life and that if the alleged expenses for repairs so incurred as alleged were paid, that they were paid out of the money so collected by him. 20 30

12. Paragraph 12 is denied.

13. Complainant has no knowledge or information sufficient to form a belief as to the allegations 40

Joinder of Issue on the Answer of the Complainant.

contained in paragraph 13 of the counterclaim, except that she admits that the \$10,000.00 mortgage loan executed by her and her husband to the Jefferson Building & Loan Association of Hoboken, New Jersey, has not been paid.

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MEANEY & LIFLAND,
Solicitors of Complainant.

**Joinder of Issue on the Answer of the
Complainant.**

(Filed 3/25/30.)

IN CHANCERY OF NEW JERSEY.

20

77—279.

Between

JENNIE REPETTI NOBILE,
Complainant,
and

FRANK J. BARTLETTA and DANIEL
REPETTI,
Defendants.

On Bill for
Accounting.

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The above named defendants join issue on the answer of the complainant, Jennie Repetti Nobile, to the counterclaim of these defendants.

ANTHONY P. LA PORTA,
Solicitor of the Defendants.

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Order of Reference.

(Filed 4/22/30.)

IN CHANCERY OF NEW JERSEY.

77—279

<p>Between</p> <p style="text-align: center;">JENNIE REPETTI NOBILE, Complainant, and FRANK J. BARLETTA and DANIEL REPETTI, Defendants.</p>	}	<p>10</p> <p>On Bill for Accounting.</p>
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This matter being opened to the court by Meaney & Lifland, solicitors of the complainant, and it appearing that Anthony P. La Porta, solicitor for the defendants, has consented hereto: 20

It is, on this 22nd day of April 1930, on motion of Meaney & Lifland, solicitors of the complainant, ORDERED that the above entitled cause be referred to Honorable J. J. Fallon one of the Vice-Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein. 30

E. R. WALKER,
C.

I hereby consent to the entry of the foregoing order.

ANTHONY P. LA PORTA,
Solicitor of Defendants.

A true copy.

FERD GARRETSON, 40
Clerk.

Notice to Produce.

IN CHANCERY OF NEW JERSEY.

77—279

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Between

JENNIE REPETTI NOBILE,
Complainant,
and

FRANK J. BARLETTA and DANIEL
REPETTI,
Defendants.

On Bill, &c.

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To ANTHONY P. LA PORTA, Esq.,
Solicitor of the Defendants.

Sir:

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TAKE NOTICE THAT you are required to produce at the hearing of the above matter, original proof of claim entitled in the Hudson County Orphans Court, and made by the complainant herein against the Estate of Angelo Nobile, deceased, in the total sum of \$1,931.44;

AND TAKE FURTHER NOTICE that unless said paper is produced at the time and place specified, secondary evidence as to its contents will be offered.

Respectfully,

MEANEY & LIFLAND.

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Dated, September 12th, 1930.

Final Decree.

(Filed 10/9/30.)

IN CHANCERY OF NEW JERSEY.

Between

JENNIE REPETTI NOBILE,
Complainant,
and

FRANK J. BARTLETTA and DANIEL
REPETTI, Executors under the
last Will and Testament of
Angelo Nobile, deceased,
Defendants.

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On Bill for
Accounting.

This cause coming on to be heard in the presence
of Louis Bort, of the firm of Meaney and Lifland,
Solicitors of the complainant, and Anthony P.
La Porta, Solicitor of the defendants:

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AND the Court having examined the pleadings,
and having taken proofs orally and in open Court,
and having heard and considered the arguments of
counsel thereon, and being satisfied that on the
5th day of July, 1927, the complainant together
with her husband, Angelo Nobile, the defendants'
testator purchased a certain piece of property com-
monly known as 415 Grand Street in the City of
Hoboken, County of Hudson and State of New Jer-
sey, as tenants by the entirety; and that the pur-
chase price paid for the said property was Fourteen
thousand (\$14,000.00) Dollars, of which sum Ten
thousand (\$10,000.00) was raised by the execution
by both the complainant and her husband, the said
Angelo Nobile, of a purchase money bond and
mortgage to the Jefferson Building and Loan Asso-
ciation of Hoboken, New Jersey; and that the said

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Angelo Nobile died on the 18th day of September, 1928, leaving a last will and testament whereby the defendants herein, Frank J. Bartletta and Daniel Repetti were appointed executors; and that on the day of the death of the said Angelo Nobile there was due and owing to the said Jefferson Building and Loan Association of Hoboken, as arrears of principal, interest, premiums and fines, the sum of One thousand three hundred and ninety-seven Dollars and Fifty Cents (\$1,397.50), and to the City of Hoboken, Hudson County, New Jersey, as arrears of taxes and water rents chargeable against the said building and premises so held by the entirety as aforesaid, the sum of Five hundred and fifty-eight Dollars and Thirty-six Cents (\$558.36); and the Court being satisfied that the said sums totalling One thousand nine hundred and fifty-five Dollars and Eighty-six Cents (\$1,955.86) were paid by the complainant out of her own and separate estate:

AND the Court having found and being satisfied that the said Angelo Nobile, during his lifetime collected all of the rents, issues, and profits accruing from the said premises and made all necessary disbursements for repairs, and being satisfied, upon the facts being admitted in open court and from the proofs herein, that the net rents, issues, and profits so collected amounted to Four hundred and ninety-eight Dollars and Thirty-six Cents (\$498.36); and that no part thereof has been paid to complainant;

AND the Court having considered the counterclaim of the defendants and being satisfied that there were paid to complainant at divers times during the lifetime and after the death of the said

Angelo Nobile certain sums of money aggregating Seven hundred and twenty-three Dollars and Twenty-seven Cents (\$723.27), which sum includes a payment of Seventy-four Dollars (\$74.00) made on account of a radio which was bought by the said Angelo Nobile during his lifetime.

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AND the Court being of the opinion that the complainant is entitled to contribution from the estate of Angelo Nobile a sum equal to One-half of the sum of One thousand nine hundred and fifty-five Dollars and Eighty-six Cents (\$1,955.86) so paid by her as aforesaid to the Jefferson Building and Loan Association of Hoboken, and to the City of Hoboken; and that she is entitled to receive from said estate one-half of the sum of Four hundred and ninety-eight Dollars and Thirty-six Cents (\$498.36) collected by the said Angelo Nobile as rents aforesaid, amounting in all to One thousand two hundred and twenty-seven Dollars and Ten Cents (\$1,227.10);

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AND the Court being of the opinion that the aforesaid radio mentioned in the counterclaim of the defendants is the property of the estate of the said Angelo Nobile and that the claim of Seventy-four Dollars (\$74.00) made by the defendants against the complainant should be disallowed, but that the complainant should account to the defendants, as executors aforesaid, for the remaining sums paid to her as aforesaid, amounting in the aggregate to Six hundred forty-nine Dollars and Twenty-seven Cents (\$649.27), and that the said sum of Six hundred forty-nine Dollars and Twenty-seven Cents (\$649.27) should be set off against the moneys payable to the complainant as hereinabove mentioned;

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AND the Court having considered that portion of the defendants' counterclaim which seeks to compel complainant to discharge the bond and mortgage held by the said Jefferson Building and Loan Association, or to indemnify the defendants by her bond with some sufficient surety against any financial loss by reason of any money deficiency arising out of a foreclosure of the mortgage lien, and being satisfied and of the opinion that such portion of the counterclaim lacks equity;

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It is, thereupon, on this 9th day of October, 1930, ORDERED, ADJUDGED, AND DECREED that there is due and owing to the complainant from the estate of the said Angelo Nobile, deceased, the sum of Five hundred and seventy-seven Dollars and Eighty-three Cents (\$577.83).

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And it is further ORDERED, ADJUDGED AND DECREED that defendants' counterclaim in so far as it seeks to require complainant to discharge a bond and mortgage held by the Jefferson Building and Loan Association of Hoboken, or to give security to save the estate of the said Angelo Nobile harmless from any liability thereon, be and the same is hereby dismissed, and

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It is further ORDERED that no costs shall be allowed or taxed by either party against the other.

It is further ORDERED that the said defendants Frank J. Bartletta and Daniel Repetti, as executors of the estate of Angelo Nobile, deceased, within twenty days after the service upon them, or either of them, of true but uncertified copies of this decree, pay to the said complainant the sum of Five hundred and seventy-seven Dollars and Eighty-three Cents (\$577.83) due to her as afore-

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Stipulation as to Deposit.

said, and that, in default of such payment, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate held by the said defendants, Frank J. Bartletta and Daniel Repetti, as executors under and by virtue of the last will and testament of the said Angelo Nobile, directed to the Sheriff of the County of Hudson to make said sum of Five hundred and seventy-seven Dollars and Eighty-three Cents (\$577.83), according to the practice of this Court. 10

E. R. WALKER,
C.

Respectfully advised.

JNO. J. FALLON,
V. C.

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Stipulation as to Deposit.

(Filed 10/20/30.)

IN CHANCERY OF NEW JERSEY.

77—279

Between

JENNIE REPETTI NOBILE,
Complainant,
and

FRANK J. BARTLETTA and DANIEL
REPETTI,
Defendants.

On Appeal
from Decree
in Chancery.

30

It is on this 20th day of October, 1930, stipulated by and between Messrs. Meaney & Lifland, Esqs., 40

Testimony.

solicitors for the complainant-respondent in the above entitled cause, and Anthony P. La Porta, Esq., solicitor of the defendants-appellants, that the deposit of \$100, required by the rules of this Court to answer the costs of appeal, is hereby waived.

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ANTHONY P. LA PORTA,
Solicitor for Defendants-Appellants.

MEANEY & LIFLAND,
Solicitors for Complainant-Respondent.

Testimony.

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IN CHANCERY OF NEW JERSEY.

77—279

Between

JENNIE REPETTI NOBILE,
Complainant,
and

30 FRANK J. BARTLETTA and DANIEL
REPETTI,
Defendants.

On Bill, etc.

Final Hearing before Hon. JOHN J. FALLON,
Vice-Chancellor.

Chancery Chambers, Jersey City, September 16,
1930.

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Jennie Repetti Nobile—Direct Examination.

APPEARANCES:

MESSRS. MEANEY & LIFLAND, for Complainant (appearing by Mr. Louis Bort).
 MR. ANTHONY P. LA PORTA, for Defendants.

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Complainant's case.

JENNIE REPETTI NOBILE, being sworn.

Direct Examination by Mr. Bort:

Q. Mrs. Nobile, you are the complainant in this action? A. Yes, sir.

Q. The husband of Angelo Nobile? A. Yes, sir.

Q. When did he die, if you remember? A. September 18, 1928. 20

Q. At the time of Mr. Nobile's death you and he owned certain property known as 415 Grand Street, Hoboken?

The Court: There is a better way of proving that. Have you the deed here?

Mr. Bort: Yes.

By Mr. Bort:

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Q. I show you a deed between Horace L. Allen and Frederick C. Kruse, executors under the last will and testament of Julius H. Kruse, deceased, to Angelo Nobile and Jennie Nobile, husband and wife, and ask you if this is the deed under which you and your husband, now deceased, took title to the property 415 Grand Street? A. Yes, sir.

The Court: Let it be marked.

(Deed marked Exhibit C-1 in evidence.) 40

Jennie Repetti Nobile—Direct Examination.

The Court: Read the date of recording.

Mr. Bort: The deed is dated July 5, 1927 and recorded in the Hudson County Register's Office on the 16th day of August, 1927, in Book 1662 of Deeds on page 44.

10 Q. Now, Mrs. Nobile, do you know how much money was paid for this property?

The Court: How is that material?

Mr. Bort: For this reason your Honor. We understand that a certain sum of money was raised by purchase money mortgage.

The Court: Produce the purchase money mortgage and prove it.

Mr. Bort: That is admitted.

20 The Court: I cannot let this witness tell it. The deed shows what was paid. Even if it is one dollar it is sufficient for the purpose.

Mr. Bort: We don't have the mortgage before us because it was admitted in the pleadings and we thought it would dispense with the necessity of proving it.

30 The Court: You are referring to the portion of the bill which refers to the mortgage and the portion of the answer which admits it?

Mr. Bort: Paragraph 4.

The Court: That relates to what?

Mr. Bort: To a \$14,000 purchase money. \$10,000 was raised jointly by complainant and her husband.

40 The Court: It only refers to a mortgage referred to hereinabove. You had better put in the record that what you are alluding to. Paragraph 2 of the counterclaim seems to be

Jennie Repetti Nobile—Direct Examination.

the one. Paragraphs 2, 3 and 4 run together, don't they?

Mr. Bort: Yes, your Honor. Paragraph 4 states the \$10,000 purchase money mortgage, and Paragraph 4 of the replication and answer to the counterclaim admits that and we thought we could dispense with proof of that. 10

Mr. La Porta: That is so.

The Court: Paragraph 4 of the replication and answer to counterclaim says "Paragraph 4 of the counterclaim is denied in so far as it alleges that a \$10,000 purchase money mortgage was raised jointly by complainant with her husband by obtaining a building and loan mortgage." Is that the extent to which you wish to go? 20

Mr. Bort: Yes.

By Mr. Bort:

Q. To whom was the mortgage made, Mrs. Nobile—the name of the mortgagee?

Mr. La Porta: The Jefferson Building & Loan Association.

By Mr. Bort: 30

Q. Now, at the time of Mr. Nobile's death Mrs. Nobile, how much was due by way of principal and interest on that mortgage?

Mr. La Porta: If your Honor please I object to the question on the ground that the witness is incompetent to testify as to transactions had with the deceased or admissions made by the deceased. The action is 40

against Frank J. Bartletta and Daniel Repetti, as executors.

