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Notice of Appeal.

Essex County Circuit Court

HELEN LEVY, Plaintiff, vs. CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation, Defendant.	Action at Law.

To: Stein, McGlynn & Hannoch, Esqs., Attorneys of Defendant.

Sirs:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Dated: December 15, 1930.

BILDER & BILDER,
Attorneys of Plaintiff.

Stipulation.

ESSEX COUNTY CIRCUIT COURT.

HELEN LEVY, Plaintiff, vs. CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation, Defendant.	Action at Law.

IT IS HEREBY STIPULATED AND AGREED that it is unnecessary to include in the record in this case on appeal the following pleadings filed in this cause:

1. Defendant's answer
2. Plaintiff's reply to said answer.
3. Defendant's first amended answer.
4. Defendant's amended reply to said first amended answer.

Dated, December 26th, 1930.

BILDER & BILDER,
Attorneys of Plaintiff.

STEIN, MCGLYNN & HANNOCH,
Attorneys of Defendant.

Summons.

The State of New Jersey to Crosstown Building and Loan Association, a corporation:

YOU ARE HEREBY SUMMONED to answer the annexed complaint of Helen Levy in an action at law in the Essex County Circuit Court.

AND TAKE NOTICE that unless you file your answer to the said complaint with the Clerk of the Essex County Circuit Court, at Newark, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you (and see notice endorsed hereon).

WITNESS, Worrall F. Mountain, Judge of the Essex County Circuit Court, at Newark, New Jersey, this 18th day of October, A. D. 1928.

BILDER & BILDER,
Attorneys.

JOHN H. SCOTT,
Clerk.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

HELEN LEVY, Plaintiff, vs. CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation, Defendant.	Action at Law.

Plaintiff, residing in the City of New York, County and State of New York, says:

1. Plaintiff is the holder and owner of certificate No. 1231 for ten shares of the defendant's stock.

2. There has been paid in on said shares of stock monthly installments amounting in the aggregate to $1,090.00.

3. On June 6, 1928, said shares of stock had a withdrawal profit of $427.90, making a total withdrawal value of $1,517.90.

4. On or before June 6, 1928, plaintiff notified defendant that plaintiff desired to withdraw from the Association and to receive from the Association the full amount paid in on said shares, together with withdrawal profit and interest earned by said shares.

5. On or about said date defendant notified plaintiff that defendant would not pay said sum to plaintiff, defendant claiming that there had been

borrowed on said shares of stock by plaintiff a sum of $900.00, and that the whole of said alleged loan, besides interest thereon, was unpaid.

6. Plaintiff has not borrowed any money from defendant on said shares of stock.

WHEREFORE, plaintiff demands of the defendant $1,517.90, besides interest and any additional profits on said shares to which plaintiff may be entitled.

Judgment will be claimed by plaintiff against defendant in the sum of $1,517.90, besides interest and profits as aforesaid.

BILDER & BILDER,
Attorneys of Plaintiff.

Order.

ESSEX COUNTY CIRCUIT COURT.

HELEN LEVY, Plaintiff, vs. CROSSTOWN BUILDING & LOAN ASSOCIATION, a corporation, Defendant.	Action at Law.

This matter being opened to the Court by Bilder & Bilder, attorneys of plaintiff, in the presence of Nathan Kussy, Esq., of Kussy & Kohn, attorneys of defendant, and the Court having heard the arguments of counsel, and good and sufficient reason appearing therefor, it is on this 15th day of April, A. D. 1929, on motion of Bilder & Bilder, attorneys of plaintiff,

ORDERED, that the plaintiff's motion to strike out the defendant's answer on the ground that said answer is sham be and it is hereby denied, providing said defendant pay to the plaintiff or to Bilder & Bilder, her attorneys, the sum of $617.90 within twenty days from the date of this order, the said sum representing the difference between the withdrawal value of shares standing in the name of Helen Levy on the books of Crosstown Building & Loan Association and the sum of $900.00 alleged by said Association to have been advanced to the plaintiff on account of said shares, but which allegation is denied by said plaintiff.

WM. A. SMITH,
Circuit Court Judge.

Amended Answer.

ESSEX COUNTY CIRCUIT COURT.

HELEN LEVY, Plaintiff, vs. CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation, Defendant.	Action at Law.

Defendant, a corporation of New Jersey, with its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

1. It admits the matters in paragraph 1 of the complaint concerning ownership of the stock, but denies that part saying plaintiff is the holder of the certificate.

2. It admits the allegations in paragraphs 2, 3 and 5.

3. It denies the matter in paragraphs 4 and 6.

FIRST SEPARATE DEFENSE.

4. Plaintiff, by her lawfully authorized agent and attorney, one Louis Cleveland Levy, her husband, took out the ten shares represented by the certificate #1231, as alleged in the complaint, made the payments and borrowed $900.00 from the defendant, delivering to the defendant a signed note, witnessed by a notary, and the stock certificate. This certificate the defendant has held as collateral security. All these dealings between plaintiff and defendant were transacted by plaintiff through her agent.

SECOND SEPARATE DEFENSE.

5. Plaintiff applied for the said shares before May 13th, 1919, through aforesaid Levy, and made all payments thereon from that time forward, for about eight years, through said Levy, thus holding him out to defendant as her ostensible agent in dealings with the defendant concerning these shares.

6. On or about January 19, 1927, said Levy, purporting to act for plaintiff, applied for a loan of $900.00, delivering to defendant the certificate unendorsed and a note for $900.00 with plaintiff's signature and the signature of a notary public purporting to have witnessed plaintiff's signature.

7. Reasonably relying on the said holding out, defendant thereupon advanced the money by handing over to the said Levy a check of $900 drawn to plaintiff as payee.

8. Defendant was reasonable in relying on the said holding out and is therefore entitled to the benefit of any transaction made with the ostensible agent purporting to act for plaintiff.

THIRD SEPARATE DEFENSE.

9. Defendant repeats the allegations of paragraphs 5, 6, 7, and that part of 8 which states that it was reasonable in relying upon said holding out.

10. The check mentioned in paragraph 7 above was duly honored and paid by defendant's depository on or about January 24, 1927.

11. Said amount of $900.00 was then charged to defendant's account with its depository.

12. By reason of the operation of Law of New Jersey 1908, Chapter 215, defendant may now be unable to regain the $900.00 from the depository.

13. This great loss is impending upon the defendant through its reasonable reliance upon aforesaid holding out made to it by plaintiff, and may well result if plaintiff is permitted to deny the authority of Levy to act for her.

14. To prevent the inevitable consequences of such denial, defendant is estopped to deny aforesaid authority of Levy to act for her in borrowing money on these shares.

FOURTH SEPARATE DEFENSE.

15. Defendant offered to pay plaintiff the value of the shares, deducting the sum borrowed thereon, with interest on said loan, but plaintiff refused said offer and refused to let defendant deduct the sum so borrowed from the sum otherwise due on the shares.

FIFTH SEPARATE DEFENSE.

16. The certificate was delivered to defendant by Levy under the circumstances aforestated in this answer.

17. Defendant took the certificate in good faith in the ordinary course of business and without knowledge of an infirmity, if any existed, in the instrument, giving as value therefor the loan of $900.00.

18. Plaintiff has refused to repay the money loaned or allow a deduction of that amount from the withdrawal value of the stock.

19. Under Laws of New Jersey 1916, Chapter 191, defendant is entitled to retain the certificate until repaid the loan.

SIXTH SEPARATE DEFENSE.

20. Defendant has paid to the plaintiff all money due her from defendant, and is no longer indebted to plaintiff.

STEIN, MCGLYNN & HANNOCH,
Attorneys for Defendant.

Dated: 10/4/30.

Reply to Amended Answer.

ESSEX COUNTY CIRCUIT COURT.

HELEN LEVY, Plaintiff, vs. CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation, Defendant.	Action at Law.

Plaintiff, replying to the amended answer filed by defendant herein, says:

AS TO THE FIRST SEPARATE DEFENSE:

1. Plaintiff denies the truth of each of the allegations contained in the first separate defense.

AS TO THE SECOND SEPARATE DEFENSE:

1. Plaintiff denies the truth of each of the allegations contained in the second separate defense.

AS TO THE THIRD SEPARATE DEFENSE:

1. Plaintiff denies the truth of the allegations of paragraph numbered "9" of the third separate defense.

2. Plaintiff has no knowledge or information sufficient to form a belief as to the truth of paragraph numbered "10" of the third separate defense.

3. Plaintiff has no knowledge or information sufficient to form a belief as to the truth of paragraph numbered "11" of the third separate defense.

4. Plaintiff denies the truth of the allegations of paragraph numbered "13" of the third separate defense.

5. Plaintiff denies the truth of the allegations of paragraph numbered "14" of the third separate defense.

AS TO THE FIFTH SEPARATE DEFENSE:

1. Plaintiff has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph numbered "16" of the fifth separate defense.

2. Plaintiff has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph numbered "17" of the fifth separate defense.

3. Plaintiff denies the truth of the allegations of paragraph numbered "19" of the fifth separate defense.

AS TO THE SIXTH SEPARATE DEFENSE:

1. Plaintiff denies the truth of the allegations of paragraph numbered "20" of the sixth separate defense.

At the trial of this action plaintiff shall move to strike out each and every one of the separate defenses set forth in defendant's amended answer, on the ground that such defenses respectively do not constitute good and valid defenses to plaintiff's cause of action.

BILDER & BILDER,
Attorneys of Plaintiff.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

HELEN LEVY,
Plaintiff,

vs.

CROSSTOWN BUILDING & LOAN ASSOCIATION, a corporation,
Defendant.

Action at law on verdict by a jury. Judgment for defendant, December 3, 1930. Costs, $92.65.

Stein, McGlynn & Hannoch, Attorneys for Defendant.

This action was tried before Judge Worrall F. Mountain with a jury, at the Essex Circuit Court, on December 3, 1930.

The Cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the defendant, Crosstown Building and Loan Association, and against the plaintiff, Helen Levy.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff costs, which are taxed at Ninety-two Dollars and Sixty-five Cents. Judgment signed and entered December 3, 1930.

WILLIAM S. GUMMERE,
C. J.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HELEN LEVY, Plaintiff-Appellant, vs. CROSSTOWN BUILDING AND LOAN ASSOCIATION, Defendant-Appellee.	On Appeal.

The following are the grounds on which plaintiff-appellant appeals in the above entitled cause:

1. The Court erroneously denied plaintiff-appellant's motion for direction of a verdict in favor of plaintiff-appellant and against defendant-appellee.

2. The Court erroneously admitted in evidence Exhibit D-5.

3. The Court erroneously overruled plaintiff-appellant's objection to the following question put to the defendant-appellee's witness, Harry Miller, and permitted the said witness to answer said question, viz.:

> "Q. Now, I ask you who paid the interest on that note?"

4. The Court erroneously admitted in evidence Exhibit D-6.

5. The Court erroneously refused to strike out the following answer of the defendant-appellee's witness, Harry Miller:

> "Q. When Mr. Levy came over to Newark and received this check which you handed him, what did he hand you at that time? A. A note signed by Helen Levy before a New York notary.

6. The Court erroneously admitted in evidence Exhibit D-2.

7. The Court erroneously admitted in evidence Exhibit D-3.

8. The Court erroneously refused to charge plaintiff-appellant's second request to charge, viz.:

> "When the defendant delivered to Louis Levy the check for $900 made payable to the plaintiff, the defendant constituted Louis Levy its agent and should suffer as against the plaintiff for Louis Levy's wrongful act in not delivering said check to plaintiff."

BILDER & BILDER,
Attorneys of Plaintiff-Appellant.

Testimony.

ESSEX COUNTY CIRCUIT COURT.

HELEN LEVY vs. CROSSTOWN BUILDING & LOAN ASSOCIATION.	Action at Law. Before: HON. WORRALL F. MOUNTAIN, *J.*, and a jury.

December 3, 1930.

For plaintiff appear BILDER & BILDER (by WALTER J. BILDER).

For defendant appear STEIN, MCGLYNN & HANNOCH (by EDWARD R. MCGLYNN).

(A jury is called and sworn.)
(Mr. Bilder opens for plaintiff.)
(Mr. McGlynn opens for defendant.)

HELEN LEVY, plaintiff, sworn in her own behalf.

Direct examination by Mr. Bilder

Q. You are the plaintiff in this suit? A. I am.

Q. Did you ever borrow any money on stock certificate No. 1231, for ten shares which you owned in the Crosstown Building & Loan Association, the defendant in this suit? A. No.

Q. Did you ever authorize anyone to borrow any money for you on that stock from this defendant? A. No.

Q. Did you ever receive any money from this defendant on that certificate as a loan thereon? A. No.

Q. Did you ever receive any money from anyone with knowledge that that money had come from the Crosstown Building & Loan Association as a loan upon this certificate? A. No.

Cross-examination by Mr. McGlynn.

Q. What was your husband's name? A. Louis Cleveland Levy.

Q. When did he die? A. May 15th.

Q. What year? A. Two years ago, 1928.

Q. Did you know that he had taken out for you, or in your name, shares of stock in the Crosstown Building & Loan Association of Newark? A. I did.

Q. When did you first know that? A. When he took them out.

Q. Do you know when that was? A. Some time in 1919; about eleven years ago.

Q. Have you the stock certificate in your possession? A. No, I have not.

Q. Did you ever have it? A. I didn't have it; it was in the vault.

Q. Did you ever have personally and physically in your possession the stock certificate in this building and loan association? A. No, I did not.

Q. Do you know who did have it? A. My husband.

Q. Do you know when he got it? A. When he took out the certificate, from what I understood.

Q. Who made the monthly payment to the building and loan association as dues on that stock? A. My husband, but I gave him the money.

Q. You gave him the money? A. I gave him the money every month.

Q. Did you give it to him in cash or by check? A. In cash.

Q. You left it to him to make the payments to the building and loan association? A. I did.

Q. Prior to his death had you ever had any contact at all with the building and loan association? A. None at all.

Redirect examination by Mr. Bilder.

Q. You speak of the stock certificate being kept in a vault. What vault was that? A. The New York Trust Company, I think, on Wall Street.

Q. Safe deposit box? A. Yes, sir.

Q. Did you have access to the box? A. Yes, sir.

Q. You were able to get in it yourself? A. Yes, sir.

Q. Without your husband being with you? A. Yes, sir.

Q. What was kept in that box belonging to you? A. My jewelry and, as I thought, that stock certificate.

Q. Any other documents? A. And my will.

Q. Your will? A. Yes, sir.

Recross-examination by Mr. McGlynn.

Q. You never saw the stock certificate in the vault, did you? A. I never had occasion to go down to the vault. Every time I wanted anything it was brought up to me.

Q. You let your husband go into the vault and bring up to you what was wanted? A. Yes, sir.

Q. Your husband was a lawyer? A. Yes, sir.

Redirect examination by Mr. Bilder.

Q. What did your husband bring to you on request? A. Just the jewelry.

Q. Where was your home at that time? A. 149th Street and Riverside Drive.

Q. Where was the bank? A. On Wall Street.

Q. Where was your husband's office? A. 27 Cedar Street.

Q. How near the bank was his office? A. Two or three blocks.

Q. How often was your husband downtown at his office? A. Every day.

PLAINTIFF RESTS.

Mr. McGlynn: I respectfully move for a nonsuit. The plaintiff's complaint distinctly says, paragraph 1, the plaintiff is the holder and owner of stock certificate No. 1231, for ten shares of stock, but the proofs do not show that.

Mr. Bilder: You admit it in your answer. There were two answers filed in this case. I have before me the original answer and the amended answer, in which the defendant says that it admits allegations in paragraphs 1, 2, 3 and 4.

The Court: Is there an amended complaint?

(Argument.)

Mr. Bilder: May I pray leave to have the plaintiff resume the stand so I may interrogate her further?

Mr. McGlynn: No objection.

HELEN LEVY, plaintiff, recalled.

Direct examination by Mr. Bilder.

Q. Did you authorize your husband or anyone else to re-deliver your stock certificate No. 1231 back to the Crosstown Building & Loan Association? A. No.

Mr. McGlynn: I object.
The Court: I will admit it.

Q. When did you first know or find out that the stock certificate was not in that vault, but had been re-delivered to the company? A. After my husband died.

Q. When was that? A. May 15, 1928.

(Cross-examination waived.)

PLAINTIFF RESTS.

Mr. McGlynn: In order that my client may have an air of finality in this matter, I will waive the motion for a nonsuit and go into my proof.

The Court: That will be better all the way around.

HARRY MILLER sworn in behalf of defendant.

Direct examination by Mr. McGlynn.

Q. You are an officer of the Crosstown Building & Loan Association of Newark? A. Vice-president.

Q. How long have you been connected with that building and loan association? A. A matter of fourteen years.

Mr. McGlynn: I offer in evidence certificate No. 1231 in the Crosstown Building & Loan Association of Newark, representing ten shares of stock in the fifty-seventh series. Certificate dated May 13, 1919.

(Same is received in evidence and marked Exhibit D-1.)

Q. I show you a note dated January 20, 1927. Is the Crosstown Building & Loan Association the holder of that note? A. Yes, they are.

Mr. McGlynn: I offer this note in evidence.

Mr. Bilder: I object to its admission unless the signature is proved.

(Note is received for identification and marked Exhibit D-2.)

Mr. McGlynn: Note dated January 20, 1927, in the sum of $900, to the order of Crosstown Building & Loan Association. It is a collateral form of note purporting to be signed by Helen Levy and witnessed by one M. Somers, Commissioner of Deeds of the State of New York.

Mr. Bilder: I object to counsel reading it into the record.

Q. I show you a check dated January 19, 1927, and I ask you if that check was issued by the Crosstown Building & Loan Association? A. Yes, sir, it was. I signed it at the time.

Q. In connection with the note just marked? A. Yes.

The Court: What is the amount of that?

Mr. McGlynn: $882, dated January 19, 1927.

The Court: To whose order is that?

Mr. McGlynn: Helen Levy.

Q. Do I understand that this check was issued for the proceeds of the note you just identified? A. Absolutely.

Mr. McGlynn: I offer this check for identification.

(Same is marked Exhibit D-3 for Identification.)

Q. Tell us, if you can, if you had anything personally to do with this note transaction. A. Yes, sir.

Q. What? A. Mr. Levy, a New York attorney, had some shares in our association and he called me on the telephone at around that time, telling me that he was in need of some money. He asked me how he could borrow money from the association on his shares in the association. I told him the only way to do that was to come over personally, and by signing a note we would issue a check to him for 90 per cent. of the proceeds of the value of his stock. That is all there was to that telephone conversation, and a half an hour later he called up again and told me that Helen Levy had some shares in our association and she wanted to borrow some money on that, and how that could be done. I told him that Helen Levy would have to come to Newark. He said that that was impossible, but he could have her sign a note. I asked him to do that and told him that the note would have to be signed before a notary. He said that he was a

New York attorney and he could witness his wife's signature, or the signature of Helen Levy. I told him that would not——

Mr. Bilder: I object to any further conversation between this witness and a third person until it is first shown that the third person had authority to bind this plaintiff.

Q. Before you can go any further, do you know of your own knowledge who had been making payments to the building and loan association on account of certificate No. 1231? A. Mr. Levy at all times.

Q. Do you know how those payments were made, by cash or check? A. By check at all times.

Q. Have you the association correspondence file here? A. Yes, sir.

Q. Is this bunch of letters correspondence from Mr. Levy to the building and loan association? A. That's right.

Q. Does that file contain numerous letters from him, enclosing checks covering payments on that certificate in question, No. 1231?

Mr. Bilder: I object to counsel mentioning the document in his question.

Mr. McGlynn: Do you want to put the file in?

Mr. Bilder: Let me examine it.

Mr. McGlynn: Mr. Bilder has looked at some correspondence and agreed that I can put in a form letter enclosing a check for the monthly payment, which we can agree is a fair example of numerous letters we received prior to the loan—letters from Louis Cleveland Levy to the building and

loan association and letters from the building and loan association to him.

(Same are received in evidence by consent and marked Exhibit D-4.)

Q. I show you copy of a letter from the building and loan to Mr. Levy, dated January 19, 1927. Are you familiar with that letter, the contents of it? A. Yes, I am.

Q. Is that a true copy of the original letter sent to Mr. Levy under that date? A. Yes, sir, it is.

Mr. McGlynn: I offer the letter in evidence.

Mr. Bilder: I object. First, the original has not been produced by any demand made on us for its production, nor has any diligent attempt been shown to have been made to obtain the original. Secondly, the letter appears to be a communication between the defendant and a third person, and therefore is not binding on this plaintiff, nor has the third person's authority to communicate, on behalf of this plaintiff, with the defendant in regard to the matter set forth in this letter been established.

Mr. McGlynn: Notice to produce was served upon counsel under date of January 3, 1930, by the attorney for the defendant at that time. Mrs. Levy testified that her husband is now dead, and I think that it was at least held out to us that he was her agent.

The Court: The notice to produce was served by whom?

Mr. McGlynn: The attorney who first represented the defendant.

The Court: If you have had notice to produce, Mr. Bilder, what is the objection to this letter going in on that ground?

Mr. Bilder: My objection on the ground that no notice was served upon me was incorrect. I withdraw that motion, but my objection still continued on two grounds: first, that the notice to produce is to produce a letter where a diligent attempt has not been made to produce the original, and, as I say, appears to be a communication between the defendant and a third person and therefore is not binding on this plaintiff.

The Court: The third person was the plaintiff's husband?

Mr. McGlynn: Yes.

Mr. Bilder: Yes, your Honor.

The Court: I will admit it.

(The same is received in evidence and marked Exhibit D-5.)