The Court: It does not say so in the bill of complaint.

10 Mr. La Porta: The subpoena says Frank J. Bartletta and Daniel Repetti, executors of the estate of Angelo Nobile, deceased. Paragraph 4 of the bill of complaint says the said Angelo Nobile left a last will and testament dated May 20, 1928, by the sixth clause of which Frank J. Bartletta and Daniel Repetti, the defendants herein, were appointed executors, and the said Frank J. Bartletta and Daniel Repetti have taken upon themselves the burden of the execution of the estate of the said Angelo Nobile, de-

20 ceased.

The Court: Is this suit against the executors or against the individuals?

Mr. La Porta: Again the executors.

The Court: It is not so endorsed. All the way through it looks as though it is against the individuals. If it is against the executors how can you prove by this witness anything relating to a transaction with the decedent?

30 Mr. Bort: My question did not apply to any transaction with the deceased.

The Court: What is your name?

Mr. Bort: Mr. Bort.

The Court: Why don't you produce the papers from the records?

Mr. Bort: I intended to bring out the questions which were admitted in the pleadings.

The Court: He is objecting to a question.

40 Mr. Bort: I asked this witness how much

Jennie Repetti Nobile—Direct Examination.

was due on the mortgage. It don't relate to a transaction with the deceased.

The Court: Isn't that so? Suppose there was a mortgage of \$10,000 and four or five thousand dollars paid. How can that hurt?

Mr. La Porta. It is a transaction with the deceased. 10

The Court: I will allow it.

By Mr. Bort:

Q. Do you know how much was due by way of principal and interest on that mortgage to the Jefferson Building & Loan Association by the mortgagors on the date of Mr. Nobile's death?

Mr. La Porta: Now that mortgage is a joint mortgage as I understand it between her and Mr. Nobile, deceased. Now she is relating to a transaction with a decedent. 20

The Court: I will admit it.

Mr. La Porta: Allow me an exception.

The Court: It is a matter of record.

By Mr. Bort:

Q. Do you know how much was due? A. \$1,882.50. 30

Q. Due as of September 18th, the date of Mr. Nobile's death?

The Court: You asked her at the time of his death.

By Mr. Bort:

Q. Does that \$1,882.50 represent the amount due at the date of his death? A. Yes. 40

Jennie Repetti Nobile—Direct Examination.

Q. Now, Mrs. Nobile, I show you here a check dated November 20th drawn by yourself to the order of Jefferson Building & Loan Association in the sum of \$1,882.50, dated November 20, 1928, and ask you whether or not that was the check which you sent to the Jefferson Building & Loan

10 Association? A. Yes, sir.

Q. Now, notice the date on the check, November 20, 1928. Does that amount represent the amount due as of that date or as of the date of the death of Mr. Nobile?

The Court: Isn't there a better way of proving that by producing the bond and mortgage itself or getting the records of the association?

20 Mr. La Porta: You see your Honor this is a building and loan mortgage and there are penalties and fines and interest, and this witness is looking for an accounting.

The Court: They are both responsible to the building and loan association.

Mr. La Porta: Yes, they are, but the witness takes the estate with the burden.

The Court: What do you mean she takes it with the burden?

30 Mr. La Porta: With the mortgage.

The Court: I gather from the pleadings this mortgage was made by her and her husband, and she is trying to get from her husband's estate—

Mr. La Porta: She is attempting to collect from the estate moneys with interest which accrued on a mortgage.

The Court: She and her husband executed a bond and mortgage.

40 Mr. La Porta: Yes, in the purchase of this property.

Jennie Repetti Nobile—Direct Examination.

The Court: They have been called upon to pay it. She paid it, didn't she?

Mr. La Porta: So I understand.

The Court: And she is looking to the other party on the bond, or his representatives, to pay her one-half of that?

Mr. La Porta: Yes.

10

The Court: I will admit it.

By Mr. Bort:

Q. I show you a book made in the name of Angelo Nobile and Jennie Nobile in an account with the Jefferson Building & Loan Association of Hoboken, New Jersey. Can you tell me what this book represents?

The Court: She cannot tell you any more than we can by looking at it. I will overrule it.

20

Mr. Bort: I will offer the book in evidence.

Mr. La Porta: It is very voluminous.

Mr. Bort: If your Honor please there seems to be an objection to everything we offer.

The Court: It is a lawyer's privilege. Show it to him.

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Mr. Bort: The peculiar part of it all these payments were admitted in the answer.

The Court: You can simplify this matter as you go along if you call attention to the paragraphs. If there is anything in the pleadings of the defendants which admits the items bring it out.

Mr. Bort: Paragraph 6 of the bill of complaint says that on or about the date of the

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10 death of Angelo Nobile, deceased, there was due and owing to the Jefferson Building & Loan Association of Hoboken, New Jersey, the sum of \$1,497.00 of principal and interest, representing arrears on a certain mortgage covering the premises aforementioned. Now before we go any further I wish to ask an amendment to change it to \$1,370.00.

The Court: You can't object to that Mr. La Porta. How much?

Mr. Bort: \$1,397.50.

The Court: Instead of \$1,497.00 it is now \$1,397.50.

20 Mr. Bort: Yes. Paragraph 7 reads that on or about the date of the death of said Angelo Nobile there was due and owing to the City of Hoboken the sum of \$65.95 for water rents charged against the said premises known as 415 Grand Street, Hoboken. Paragraph 8 reads that on or about the date of the death of said Angelo Nobile there was due and owing to the City of Hoboken for taxes for the second half of 1927 on said property the sum of \$198.20. Paragraph 9 reads there was due and owing to the City of Hoboken the sum of \$294.21, which sum represented the taxes for the year 1928. Now
30 paragraph 10 reads that complainant was compelled to pay each of the items mentioned in paragraphs 6, 7, 8 and 9 in order to avoid proceedings of foreclosure and sale upon said liens and complainant has demanded of the executors Frank J. Bartletta and Daniel Repetti, the defendants herein, contribution equivalent to one-half of the
40 payments made by her, but said executors

have refused to make said payment as demanded and no part thereof has been paid. Now, if we will turn to their answer, paragraph 5 of their answer —

The Court: Take paragraph 4 first.

Mr. Bort: I am referring to paragraph 5 in which the defendants say they admit paragraphs 7, 8, 9 and 10 of the bill of complaint. 10

The Court: All right. What about paragraph 6. You are skipping that.

Mr. Bort: That is the only item which is not admitted.

The Court: They deny that?

Mr. Bort: Yes, and I assume it is because \$1,497.00 was due. As a matter of fact paragraph 4 of their answer says that the sum should have been \$1,397.50. That is the reason they deny it. 20

The Court: Yes, they say \$1,397.50.

Mr. Bort: So you see your Honor each of the items is admitted as well as the fact that payment was made by this complainant here. I intended to point it out when Mr. La Porta interrupted in the beginning. These admissions done away with the necessity of producing proof to establish those allegations. 30

The Court: Try your case in your own way, if you think it does.

By Mr. Bort:

Q. Now, Mrs. Nobile, during the period of Mr. Nobile's lifetime and after this property was bought, who managed the property?

Mr. La Porta: If your Honor please again that is touching upon transactions with the deceased. 40

Jennie Repetti Nobile—Direct Examination.

The Court: I don't know whether it is or not.

10 Mr. La Porta: I object to that question on the further ground that the complaint states that Angelo Nobile, deceased, husband of this complainant, solely and exclusively managed the property and looked after it.

The Court: Is that in the bill of complaint?

Mr. La Porta: Yes, sir.

The Court: Paragraph what?

Mr. La Porta: I allege that in my count-reclaim and they admit it.

Mr. Bort: We will admit it at this time.

20 The Court: During the lifetime of Mr. Nobile he managed and conducted the property?

Mr. Bort: And controlled the property.

The Court: What do you mean by controlled the property?

Mr. Bort: That he made the necessary repairs and hired men to do it.

By Mr. Bort:

30 Q. During the lifetime of Mr. Nobile did you receive from Mr. Nobile any sums of money as your share of the rentals?

Mr. La Porta: Again I object as relating to a transaction with the deceased.

The Court: I will overrule your objection. Am I expected to take an accounting between the parties? If so I will refer it to a Master. If there are any legal questions involved—

40 Mr. Bort: There are some legal questions pointed out. The executors admit they

Jennie Repetti Nobile—Cross Examination.

have managed the estate since the decedent's death, and if it can be shown the wife is entitled to her share of the rents—

The Court: I will receive it.

By Mr. Bort:

Q. Have you received any such rents? A. No, sir. 10

Q. Have you received any such rents from the executors since the time of his death? A. Well, just for mourning clothes.

Q. Have you received any rent from the property? A. No, sir.

By the Court:

Q. Did you receive any of the rents of the property during the lifetime of your husband while the property was owned by you and him? A. No, your honor. 20

Cross Examination by Mr. La Porta:

Q. I show you Schedule D, annexed to the answer and counterclaim, and ask you whether or not you didn't receive \$723.27, as set forth in the schedule, from the executors? A. I received the seven hundred. 30

By the Court:

Q. Look at it closely and be careful of your answer. You can read, can't you? A. Yes.

Q. Then read it carefully. A. For household.

Q. What do you mean by household? Why should Mr. Bartletta pay you money before your husband's death, do you know? A. Because he handled his estate and he was the agent for it. 40

Jennie Repetti Nobile—Cross Examination.

Q. You mean he collected the rents? A. Yes. Mr. Nobile was in the hospital at the time.

Q. Now this Schedule D, the first item, indicates apparently, according to the reading matter at the head of it, that Mr. Bartletta as an executor of your husband's estate paid to you before his death \$50.00 at one time and \$100.00 at another time? A. Before his death, yes, sir.

Q. What was that paid to you for?

Mr. La Porta: I am not asking that now. I am asking whether or not she received that money.

By Mr. La Porta:

Q. Did you receive \$723.27? A. I can't make out the 117.

Q. I show you a check #124, dated July 19, 1928, drawn to your order in the sum of \$50.00, by Angelo Nobile, through Frank J. Bartletta, attorney, and ask you whether you received that check? A. Yes, sir.

The Court: Let it be marked for identification.

(Check marked D 1 for Identification.)

By Mr. La Porta:

Q. I show you check #92, dated June 7, 1928, to your order in the sum of \$100.00? A. Right.

Q. Made by Angelo Nobile, through his attorney Frank J. Bartletta, and ask you if you received that check? A. Yes, sir.

The Court: Let it be marked.

(Check marked D 2 for Identification.)

The Court: Is it your claim, Mr. La Porta, that these moneys represented by Schedule D were paid out of the rents or some other personal property?

Mr. La Porta: Out of the rents held by the entirety.

The Court: Not out of the personal property of the decedent? 10

Mr. La Porta: No, out of the rents.

The Court: Did Mr. Bartletta have in his possession any other moneys belonging to the decedent other than the rents?

Mr. La Porta: Yes, he managed other property as well as this property.

The Court: You will have to prove this particular money came out of this particular property. 20

Mr. La Porta: Yes.

The Court: She would be entitled to a certain portion of his property.

Mr. La Porta: Mr. Bartletta during the lifetime of the decedent was the manager of his estate and after his death took care of the collection of rents.

The Court: Let me ask you. Do you expect to show the items as to the amounts he paid out? If so I will refer it to a Master. 30

Mr. La Porta: I see the point; but it will not take very long.

By Mr. La Porta:

Q. I show you check #27, dated November 2, 1928 to the holder in the sum of \$35.00, made by the estate of Angelo Nobile, deceased, drawn by Frank J. Bartletta and Daniel Repetti, executors, and ask you if you got that check? A. Yes, sir.

Jennie Repetti Nobile—Cross Examination.

The Court: Let it be marked.
(Check marked D 3 for Identification.)

By Mr. La Porta:

10 Q. I show you another check #30, dated October 11, 1928, in the sum of \$35.00, made by the estate of Angelo Nobile, deceased, by Frank J. Bartletta and Daniel Repetti, executors, and ask you if you got that check? A. Yes, sir.

The Court: Let it be marked.
(Check marked D 4 for Identification.)

By Mr. La Porta:

20 Q. I show you another check #19, dated November 20, 1928, in the sum of \$241.27, drawn by the estate of Angelo Nobile, deceased, Frank J. Bartletta and Daniel Repetti, executors. Did you get that money? A. Yes, sir.

The Court: Let it be marked.
(Check marked D 5 for Identification.)

By Mr. La Porta:

30 Q. I show you check #18, dated November 20, 1928, in the sum of \$70.00, drawn to your order by the estate of Angelo Nobile, deceased, Frank J. Bartletta and Daniel Repetti, executors. Did you get that check or the money represented by the check? A. Yes, sir.

The Court: Let it be marked.
(Check marked D 6 for Identification.)

By Mr. La Porta:

40 Q. I show you check #17, dated November 20, 1928, in the sum of \$117.90, by the estate of Angelo

Jennie Repetti Nobile—Cross Examination.

Nobile to your order, drawn by the executors of the estate, and ask you whether you got that check?

A. Yes, sir.

The Court: Let it be marked.
(Marked D 7 for Identification.)

10

By Mr. La Porta:

Q. Now I show you check #103, dated June 21, 1928, drawn by the executors of Angelo Nobile, deceased, to the order of Greenberg Radio in the sum of \$74.00, and ask you whether that wasn't paid for the account of a radio which you claim to be the owner of? A. No, sir. Not for my own.

Q. It wasn't paid for your account? A. No, sir.

Q. Isn't this the radio you claim is your property in your claim against the estate? A. That radio was bought by Mr. Nobile and he was supposed to pay for it.

20

Q. And there was \$74.00 owing? A. Paid monthly. There was some payments and the rest I paid.

Q. To get a clear title to the radio you paid \$74.00?

The Court: If it was paid by somebody else she wouldn't have to pay it.