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Was it in accordance with that letter that you received the note which has been identified by you?

Mr. Bilder: I object to the question as calling for a conclusion.

The Court: Sustain the objection.

By the Court.

Q. Did you receive the note after the letter was signed? A. Yes, sir, I did.

Q. From whom? A. Mr. Levy, as I recall it now.

By Mr. McGlynn.

Q. Then, subsequent to the receipt of that note and stock certificate, the check which you identified, what was done with that? A. Given to Mr. Levy, who appeared personally.

Q. The letter shows that the check was to be left with you personally. Was that actually done? A. Yes, sir.

Q. Did Mr. Levy personally call? A. Yes, sir.

Q. And you handed him the check? A. That's right. Gave him the checks upon receipt of the notes.

Q. You say "checks" because there was another loan that affected his stock? A. Yes.

Q. Subsequent to January 1st, 1927?

Mr. Bilder: I object to any further conversation by this witness or any testimony by this gentleman of a transaction with a third person.

The Court: Their defense is that the husband was the agent of the wife.

Mr. Bilder: My objection is that they may not show any transaction with the husband until they prove that he was the authorized agent to conduct those transactions.

The Court: That is a question of fact for the jury.

Mr. Bilder: I ask an exception, and may it appear that your ruling was as of that time when I made that objection?

The Court: No, not then.

Mr. Bilder: May I have the record note that your Honor did not rule in response to my objection?

The Court: I did not rule because you went right on with the case.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Subsequent to the receipt of this note which you have identified and giving of this check by the association, do you recall how the payments of the monthly dues on certificate No. 1231 were made and by whom? A. They were made through Mr. Louis Cleveland Levy.

Q. The correspondence you have before you, does that in any way indicate who, if anyone, paid interest on these notes or this particular note? A. Yes, it does. It shows the payment on No. 1231.

Q. Does the correspondence in your possession, which I understand came from the files of the Crosstown Building & Loan Association subsequent to the receipt of this note, indicate who paid the interest on that note? A. Yes, sir, it does.

Q. Now, I ask you who paid the interest on that note?

Mr. Bilder: I object.

The Court: On the Helen Levy note?

Mr. McGlynn: Yes.

Mr. Bilder: I object to such testimony on the ground it has not been shown that this loan was made to Helen Levy, nor has it been shown that the person to whom the loan was made is her agent, nor has it been shown that the communication which the Court has before it established that the interest was paid with the plaintiff's authority.

The Court: We have evidence indicating that the certificate of stock standing in the

name of the plaintiff was delivered by her husband from the safe deposit box, to which he had access, to the building and loan association, and that a check was made out, not to him, but to her, and a note given to the association signed by her name—I do not know whether it is her signature or not. Now, the question is, who paid the interest on that note? I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Question read.) A. Louis Cleveland Levy.

Mr. McGlynn: I offer one of these letters in evidence, the first letter after the loan, which was January 5, 1927.

Mr. Bilder: I object to it on the ground it is a communication from a third person not shown to be the agent of the plaintiff in connection with the loan therein referred to for the purpose of writing said letter, and therefore nothing therein contained is binding on the plaintiff.

The Court: I will admit it.

(Letter is received in evidence and marked Exhibit D-6.)

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Exhibit D-6 is read to the jury.)

Q. How did it come to be $5? A. A $1,000 loan would be $5 a month interest.

Q. Mrs. Levy's loan was only $900?

Mr. Bilder: I object to testimony as to "Mrs. Levy's loan."

Q. The $900 loan you are talking of. I will leave the name out.

The Court: The loan made to Helen Levy, with the check drawn to her order.

Mr. Bilder: I object, your Honor.

The Court: That is the evidence we have before us.

Q. In order to explain the $5 item, the other check you speak of was to whom? A. The other loan was to Louis Cleveland Levy, for $100, and one loan of $900 to Helen Levy.

Q. That would make the interest charge how much? A. $5 on the two loans.

Q. When Mr. Levy came over to Newark and received this check which you handed him, what did he hand you at that time? A. A note signed by Helen Levy before a New York notary.

Mr. Bilder: I object to that and ask that it be stricken out on the ground the witness has stated a fact obviously a conclusion.

The Court: He already stated that he handed the check on the receipt of the note.

Mr. McGlynn: I offer the note and check marked D-2 and D-3 respectively for identification.

Mr. Bilder: I object to the admission in evidence of the check marked D-3 for Identification on the ground it has not been shown that the check was either handed to Helen Levy or that it got into her possession, nor does it show the words "Helen

Levy" on the back of the check was in her writing or made with her authority.

The Court: That endorsement was not on there when the check was delivered by this witness. I will admit it.

(Exhibit D-3 for Identification is received in evidence and marked Exhibit D-3.)

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Bilder: I object to the admission in evidence of D-2 for Identification on the ground it has not been shown that this paper was signed by this plaintiff, nor that the words "Helen Levy" appearing on the back are in her handwriting, nor that those words were put upon this instrument by her authority.

The Court: I will admit it.

(Exhibit D-2 for Identification is received in evidence and marked Exhibit D-2.)

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross-examination by Mr. Bilder.

Q. Referring to the letter—carbon copy of letter bearing date April 14, 1925, which I have taken from the batch of letters marked Exhibit D-4, I call your attention to a reference in that letter reading as follows: "If you will verify enclosed authorization executed by the respective owners of the shares, authorizing us to deliver the certificates

to you, your wishes therein will have our attention accordingly." Did you get back authorizations authorizing the defendant to make delivery of this stock certificate 1231 standing in the name of Helen Levy to anyone? A. Yes, sir, we did.

Q. Have you that authorization here with reference to the delivery of this stock certificate 1231? A. I don't know whether it is here in these papers or not.

Q. Did you ever see it? A. I am only connected as vice-president with the association, I am not the secretary.

Q. Do you ever recall seeing those authorizations? A. No.

Q. Do you know whether they came in? A. They must have come in, otherwise we would not have delivered the certificate.

Q. You can make sure of that by looking at a subsequent letter, can you not? A. Probably.

Q. Does this letter enable you to tell positively that that written authorization came in authorizing the defendant to make delivery of the stock certificate No. 1231 standing in the name of Helen Levy? A. Yes, sir, it does.

Q. You can state positively now that did come in? A. Yes, sir.

Q. Can you state to whom that authorization directed and authorized the building and loan association to make delivery of stock certificate No. 1231? A. To Louis Cleveland Levy.

Q. The payments you got always came through the mail, is that correct, on account of the stock? The regular monthly dues always came by mail from New York? A. Always came by mail, yes, sir.

Q. Now, the exhibit marked Exhibit D-3 came to your hands by mail, or was it personally turned over to you by someone? A. No, this was turned over to me by the treasurer.

Q. I mean this (indicating). A. This is a check.

Q. My question should be the reverse. This exhibit marked D-3 by the defendant was turned over by the defendant to someone personally or mailed, which? A. No, this was turned over to Louis Cleveland Levy.

Q. Personally he was present at the office of the defendant at the time? A. In the office, to be exact.

Q. At Newark? A. Yes, sir.

Q. This document came how into the defendant's possession? By mail? A. This was handed to me at the time I turned over the check.

Q. By whom? A. This was handed to me by Louis Cleveland Levy.

Q. Did you know Mr. Levy at that time, so that you knew you were turning that over to the gentleman of that name? A. Yes, from prior dealings with him. He had been with our association for a number of years.

Q. You knew him personally to identify him? A. Yes, sir, I did.

Q. You had had dealings with him previously in connection with other stock certificates? A. Yes, sir.

Q. Belonging to other persons, other than the plaintiff? A. His own, yes, and the plaintiff's, and others, yes.

DEFENDANT RESTS.

HELEN LEVY, plaintiff, recalled in her own behalf in rebuttal.

Direct examination by Mr. Bilder.

Q. I show you a paper which is marked Exhibit D-2 and I ask you whether your signature, written by you, is on that paper? A. It is not.

Q. Did you ever see that paper before? A. I did not.

Q. Did you ever authorize anyone to write your name on that paper? A. No.

Q. I show you Exhibit D-3 and I ask you to look at the reverse side of that document and state whether or not your handwriting is on that. A. No, it is not.

Q. The words "Helen Levy" were written by you? A. No.

Q. Did you ever see this document before? A. No.

Q. Did you ever authorize anyone to put your name or the words "Helen Levy" on the back there? A. No.

Q. Did you get, to your knowledge, the proceeds of that check? A. No.

Q. Did that pass through your personal bank account, that you can tell by looking at it? A. No.

Q. Will you kindly write two specimens of your signature on this paper? A. (Witness does as requested.)

JOHN V. HARRING sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Bilder.

Q. What is your business? A. Examiner of questioned documents.

Mr. McGlynn: Admit his qualifications as a handwriting expert.

Q. How long have you been a handwriting expert? A. I have been in penmanship for forty years. I have been examining and giving opinions in regard to questioned handwriting thirty years. I have testified since 1912 in courts in New York, New Jersey, Pennsylvania and many other states, in both criminal and civil cases.

Q. Have you examined the handwriting of Helen Levy on either of these or both documents which I now show you, marked respectively Exhibits D-2 and D-3? A. D-2, I have examined a natural size photograph and also an enlargement of that signature, but never have I examined this D-3 check.

Q. Did you ever see either one of those two papers personally yourself? A. My recollection is that I have examined this Exhibit D-2.

Q. Where? A. At the office of the attorney.

Q. Kussy & Kohn? A. My memorandum was mislaid. I don't just recall the office.

Q. Can you tell us where you went to examine that? A. No. It was some time ago and I have been many places since.

Q. Have you photographs made of that? A. Photographs, yes. Here is an enlarged photograph of Exhibit D-2, of the signature.

Mr. McGlynn: I admit it is a photograph.

Mr. Bilder: I offer in evidence this photograph.

(Same is received in evidence and marked Exhibit P-1.)

Mr. Bilder: May I ask Mrs. Levy to resume the stand for the purpose of identifying this?

Mr. McGlynn: I will admit any signatures of hers.

Mr. Bilder: I offer these documents bearing the true signature of the plaintiff.

(Same are received in evidence and marked Exhibit P-2.)

Mr. Bilder: I offer in evidence the yellow sheet showing the signature made by Helen Levy on the stand.

(Same is received in evidence and marked Exhibit P-3.)

Q. Have you examined the signatures on the letters marked in evidence Exhibit P-2 and compared them with the large signature appearing on the photograph, Exhibit P-1? A. I have.

Q. To ascertain whether or not they were, in your opinion, written by the same person? A. I did.

Q. What is your opinion as to whether or not the signatures "Helen Levy" in Exhibit P-2 were or were not made by the same person who wrote the signature "Helen Levy" of which Exhibit P-1 is an enlarged photograph? A. I also had another signature to a will——

Q. Will you answer the question, please? A. What is the question again, please?

Q. (Question read.) A. My opinion is that the person who wrote one did not write the other.

Q. I ask you now to examine Exhibit P-3 and compare the signature in duplicate there of Helen Levy made thereon with the signature "Helen Levy" on Exhibit D-2. Please examine them so that I may ask you a further question. A. (Witness does as requested.) I have made a witness stand examination.

Q. Now will you state your opinion as to whether or not the same person who wrote the words "Helen Levy" on Exhibit D-2 wrote the words "Helen Levy" on Exhibit D-3? A. In my opinion they did not.

Q. Now examine or compare the signature "Helen Levy" on Exhibit D-2 and the signature "Helen Levy" on Exhibit P-2 and state whether or not in your opinion the same person wrote the signatures on each exhibit. A. (Witness does as requested.) I have made such an examination and I think I have testified that they did not.

Q. You now so testify, if by chance you have not so testified already? A. I do.

Q. Compare the signature "Helen Levy" on the back of Exhibit D-3 with the signatures on Exhibit P-3 and state whether in your opinion the same person wrote both signatures "Helen Levy." In my opinion they did not.

Q. Now please examine the signature on the back of Exhibit D-3 and compare it with the signature on Exhibit P-2 and state whether in your opinion the same person wrote the signatures in those two exhibits. A. (Witness does as requested.)

I have made such examination before, and in my opinion they do not. I have also made the examination now.

Cross-examination by Mr. McGlynn.

Q. Did you make any examination of the alleged signature of Helen Levy made by her husband, Louis Cleveland Levy? A. No, sir, I did not.

PLAINTIFF RESTS.
DEFENDANT RESTS.

Mr. Bilder: I respectfully move for the direction of a verdict on the ground that it is established by the proofs that the signatures on the documents upon which the defendant relied to show the alleged loan were not made by this plaintiff. Her testimony, uncontradicted, is that she did not authorize this loan and she did not receive the proceeds and did not know of it at all until after her husband's death, when she learned of it only from this defendant. The remaining consideration concerns the alleged agency of her husband, and, under the authority which I desire to cite to your Honor, it seems perfectly clear that sufficient evidence has not been shown of any agency in fact or in law which entitles this defendant to have any question submitted to the jury.

(Argument.)

The Court: What I am interested in is this: This man, the husband of this plaintiff, came over to Newark concerning a certificate of stock, and he delivered a note purporting to be signed by his wife and received a check payable, not to his order,

but to his wife's order. Did he have the authority or apparent authority to perform that particular act in question at that particular time? The fact that after that check was delivered to him he forged it, if he did, I do not think is a matter of much interest. He received a check made to his wife's order and he had the certificate of stock which belonged to her, and he had it in his possession. It was her certificate. He had a note purporting to be signed by her and I think had some semi-official stamp on it of some commissioner of deeds. Isn't the question whether at that time he had the apparent authority to perform that particular act? What happened after he got the check, which was payable to his wife, I do not think is of much interest. I assume it was a forgery. She says it was not her signature and Mr. Harring says it is not, and I believe the defendant admits it was not, but that is not the question.

Mr. Bilder: I agree with your Honor that the only question in this case is, was there any conduct on the part of the plaintiff which precludes her now from impeaching this instrument, because that is what the Negotiable Instruments Law provides.

(Argument.)

The Court: As I have listened to the testimony, the only thing is she did not let her husband see to whom she paid or was supposed to pay the money to the building and loan. That was the only thing she did not allow him to do. Is there anything else? What other connection was there?

Mr. Bilder: The fundamental connection is it was issued to her name.

The Court: You do not follow me. If you want to argue about the facts in this case, I am willing to argue with you. I do not think you are wise to do so, but I will allow you to.

The only connection she had with the defendant was that she said to her husband every month, "Here is so much money to pay my premium." There is no connection that she ordered him to buy it or that he ever saw the certificate. It was put in his safe deposit box and he kept it, and now you want me to direct a verdict against the defendant?

Mr. Bilder: Yes, certainly, your Honor.

The Court: No, I will not do that.

Mr. Bilder: May I——

The Court: You may have an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. McGlynn: I respectfully move for the direction of a verdict in favor of the defendant, first, on the ground that the plaintiff's complaint alleges that she is the holder of stock, and there is positive proof in this case that she was not the holder when this suit was started and is not the holder now. There is no proof that she ever was physically the holder of it.

Secondly, it seems from the facts in this case that sufficient has been proven by the building and loan association in this case to bring it within the case of Wisnowski against Polish American Building & Loan Association, decided in the Supreme Court and taken to the Court of Errors, which makes this question really a question of estoppel.

The Court: I think that case was much stronger than this.

Mr. McGlynn: It is, but I think the underlying principle is the same and I believe that the facts proved in this case should be passed on by the Court.

The Court: I think it is a jury question. I will deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Mr. McGlynn sums up for defendant.)

(Mr. Bilder sums up for plaintiff.)

(The Court charges the jury as follows:)

The Court's Charge.

MOUNTAIN, J.:

The plaintiff in this case has brought an action against the defendant, alleging that she was the holder and owner of a certificate of stock in the defendant corporation, a building and loan corporation in this state, and that after her husband died she said that she made a demand upon the defendant for the withdrawal value of the stock, as I understand it, which I think at that time amounted, it is claimed, to about $1517.90. By order of the Court, $617.90 of that amount was paid by the defendant to the plaintiff. That left $900, which the defendant contends it did not owe to the plaintiff, because it said it had loaned that amount to her, and that is the question we are trying to-day.

The plaintiff claims she is entitled to this $900 and the defendant denies it, because it says it loaned the money to her, and, having loaned the money to her, it does not owe it to her.

What does the testimony indicate? It appears from the stories we have heard from both sides that when this stock was originally purchased, as I understand it, it was taken out in the name of the plaintiff and the certificate was issued to Mrs.

Helen Levy. I have that certificate in front of me and you will have an opportunity to examine it. It is dated May 13, 1919. There is testimony indicating that this was done by her husband and that the certificate was placed, as I understand it, in a safe deposit box jointly owned—that is, both husband and wife had access to the safe deposit box. I do not remember any testimony indicating that she even ever saw this certificate, but she testified that she gave her husband cash each month and that he paid the premiums to the building and loan association on the certificate in question. She stated on her case that she had never had any talk with this defendant herself, and she testified that she had never borrowed money on this certificate, that she had never authorized her husband to deliver the certificate of stock to the defendant and that she had never received any money from her husband, if he had consummated this loan. She denied, I think, that he had any authority to do it from her.

The defendant alleges on its part that throughout the entire dealings between the parties it never had any talk with Helen Levy; that the only person it knew as representing her was her husband, and it has put in evidence letters indicating the character of the communication between the parties and indicating the fact, I think, that he paid the premiums. It alleges that when the loan was demanded, this loan of $900 from the defendant, that it sent a letter requesting certain authority to be given to it before any loan would be made. Mr. Miller on the stand testified that that authority was received from the husband and that the husband came bearing this certificate of stock and pre-

sented it to the defendant. This was a collateral loan, to be held by the defendant as collateral on the loan.

Now, after the defendant had received this authorization and had received the certificate of stock, it issued a check, not to the husband, but to Helen Levy, and I forgot to say that when her husband came with this certificate of stock he also came with a note which has been put in evidence and which was not her note; it was a note either signed by her husband or someone else. It was an apparent forgery, but the defendant upon the receipt of this note and upon receipt of the note with the authorization I have spoken of, says it handed the husband a check. That is the particular transaction to which I invite your attention.

You may find, when you retire to the jury room, that right there is the meat of the case, and not what happened to the check after the husband got it or after he left, although that might have some bearing, of course, on your consideration of the whole case; but when you retire to the jury room you may consider that that particular part of this transaction is quite important, because the question arises as to whether or not the husband had authority to do what he did. And that brings us to this charge of law by the Court, that the fact that a marital relation existed between these persons, the fact that one is the husband of another, does not give rise to any presumption of agency. No one can presume agency, without any act, from the fact that two people are married—I mean, such an act as this one—and so the defense of agency by the defendant is an affirmative defense.

Now, exactly what do we mean when we talk of principal and agent? Well, agency generally results when one party, called the principal, au-

thorizes another, called the agent, to act for her in her business dealings with third persons. The relation of principal and agent is not always so clear that we can say that an express contract shows it. Sometimes it is only susceptible by reason of the fact that the acts of the principal with the agent would tend to indicate that the principal held the agent out as agent and that that relation did exist between them.

The courts have held in this state that in every case depending upon the apparent authority of the agent the question is whether the principal has—that is in this case the plaintiff—Mrs. Levy has, by her voluntary act, placed the agent—that is her husband—in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, was justified in presuming that such agent had authority to perform the particular act in question. That is the law which I think you will find applies to the situation as it existed on the day when this lady's husband came to Newark bearing, as I say, the certificate of stock and note.

Now, did her husband on that day, in accordance with that law, have the apparent authority, or did he have any authority, to perform that particular act in question? You will note in connection with what happened on that day, or you may find—I will put it that way—that credit was not given by the defendant exclusively to the husband. I say you may find that, because you might find that credit had been given exclusively to him if this check had been made payable to him instead of to Helen Levy.

If you find that the plaintiff is entitled to recover, she will be entitled to recover $900 with interest

from October 22, 1928, which, I think, was the date of the service of the complaint upon the defendant, to be calculated at 6 per cent.

If you find that the plaintiff is not entitled to recover and that her husband was in fact acting as her agent, and, as I have charged you, that the note was delivered to him and she was then principal, then your verdict would be for the defendant.

You know, of course, that you have to decide all questions of fact, so if I have misquoted any of this testimony, you must ignore what I have said and take your own recollection of what the witnesses testified to.

(The jury retires.)

PLAINTIFF'S REQUESTS TO CHARGE.

1. The husband is not regarded in law as the agent of his wife by virtue alone of their marital relationship.

Denied.

2. When the defendant delivered to Louis Levy the check for $900 made payable to the plaintiff, the defendant constituted Louis Levy its agent and should suffer as against the plaintiff for Louis Levy's wrongful act in not delivering said check to plaintiff.

Denied.

Exhibit P-1.

Enlarged photograph of signature on Exhibit D-2.

Exhibit P-2.

Four letters of plaintiff, Helen Levy, showing her true signature.

Exhibit P-3.

Two specimen signatures of plaintiff made at the trial.

Exhibit D-1.

No. 1231 10 Shares

THE CROSSTOWN BUILDING AND LOAN ASSOCIATION OF NEWARK, N. J.

THIS IS TO CERTIFY, that Mrs. Helen Levy is entitled to TEN Shares in the Fifty Seventh Series of the Capital Stock of the CROSSTOWN BUILDING AND LOAN ASSOCIATION OF NEWARK, N. J.

Transferable in person or by attorney only on the books of this Association upon surrender of this Certificate.

Newark, N. J., May 13, 1919.

MORRIS MILLER, President. DAVID LONGFELDER, Secretary.

Cancelled

(Seal of Crosstown Building and Loan Association of Newark, N. J.)