Mr. La Porta: This radio was a debt of Mrs. Nobile?

30

The Court: She said her husband bought it.

By the Court:

Q. Who bought the radio? A. My husband bought it.

The Court: If the husband bought it it is a debt of the husband's.

40

Jennie Repetti Nobile—Cross Examination.

Mr. Bort: In speaking with Mrs. Nobile she told us she paid \$291.00 toward the radio and she held it as a piece of family furniture, but it was her husband's.

The Court: She answered it by saying her husband bought it.

10

By Mr. La Porta:

Q. Now since the making of this deed in the entirety to you and your husband, which deed was dated July 5, 1927, down to the time of the death of your husband—You say he died September 18, 1928? A. Yes, sir.

Q. Making it a period of a little over two years, you never managed this property? A. Never.

20

Q. You never controlled it? A. No.

Q. Never had anything to do with it? A. Never.

Q. And Mr. Bartletta— A. Had all to say.

Q. While your husband was living, and since? A. And since.

Q. And whatever repairs were made you knew nothing about? A. All I know he wired the place.

Q. But whatever repairs were made you knew nothing about them? You didn't hire the men to make the repairs? A. No, sir.

30

Q. You didn't bother with that end of it at all? A. No, it was left all to him.

Q. You left it all to Mr. Bartletta and to Mr. Nobile? A. Right.

Q. And whatever moneys were paid out for repairs by Mr. Bartletta or by your husband you knew nothing about it? A. No.

Q. And whatever rents were collected by Mr. Nobile for your husband in his lifetime or since his death you knew nothing about? A. No.

40

Q. Now after Mr. Nobile died you allowed Mr.

Bartletta to continue to collect the rents for you, didn't you? A. At 415?

Q. This entirety estate. This property. You allowed him to collect it? A. I had nothing to say.

By the Court:

Q. He has continued to collect the rents. He is asking you whether you permitted him. A. I had nothing to say.

10

By Mr. La Porta:

Q. Nothing to say at all? A. No.

By the Court:

Q. What do you mean by that? Under the law when your husband died the property belonged to you. A. Why, I say that because when I went down to get my weekly maintenance or allowance—

20

Q. After your husband's death or before? A. After. Before I got it. That is why he has these checks against me. After that he said the Surrogate stopped him.

By Mr. La Porta:

Q. After your husband died Mr. Bartletta, the executor of the estate sent you a number of checks? A. Yes.

30

The Court: You knew Mr. Bartletta as executor had nothing to do with the property against her will.

Mr. La Porta: He had a perfect right to advance moneys.

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The Court: He had no right as executor. He did not control that property.

Mr. La Porta: Not this property, but with her acquiescence and consent it went on.

10 The Court: He has evidently been the agent and collecting the rents. Nobody is disputing that.

Mr. Bort: I have not objected to this line of testimony, but the testimony as to the payments I object to unless the defendants can tie it up with the fact that these moneys were paid out of the rents collected of the porperty.

20 The Court: I suppose they are going to show that. I see an exhibit annexed to the answer and counterclaim. It shows from September, 1927 to September, 1928 rents collected \$1,723.84. That is Schedule B. Schedule C indicates a lot of items which are listed under the heading "Expenses for Repairs Paid From Aug. 1, 1927 to Sept. 18, 1928", and they aggregate \$1,225.48. Then Schedule D contains a statement
30 "Rents Paid to Mrs. Jennie Nobile Before and After the Death of Angelo Nobile, Deceased, By Frank J. Bartletta, His Agent and Executor", and there are two items aggregating \$150.00 which are said to be before death, and the other items making up the sum of \$723.27 read after death. Now the record shows this situation so you need not lose much time.

Mr. Bort: I would like to question Mrs. Nobile as to—

40 The Court: He is not through with her yet.

By Mr. La Porta:

Q. Now, Mrs. Nobile, with reference to the payments on the bond and mortgage by you and your husband, you never paid a cent on that bond and mortgage during the lifetime of your husband, did you? A. No, sir. 10

Q. And you never paid a cent for taxes or water rents or anything towards the maintenance of this property during the lifetime of your husband, did you? A. The building and loan will show I did.

Q. During the lifetime, yes or no, while your husband was living? A. No, it was in arrears thirteen months.

Q. On this building and loan mortgage a certain amount of money which wasn't paid you claim was how much? 20

Mr. Bort: \$1,397.50.

The Court: Unless it is to be conceded that that bond and mortgage was signed by both of these parties you had better offer them.

Mr. Bort: Yes, it is conceded.

Mr. La Porta: I will concede that your Honor.

The Court: All right. 30

By Mr. La Porta:

Q. Now the main part was by way of fines, penalties and interest, was it not?

The Court: I will overrule that because the books will show it.

Mr. Bort: If your Honor please we admit that. 40

Jennie Repetti Nobile—Re-direct Examination.

Mr. La Porta: I have set that out in detail how it was paid.

Mr. Bort: Paragraph 4 of the answer.

10 Mr. La Porta: Yes, your Honor. That statement was secured from the building and loan association. \$650.00 as principal towards the reduction of the mortgage; \$650.00 was paid as interest from August 15, 1927 to September 18, 1928; then \$65.00 was paid as premium for the same period; and then \$32.50.

The Court: The \$32.50 was fines?

Mr. La Porta: Yes. So they make a total of \$1,397.50, and they admit it was paid in that manner.

Mr. Bort: Yes.

20

Re-direct Examination by Mr. Bort:

Q. Mrs. Nobile, these items which Mr. La Porta just showed you are contained in Schedule D. Now I call your attention first to the third and fourth items of \$35.00 each. When those two items were paid to you by Mr. Bartletta did he mention the fact they were paid to you on account of the rents received from 415 Grand Street? A. No, it was
30 the weekly allowance for the family and I.

Q. For family expenses? A. Yes, sir.

Q. Now, I call your attention to the item for \$241.37, and ask you whether at the time when that was paid any mention was made of the fact that was paid to you out of the rents of the property which is under consideration here? A. No, sir.

40 Q. At the time the check was paid to you in the sum of \$70.00, as indicated in item 6, was any mention made to you of the fact that it came out of the rents? A. No, that was the weekly allowance.

Jennie Repetti Nobile—Re-cross Examination.

The Court: What's the difference? She was not entitled to any money for living expenses. The executor had no right to give it to her for any such purpose without taking proceedings in the Orphans Court.

By Mr. Bort:

10

Q. With reference to the item of \$241.37, item 5, for what purpose was that sum given you? A. For mourning clothes for myself, and for Mr. Nobile's burial clothes.

Q. That was given to you for Mr. Nobile's burial clothes and for mourning clothes for yourself? A. Yes, sir.

Q. Out of that sum do you remember how much you paid for Mr. Nobile's burial clothes? A. Mr. Bartletta has the receipts for them.

20

Q. You don't remember? A. No, I gave him all the receipts.

Q. Do you remember for what purpose these items of \$70.00 and \$117.90 were given you? A. For the weekly allowance. One week he gave me \$117.90.

Re-cross Examination by Mr. La Porta:

Q. Were any children born between you and Angelo Nobile, deceased? A. No.

30

Re-direct Examination by Mr. Bort:

Q. Are you the first wife of Mr. Nobile? A. The third.

Q. And do you know whether or not he had any children born of the other two? How many children were there? A. Two from the first and five from the second, which I took care of.

40

Jennie Repetti Nobile—Re-direct Examination.

- Q. And two were under the age of twenty-one?
A. They were all under age. From five to twelve and a half.
- Q. I mean at the time of his death? A. Yes, two.
- 10 Q. And they lived where? A. With me.
- Q. Where? A. 1106 Garden Street.
- Q. And have they any separate income of their own so far as you know? A. No, they have been working.
- Q. Were they all boys or girls, or some of each?
A. Two girls and two boys.
- Q. And were the girls working? A. One.
- Q. And the other was not? A. No.
- Q. And all these items which were paid to you after Mr. Nobile's death and mentioned in Schedule
- 20 D were they paid to you for family expenses and running the household? A. Yes, sir.

Mr. Bort: No further questions. Complainant rests.

Defendants' Case.

Mr. La Porta: I now offer the defendants' exhibits in evidence.

- 30 Mr. Bort: If your Honor please I object to receiving those exhibits in evidence unless counsel for the defendants can show that those items came out of the rents. At least so far as the two checks which are alleged to have been paid prior to the death are concerned.

The Court: I will sustain the objection.

FRANK J. BARTLETTA, being sworn.

Direct Examination by Mr. La Porta:

Q. Mr. Bartletta, I show you Schedule D, and ask you whether the items therein mentioned, which amount to \$723.27, are represented by these checks which have been marked for identification? A. Yes. 10

The Court: I observe the \$74.00 check was not marked.

Mr. La Porta: Then I ask the \$74.00 check be marked for identification.

(Marked D 8 for Identification.)

Q. In the lifetime of Mr. Nobile, Mr. Bartletta, were you collecting the rents, issues and profits of the property in question? A. Yes. 20

Q. And were you doing that by authority of Angelo Nobile, deceased? A. Yes, sir.

Q. And did you manage this property for Angelo Nobile? A. I did.

Q. And did you take care of the repairs and the renting of the premises as well? A. Yes, sir.

Q. And did you collect all the rents? A. I did.

Q. When did you stop collecting the rents? A. About four or five months ago. 30

Q. Now, I show you Schedule B, annexed to the answer, and ask you if those are the rents collected by you for the period therein set forth? A. Yes, sir.

Q. And is the total amount for rents collected by you from September 1, 1927 to September 18, 1928 as stated in the sum of \$1,723.84 correct? A. Yes, sir.

The Court: No dispute about that is there? 40

Mr. Bort: I don't see how we can dispute it.

By Mr. La Porta:

10 Q. Now I show you Schedule C, which shows expenses for repairs paid from August 1, 1927 to September 18, 1928, and ask you whether or not you or the decedent expended the total sum of \$1,225.48? A. It was partly by cash by Mr. Nobile and partly by check by myself.

Q. For the repairs? A. Yes, sir.

The Court: You will have to prove those items.

Mr. La Porta: Yes.

20 Q. Were those repairs made? A. Yes.

Q. At whose request were those repairs made? A. Mine and Mr. Nobile's.

Q. What do you mean by mine? A. He asked me to have the work done, and I had it done.

Q. Then you have personal knowledge of those items? A. Yes, sir.

Q. And all that money was paid out? A. Yes, sir.

30 The Court: You will have to prove that in another way. The reason I say that they have indicated you have the items here. I don't know whether they are disputing them particularly.

Mr. Bort: If your Honor please if Mr. La Porta will let me look at one or two of them?

Mr. La Porta: I have got them all here.

40 Mr. Bort: We admit the items to save the time of the court.

The Court: Do you admit those moneys were paid by Mr. Bartletta out of these rents?

Mr. Bort: Or by Mr. Nobile.

The Court: Out of the rents of this property?

Mr. Bort: Yes.

10

By Mr. La Porta:

Q. Were these all necessary—

The Court: They are not disputing it.

Mr. La Porta: All right.

Q. Now you say \$723.27 was advanced to Mrs. Nobile during the lifetime of her husband while he was sick and after his death as well? A. As well. Both before and after.

20

Q. And Schedule D, which represents \$723.27, was that paid out to Mrs. Nobile, the complainant herein? A. Yes, sir.

Q. Now will you explain to us the circumstances under which you as agent for Nobile advanced \$74.00 in payment of that radio? A. Mrs. Nobile came to me I believe during Mr. Nobile's illness—

Q. What's that? A. She came to us after Mr. Nobile's death and said that Mr. Greenberg had called up and wanted a check for the radio. I said "All right, I will issue a check out of Mr. Nobile's account", and I did, and gave it to her for \$74.00.

30

Q. And when you issued the check out of Mr. Nobile's account what account did you have reference to? A. There was only one account. The account for the rents.

By the Court:

Q. Rents of what property? A. All of this property.

40

Q. Then you had the rents of 415 Grand Street commingled with the rents of some other property owned by Mr. Nobile? A. Yes, it was all owned by him.

10 The Court: This 415 was not owned by him alone?

Mr. La Porta: No, by the entirety. There is no dispute about that.

The Court: She was entitled to half of the rents as well as him.

By Mr. La Porta:

Q. Now will you tell us the circumstances under which check No. 92 in the sum of \$100.00 was paid to her? A. She must have wanted \$100.00 and we
20 gave it to her.

By the Court:

Q. That was before the death? A. Yes.

Mr. La Porta: We put in a counterclaim for this your Honor.

The Court: She is not disputing the receipt of these moneys?

30 Mr. La Porta: She doesn't want to allow for them.

The Court: Is that so?

Mr. Bort: We claim they are not properly to be deducted from her share of the rents to which she may be entitled because of the fact that as we claim these two items of \$50.00 and \$100.00 were family expenses and during his lifetime he was in duty bound to support her, and she testified they did
40 not come out of the rents of the property.

The Court: But the checks were to her order.

Mr. Bort: Yes, your Honor. They cannot collect from her these sums of \$50.00 and \$100.00 if they were given to her by her husband as family expenses.

The Court: The checks were from Mr. Bartletta to her. Let her explain what disposition she made of them. If she used moneys given to her for family expenses it is her business. 10

Mr. Bort: Then do I understand Mr. Bartletta to say that they came out of the rent account for 415?

The Witness: They came out of the rents.

The Court: He says that all the rents he handled for Mr. Nobile were put together and he didn't segregate one from the other. All those checks came from the one fund. 20

Mr. Bort: Then I submit they cannot charge it against the account.

The Court: Whatever she did with it is something for you to explain.

By Mr. La Porta:

Q. Now check No. 124. What was that given to her for? A. Given to Mrs. Nobile. All these checks. I can explain one of them or all of them at once. 30

Q. Go ahead. A. All of these checks were given to Mrs. Nobile whenever she came to the office and asked for money.

By the Court:

Q. That was after the death? A. Yes. Every 40

time she asked for \$35.00 and \$50.00 I gave her a check up until I was stopped.

The Court: That money after her husband's death belonged to her she was getting from Mr. Bartletta.

10 Mr. Bort: Yes, of course.

The Court: Then there is no dispute about those items.

Mr. Bort: No.

The Court: From what she said they are attempting to say they are for household expenses.

Mr. Bort: Yes.

The Court: They can't do that.

20 By Mr. La Porta:

Q. Did you take it out of that account? A. That was the only account.

Q. And at that time you hadn't settled what was due her? A. No.

30 The Court: She was no more entitled to moneys from the executors two weeks after the death than today for running the house. She could have applied to the Orphans Court.

Mr. Bort: If your Honor please perhaps we can obviate a lot of this testimony. As I understand it these people are only count-erclaiming for moneys paid to the witness.

40 The Court: You are claiming these men received as rents from this property an aggregate sum of money. They admit that and say out of that money we paid over to this lady so much.

Mr. Bort: They say it was paid out after his death. You couldn't properly argue that it came out of the rents collected prior to that time.

The Court: No, prior; because the proofs before me show he continued subsequently to collect the rents. He was collecting them and turning them over to her. Anything collected subsequent to the death belonged to her. 10

Mr. Bort: May I ask on what theory they are counterclaiming?

The Court: Wait until the case is over.

Mr. La Porta: We are accounting here for the rent and show what we are entitled to by way of counterclaim. 20

By the Court:

Q. He died September 18, 1928, did he? A. Yes.

Q. Any moneys you collected subsequent to September 18th belonged to this woman and you can't ask for any allowance from the estate. A. All the moneys collected from this property since the date of his death has been turned over to her. In addition to that all these other moneys have been turned over to her before and since his death. 30

Q. Do you mean you paid over to her all the moneys collected from this property 415 Grand Street as rents and in addition that you gave her these checks you are referring to? A. Yes, sir.

By Mr. La Porta:

Q. Were all the checks given to her by you at her request? A. Absolutely. 40

By the Court:

Q. Why did you give her these moneys unless you considered the fund belonged to the estate of the decedent? Why did you give her those moneys other than the rents? A. She had to have money
10 to run the house.

Q. She had the rents? A. I gave it to her as she came and asked for it.

The Court: It seems to me she got the money and has to account to him for it. Suppose she didn't get it from Mr. Bartletta from these rents but she did get it. Now he has a right to sue for money had and received.

20 Mr. Bort: Yes, but in the Court of Chancery—

The Court: We are looking for substance. If she owes him \$723.27 do you mean to say I am going to put her out of this Court and allow her to go to a law court?

Mr. Bort: I have been waiting for an opportunity to ask Mr. Bartletta a question.

Mr. La Porta: Take the witness.

30 Cross Examination by Mr. Bort:

Q. Mr. Bartletta, you have testified Mr. Nobile owned several pieces of property prior to his death?

A. Yes, sir.

Q. And included in that property was a piece which he owned in entirety? A. Yes.

Q. Were you the agent for all these properties? A. Yes.

40 Q. Did you keep separate accounts of the rents collected from all these properties? A. No, sir.

By the Court:

Q. Where is your rent book? Your rent book should show how much money you received from each property. A. Here is what we received from the time the house was purchased.

Q. Of this property? A. Yes, Schedule B. 10

Q. Haven't you got a book which will show how much money was collected from the tenants of one house and tenants from another? A. The only one we were concerned in was this one and I took a page from that book and put it in here.

By Mr. Bort:

Q. Do you know what the two items of \$35.00 in Schedule D was paid for? A. At the death?

Q. Yes. A. At her request. 20

By the Court:

Q. Won't your books show what that was paid for? A. Advanced to Mrs. Nobile at her request.

Q. Haven't you your books here? A. No.

Q. We will adjourn until two o'clock and you can produce your books. You keep books, don't you? A. I will have to get Mr. Baker the accountant here.

Mr. La Porta: What is the question? 30

Mr. Bort: Will counsel stipulate that the amount of \$241.37 was paid for a mourning outfit for the deceased?

Mr. La Porta: I will say it was allegedly applied.

Re-direct Examination by Mr. La Porta:

Q. Were those for personal use? A. She is in a better position to explain it than I am. 40

The Court: Suppose we take a recess until two o'clock and let your adversary see the bills. She said she sent him the bills. We may save time.

10

Afternoon Session.

FRANK J. BARTLETTA, recalled.

Re-direct Examination (Continued) by Mr. La Porta:

Q. I show you Schedule A, the closing sheet, and ask you does that show the purchase price of the property? A. Yes.

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The Court: How is that material?

Mr. La Porta: The decedent laid out the entire purchase price—or at least the cash on the purchase price.

The Court: You mean Nobile?

Mr. La Porta: Yes.

30

Mr. Bort: The purpose of this testimony is to show that the testator paid \$4,000 cash towards the purchase of this property and that thereby the estate is entitled to be reimbursed to the extent of one-half of that. If that is the purpose then I am going to object to it.

The Court: You are not attempting to show that?

Mr. La Porta: I am attempting to rebut, your Honor.

The Court: All right.

40

By Mr. La Porta :

Q. Now, he paid \$14,000?

The Court: What has that to do with it? What does this witness know that about?

10

Mr. La Porta: We have checks here—to save time.

Mr. La Porta: He can't testify to that. Checks from whom?

Mr. La Porta: On the closing.

The Court: What does this witness know about it?

Mr. La Porta: He is looking after Nobile's—

The Court: If he is going to read something from a schedule which we have before us we can do that.

20

By Mr. La Porta :

Q. Have you any knowledge of the purchase price?

The Court: Excepting what you were told. You know a contract was entered into but you were not there?

30

The Witness: I was there when the \$14,000 was paid.

The Court: There is no dispute the purchase price was \$14,000?

Mr. Bort: No.

Mr. La Porta: There is no dispute that all the cash was advanced by Mr. Nobile?

Mr. Bort: We admit that in our pleadings.

40

The Court: They admit that but nevertheless they claim you can't claim any of it. You are claiming it must be regarded as a gift to her?

Mr. Bort: Yes.

10 The Court: The burden is on Mr. La Porta to show it is not a gift.

Re-cross Examination by Mr. Bort:

Q. Mr. Bartletta, you testified before lunch hour that this sum of \$723.27 was not paid out of the rents collected from 415 Grand Street? A. I don't believe I testified to that effect.

Q. Didn't you say all the rents which were collected after the death of Mr. Nobile were paid to Mrs. Nobile? A. Yes.

20 Q. And that the \$723.27— A. Exclusive of that.

Q. So that \$723.27 does represent rents collected out of 415? A. Except the two checks.

Q. Which checks? A. The first two.

Q. For \$100.00 and \$50.00? A. Yes.

Q. Mr. Bartletta, when you were served with the subpoena in this matter did you turn the matter over to Mr. La Porta, your solicitor here? A. Yes.

30 Q. And did he consult you with reference to the defenses to be made to this action? A. No. He consulted me with regard to the expenses and checks and everything we had showing the money we paid out and received.

Q. And when you decided to include in your counterclaim a demand for \$723.27 did you tell Mr. La Porta under what circumstances those sums were paid? A. I gave him the checks that I gave Mrs. Nobile by her request.

40 Q. Did you tell him those sums came out of the

rents collected from 415 Grand Street? A. Yes, sure.

Q. And do you know whether or not he incorporated in his answer and counterclaim a statement to the effect that this \$723.27 came out of the rents of 415 Grand Street? A. I read the answer but I don't remember the language.

10

Mr. Bort: It is a matter of record, your Honor. I am asking this question to attack the credibility of this witness.

The Court: There is no statement in Schedule D it came out of the rents of that property.

Mr. Bort: Paragraph 6 of the answer says, the second line from the last sentence—"Besides, the complainant, out of the rents collected received from her husband, through his agent and executor, Frank J. Bartletta, the sum of \$723.27." If that leaves any doubt in your Honor's mind—

20

The Court: With the exception of the two items which were paid before death she would be entitled to all of the rents.

Mr. Bort: But he changed his testimony and said they didn't come out of that.

The Court: He says he turned over to her all of the rents since the death.

30

Mr. Bort: But he says the \$723.27 did not come out of the rents of this property.

The Court: He said that \$723.27 was exclusive of the rents.

Mr. Bort: Paragraph 9 of the counterclaim your Honor—

The Court: It says—"Out of the rents collected by the complainant's husband in his lifetime or by Frank J. Bartletta, his

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agent and executor, and also as her agent, the complainant was paid the sum of \$723.27."

Mr. Bort: Also as her agent. They are trying to counterclaim for rents collected out of the property as her agent as well.

10

By Mr. Bort:

Q. Mr. Bartletta, as one of the executors of the estate of Angelo Nobile, deceased, did you receive from Meaney & Lifland, representing Mrs. Nobile, a certain proof of claim claiming among other things a radio?

Mr. La Porta: That is admitted.

20

By Mr. Bort:

Q. And you filed a notice disputing that claim?

Mr. La Porta: That is admitted.

By Mr. Bort:

Q. You disputed the entire claim as I understand?

30

The Court: What entire claim?

Mr. Bort: The entire claim for the rents.

The Court: That was not what your question was. Your question related to the radio.

By Mr. Bort:

Q. This claim had a claim for a radio as far as you know? A. I think it did.

40

Mr. Bort: I served a notice to produce. I offer it in evidence at this time.

The Court: I don't know what the purpose is but I will let it be marked.

(Marked Exhibit C-2 in evidence.)

By Mr. Bort:

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Q. This claim, in a portion thereof, reads as follows—"The undersigned further claims and demands the radio which is now located in the late home of said Angelo Nobile which was bought by her and paid for by the undersigned out of her own separate estate. And also all the furniture and household effects now located in the late home of said Angelo Nobile which was given to her at the time of their inter-marriage and on various occasions subsequent thereto— A. I don't know anything about that.

20

Q. Let me finish. You disputed that claim did you not?

The Court: What do you mean?

Mr. Bort: This is entitled in the Hudson County Orphans Court.

Mr. La Porta: We admit that.

By Mr. Bort:

30

Q. Did you dispute that claim? A. Yes.

Q. Did you thereby mean to say that that radio and the household effects belonged to the estate?

The Court: I am not trying that case am I?

Mr. Bort: They claim the radio was theirs.

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Conclusions.

The Court: I am not going to determine who owns the radio.

10 Mr. La Porta: Now, if your Honor please, under the proof of claim it appears conclusively she bought the radio and that we paid the \$74.00. There is a proof of claim filed by her.

The Court: She testified to that. She testified her husband bought it and made some payments and she paid the rest of it. If that property belonged to him and she paid an amount of money owing by her husband you can set that up if you wish.

Mr. Bort: All right, no further questions.

The Court: Anything else?

20 Mr. La Porta: That's all.

Conclusions.

30 The Court (after oral argument of counsel). I determine that the defendants are obliged to account to the complainant for one-half of the amount of moneys she paid on account of the mortgage referred to herein representing an indebtedness existing and payable at the time of the death of complainant's husband who held title with her to the property in question as tenants by the entirety; that the defendants are indebted to the complainant for one-half of the moneys paid by complainant to the City of Hoboken for water rents, and for taxes for the years 1927 and 1928, the amounts whereof were mentioned herein. The defendants are answerable to the complainant for the entire amount of rents collected by them subsequent to the death of her husband, and also for one-half of the amount

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of rents collected by them previous to the death of her husband, the amount whereof was mentioned herein. The complainant is answerable to the defendants for one-half of the amount of moneys expended by the defendant Bartletta for repairs to the property held as an estate by the entirety by the complainant and her husband during the period of time he acted as agent and manager of said property, which items are not disputed herein. As to the two first items mentioned in the schedule referred to herein, representing the sum of \$723.27, it appears that the complainant received from the defendant Bartletta the moneys represented by such items, and I determine that she cannot claim that she received same for *household expenses* as claimed by her; there is no proof before me to sustain her claim in such respect. The item of two hundred and some odd dollars which it is said was for the purchase of habiliments to clothe the deceased at the time he died, and for the purpose of burial, will have to be allowed to the complainant; the executors can charge said item in their account, as executors, which they will present to the Orphans Court. The amount which the executors paid to complainant for mourning clothes will have to be allowed to them in the accounting between complainant and defendant. The sum of \$74.00 I will disallow to the executors, because the testimony herein indicates such sum was paid on account of an instrument bought by the complainant's husband in his lifetime. Complainant's right is clear, under the law, to an accounting of the rents and profits collected by her husband, or by the real estate agent Bartletta in his behalf, from the property owned by complainant and her husband as tenants by the entirety. Counsel for the defendants stated herein that the husband paid from his own funds a con-

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siderable part of the purchase price of the property held by him and his wife as tenants by the entirety. Upon the proofs herein I determine that even though a considerable part of the consideration for the purchase of the property was paid by complainant's husband out of his own funds, such cannot be held to minimize the legal rights of the complainant, as established by law. Any moneys paid by the husband as consideration for the purchase of the property or for the maintenance or upkeep thereof will be presumed to be gifts from the husband, on the state of the proofs herein. It is well established in law that where the title to land rests in the husband and wife as tenants by the entirety, the wife holds in her possession during the joint lives one-half of the estate in common with her husband, and, as between themselves, the respective rights of the parties are those of tenants in common. In view thereof the complainant's husband was not only entitled to one-half of the rents, issues and profits of the property, but he was obliged to sustain the burden of paying one-half of the charges against the property such as taxes, water rents, insurance, repairs, and the like. I will advise a decree accordingly. Counsel may collaborate on the form of the decree to be submitted to me.