Exhibit D-2.

No. 1231 $900.00

Newark, N. J., January 20th, 1927.

On Demand I promise to pay to the order of the Treasurer or Acting Treasurer of the CROSSTOWN BUILDING AND LOAN ASSOCIATION, of the City of Newark, N. J., Nine hundred and ..00 Dollars, being the amount this day loaned to me by the said Association, and I hereby assign and transfer unto the said CROSSTOWN BUILDING & LOAN ASSOCIATION, of the City of Newark, all my right, title and interest in Ten (10) shares* of stock in said Association, and standing in my name on the books thereof, as a collateral security for the payment of the sum loaned, and hereby secured, together with interest thereon at the rate of one-half per centum per month, also the monthly instalment of one dollar on each share of said stock, and any fines and other penalties incurred thereon under the provisions of the constitution of said Association, with full power to sell the said shares of stock, in such manner as the Board of Directors (or the majority of the members thereof), of said Association may direct, whenever I may become six (6) months in arrears on the books of the said Association.

HELEN LEVY.

Witness: MORRIS SOMERS,
Com. of Deeds of N. Y.

*Certificate No. Dated 191 for shares.

Exhibit D-3.

CROSSTOWN BUILDING & LOAN ASSOCIATION
No. 5067

Newark, N. J., Jan. 19 1927

Pay to the order of Helen Levy $882.00 Eight hundred eighty two and no dollars.

In payment of loan Certificate "1231."

DAVID LONDFELDER
Secretary

HARRY MILLER
Vice President

(*On side.*)

ACCEPTED
and payable at the
West Side Trust Company
Newark, N. J.
M. GINSBERG
Treas.

(*Endorsements.*)

Pay to the order of
Louis Cleveland Levy
Helen Levy
Pay to the order of
The Chase National Bank of City of N. Y.
Maiden Lane Branch
Louis Cleveland Levy

Exhibit D-4.

LOUIS CLEVELAND LEVY
ATTORNEY AT LAW
27 Cedar St., New York

New York, April 5, 1924.

Crosstown Building & Loan Association
of Newark, N. J.,
203 Springfield Avenue,
Newark, New Jersey.

In Re: 1231 Series 57 Shares 10
1232 Series 57 Shares 10

Gentlemen:

Enclosed please find check for Twenty ($20) Dollars, being Ten ($10.) Dollars payment on each of the above numbered shares of stock in your association for April, 1924. Please acknowledge receipt and oblige.

Very truly yours,

LOUIS CLEVELAND LEVY.

LCL: EM
Enc.

P. S. You will also find enclosed the two books in which I would ask you to please enter the payments from May 1923 to and including April 1924 and return said books to me.

L. C. L.

Exhibit D-4.

LOUIS CLEVELAND LEVY
ATTORNEY AT LAW
27 Cedar St., New York

New York, April 7, 1923.

Crosstown Building & Loan Association
of Newark, N. J.,
203 Springfield Avenue,
Newark, N. J.

In Re: 1231 Series 57 Shares 10.
1232 Series 57 Shares 10.

Gentlemen:

Enclosed you will please find my check for $20. being the April, 1923, payment of $10 each on the above numbered shares in your association. You will also find enclosed the two books in which I would ask you to please enter the payments from May to and including December, 1922 and from January to and including April, 1923, and *return said books to me.*

Thanking you in advance for this courtesy, I am

Very truly yours,

LOUIS CLEVELAND LEVY.

LCL: MD

Exhibit D-4.

LOUIS CLEVELAND LEVY
ATTORNEY AT LAW
27 Cedar St., New York

New York, April 8, 1922.

Crosstown Building & Loan Ass'n of Newark, N. J.,
203 Springfield Avenue,
Newark, New Jersey.

In Re: #1231 Series 57 Shares 10.
#1232 Series 57 Shares 10.

Gentlemen:

Enclosed you will please find my check for $20. being the April, 1922 payment of $10 each on the above numbered shares in your association. You will also find enclosed entry books in which I would ask you to please enter the payments made from May to and including December, 1921 and from January to and including April, 1922, and return said books to me.

Thanking you in advance for this courtesy, I beg to remain

Very truly yours,

LOUIS CLEVELAND LEVY.

LCL/MD

Exhibit D-4.

LOUIS CLEVELAND LEVY
ATTORNEY AT LAW
27 Cedar St., New York

New York, April 8, 1921.

Crosstown Building & Loan Association
of Newark, N. J.,
203 Springfield Avenue,
Newark, New Jersey.

In Re: #1231 Series 57 Shares 10
#1232 Series 57 Shares 10

Gentlemen:

Enclosed you will please find my check for $20. being the April, 1921, payment of $10 each on the above numbered shares in this association. You will also find enclosed the books for each account, which I would ask you to please write up for the year 1919 and to date and return the same to me.

Trusting that you will give this your immediate attention, I am

Very truly yours,

LOUIS CLEVELAND LEVY.

LCL/MD

Exhibit D-4.

LOUIS CLEVELAND LEVY
ATTORNEY AT LAW
27 Cedar St., New York

New York, April 10, 1920.

Crosstown Building & Loan Association
of Newark, N. J.,
203 Springfield Avenue,
Newark, New Jersey.

In Re: #1231 Series 57 Shares 10
#1231 Series 57 Shares 10

Gentlemen:

Enclosed you will please find my check for Twenty ($20.00) Dollars, being the April 1920 payment of Ten (10.00) Dollars each on the above numbered shares in this association.

You will also find enclosed the two books which I would ask you to please write up for the payments made since June last, and return same to me at my office.

Thanking you in advance for this courtesy, I am

Yours very truly,

LOUIS CLEVELAND LEVY.

LCL/MD
Enc. 3.

Exhibit D-4.

LOUIS CLEVELAND LEVY
ATTORNEY AT LAW
27 Cedar St., New York

New York, April 11, 1925.

Crosstown Building & Loan Association
of Newark, New Jersey,
203 Springfield Avenue,
Newark, New Jersey.

In Re: 1231 Series 57 Shares 10
1232 Series 57 Shares 10
2178 Series 78 Shares 5
2179 Series 78 Shares 5
2180 Series 78 Shares 5
2234 Series 79 Shares 5

Gentlemen:

Enclosed you will please find my check in the sum of $40 being the payments on each of the above shares in your association for April 1925 which I would ask you to please credit upon the books of your association. You will also find enclosed the books for #1231 and #1232 in Series 57 and books for #1624 Series 68 and #1950 Series 74, in which I would ask you to please enter the payments including April 1924 and return all these books to me.

I find that of all the shares in your association which have been purchased through my efforts no certificates have been forwarded to the writer or to the holders of said certificates and am therefore

requesting that you forward to me certificates as follows:

#1231	Series	57	Shares	10
1232	Series	57	Shares	10
2178	Series	78	Shares	5
2179	Series	78	Shares	5
2180	Series	78	Shares	5
2234	Series	79	Shares	5
1624	Series	68	Shares	5
1950	Series	74	Shares	5

Upon receipt of these certificates I will see that they are delivered to the proper persons and holders of the same. Kindly give this matter your immediate attention.

Thanking you in advance for this courtesy, I am

Very truly yours,

LOUIS CLEVELAND LEVY.

LCL: MD

Exhibit D-4.

April 17, 1925.

Mr. Louis Cleveland Levy,
27 Cedar Street,
New York City.

Dear Sir:

In accordance with the authorizations sent us enclosed please find the following certificates:

#1231—10	Shares in the name of	Mrs. Helen Levy,
#1232—10	" " " " "	Isaac G. Hyman,
#1624— 5	" " " " "	Dr. Geo. H. Hyman,
#1950— 5	" " " " " " " " "	
#2178— 5	" " " " "	Louis Cleveland Levy,
#2179— 5	" " " " "	George J. Levy,
#2180— 5	" " " " "	Gertrude Jane Levy,
#2234— 5	" " " " "	Clara Hyman.

Kindly acknowledge receipt thereof on the enclosed forms, one for each certificate, and return, thereby completing our records therein and oblige.

Concerning the pass books, they no doubt have reached you by this time, if not if you will kindly let us know we will send a tracer after them through the Post Office Department.

Very truly yours,

Secretary.

C. T. L.—R. K.
Encs.
(Registered Mail.)

Exhibit D-4.

April 14, 1925.

Mr. Louis Cleveland Levy,
27 Cedar Street,
New York City.

Dear Sir:

We are in receipt of yours of the 11th enclosing check for April share dues, and beg to advise that pass books #1231, 1232, 1624 and 1950 are being returned to you today by mail under separate cover with full instructions therein, all of which you will no doubt find correct concerning the certificates which you state neither you nor those parties which you have interested in the association have received, beg to advise therein that these certificates are negotiable and safety demands that they be delivered only to the owner of record or to a duly authorized representative. If you will therefore have the enclosed authorizations executed by the respective owners of the shares authorizing us to deliver the certificates to you their wishes therein will have our attention accordingly. You no doubt will realize the importance of this, and we await your further wishes therein.

Very truly yours,

Secretary.

C. T. L.—R. K.
Encs.

Exhibit D-5.

January 19, 1927.

Mr. Louis C. Levy,
27 Cedar Street, Room 1033,
New York City.

Dear Sir:

In accordance with the request, through Mr. Harry Miller, for two loans to be applied on certificates #2178 and #1231, beg to hand you enclosed collateral notes which if you will kindly have executed before a Notary Public and return to us, with the certificates attached thereto, checks for the amounts due you thereunder will be sent you, or, if it is your desire to call in person the checks will be in the possession of Mr. Harry Miller.

For your information beg to advise that there will be a 2% premium charge deducted from the face of the notes and interest thereon will be payable monthly, with your regular share dues. In other words, on a loan of $100.00 you will receive a check for $98.00 and interest at the rate of 50¢ per month will be payable thereon.

Kindly have Helen Levy execute the note for #1231 personally before the Notary as these papers must be signed by the one in whose name the shares are recorded.

Awaiting yours further therein, I am

Very truly yours,

Acting Secretary.

C. T. L.—M. S./R. K.
Encls.

Exhibit D-6.

LOUIS CLEVELAND LEVY
ATTORNEY AT LAW
27 Cedar St., New York

New York City, Feb. 5, 1927.

Crosstown Building & Loan Ass'n
of Newark, N. J.,
203 Springfield Avenue,
Newark, New Jersey.

In Re: 1231 Series 57 Shares 10
1232 Series 57 Shares 10
2178 Series 78 Shares 5
2179 Series 78 Shares 5
2180 Series 78 Shares 5
2234 Series 79 Shares 5

Gentlemen:

Enclosed you will please find my check in the sum of $40.00 being the payments on each of the above shares in your association for February, 1927, which I would ask you to please credit upon the books of your association.

Thanking you in advance for this courtesy, I beg to remain

Very truly yours,

LOUIS CLEVELAND LEVY.

LCL.EM
Enc.