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Exhibit (Complainant's).

HUDSON COUNTY ORPHAN'S COURT.

<p style="text-align: center;">In the Matter</p> <p style="text-align: center;">of</p> <p style="text-align: center;">The Estate of ANGELO NOBILE, deceased.</p>	}	<p>Proof of Claim. 10</p>
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TO: FRANK J. BARTLETTA and DANIEL REPETTI,
EXECUTORS OF THE ESTATE OF ANGELO NOBILE,
DECEASED.

The undersigned, JENNIE REPETTI NOBILE, widow
of Angelo Nobile, claims of the estate of Angelo
Nobile, deceased, the following: 20

One-half of the sum of \$1,497, which
sum is equivalent to 13 payments of
\$107.50 each, which payments at the
time of the death of the said Angelo
Nobile were in arrears and due to the
Jefferson Building and Loan Associa-
tion of Hoboken, N. J., on a building
located at 415 Grand Street, Hoboken,
N. J., which sum the undersigned and
the said Angelo Nobile were severally
obligated to pay, and which sum was
paid in full by the undersigned on
November 20th, 1928 \$ 748.75 30

One-half of the sum of \$65.95 paid by
the undersigned in full on the 2nd
day of January, 1929, to the City of
Hoboken, for water—rents, due and
owing to the said City at the time of
the death of the said Angelo Nobile for 40

Exhibit (Complainant's).

	water furnished in the building located at 415 Grand Street, Hoboken, N. J., which building was owned by the undersigned and the said Angelo Nobile as tenants by the entirety	32.98
10	One-half of the sum of \$198.20 paid in full by the undersigned on December 31st, 1928, to the City of Hoboken, N. J., for taxes for the second half of the year 1927, due upon the house known as 415 Grand Street, Hoboken, N. J., which house was owned by the undersigned and Angelo Nobile as tenants by the entirety	99.10
20	One-half of the sum of \$294.21, which sum the undersigned and the said Angelo Nobile were obligated to pay to the City of Hoboken, N. J., for taxes upon the said house located at 415 Grand Street, Hoboken, N. J., for the year of 1928, and which sum was the amount due to the City from the 1st day of January, 1928, until the date of his death on September 18th, 1928, and which sum was paid in full by the undersigned on December 31st, 1928	147.11
30	One-half of the rents, issues and profits collected and appropriated by the said Angelo Nobile from the said premises located at 415 Grand Street, Hoboken, N. J., from the date of purchase on August 15th, 1927, until the date of the death of the said Angelo Nobile on September 18th, 1928, which sum in the aggregate amounts to \$1,807.00 on information and belief	903.50
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	Total	<u>\$1,931.44</u>

Exhibit (Complainant's).

The undersigned further claims and demands the radio which is now located in the late home of the said Angelo Nobile, which was bought by her and paid for by the undersigned out of her own and separate estate, and also all the furniture, and household effects now located in the late home of the said Angelo Nobile, which was given to her at the time of their inter-marriage and on various occasions subsequent thereto. 10

JENNIE NOBILE,
Claimant.

State of New Jersey, }
County of Hudson, } ss.:

JENNIE REPETTI NOBILE, being duly sworn on her oath according to law, deposes and says that she is the creditor in the foregoing claim mentioned and that the items therein enumerated were paid by her in the manner as in the foregoing claim named, and that the matters therein contained are true; and deponent further says that no part of the foregoing claim has been paid and that the whole sum of \$1,931.44, therein named is justly due and owing to her. 20 30

JENNIE NOBILE.

Sworn and subscribed to before me
this 17th day of July, 1929.

HYMAN SEGAL,
Attorney at Law
of New Jersey.

The author of the book is a man of letters, and his style is elegant and clear. He has a deep knowledge of the subject, and his treatment is thorough and impartial. The book is a valuable contribution to the literature of the subject, and it is one that every student of the subject should read.

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New Jersey Court of Errors and Appeals

Between

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants-Appellants.

On Appeal
from Decree
in Chancery.

BRIEF.

**BRIEF OF ANTHONY P. LA PORTA, ESQ.,
IN BEHALF OF FRANK J. BARTLETTA
AND DANIEL REPETTI, DEFENDANTS-
APPELLANTS.**

Introduction.

This is an appeal from a Final Decree made by his Honor Edwin Robert Walker, on the 9th day of October, 1930, on the advice of Honorable John J. Fallon, one of the Vice-Chancellors of the Court of Chancery.

Statement of Facts.

The complainant, Jennie Repetti Nobile, the respondent herein, filed a Bill of Complaint in the Court below for an accounting arising out of her estate by the entirety. The defendants, Frank J. Bartletta and Daniel Repetti, the appellants here-

in, as executors under the last Will and Testament of Angelo Nobile, deceased, who was the husband of the complainant, filed a counterclaim for moneys had and received, etc., from the estate of the decedent and from them.

The undisputed facts of the case, as is evidenced by the admissions in the proceedings, pleadings and testimony, are these:

In the month of March, 1916, the complainant-respondent, Jennie Repetti Nobile, was married to Angelo Nobile who died on the 18th day of September, 1928. Sometime prior to the 15th day of August, 1927, Angelo Nobile had contracted to buy the house and premises known as 415 Grand Street, in the City of Hoboken, County of Hudson, in this State, from the estate of Julius H. Kruse, deceased, for the sum of \$14,000.

About the 15th day of August, 1927, Angelo Nobile, deceased, in his lifetime caused the title to the aforementioned premises to be conveyed by deed to himself and his wife, Jennie Repetti Nobile, as tenants by the entirety. \$14,000 purchase money was all paid on the delivery of the deed; \$10,000 of it was raised jointly by Angelo Nobile and his wife, Jennie Repetti Nobile, on the 15th day of August, 1927, by procuring a Building and Loan Mortgage from the Jefferson Building and Loan Association of Hoboken, New Jersey, which is still unpaid and a lien on the property. The balance of the purchase price with the incidental expenses incurred at the closing of the title, which amounted to about \$4,400, was paid by Angelo Nobile, out of his own funds. Schedule "A" of the executors' counterclaim shows a complete itemized statement of the title closing (See State of Case, p. 19).

The house and premises of the entirety estate, by and with the consent and acquiescence of Jen-

nie Repetti Nobile, were solely and exclusively managed and controlled by her husband, Angelo Nobile, from the time of the purchase to the time of his death.

The rents collected by Angelo Nobile from the House and premises of the entirety estate, and thru his agent and executor, Frank J. Bartletta, from September 1st, 1927, to October 1st, 1928, amounted to \$1,723.84. An itemized statement thereof is shown by Schedule "B" annexed to the counterclaim (See State of Case, p. 20).

Towards the management and control of the entirety property aforesaid and in the preservation thereof, keeping it in repair and in a tenantable condition, Angelo Nobile, incurred, expended and paid out of his own funds and estate the sum of \$1,225.48. An itemized list and statement thereof is shown by Schedule "C" annexed to the counterclaim (See State of Case, p. 21).

Out of the rents collected by Mrs. Jennie Repetti Nobile's husband in his lifetime, or by Frank J. Bartletta, his agent and executor, and also as her agent, she was paid the sum of \$723.27. An itemized statement thereof is shown by Schedule "D" annexed to the counterclaim (See State of Case, p. 21).

Mrs. Jennie Repetti Nobile, has not contributed or paid any part of the \$4,400 paid by Angelo Nobile, defendants' testate, towards the purchase price of the house and premises bought and owned by them by the entirety, nor has she contributed or paid any part of \$1,225.48, incurred and paid by the defendants' testate for repairs towards the upkeep of the house in a tenantable condition.

The defendants, who are the executors of Angelo Nobile, deceased, charge that his widow, Jennie Repetti Nobile, has been over-paid out of the rents collected by her husband.

On the 18th day of September, 1928 (being the date of the death of the said Angelo Nobile), there was due and owing to the Jefferson Building and Loan Association of Hoboken, New Jersey, from both Mrs. Jennie Repetti Nobile, and her husband, the said Angelo Nobile, deceased, the sum of \$1,397.50; consisting of the following items: *As principle towards the reduction of the mortgage, \$650*; as interest from August 15th, 1927, to September 18th, 1928, \$650; as premium for the same period, \$65; as fines for the same period \$32.50.

On or about the death of the said Angelo Nobile, there was due and owing to the City of Hoboken, the sum of \$65.95 for water rents charged against said premises held by the entirety aforesaid. There was also due to the City of Hoboken for taxes for the second half of the year 1927 against said premises the sum of \$198.20; and there was also due and owing to the City of Hoboken at the time of the death of the said Angelo Nobile, the sum of \$294.21, which represented taxes for the year 1928.

Mrs. Jennie Repetti Nobile, the complainant-respondent, in her Bill of Complaint demanded and was allowed by the decree of the court, contribution equal to one-half the amount paid by her on the mortgage installment for principle and interest and also for water and tax liens against the premises held by the entirety. In this there is error.

The court refused to charge her with an item of \$74 for moneys advanced to her by the defendants upon her special instance and request in payment for a radio owned by her, and which the defendants by their counterclaim sought to collect from her. In this there is error.

The defendants by their counterclaim sought to charge her with certain items of expenditures and moneys advanced to her and to compel her to dis-

charge the entirety Bond and Mortgage in order to save decedent's estate, of which the defendants are its executors, harmless from any contingent liability should she default in the payment thereof. The counterclaim to that extent was dismissed. In this the Court also erred.

Questions Involved and Contentions.

1. Can the widow—the survivor of an estate by the entirety—seek reimbursement and contribution from her husband's estate, on an installment for principle and interest due on a purchase money Bond and Mortgage made and executed by them on the land held by the entirety, and still a lien on the entirety premises, and also for municipal water and tax liens, which became due and payable in the lifetime of the tenants by the entirety, which was paid by the survivor after the death of the other tenant by the entirety.

In other words does the doctrine of contribution apply to an estate by the entirety.

2. The court erroneously allowed the complainant contribution of one-half of \$1,397.50, which was decreed to be paid by the defendants as executors of the estate of Angelo Nobile, deceased, *there being no express agreement between her and her husband* made at any time in the lifetime of the decedent that he should contribute for payments towards the reduction of the mortgage against the entirety property. The said sum of \$1,397.50 being arrears of principle, interest, premiums and fines on the Bond and Mortgage jointly executed by the complainant with her husband in his lifetime and given in part payment of the purchase price for the premises held by the entirety. *\$650 of said sum went towards the reduction of the principle of*

the said Bond and Mortgage and the rest towards interest, fines, premiums, etc., which became due in the lifetime of the complainant's husband, but was not paid by the complainant until after his decease.

3. The court also erroneously allowed contribution to the complainant against the estate of her husband, of which the defendants are executors, for the taxes and water rents being liens against the estate by the entirety, equal to one-half of \$577.83, which were paid by her after the decease of her husband.

4. The court erroneously found as a fact without any basis and contrary to the weight of the evidence, that the radio mentioned in the Counterclaim of the defendants is the property of the estate of Angelo Nobile, deceased, and that the claim of \$74 made by the defendants against the complainant should be disallowed; whereas the truth of the matter is, as is evidenced by the record in the case, that she is the owner of the radio and that the \$74 advanced to her upon her special instance and request by the defendants should be allowed against her claim.

5. The court erroneously dismissed the defendants' Counterclaim in so far as it seeks to require complainant to discharge the Bond and Mortgage held by the Jefferson Building and Loan Association of Hoboken, against the entirety estate or to give security to save the estate of the said Angelo Nobile harmless from any liability thereon. This Bond and Mortgage was given by the complainant and her deceased husband, as tenants by the entirety, on the lands and premises of which she is now absolutely seized in fee by reason of her having survived him and should be assumed and paid

by her, she taking the land by the entirety with the burden.

6. The court erred in decreeing that there is due and owing to the complainant from the estate of Angelo Nobile, deceased, the sum of \$578.83. It should have decreed a money decree in favor of the defendants and against the complainant on the complainant's bill for accounting and the Counterclaim of the defendant.

POINT ONE.

The survivor of an estate by the entirety takes the estate cum onere, that is to say, with the burdens of the estate.

Mrs. Jennie Repetti Nobile, the complainant-respondent, was the survivor of the estate by the entirety. The Bond and Mortgage was a debt which she contracted for the payment of her property and therefore, inasmuch as the property was hers subject, however, to the life of her husband, and inasmuch as the heirs of her husband took nothing by inheritance, after his decease whatever encumbrances or liens might be upon said property, she cannot have same paid to her by way of contribution, or otherwise, from her husband's personal estate.

By the common law when land was conveyed to husband and wife they did not take as tenants in common, or as joint tenants, but each became seized of the entirety, per tout, et non per my, and upon the death of either the whole survived to the other. The survivor took the estate not by right of survivorship simply, but by virtue of the grant which vested the entire estate in each grantee.

During the joint lives the husband could for his own benefit use, possess and control the land, and take all the profit thereof, and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of the land that would prejudice the rights of his wife in case she survived him. This rule is based upon unity of husband and wife and is very ancient.

LAW.

HOW AN ESTATE BY ENTIRETY IS CREATED.

In *McDermott v. French*, 15 N. J. Eq. 80, the Court said:

“If an estate in fee be given to a man and his wife, or a joint purchase be made by them during coverture, they are neither properly joint tenants nor tenants in common, *for they are but one person in law, and cannot take by moieties.* They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole. * * * Where a husband and wife are thus seized of the entirety a conveyance by either is inoperative.”

THE TRUE CHARACTER OF AN ESTATE BY ENTIRETY AND ITS PECULIAR NATURE IS SHOWN BY A COMPARISON OF IT WITH A JOINT TENANCY.

In *Den v. Hardenbergh*, 10 N. J. L. 42, 44, the Court said:

“A conveyance of lands to a man and his wife, made after their inter-marriage, creates and vests, in them an estate, of a *very peculiar*

nature, resulting from that intimate union, by which as Blackstone says, 'the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.' The estate correctly speaking is not what is known in the law by the name joint tenancy. The husband and wife are not joint tenants. * * * The very name joint tenants, implies a plurality of persons. It cannot then aptly describe husband and wife, nor correctly apply to the estate vested in them, *for in contemplation of law they are one person.* * * * Of an estate in joint tenancy, each of the owners has an undivided moiety or other proportional part of the whole premises, each a moiety, if there are only two owners, and if more than two, each his relative proportion. They take and hold by moieties or other proportional parts; in technical language, they are seized *per my et per tout.* *Of husband and wife, both have not an undivided moiety but the entirety. They take and hold not by moieties, but each the entirety. Each is not seized of an undivided moiety, but both are, and each is seized of the whole. They are seized not per my et per tout, but solely and simply per tout.* The same words of conveyance, which make two other persons joint tenants, will make husband and wife tenants of the entirety. * * * In joint tenancy, either of the owners may at his pleasure, dispose of his share and convey it to a stranger, who will hold undivided and in common with the other owner. Not so with husband and wife. Neither of them can separately or without the assent of the other, dispose of or convey away any part.

* * * A severance of a joint tenancy may be made and the estate thereby turned into a tenancy in common by any one of the joint owners at his will. Of the estate of husband and wife, there can be no severance. * * * Joint tenants may make partition among them of their lands, after which each will hold in severalty. Of the estate of husband and wife, partition can not be made. The treason of a husband does not destroy the estate of a wife. In an estate held in joint tenancy, the peculiar and distinguishing characteristic is the right of survivorship, whereby on the decease of one tenant, his companion becomes entitled to the whole estates. *Between husband and wife the jus accrescendi does not exist.* The surviving joint tenant takes something by way of accretion or addition to his interest, gains something he previously had not, the undivided moiety which belonged to the deceased. *The survivor of husband and wife, has no increase of estate or interest by the decease, having before the entirety, being previously seized of the whole. The survivor, it is true, enjoys the whole, but not because any new or farther estate or interest becomes vested, but because of the original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected.* * * * If lands be granted to a man and woman and their heirs, and afterwards they marry they remain, as they previously were, joint tenants, they have moieties between them, as they originally took by moieties they will continue to hold by moieties after the marriage, and the doctrine of alienation, severance, partition and of the jus accrescendi may apply."

IN AN ESTATE BY ENTIRETY, IF THE WIFE SURVIVES SHE MAY THEN RAISE THE QUESTION AS TO THE NATURE AND EXTENT OF HER INTEREST IN THE LAND PROVIDED SHE HAS NOT PRECLUDED HERSELF BY HER OWN ACT OR DEED, AS BY A MORTGAGE.

In *Den v. Gardner*, 20 N. J. L. 566, 562, 563, the Court said:

“Since the decision of this Court in *Den v. Hardenbergh*, 5 Halst. 42, I apprehend no doubt can exist as to the true character of an estate conveyed to husband and wife, during coverture. They take neither as joint tenants, nor tenants in common, but become seized of a ‘peculiar estate, resulting from that intimate union, whereby the legal existence of the wife is suspended during the marriage, or at least incorporated with that of the husband.’ Each becomes seized of an entirety in the lands so conveyed, and neither can convey or dispose of the same without the assent of the other. IT IS AN ESTATE OF WHICH PARTITION CANNOT BE MADE, AND WHICH CANNOT BE SEVERED; AND UPON THE DEATH OF EITHER, THE SURVIVOR WILL BECOME SEIZED OF THE WHOLE. But it will not follow from any of these principles, that the husband cannot charge or encumber such an estate by mortgage during the coverture. * * * IF THE WIFE SURVIVE, SHE MAY THEN RAISE THE QUESTION AS TO THE NATURE AND EXTENT OF HER INTEREST IN THE LAND, IF SHE IS NOT PRECLUDED BY HER OWN ACT OR DEED.” In this case the deed had been made to husband and wife and their six children, to have and to hold to each of them during the natural lives of husband and wife and the survivor of them. The husband having executed a mortgage on the

lands so conveyed, it was adjudged, that the mortgage was valid during the joint lives of himself and wife, and to the extent of their share in the lands. The counsel for the defendant seemed to think, from the general expression found in the books, 'that where an estate is conveyed to husband and wife, neither can convey or dispose of the same or any part of it without the concurrence of the other,' and that the husband is precluded from leasing the land or charging it by mortgage. The true meaning of such expression is, that neither can make such a disposition of the estate, without the concurrence of the other, as will effect the right and interest of the other. THE MORTGAGE BY THE HUSBAND DOES NOT AFFECT THE WIFE'S RIGHT OR INTEREST IN THE LANDS; IF SHE SURVIVE, THE WHOLE TITLE AND ESTATE WILL VEST IN HER FREED FROM THE MORTGAGE."

DURING THE JOINT LIVES OF HUSBAND AND WIFE HOLDING AN ESTATE BY ENTIRETY THEY HOLD THE ESTATE AS TENANTS IN COMMON FOR THEIR JOINT LIVES WITH THE REMAINDER IN FEE TO THE SURVIVOR.

In *Schulz v. Ziegler*, 80 N. J. Eq. 199; 83 A. 968, 969, the Court said:

"We hold, therefore, that by virtue of an estate by entireties the seisin of husband and wife during the joint lives is essentially a tenancy in common, terminated on the death of either, with remainder in fee to the survivor; and that the right of the husband may be transferred by him to a third party who thereby becomes tenant in common for the joint lives in the husband's place; and that

partition may be had between such purchaser and the wife of this tenancy in common, but without affecting in any way the common-law right of survivorship."

AN ESTATE BY THE ENTIRETY, WHILE THE MARRIAGE SUBSISTS, CANNOT BE PARTITIONED. WHERE THE CHARACTER OF THE PROPERTY IS CHANGED BY SALE IN PARTITION, FROM LAND TO MONEY, THE COURT CANNOT ORDER THE DIVISION OF THE MONEY BETWEEN THEM.

In *Platt v. Platt*, 93 N. J. Eq. 395; 116 A. 326, 327, Vice-Chancellor Fielder said:

"Neither the husband or wife holds the estate by moieties, but both are seized of an entirety, and neither can dispose of the fee without the consent of the other. During their joint lives *they have equal rights to the usufruct of the property*. It therefore follows that partition cannot be had between husband and wife of an estate held by the entirety and the partition act omits mention of such an estate. When the character of the property is changed by sale in partition from land to money, the court cannot order a division of the money between John W. Platt and his wife, and between Bertram W. Platt and his wife, but the same will be held under the control of the court to await the death of the husband or wife, and, when the question of survivorship is determined, the principal will be ordered paid to the survivor. In the meantime, each share in the net proceeds of sale will be invested under the direction of the court, and the interest arising on the investment of each share will be paid equally

to the husband and wife during their joint lives. This is the course provided by sections 45, 47 and 48 of the partition act. Of course, after the property is sold and the net proceeds of sale ascertained, the share of each husband and wife may be paid to them, if they desire it, upon their joint receipt or release, and they make such division or disposition of their share as may be agreeable to them."

A DIVORCE BETWEEN TENANTS BY THE ENTIRETY WORKS A SEVERANCE OF THEIR ESTATE AND THEY BECOME TENANTS IN COMMON AND THE RIGHT OF SURVIVORSHIP IS ACCORDINGLY DESTROYED.

In *Sbarbaro v. Sbarbaro*, 88 N. J. Eq. 101; 102 A. 256, Vice-Chancellor Leaming said:

"That the effect of the divorce was to destroy the estate by the entirety was admitted not only in the answer of the defendant but in the argument, and seems to be the result not only of the authorities but of sound reasoning. * * * the decree entered and affirmed can only be properly regarded by this court as giving sanction to the view that absolute divorce severs an estate by the entirety in such manner as to destroy the right of survivorship and thus render it subject to partition as a tenancy in common."

THE INTEREST OF A TENANT BY THE ENTIRETY MAY BE SOLD UNDER A JUDGMENT.

In *Zubler v. Porter*, 98 N. J. Eq., 444; 120 A. 194, the Court of Errors and Appeals said:

"An estate by the entirety amounts to a tenancy in common between husband and wife

for their joint lives, with remainder to the survivor; but the husband can transfer his right to a third party, who thereby becomes a tenant in common with the wife for the joint lives of both husband and wife. It follows, that upon the sale of the interest of one of such tenants by the entirety under a common-law judgment, the purchaser becomes vested with all the interest which the defendant had in the lands during the joint lives of the husband and wife."

THE RESPECTIVE RIGHTS OF HUSBAND AND WIFE TO LAND OWNED BY THE ENTIRETY ARE THOSE OF TENANTS IN COMMON DURING THEIR LIFETIME AND EITHER MAY DEMAND AN ACCOUNTING FROM THE OTHER.

In *Neubeck v. Neubeck*, 94 N. J. Eq. 167; 119 A. 26, Mr. Justice Trenchard said:

"Where the title to lands rests in a husband and wife as tenants by the entirety, the wife holds in her possession during their joint lives one-half of the estate in common with her husband, and as between themselves, the respective rights of the parties are those of tenants in common."

The Court also said:

"Where the title to real estate rests in a husband and wife as tenants by the entirety, the wife is entitled to an accounting of the rents collected by her husband from the common property, even though the property was paid for by her husband out of his own funds and her interest therein was a gift from her husband."

ESTATES IN ENTIRETY—SURPLUS MONEY ON FORECLOSURE — DISTRIBUTION — SURPLUS MONEY HELD UNDER THE CONTROL OF THE COURT.

In *Servis v. Dorn*, 76 N. J. Eq. 241; 76 A. 246, the Court said:

“Surplus money arising upon a sale of land owned by husband and wife by an estate in entirety, will not be paid to the husband and wife upon their petition, when there are judgments against either one of them, but will be held under the control of the court to wait the severance of the estate by the death of one of the parties, when the fund will or will not become available in satisfaction of the judgments, accordingly as the judgment debtor survives or dies before the other tenant by entirety.”

NOW THE RIGHT OF AN EQUAL DIVISION OF THE RENTS AND PROFITS EXIST BETWEEN TENANTS BY THE ENTIRETY.

In *Bilder v. Robinson*, 73 N. J. Eq. 169; 67 A. 828, 830, the Court said:

“The estate in entirety still remains, but the married woman is no longer obliged to surrender to her husband the entire rents and profits of the land. The husband has a right to one half and the wife to the other half. Creditors of the husband can no longer appropriate the entire rents and profits, but they can appropriate the husband’s share.”

THE RIGHT OF CONTRIBUTION AS BETWEEN HUSBAND AND WIFE HOLDING AS ESTATE BY THE ENTIRETY IN THE ABSENCE OF AN EXPRESS AGREEMENT BETWEEN THEM DOES NOT EXIST.

In *Ringold v. Ringold*, 95 N. J. Eq. 357; 116 A. 690, Vice Chancellor Foster said:

“The reasons supporting the presumption of a gift, as indicating an intention to make an advancement or settlement upon a wife, apply whether the gift be made in one sum, or if, as here, the gift be made in monthly installments, in the form of monthly dues, paid by defendant, in reduction of the mortgage debt upon the property in their joint names, *as these installment payments were in fact and effect payments on the purchase price of the property.*

“In fact in the present situation these reasons apply with greater force, for by the nature of their estate in the property the defendant in making such payments was not only making advancements or settlements upon his wife; *he was also reducing his own liability upon the bonds and mortgages, and was thereby completing the payment of the purchase price of the property, and he would if he survived her, obtain the exclusive benefit of the payments thus made. And it is not unreasonable to assume that he had this possibility in mind when he made these payments.*

“The presumption that these payments were intended as gifts may of course be rebutted by proof that they were made with the intention and understanding or agreement that they should not be presumed or considered as gifts.

“The nature and extent of the proof required to ‘rebut the presumption of a gift or settlement in the case of a child or wife, must be of facts antecedent to or contemporaneous with the purchase, or else immediately afterwards, so as to be in fact, part of the same transaction’ (Read v. Huff, *supra*), and this proof ‘must be certain, definite, reliable and

convincing, leaving no reasonable doubt of the intention of the parties' (McGee v. McGee, supra). There is no such proof in this case, relating to the time when any or all of the dues in question were paid nor to any other time, and I will advise that the exceptions be overruled."

THE PRESUMPTION OF A GIFT AS TO CONTRIBUTIONS MADE BY EITHER HUSBAND OR WIFE TO PROPERTY OWNED BY THEM AS TENANTS IN THE ENTIRETY ARISES FROM THE RELATIONSHIP OF HUSBAND AND WIFE.

The rule above stated was mentioned by Vice Chancellor Lewis in the case of Mendelsohn v. Mendelsohn, 106 N. J. Eq. 537, 540.

The Court also stated that in a tenancy by the entirety expenditures made on the premises by the husband in the absence of an agreement to the contrary are presumed to be gifts. The husband is not entitled to reimbursement therefor.

THE DOCTRINE OF EXONERATION DOES NOT APPLY AS BETWEEN HUSBAND AND WIFE WHERE THE LAND IS HELD BY THE ENTIRETY, NOR CAN THERE BE CONTRIBUTION EXACTED AGAINST THE OTHER IN THE ABSENCE OF AN AGREEMENT BETWEEN THEM.