Enclosed check also covers interest charge of $5.00 on loan.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HELEN LEVY,
Plaintiff-Appellant,

vs.

CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation,
Defendant-Appellee.

On Appeal.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

Defendant-appellee's argument makes this case turn on whether or not defendant-appellee was justified in presuming that the husband as the agent of the plaintiff-appellant had authority to deliver the stock certificate and obtain a check representing the proceeds of the loan which the defendant association made on the strength of the same. This question, we contend, is wholly irrelevant. Granting, for the sake of argument only, that defendant-appellee was so justified, it does not follow that the subsequent payment of said check (which was payable to the order of plaintiff-appellant) by the bank to plaintiff-appellant's husband upon a forged endorsement of her name, was the legal equivalent of payment to plaintiff-appellant. The giving of said check by defendant-appellee to plaintiff-appellant's husband did not in itself constitute a payment of money or necessarily impose a loss upon defendant-appellee. It was the (wrongful) payment of said check by defendant-appellee's bank to plaintiff-appellant's husband without plaintiff-appellant's genuine or authorized endorsement thereon, that caused the difficulty in this case, and

even that act (of the bank) did not prejudice the defendant-appellee. The fact that defendant-appellee has gratuitously assumed or appears to have assumed the loss which legally is chargeable against the bank, cannot create any right in favor of defendant-appellee against plaintiff-appellant.

The case of *Corona Kid Co.* v. *Lichtman*, 84 N. J. Law 369, cited by counsel for defendant-appellee on page 5 of their brief, is not in point. In that case, which was in trover, it was sought to charge a principal with the fraud of his agent so as to make the principal liable in damages for said fraud. In the case at bar defendant-appellee set up in defense to a suit for a debt, a claim of payment to an apparent agent but, instead of proving payment (by defendant-appellee) to the apparent agent, proves the giving of a check to the supposed agent, which check was payable to the principal. Payment of the check was not made by defendant-appellee but (wrongfully) by its bank upon a forged endorsement of the payee's name.

The case of *Mick* v. *Corporation of Royal Exchange, etc.*, 87 N. J. Law 607, cited by counsel for defendant-appellee on page 5 of their brief, was a suit on an insurance policy. Defendant set up the defense of a fraudulent representation which operated to avoid the policy. Defendants proved a fraudulent representation made by plaintiff's authorized agent. The Court held the fraud of the agent was imputable to the plaintiff. The case is obviously not in point. Defendant-appellee has sustained no loss as a result of the alleged fraud of plaintiff-appellant's husband. Defendant-appellee has gratuitously assumed that loss, which indisputably is chargeable against the bank.

Defendant-appellee, on page 6 of its brief, argues that plaintiff-appellant cannot recover from defendant-appellee on this case because plaintiff-appellant is not the holder of the certificate of stock in question, that having been delivered to defendant-appellee by plaintiff-appellant's husband in connection with the supposed loan. The answer to this is that, although the certificate is actually in defendant-appellee's possession, defendant-appellee is not entitled to retain same adversely to plaintiff-appellant because defendant-appellee has actually made no loan on said certificate either to plaintiff-appellant or her husband. In other words, defendant-appellee is not now rightfully holding said certificate as security for the repayment of any loan made by it thereon, since the wrongful payment of the defendant-appellee's check in question by the bank is not equivalent to a loan by defendant-appellee to plaintiff-appellant. Defendant-appellee's mere possession of said certificate does not defeat plaintiff-appellant's right to demand and obtain the full cash surrender value of said shares. In order to be entitled to withhold the full cash surrender value of said certificate from plaintiff-appellant, defendant-appellee must show the making of a loan thereon to plaintiff-appellant, actually or in contemplation of law. This the defendant-appellee has failed to do.

The case of *Wysakowska* v. *Polish-American, &c., Ass'n*, 95 N. J. Law 352 (and on appeal in 96 N. J. Law 447), is fully discussed and distinguished in plaintiff-appellant's principal brief on page 14. Defendant-appellee's reliance on said case is wholly unwarranted.

In the case of *Wilson* v. *Walsh*, 148 Atl. Rep. 7, cited by counsel for defendant-appellee, a mortgagee gave to his own attorney a check endorsed

by the mortgagee (payee) in blank for delivery to the mortgagor. The attorney used the check himself. The Court held that the mortgagee must bear the resultant loss.

The case of *J. Wiss & Sons Co.* v. *H. G. Vogel Co.*, 86 N. J. Law 618, cited by defendant-appellee on page 9 of its brief, is not in point. In that case a suit was brought to recover the difference between the price at which the defendant company is alleged to have agreed to install a sprinkling system for the plaintiff and the cost of the same to the plaintiff after the defendant had refused to perform. The case turned on the power of the defendant's agent to execute the contract. The contract, as completed, was signed "H. G. Vogel Company by G. W. Bechtold." In the case at bar there is no question (as in the cited case) as to whether or not a supposed agent who signed a contract on behalf of his principal, had implied authority to do so.

The case of *Marx & Rawolle* v. *Standard Music Roll Co.*, 98 N. J. Law 516, cited by defendant-appellee on page 9 of its brief, is not in point. In that case plaintiff, for a considerable period, and at frequent intervals, had bought goods from defendant at its place of business; such purchases being made of defendant's agent in charge of its store. This agent stated to plaintiffs that defendant was offering goods at a reduced price if purchased in large quantities, and plaintiffs made two purchases, paying cash therefor to the agent, but received only a part of the goods, and an action was brought for failure to deliver the balance of such goods. It was held that whether the transactions were of such an unusual character as to oblige the plaintiffs to inquire into the agent's authority was, in view of the course of dealing, a question for the jury, as was also the

question whether the defendant had clothed the agent with apparent authority to make the sales in question.

None of the other cases cited by defendant-appellee on pages 9 and 10 of its brief are in point.

Defendant-appellee's counsel on page 10 of their brief say:

> "As we have said before and again repeat, either the defendant building and loan association was justified in dealing with the plaintiff's husband as it did, or it was not justified. If it was so justified, what happened subsequent to the delivery of the building and loan association's check to the plaintiff's husband, has no relevancy in connection with the legal issues involved in the decision of this case."

We submit that counsel is in error. Even if defendant-appellee was "justified in dealing with the plaintiff's husband as it did," still the wrongful cashing of that check (which was payable to plaintiff-appellant) by her husband, was not chargeable to plaintiff-appellant as if the payment of the sum involved had been made to her (or with her knowledge and consent). Furthermore, the wrongful (or erroneous) payment of this check by defendant-appellee's bank to the husband did not even create a charge against defendant-appellee or impose any necessary loss upon defendant-appellee.

Respectfully submitted,

BILDER & BILDER,
Attorneys of Plaintiff-Appellant.

Of Counsel:
WALTER J. BILDER.

NEW JERSEY

Court of Errors and Appeals

HELEN LEVY, Plaintiff-Appellant, vs. CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation, Defendant-Appellee.	ON APPEAL.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

Statement of Facts.

There is no dispute as to the facts in this case. On June 6, 1928 (several months prior to suit), plaintiff-appellant was the owner of ten shares of stock in the defendant-appellee corporation represented by certificate No. 1231, said shares then having a withdrawal value of $1,517.90 (see plaintiff-appellant's complaint and defendant-appellee's amended answer, State of Case, pp. 4 and 7). Plaintiff-appellant sought to obtain from defendant-appellee the said cash surrender value of said shares, but defendant-appellee, claiming it had theretofore lent plaintiff-appellant on said shares the sum of $900, offered to pay plaintiff-appellant the balance remaining after deduction of said alleged loan. This balance was subsequently paid to

plaintiff-appellant by defendant-appellee pursuant to an order of the Court made in this cause on April 15, 1929 (see State of Case, p. 6). Plaintiff-appellant denied that she had borrowed any money on said shares and so testified at the trial (see State of Case, p. 16, lines 30-40, and p. 17, lines 1-11). Defendant-appellee offered testimony to show that an application for a loan on said shares was made by plaintiff-appellant's husband, Louis Cleveland Levy, in plaintiff-appellant's name on or about January 19, 1927 (see State of Case, p. 22, lines 19-41; p. 57, lines 1-40); that on or about January 20, 1927, said Louis Cleveland Levy delivered to defendant-appellee plaintiff-appellant's said stock certificate No. 1231, without any endorsement thereon, together with a promissory demand note for $900 bearing the signature "Helen Levy," and that thereupon defendant-appellee delivered to Louis Cleveland Levy defendant-appellee's check for $900 payable to the order of Helen Levy (see State of Case, p. 25, lines 38-40; p. 26, lines 1-20; p. 45, Exhibit D-1; p. 46, Exhibit D-2; p. 47, Exhibit D-3; p. 57, Exhibit D-5). It appeared that said check was subsequently presented to defendant-appellee's bank for payment and paid through banking channels, said check bearing the endorsements:

"Pay to the order of
Louis Cleveland Levy
Helen Levy

Pay to the order of
The Chase National Bank of City of N. Y.
Maiden Lane Branch
Louis Cleveland Levy"

(see State of Case, p. 47, Exhibit D-3). It further appears that the original delivery of the said

stock certificate had been made by defendant-appellee to plaintiff-appellant through her husband, after defendant-appellee had received a written authorization from plaintiff-appellant to deliver said certificate to her husband, defendant-appellee having expressly required such written authorization in advance (see State of Case, p. 53, Exhibit D-4, letter dated April 11, 1925; p. 54, same exhibit continued, p. 56, Exhibit D-4, letter dated April 14, 1925; p. 55, Exhibit D-4, letter dated April 17, 1925; p. 30, lines 33-40; p. 31, lines 1-35). It further appears that all the payments on said shares made by plaintiff-appellant were forwarded to defendant-appellee by plaintiff-appellant's husband in the form of his check, the funds therefor being furnished by plaintiff-appellant to her husband for that purpose (see State of Case, p. 23, lines 13-28; p. 48, Exhibit D-4, letter dated April 5, 1924; p. 13, lines 37-41; p. 18, lines 1-8). Plaintiff-appellant testified that the stock certificate was at all times kept in a safe deposit box which she and her husband used in common and to which both had access (see State of Case, p. 18, lines 14-29). She says she first learned of the abstraction of the certificate from said box when she learned from defendant-appellee, after her husband's death on May 15, 1928, that said stock had been redelivered to defendant-appellee by her husband (see State of Case, p. 20, lines 17-21). She denied knowledge of said loan (see State of Case, p. 16, lines 34-41; p. 17, lines 1-11; p. 33, lines 1-31), denied that she had authorized her husband or anyone else to borrow any money on her said shares (see State of Case, p. 16, lines 34-41), and denied that the signature "Helen Levy" on the said promissory note and on the back of said check had been written by

her, and denied that she had received the proceeds of said check or any part thereof (see State of Case, p. 33, lines 1-27; p. 33, lines 28-31). A handwriting expert of admitted qualifications testified positively that in his opinion said signatures "Helen Levy" on the note and check had not been written by plaintiff-appellant (see State of Case, p. 34, lines 22-40; p. 35, lines 1-33; p. 36, lines 1-40; p. 37, lines 1-9).