In *re Staiger's Estate*, 144 A. 619 (not yet officially reported), Mr. Justice Campbell said:

"In the first place, the reason underlying the common-law rule of exoneration is that the personal estate of the deceased mortgagor 'had the benefit of the money from the security of which the mortgage was given and the maxim applies * * * that should have the satisfaction that sustained the loss.'

In the present case we think the rule should not apply because the bonds and mortgages asked to be exonerated were not the sole and single obligations and undertakings of the husband, John Staiger, but the joint and several obligations of him and his wife, Sadie V. Staiger. TO EXACT AN EXONERATION UNDER SUCH CONDITIONS WOULD DEPRIVE THE RULE OF COMMON LAW RELIED UPON, AND BEFORE REFERRED TO, OF ALL ITS EQUITY, AND TAKE FROM IT THE REASON FOR ITS EXISTENCE.

*In the second place, John Staiger, and his wife, Sadie V. Staiger, took and held the lands in question by an estate in entirety. They both, during the continuance of the lives of both, were seized of such lands in their entirety, and not in equal undivided portions thereof. When John Staiger, the husband, died, his wife took nothing in such lands from him. His interest therein simply ceased as it were. As is said in Hardenbergh v. Hardenbergh, 10 N. J. L. 42, at page 46 (18 Am. Dec. 371): 'Between husband and wife the jus accrescendi does not exist * * *. The survivor of husband and wife has no increase of estate or interest by the decease, having before the entirety being previously seized of the whole. The survivor it is true, enjoys the whole, but not because any new or farther estate or interest becomes vested, but because of the original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected.'*

So, therefore, upon the death of her husband, Sadie V. Staiger took no new estate and therefore took neither as widow nor heir nor devisee."

POINT TWO.

The court erred in disallowing the claim of \$74 made by the defendants-appellants to Mrs. Jennie Repetti Nobile, the complainant-respondent, upon her special instance and request.

Upon the special instance and request of Mrs. Jennie Repetti Nobile, complainant-respondent, the defendants, executors of her husband's estate paid \$74 which was due on the purchase price of a radio owned by her. It is not disputed that \$74 was paid to one, Greenberg, who sold the radio, but the court found as a fact that the radio was owned and bought by the defendants' testate, husband of Mrs. Jennie Repetti Nobile, and therefore, disallowed the claim of \$74 against her. This finding of fact was contrary to the evidence. Mrs. Jennie Repetti Nobile filed a Proof of Claim with the defendants, executors of her husband's estate (see pp. 73 and 74 of the State of Case), verified by her. In her Proof of Claim she stated as follows:

"The undersigned further claims and demands the radio which is now located in the late home of the said Angelo Nobile, which was bought by her and paid for by the undersigned out of her own and separate estate."

Her affidavit thereto attached shows "that the matters therein contained are true." Signed and sworn to by her.

No contention is made by the defendants, as executors, that the radio was bought by their testate.

This Proof of Claim was produced at the trial upon her own request. The notice to produce the

Proof of her claim is found on page 26 of the State of Case. How can this woman be permitted to contradict her Proof of Claim under solemn oath that she owns the radio and then when a claim is made for the \$74 advanced to her to say that the \$74 was paid for the benefit of the decedent's estate, and therefore she should not reimburse them although she requested that the moneys be paid. Perhaps my opponents will explain this sudden change of proof and contention.

POINT THREE.

The court erroneously dismissed the defendants' counterclaim insofar as it seeks to require the discharge of the bond and mortgage or a bond of indemnity.

As the survivor of an estate by the entirety takes the estate cum onere, that is, with the mortgage burden, tax liens and the like, why should the survivor be not compelled to pay off the Bond and Mortgage and save the decedent's estate harmless from any liability thereon.

The Bond and Mortgage in the case *sub judice* are made and executed by Mrs. Jennie Repetti Nobile and her husband, Angelo Nobile, deceased, to secure the payment of part of the purchase price in the sum of \$10,000. As she has survived her husband and is seized of the entire estate and the interest of her husband, Angelo Nobile, has terminated by his death, and his heirs take nothing, and the beneficial enjoyment is now in his widow, why should not she be compelled to assume the burden and give some security to the decedent's estate and thereby save his estate harmless from any liability thereon. Of course, there are no precedents for

this demand. The claim and relief are novel and will probably be denied by this Court. However, it is presented to this Court by reason of the fact that one of the executors, the defendants herein, suggested that the claim be made and I thought it was my duty to raise the point notwithstanding the want of precedents for the desired relief.

The decedent's contingent liability on the Bond and Mortgage may never accrue, yet the executors and the beneficiaries under the Will will naturally be in a quandary until the mortgage is liquidated. Their rights against the survivor should be determined and the advice of this Court is accordingly requested.

For the details of the relief against the survivor, the complainant-respondent, on the question of compelling her to pay off the Bond and Mortgage or give indemnity, see defendants' counterclaim and the relief therein prayed for.

Conclusion.

From an examination of the facts of the case and the law relating to estate by entirety it is plain that the doctrine of equitable contribution being based upon the maxim in equity that equality is equity, does not apply in estates by entirety in view of the fact that the survivor of the estate takes it only subject to the liens, which he or she has created, and the heirs of the decedent take and inherit nothing.

At common-law where two or more persons bind themselves to pay a sum of money or to perform any other act, the obligation and liability are joint; and in case of the death of one of the obligors his obligation ceases and his estate cannot be subjected to the obligation, but the survivor must bear

the entire burden. This old rule of the common-law, in my opinion, applies in a court of equity to an estate by the entirety, and hence there should be no contribution; and it has been said that the doctrine of equitable contribution is never enforced in a court of equity except between those whose equities are equal. Can it be said that the equities are equal in the case *sub judice* where the heirs of the decedent take nothing and inherit nothing of the estate by the entirety. Besides there is a presumption that where one tenant by the entirety makes an installment payment towards the reduction of the Bond and Mortgage, for principle and interest, which was given for the purchase money of the entirety premises, that it was a gift and was done so for the benefit of his own estate should he, or she, survive. This presumption prevails while the parties to the entirety estate are living *a fortiori*, it surely prevails if the payment is made by the survivor and after the death of the other.

We respectfully submit that the survivor takes the estate cum onere; that she is not entitled to any contribution for payments made on account of the principle and interest of the purchase money mortgage against the estate by the entirety, and for tax and water liens. The decree of the court therefore, in so far as it permits contribution, should be modified so as to deny the right of contribution to the complainant-respondent.

The claim of \$74 by the defendants-appellants on their Counterclaim should be allowed as against the complainant-respondent, for the reason set forth in Point 2 of the argument.

The decree, in so far as it dismissed defendants' Counterclaim on the question of compelling the survivor to pay off the purchase money mortgage

or to give a bond of indemnity to save the estate of the defendants-appellants harmless, should likewise be modified for the reasons set forth in Point 3 of the argument.

It is requested that this Honorable Court state whether the decree is affirmed or modified, by whom costs are to be paid.

Respectfully submitted,

ANTHONY P. LA PORTA,
Solicitor for and of Counsel with
Frank J. Bartletta and Daniel Repetti,
Defendants-Appellants.

24 MAY.T.1931

New Jersey Court of Errors and Appeals

Between

JENNIE REPETTI NOBILE,
Complainant-Respondent,

and

FRANK J. BARTLETTA and
DANIEL REPETTI,
Defendants-Appellants.

On Appeal
from
Decree in
Chancery.

BRIEF OF COMPLAINANT-RESPONDENT.

The facts are fully and substantially set forth in the brief filed by the defendants-appellants, and need not here be repeated. We shall proceed, therefore, to a discussion of what we conceive to be the law applicable to the questions which have been presented to this Court.

ARGUMENT.

POINT I.

Where a husband purchases property out of his own funds, but takes title thereto in the name of himself and his wife as tenants by the entirety, it will be presumed that a settlement or advancement was intended.

The rule above quoted is well established law in this State. Vice-Chancellor Leaming in the case of *Herbert vs. Alvord*, 75 N. J. Eq. 428, 429, said:

“Where one purchases property and pays the consideration therefor, and the conveyance of the legal title is taken in the name of a stranger, a trust will be presumed to have arisen in virtue of the transaction in favor of the person who has paid the consideration. This principle results from the equitable theory that the consideration draws to it the beneficial ownership. Where, however, the conveyance is not made to a stranger, but is made to a person whom the purchaser is under a legal obligation to maintain, such as a wife or child of the person who pays the price, the good consideration of blood or love and affection will support the conveyance, and no resulting trust will arise from the payment of the consideration. In such cases the presumption is that a settlement or advancement was intended. See 3 Pom. Eq. Jur., §§981, 1039.”

POINT II.

Where title to lands rests in husband and wife as tenants by the entirety, the incidents or that estate are those of tenants in common, and either spouse is entitled to an accounting of the rents collected by the other from the common property.

This rule finds support in a number of decided cases in this State, some of which might be mentioned: *Buttlar vs. Rosenblath*, 42 N. J. Eq. 651; *Schulz vs. Siegler*, 80 N. J. Eq. 199; *Hanneman vs. Richter*, 63 N. J. Eq. 753; *Cole vs. Cole*, 69 N. J. Eq. 3; *Lloyd vs. Turner*, 70 N. J. Eq. 425; *O'Connell vs. O'Connell*, 93 N. J. Eq. 603; *Neubeck vs. Neubeck*, 94 N. J. Eq. 167.

In the last mentioned case Mr. Justice Trenchard, speaking for the Court of Errors and Appeals, and referring to the *O'Connell* case, *supra*, said:

“We therefore declared that where the title to lands rests in a husband and wife as tenants by the entirety, the wife holds in her possession during their joint lives one-half of the estate in common with her husband, and that the respective rights of the parties as between themselves were those of tenants in common. We further held that where a husband and wife thus owned property as tenants in common the wife was entitled to an accounting of the rents collected by her husband from the common property, even though she had deserted her husband without justifiable cause.

In the *O'Connell* case we pointed out that the principle upon which the rule rests is that a tenant in common in leasing the property and in collecting the rents from the lessees, acts not only in his own right, but as the representative of his co-tenants, and that consequently, to the extent that the moneys so called represent the rental value of the interest of his co-tenant, it is held in trust by him for their use.

It is suggested that the instant case differs from the O'Connell case, for the reason that all of the purchase money for the property was paid by the husband out of his earnings. But that, if true, is immaterial. Assuming that it was a gift by the husband to the wife, her title is as valid as if her interest was purchased out of her own funds.” (Italics ours.)

A case of interest as bearing upon the question involved in the case *sub judice* is *Collins vs. Babbit*, 67 N. J. Eq. 165. In that case the property was bought with money supplied entirely by the wife, title however, being taken in the names of husband and wife, as tenants by the entirety. The husband managed and controlled the property himself, collected the rents and made disbursements as necessary. After his death, the wife filed a bill

for an accounting against the administrator of her husband.

Vice-Chancellor Pitney after discussing the incidents which attach to an estate by the entirety, proceeds as follows, (at pp. 175 and 176):

“The complainant, then, was entitled to the equal undivided one-half of the net proceeds of the property in question, and the language and conduct of the husband with regard to the rents, as detailed in the evidence, must be construed accordingly. As I have said, she had the right actually to receive and to devote to her own purposes one-half of the rents, or she could permit her husband to retain them upon such terms as she chose. Now, it appears clearly that her husband did retain them, but he kept an account of their net accretion, and he declared that the object of that was to make a payment in the mortgage, and I think the evidence proves that such intention was known by the wife. Now, the application of the rents to the reduction of the mortgage, was a proper and equitable disposition of them and just to both parties, and upon the whole case I am led to the conclusion that the wife had a right, under the circumstances, to conclude that her husband would so apply them, and that she permitted them to be retained by him for that purpose. She therefore had the right in his lifetime to have those moneys so applied.

“It follows that when she survived him and the whole estate became vested in her she had the right to have the amount so accumulated in his hands, applied by his personal representative as she should direct.

“Primarily, the right was to have it applied to the reduction of the mortgage, but at his death that right became a personal one with her, to apply it or not to the reduction of the mortgage, as she chose.”

We respectfully submit, therefore, that from the authorities which have been cited, and quoted,

the complainant herein is entitled to an accounting of the rents collected by her husband during his lifetime, and that she is entitled to what an accounting will show to be her rightful share of said rents so collected.

It follows also from these cases, that in view of the fact that tenants by the entirety share the profits of the land held by them as though they were tenants in common, that they ought to share any expenses incurred. In view of the fact that the undisputed facts show that complainant had paid the entire amount which was due as principal and interest on the mortgage covering the premises, and the amounts due as taxes and water rents charged against the premises, it follows that she is entitled to reimbursement equivalent to one-half of the sums so paid by her.

The foregoing represents the basis upon which we proceeded at the hearing to maintain the cause of action stated in the bill. From the decree as filed, the Vice-Chancellor apparently sustained the contentions we thus made.

Counsel for the defendants-appellants, in his brief cites certain cases from which he gathers that another result should have been reached. We proceed to a discussion of those cases:

The first case which he cites to sustain his view is *Ringold vs. Ringold*, 93 N. J. Eq. 357 (erroneously cited in appellants' brief as 95 N. J. Eq., same page).