First Ground of Appeal.

The First Ground of Appeal is as follows:

> "The Court erroneously denied plaintiff-appellant's motion for direction of a verdict in favor of plaintiff-appellant and against defendant-appellee."

It is clear that the only question in the case is the question of whether or not the giving by defendant-appellee to plaintiff-appellant's husband of a check made payable to the order of plaintiff-appellant, followed by the payment of said check by defendant-appellee's bank to plaintiff-appellant's husband, all without plaintiff-appellant's knowledge, prior or subsequent thereto, constituted the legal equivalent of a payment of said money to plaintiff-appellant. It is our contention that this is purely a question of law and that the answer to the question is emphatically "no."

Of course, the situation would be fundamentally different if instead of giving plaintiff-appellant's husband a check payable to plaintiff-appellant's order, defendant-appellee had given the husband cash. In such a case the question actually raised in this case by defendant-appellee would at least have been pertinent, viz., the question of whether or not plaintiff-appellant had clothed her husband with an apparent authority to obtain said loan, that is, had put him in a position where defendant-appellee was reasonably entitled to suppose that he had such authority. Even in this hypothetical case we would have argued the negative for reasons which we shall hereinafter set forth.

But where, as in this case, the defendant-appellee made the supposed loan in such a form as to ensure

a receipt of the money by plaintiff-appellant, viz., by a check payable to her order, it is clear that defendant-appellee did not purport to make a loan to plaintiff-appellant *through her supposed agent, Mr. Levy,* and did not choose to deal with plaintiff-appellant's husband *as her agent.* On the contrary, defendant-appellee treated and employed plaintiff-appellant's husband as a mere medium for transmitting the check to plaintiff-appellant, in the same way as defendant-appellee might have employed the mail or another messenger for the same purpose. When thereafter defendant-appellee's *bank* paid said check to plaintiff-appellant's *husband* as *apparent* endorsee, such payment would not in legal contemplation be equivalent to a *payment by defendant-appellee* unless said check was actually endorsed over by plaintiff-appellant to her husband. Otherwise, such payment by the *bank* would not be chargeable to defendant-appellee.

In the case of *Harter* v. *Mechanics National Bank* (Court of Errors and Appeals), 63 N. J. Law 578, the Court held as follows:

> "The implied contract on the part of a bank with its depositor is that it will disburse the money standing to his credit only on his order and in conformity with his directions, and therefore, if it makes a payment on a check to which his name has been forged, or upon his genuine check to which the name of a necessary endorser has been forged, it must be held to have paid out of its own funds, and cannot charge the amount against the depositor, unless it shows a right to do so on the doctrine of estoppel or because of some negligence chargeable to the depositor.
>
> The return to a depositor of his check with a forged endorsement, together with

> his balanced pass-book, casts on him only the duty of exercising reasonable care and diligence to examine the vouchers and the account as stated by the bank and to inform the bank of any errors thus discoverable.
>
> A delivered to the plaintiffs a sum of money to be paid to B; the plaintiffs gave to C for B their check on the defendant bank, in which they were depositors, for the amount, payable to the order of B; C forged B's name on the back of the check, and thus obtained the money from the bank. Held, in an action by the plaintiffs to recover from the bank the balance of their deposits, that the bank would not be entitled to charge the check against the plaintiffs, on showing that A had lost his right of action against the plaintiffs for the money which he had delivered to them."

In the case of *Economy Auto Supply Co.* v. *Fidelity Union Trust Co.* (Court of Errors and Appeals), 144 Atl. 30, the Court said (at p. 31):

> "The legal relation of the bank to its depositor is that it will pay out of the latter's funds in its hands either to the depositor in person or to his order. Harter v. Mechanics' Bank, 63 N. J. Law, 578, 44 A. 715, 76 Am. St. Rep. 224. The checks in the present case were drawn to the order of the Cox Corporation, but as we have seen were never indorsed by it. When, therefore, they were paid by the trust company they were paid without the authority of the depositor, and the learned trial judge rightly directed a verdict in favor of the plaintiff."

Hence defendant-appellee did not take any risk in delivering said check to plaintiff-appellant's husband and it was not acting to its prejudice in reliance upon any supposed authority in the husband to obtain said check on behalf of plaintiff-appellant.

The fact that defendant-appellee has chosen to regard the payment of said check by its bank as chargeable against it and thus to assume an unnecessary loss, is wholly immaterial and surely cannot legitimately operate to prejudice plaintiff-appellant's rights. Defendant-appellee should have repudiated said payment by its bank as soon as defendant-appellee discovered that said check had been improperly paid by the bank. Whether or not defendant-appellee has lost its right to assert the wrongful payment as against said bank by reason of the statute limiting the bank's liability to a period of a year after such payment is immaterial to this case. The statutory provision referred to is as follows:

> "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment such depositor shall notify the bank that the check so paid was forged or raised (P. L. 1908, p. 428)" (Negotiable Instruments Law, Sec. 189a, Compiled Statutes 3, p. 3756).

It was incumbent on defendant-appellee to be diligent to ascertain during such year whether or not said check (as well as all its other checks) had been properly paid by its bank, and defendant-appellee's failure to do so, if it has resulted in loss to itself, is obviously due to its own negligence. If defendant-appellee had examined said check after its payment and return by the bank, defendant-appellee would have seen that the check had been deposited in plaintiff-appellant's husband's bank account, and thereby defendant-appellee would have been put on inquiry to ascertain whether or not said check had passed through

plaintiff-appellant's hands. However, it would seem that the above-mentioned statute does not apply to a case where a check has been paid on a forged endorsement of a payee's name, and hence defendant-appellee may still hold its bank liable for payment of said check. In the case of *Pannonia Building & Loan Association* v. *West Side Trust Co.* (Court of Errors and Appeals), 93 N. J. Law 377, the Court said (at pp. 385 and 386):

> "The case of Pratt v. Union National Bank, 79 N. J. L. 117, ought to be mentioned. The statute there referred to (Pamph. L. 1908, p. 428) provides that no bank shall be liable to a depositor for the payment by it of a forged check unless within one year after the return to the depositor of the voucher, such depositor shall notify the bank that the check was forged. This was not done in this case. One of the defences herein pleaded was that all checks drawn by the plaintiff against its deposit with defendant were paid by it and forthwith returned to the plaintiff, who did not within one year notify the defendant that any of the checks were forged. The trial judge ruled that this disclosed no defence because the statutory rule does not apply to the forgery of a payee's endorsement. It may be that the forgery of a check contemplated by this statute of limitation is that of the maker's signature, which he, of course, knows, and not of an endorser's signature, which he may not know. The Pratt case did not construe the statute of 1908, it being held that the act did not apply because not retroactive. As to whether that statute constitutes a defence in the case at bar, because the plaintiff did not notify the defendant of the forged endorsements within one year after the return of the checks, we express no opinion, as the question is not raised as a ground of appeal.

> It was, however, laid down by the Supreme Court in the Pratt case that the bank having paid the check (with forged endorsements) it could not charge the amount against the depositor, unless it showed a right to do so on the doctrine of estoppel or because of some negligence chargeable to the depositor. This is sound. It is in line with the decisions, and we approve it.
>
> Pratt v. Union National Bank, supra, was affirmed in the Court of Errors and Appeals (81 N. J. L. 588), but without affirming or denying the soundness of the views expressed by the Supreme Court upon the merits, because the state of the record raised no questions for review in the Supreme Court, where the cause was heard on an appeal from the Atlantic City District Court."

If that is so, then of course defendant-appellee has no right to impose the loss in this case upon plaintiff-appellant, who, the testimony shows, is an innocent party.

The present case is fundamentally different from the cases which involve the question as to whether or not one party has impliedly held out the alleged agent as having the requisite authority so as to be estopped to deny the agency where another party has relied on the appearance thereof. Examples of such cases are the following:

> *J. Wiss & Sons Co.* v. *H. G. Vogel Co.* (Court of Errors and Appeals), 86 N. J. Law 618;
>
> *Lambert* v. *Metropolitan Savings Assn.* (New Jersey Supreme Court), 65 N. J. Law 79;
>
> *Heckel* v. *Cranford Golf Club* (Court of Errors and Appeals), 97 N. J. Law 538.

In all of such cases it will be found that the alleged agent purported to deal *as an agent* of defendant with the plaintiff, and was dealt with *as agent* by the latter. It will also be found that in each of such cases, the plaintiff necessarily sustained a loss or would sustain a loss if the authority of the alleged agent was repudiated by the supposed principal. In the case at bar both of these features are entirely lacking, as we have shown above.

In the case of *J. Wiss & Sons Co.* v. *H. G. Vogel Co.* (Court of Errors and Appeals), 86 N. J. Law 618, above cited, an alleged agent purported *to make a contract* for and on behalf of defendant with plaintiff. Various acts of the defendant were shown and were held to have given the alleged agent the appearance of having the requisite authority to make the contract. Defendant's repudiation of the agent's authority resulted in a loss to plaintiff.

In the case of *Lambert* v. *Metropolitan Savings Assn.*, 65 N. J. Law 79, above cited, an alleged agent of defendant *made a contract* for and on behalf of defendant with plaintiff. Plaintiff paid money to said agent pursuant to said contract. Defendant had by its conduct given said agent the appearance of requisite authority.

In the case of *Heckel* v. *Cranford Golf Club* (Court of Errors and Appeals), 97 N. J. Law 538, above cited, an alleged agent *made purchases* of plaintiff in defendant's name as its alleged agent.

On the contrary, in the case at bar, plaintiff-appellant's husband *did not make any contract* with defendant-appellee on plaintiff-appellant's behalf. He merely *delivered* to defendant-appellee a promissory note which purported to be signed by plaintiff-appellant and which he, plaintiff-appellant's husband, represented to be so signed, and

with the note he delivered to defendant-appellee plaintiff-appellant's stock certificate unendorsed, which he represented to defendant-appellee that plaintiff-appellant had authorized him to deliver. In doing these things, plaintiff-appellant's husband was manifestly not performing acts of apparent agency, but of mere transmission or service. With reference to the distinction between servant and agent, the rule is stated in 31 Cyc. 1192 that the "essential distinction is that the agent is employed to establish contractual relations between his principal and third persons, the servant is not. Rather the servant deals with things, or if he deals with persons it is not to bring about contractual relations." Moreover, defendant-appellee did not treat plaintiff-appellant's husband *as an agent* by entering into a contract with him, as in the above-cited cases or by turning money or property over to him as the supposed *agent* of plaintiff-appellant. Defendant-appellee merely *handed to him a check* payable to the order of *Helen Levy* for $882 for *transmission* to plaintiff-appellant.