This case is cited as authority for the proposition that the right of contribution as between husband and wife holding an estate by the entirety, in the absence of an express agreement between them, does not exist. While that is the rule which appears to have been laid down in the case, we must, however, read it in the light of the facts there presented. In that case, title to the property in question had been taken by husband

and wife as tenants by the entirety in 1911, and in 1920 the complainant wife had obtained a decree of divorce from the defendant. She then filed her bill for partition of the property, whereupon defendant in his answer set up the fact that he had made certain payments on the property for which he should be allowed. It appears from the facts that although the wife paid part of the household expenses and also some of the taxes, insurance premiums and building and loan association dues, that the expenses amounting to some \$3,000.00 which were paid by the husband was by far a greater sum than that paid by the wife. Vice-Chancellor Foster stated the rule to be that in a situation such as the one there presented to him, the doctrine of contribution as between husband and wife did not apply, giving as a basis for his ruling, that the expenditure by a husband of his own moneys in the purchase of land in the name of his wife or in the improvement of her property, is presumed to be a gift to her in the absence of proof of a contrary intent.

In support of this ruling, the Vice-Chancellor cited the following cases: *Peer vs. Peer*, 11 N. J. Eq. 432; *Persons vs. Persons*, 25 N. J. Eq. 250; *Black vs. Black*, 30 N. J. Eq. 215; *Lister vs. Lister*, 35 N. J. Eq. 49; Affirmed 37 N. J. Eq. 331; *Read vs. Huff*, 40 N. J. Eq. 229; *Selover vs. Selover*, 62 N. J. Eq. 761; *McGee vs. McGee*, 81 N. J. Eq. 190; *Prisco vs. Prisco*, 110 Atl. Rep. 111.

We see, therefore, that the rule stated in the case just discussed has application to a situation which is not present in the case *sub judice*. In the case of *Ringold vs. Ringold*, it was the husband who was seeking contribution for payments made by him toward the improvement of the common property. The Court held, and correctly so, that the husband was foreclosed from demanding the relief he prayed, because of the presumption

in law that the payments so made by him were gifts to his wife. In this case it is the wife who is demanding contribution for payments made by her toward the common property. She is not faced by any presumption to the effect that those payments were intended as a gift from her to her husband. *Cole vs. Lee*, 45 N. J. Eq. 779, 785; *Adoue vs. Spencer*, 62 N. J. Eq. 782, 793; *Small vs. Pryor*, 69 N. J. Eq. 606.

In that respect, therefore, we respectfully submit that the conclusion reached by Vice-Chancellor Fallon that the respondent herein was entitled to be reimbursed to the extent of one-half of the moneys paid by her to the Jefferson Building and Loan Association on account of the mortgage held by that organization and the payments made by her to the City of Hoboken on account of municipal taxes and water rents charged against the property, is correct, and not contrary to law, as stated by the respondents on pages 5 and 6 of their brief.

The case of *Mendelsohn vs. Mendelsohn*, 106 N. J. Eq. 537, is authority for the same view as expressed in the *Ringold case*, *supra*, and as we have pointed out, does not apply to the facts in the case at bar.

With respect to the conclusion reached by Vice-Chancellor Fallon below, that the complainant was entitled to reimbursement equivalent to one-half of the sum of \$1,397.50, appellants contend that such reimbursement should not have been allowed in view of the case of *In Re: Staiger's Estate*, 144 Atl. Rep. 619 (not yet officially reported). Again we are constrained to affirm the doctrine therein laid down, but differ with the appellants as to the applicability of the rule of that case to the facts in the case *sub judice*.

We must first point out that the complainant's bill was not based upon any theory of exoneration

of the mortgage executed jointly by her and her husband during his lifetime. The bill seeks merely contribution from the estate of her husband for the over-payments made by her to the mortgagee, for which payments her husband, had he been alive, would have been equally responsible.

As pointed out above, the incidents of the estate herein under consideration are those of a tenancy in common, and in reaching a conclusion as to whether or not this case was correctly decided in the court below, we must bear in mind the rules of law pertaining to that relationship. It is well settled that where property is so held and one of the tenants expends money in the improvement of the common property, that he is entitled to contribution equivalent to the extent of his interest in the property, 38 *Cyc.* 53, and the right of one co-tenant to contribution as against another for a just proportion of the reasonable expenses incurred fairly and in good faith, for the benefit of the common property, or such as were from necessity disbursed for the common estate, such as reasonable expenditures for repairs, restorations, taxes, interest on mortgages, if any, insurance and the like, is equally well established. *Ibid.*; *Lloyd vs. Turner*, 70 N. J. Eq. 425.

Thus, it can be seen that if complainant's bill is viewed as one based upon the theory that one co-tenant is seeking thereby to recover from another her proportionate share of expenses reasonably incurred in the upkeep of the common property, and not upon the theory that exoneration from the mortgage is sought, then it is clear that the decree as rendered below is correct.

The bill as filed did not seek to have the defendants, as executors, pay any part of the mortgage money which had not as yet accrued. In that respect the case of *Re: Staiger's Estate*,

supra, is applicable, and since the Act of 1924, under which that case was decided, complainant is foreclosed from any relief which might look for exoneration of the mortgage, or so much thereof as had not yet matured.

If we may be permitted to analyse the respondents' contention, it will be seen that to sustain their view will make for a situation unfavored in the law. Let us assume that a husband and wife execute a bond and mortgage upon property held by them as tenants by the entirety. As the interest and principal (if the mortgage should contain amortization clause as in this case) accrue, either or both of the spouses may very well refuse to meet the payment, having in mind the view that if either should predecease the other, that the survivor would take the entire estate *cum onere*. In a like manner, either or both of the spouses might refuse to pay taxes, insurance rates or make other expenditures for repairs, incidentals, etc., with the net result that the property would deteriorate rather than improve. The rights of the mortgagee and municipal bodies and creditors who made the repairs would in consequence be greatly prejudiced. Innumerable suits would undoubtedly be commenced, all because of the fact that the person or persons responsible for the obligations thus incurred, might through some whim or fancy, refuse to meet those obligations, due to the fact that at some uncertain future time the property would pass to the other.

The law cannot and does not look with favor upon a rule which might lead to such confusion. Investors in property would curb their activities, especially in so far as property held by the entirety was concerned.

We respectfully submit, therefore, that the contention of the respondents that the estate which they represent is not liable for its share of the

principal, interest, etc., due on the mortgage executed by their testator and the complainant, is untenable.

POINT III.

The Court below did not err in disallowing the payment of \$74.00 made by the defendants-appellants to the complainant-respondent on account of a certain radio purchased by the appellants' testator.

Whether or not the Court was correct in its decision on this point is a pure question of fact. It appears from the testimony (State of Case, p. 47; l. 35) that the radio was purchased by the testator during his lifetime.

It appears to be the fact that \$74.00 was paid by the executors on account of the said purchase and that thereafter a certain sum of money was paid by the complainant in order to complete the balance due thereon.

The Court found as a fact that the testator had bought the radio himself and that therefore the claim of \$74.00 which the executors made, should be disallowed. It is true that in the proof of claim filed by the complainant in the Hudson County Orphan's Court there was a demand made by her for a return, among other things, of the radio.

In their brief, the respondents ask that this sudden change of front be explained. The matter is in a sense insignificant, yet perhaps the explanation should be given. At the time the complainant presented to us, as her solicitors, the facts with reference to the claim which she had against the estate of her deceased husband, she presented a cancelled check drawn by her in the

sum of \$291.00 and informed us that it was given in payment of the purchase price of the radio. Whether or not she considered the instrument as hers, we do not know; at least we were not informed of the fact that previous payments had been made by her husband, or by the executors of his estate. It was not until after the claim had been filed and disputed, that the true state of facts became known. Nevertheless, there is testimony in this case that the radio was bought by the decedent, and under those circumstances we do not see how the Court erred in so holding.

We have stated the circumstances surrounding the purchase of the radio and attempted to give the explanation asked for by the appellants and in so doing we have stated certain facts which do not appear in the testimony. They are stated, however, for what they are worth, and to aid the Court in determining the correctness of the ruling below.

POINT IV.

The Court did not err in dismissing the defendants' counterclaim in so far as it seeks to require the complainant to discharge the bond and mortgage or give indemnity.

With reference to the counterclaim filed by the defendants (we shall hereinafter refer to the appellants as such), especially that portion thereof which seeks to compel the complainant to discharge the bond and mortgage held by the Jefferson Building and Loan Association of Hoboken, a rather novel question is raised. Our search for authority to support the counterclaim as filed, has proved unavailing. We shall therefore discuss the question purely as a matter of principle.

Judging from the allegations contained in the counterclaim, it would appear that the reason why defendants seek the relief they pray, is that "the estate of the defendants' testator might become obliged to pay the same in the event of a foreclosure with a possible deficiency or insolvency of the complainant, and that they cannot wind up the affairs of the estate of their testator without great prejudice to their rights. . . ."

If we may be permitted to analyze this statement, it would seem that the defendants have reference to a situation where, in the future, the complainant *might* default in the payment of the mortgage or interest thereon, whereupon the mortgagee *might* foreclose upon the bond and mortgage, whereupon after a sale of property, there *might* be a deficiency followed by a *possible* insolvency of the complainant, with the consequent result that the estate of defendants' testator *might* become liable to pay any deficiency judgment which might be so obtained.

We respectfully submit that the defendants by this statement are attempting to carry a series of possibilities to a point not quite warranted in law. They are in fact asking the Court to assume or to take judicial notice of a situation not warranted by the facts. While it is true that in the ordinary course of events certain clauses in a mortgage are often defaulted, and that said defaults are followed by foreclosure proceedings and sale of the property, yet there is nothing in the evidence to show that any such conduct on the part of the complainant is contemplated, nor is there anything in the evidence to show that should foreclosure follow, that the property would not bring in sufficient to satisfy what may be due on the bond and mortgage, nor is there anything to show that should an insufficient sum be realized on sale of the property to satisfy the mortgage

debt, that the complainant would not be in a position to satisfy the same.

The law will never presume that a person enters into a contract with the purpose of breaching it some time in the future, nor will it presume that the person is insolvent and incapable of satisfying any judgment obtained against him as a result of the breach of a contract.

There are other matters which arise for consideration. At the time of the joint execution of the bond and mortgage, defendants' testator knew—or is presumed to have known—that in the event of his predeceasing his wife, his liability as a principal obligor on the bond would remain. In that respect, if it were the testator's desire to absolve his representatives from liability after his death—should he predecease his wife—he could readily have done so by appropriate agreement either between himself and the mortgagee, or himself and his wife. There is no evidence of any such agreement.

The case of *Re: Staiger's Estate, supra*, is authority for the proposition that where land is held by the entirety and one of the spouses dies, the survivor takes no increase of estate or interest. The Court said, "When John Staiger, the husband, died, his wife took nothing in such lands from him. His interest therein simply ceased as it were." If we may be permitted to paraphrase, the interest of the survivor, in legal contemplation, remains in *status quo*. Why, therefore, should not the obligations of the survivor remain in *status quo*?

Furthermore, the right of the estate which the defendants represent cannot in any way be prejudiced by foreclosure of the mortgage. No money decree for deficiency arising from the sale of the property may be made in the foreclosure proceedings. 3 C. S. 3420. In case of deficiency, suit

must be brought at law on the bond within six months from the date of sale. 3 C. S. 3421. The recovery of any judgment on the bond opens the proceedings of foreclosure and sale of the premises, *and the person against whom judgment was recovered* may redeem the property. 3 C. S. 3422. It is evident, therefore, that before the estate can in anywise be prejudiced under the situation as it now exists, there must, of necessity, first be a default of the terms of the mortgage by respondent, foreclosure and sale of the property, a deficit arising from the sale, and a suit at law on the bond prosecuted to final judgment. *And should all of these events occur, the estate may still protect its interests by redeeming the property.*

As we have stated above, the defendants are anticipating a series of events which may never occur, and which the law will not presume will occur. They have failed to show any danger to the rights of the estate they represent, for there is no evidence of the case that the property, in value, is insufficient to satisfy the amount due on the mortgage, or that the respondent is insolvent or unable to pay any debt or deficiency judgment.

Furthermore, the defendants by their counterclaim fail to take into consideration the rights of the Jefferson Building and Loan Association of Hoboken. By the bond and mortgage, the association entered into an agreement with the testator and his wife, the complainant, which was to remain in force for a period of some eleven years, unless default occurred prior to that time. It has certain rights under and by virtue of that agreement. It is also entitled to all the benefits of its contract. To compel the complainant at this time to complete that contract by discharging the bond and mortgage might work great prejudice to the rights which the Association has under

it. It is not a party to this suit and before any steps could be taken according to the prayer of the counterclaim, it would be entitled to an opportunity to be heard.

We respectfully submit, therefore, that in the present posture of the case, as evidenced by the record, the respondents are not entitled to the relief prayed for in that portion of their counterclaim which we have just discussed, and that the ruling of the Court below dismissing that portion of the counterclaim was correct.

From the foregoing cases which we have cited, in support of the propositions contended by us at the hearing, and which views the Court below seemingly followed, it appears to be clearly established that although the property held by the entirety retains some of the incidents which attach to that tenancy at common law, yet there have developed certain changes.

As pointed out in the case of *Buttlar vs. Rosenblath, supra*, and the cases following that decision, the incidents of the relationship between the parties holding property as tenants by the entirety since the enactment of the Married Women's Act, are those of a tenancy in common. That view has been repeatedly affirmed in this Court and in other Courts of this State and if that view is sound, then the decree of the Chancellor in this case was correctly made.

As to the counterclaim of the defendants-appellants requesting the discharge of the bond and mortgage, we have stated our views concerning the prayers made by them, and respectfully sub-

mit that the dismissal thereof at the hearing below is in accordance with law.

For the reasons stated above and under the authorities herein cited, we respectfully submit the decree of the chancellor should in all things be affirmed.

Respectfully submitted,
MEANEY AND LIFLAND,
Solicitors of Complainant-Respondent.

THOMAS F. MEANEY,
of Counsel.

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