Although unnecessary to do so, it is not unprofitable to consider whether or not the legal result would have been different in the case at bar if defendant-appellee had given plaintiff-appellant's husband $882 in cash instead of a check payable to plaintiff-appellant's own order. The question obviously would then be as to whether or not plaintiff-appellant by her conduct had held out defendant-appellee as having authority to obtain a cash loan allegedly in her behalf on her said shares. Her conduct by reference to which this would be determined consisted of the following facts: She had permitted her husband originally to obtain possession of her stock certificate for her and upon her *express written authority* to

defendant-appellee to deliver said certificate to him; she had kept the stock certificate in a safe deposit box which she and her husband used in common, and she had made monthly payments of $10 each on said stock through her husband, furnishing him the funds each time for making such payments. On these facts alone, surely defendant-appellee would not have been reasonably entitled to hand $882 in cash to plaintiff-appellant's husband in connection with *a supposed loan to her.* In the case of *Dorman* v. *W. J. Title & Guaranty Co.* (Court of Errors and Appeals), 92 N. J. Law 487, the Court said (at p. 489):

> "The habitual payment of interest to an attorney-at-law, who in turn remits it to the mortgagee, does not establish his authority to receive the principal, or any part thereof; nor does it amount to a holding out of the attorney as agent, so as to create an estoppel against the mortgagee."

In the case of *Lawson* v. *Nicholson* (Court of Errors and Appeals), 52 N. J. Eq. 821, the Court held:

> "The mere possession of a bond and mortgage by a person not the obligee will not warrant the payment thereof to such possessor.
>
> A scrivener, under a special authority for that purpose, received payment of interest on a bond and mortgage; afterwards, the obligee delivered the bond and mortgage, with other papers, wrapped up in paper, which was tied and sealed, to the scrivener for safe keeping; the scrivener surreptitiously broke open the bundle of papers and abstracted therefrom the bond and mortgage, and received payment of the principal due thereon, and then absconded. Held, that such payment was invalid."

At page 824:

> "That a person in possession of a bond is thereby shown to have the right to receive the moneys it calls for is a doctrine that has neither decision nor dictum for its sanction. If such a doctrine prevailed, it would deprive investments in such securities of much of their supposed safety."

The case of *Wysakowska* v. *Polish-American &c. Asso.* (Court of Errors and Appeals), 96 N. J. Law 447, is not at all in point. The Court states the facts in that case as follows:

> "J. permitted C., who was not known to be her agent, to deposit as apparent principal with defendant association, J.'s money for stock; C., who represented herself to be J., received the passbook and certificates made out to J., and she (C.) afterwards presented the passbook to the defendant association, without J.'s knowledge, and obtained from it a portion of the money deposited by her in J.'s name; after discovering the fraud J. sued defendant association to recover the moneys thus withdrawn by C. Held, that J.'s conduct in implicitly trusting C. and never dealing with the association herself—never even disclosing her identity to it—made her the one of two innocents who must suffer, because her lack of care and culpable negligence enabled C. to occasion the loss."

The Court, expressly differing from the view adopted by the Supreme Court in the same case below, held that the case was not governed by any rule of agency but by the doctrine of estoppel in pais. The Court said:

> "The Supreme Court, in its opinion, wherein the facts sufficiently appear, says

that the plaintiff created an estoppel in pais which debarred her from invoking liability against the innocent party (defendant) to the transaction, which is right enough, but goes on and says that if one place another by language or conduct in a responsible position he thereby holds him out as having authority to do the act within the apparent scope of his authority, and where others, relying upon this apparent authority, deal accordingly with the agent, the principal is thereby estopped from denying the authority thus apparently conceded. As a general proposition this is unassailable, but it does not apply to the facts of the case sub judice. Now, it is true that the plaintiff, Josefa, placed her sister Catherine, who defrauded her, in a position of trust and confidence as between themselves, and that enabled Catherine to take advantage of her position, but Josefa did not hold her out to the defendant association as having authority to do any act—did not make herself known to the association at all—and, therefore, the defendant did not rely upon any authority, apparent or otherwise, reposed by Josefa in Catherine.

The question, as between the plaintiff and defendant, was not one of agency, but one of identity of the only person with whom they dealt, namely, Catherine" (see pp. 448, 449).

* * * * * * *

"The facts in the case at bar fall within this rule, as Josefa permitted Catherine, who was not known to be her agent, to deposit as apparent principal, with defendant building and loan association Josefa's money for stock, and now that Catherine's forgery and embezzlement has been disclosed after the association has paid Catherine, innocently believing her to be Josefa, it is entitled to be placed in the same situation as if Catherine had been the depositor of her own

> money; and the association is entitled to the same defence against Josefa as it was entitled to against Catherine at the time of the withdrawal of the funds, namely, payment. Of course, the doctrine of estoppel in pais applies, but not for the reason given by the Supreme Court that Catherine was held out as agent with apparent authority" (see p. 450).

In the case at bar, defendant-appellee knew that plaintiff-appellant, and not her husband, was the owner of said shares of stock, and took particular care that the check which it delivered to the husband was made out to plaintiff-appellant. The two cases are entirely dissimilar.

Second Ground of Appeal.

The Second Ground of Appeal is as follows:

> "The Court erroneously admitted in evidence Exhibit D-5."

The exhibit in question was a letter dated January 19, 1927, addressed by the defendant-appellee to the plaintiff-appellant's husband, Mr. Louis C. Levy, and was as follows:

> "January 19, 1927
>
> Mr. Louis C. Levy,
> 27 Cedar Street, Room 1033,
> New York City.
>
> Dear Sir:
>
> In accordance with the request, through Mr. Harry Miller, for two loans to be applied on certificates #2178 and #1231, beg to hand you enclosed collateral notes which if you will kindly have executed before a Notary Public and return to us, with the certificates attached thereto, checks for

the amounts due you thereunder will be sent you, or, if it is your desire to call in person the checks will be in the possession of Mr. Harry Miller.

For your information beg to advise that there will be a 2% premium charge deducted from the face of the notes and interest thereon will be payable monthly, with your regular share dues. In other words, on a loan of $100.00 you will receive a check for $98.00 and interest at the rate of 50¢ per month will be payable thereon.

Kindly have Helen Levy execute the note for #1231 personally before the Notary as these papers must be signed by the one in whose name the shares are recorded.

Awaiting yours further therein, I am

Very truly yours,

Acting Secretary.

C. T. L.—M. S./R. K.
Encls."

(See State of Case, p. 57, Exhibit D-5.)

This letter was introduced in evidence in connection with the testimony of defendant-appellee's witness, Harry Miller, as follows:

"Q. I show you copy of a letter from the building and loan to Mr. Levy, dated January 19, 1927. Are you familiar with that letter, the contents of it? A. Yes, I am.

Q. Is that a true copy of the original letter sent to Mr. Levy under that date? A. Yes, sir, it is.

Mr. McGlynn: I offer the letter in evidence.

Mr. Bilder: I object. First, the original has not been produced by any demand made on us for its production, nor has any diligent attempt been shown to have been made to obtain the original. Secondly, the letter

appears to be a communication between the defendant and a third person, and therefore is not binding on this plaintiff, nor has the third person's authority to communicate, on behalf of this plaintiff, with the defendant in regard to the matter set forth in this letter been established.

Mr. McGlynn: Notice to produce was served upon counsel under date of January 3, 1930, by the attorney for the defendant at that time. Mrs. Levy testified that her husband is now dead, and I think that it was at least held out to us that he was her agent.

The Court: The notice to produce was served by whom?

Mr. McGlynn: The attorney who first represented the defendant.

The Court: If you have had notice to produce, Mr. Bilder, what is the objection to this letter going in on that ground?

Mr. Bilder: My objection on the ground that no notice was served upon me was incorrect. I withdraw that motion, but my objection still continued on two grounds: first, that the notice to produce is to produce a letter where a diligent attempt has not been made to produce the original, and, as I say, appears to be a communication between the defendant and a third person and therefore is not binding on this plaintiff.

The Court: The third person was the plaintiff's husband?

Mr. McGlynn: Yes.

Mr. Bilder: Yes, your Honor.

The Court: I will admit it.

(The same is received in evidence and marked Exhibit D-5.)

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal."

(See State of Case, p. 24, line 10 to p. 25, line 28.)

No testimony was offered to show that the said letter or the contents thereof had come to the knowledge of plaintiff-appellant.

It is clear that the admission in evidence of the said letter was erroneous.

Third Ground of Appeal.

The Third Ground of Appeal is as follows:

> "The Court erroneously overruled plaintiff-appellant's objection to the following question put to the defendant-appellee's witness, Harry Miller, and permitted the said witness to answer said question, viz:
> 'Q. Now, I ask you who paid the interest on that note?' "

The significance of the said question appears in connection with the testimony of the said witness which immediately preceded said question. That testimony is as follows:

> "Q. The correspondence you have before you, does that in any way indicate who, if anyone, paid interest on these notes or this particular note? A. Yes, it does. It shows the payment on No. 1231.
> Q. Does the correspondence in your possession, which I understand came from the files of the Crosstown Building & Loan Association subsequent to the receipt of this note, indicate who paid the interest on that note? A. Yes, sir, it does.
> Q. Now, I ask you who paid the interest on that note?
> Mr. Bilder: I object.
> The Court: On the Helen Levy note?
> Mr. McGlynn: Yes.
> Mr. Bilder: I object to such testimony on the ground it has not been shown that this

loan was made to Helen Levy, nor has it been shown that the person to whom the loan was made is her agent, nor has it been shown that the communication which the Court has before it established that the interest was paid with the plaintiff's authority.

The Court: We have evidence indicating that the certificate of stock standing in the name of the plaintiff was delivered by her husband from the safe deposit box, to which he had access, to the building and loan association, and that a check was made out, not to him, but to her, and a note given to the association signed by her name—I do not know whether it is her signature or not. Now, the question is, who paid the interest on that note? I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Question read.) A. Louis Cleveland Levy."

(See State of Case, p. 27, line 17 to p. 28, line 17.)

For the reasons stated to the Trial Court and hereinabove quoted, it is evident that the Court's ruling on the objection to said question was erroneous.

Fourth Ground of Appeal.

The Fourth Ground of Appeal is as follows:

"The Court erroneously admitted in evidence Exhibit D-6."

Exhibit D-6 was a letter dated February 5, 1927, addressed to the defendant and signed Louis Cleveland Levy (plaintiff-appellant's husband). (See

State of Case, p. 58, Exhibit D-6.) The manner in which the said letter was offered in evidence appears in the record as follows:

> "Mr. McGlynn: I offer one of these letters in evidence, the first letter after the loan, which was January 5, 1927.
>
> Mr. Bilder: I object to it on the ground it is a communication from a third person not shown to be the agent of the plaintiff in connection with the loan therein referred to for the purpose of writing said letter, and therefore nothing therein contained is binding on the plaintiff.
>
> The Court: I will admit it.
>
> (Letter is received in evidence and marked Exhibit D-6.)
>
> Plaintiff's counsel prays an exception to this ruling of the Court.
>
> Exception noted as ground of appeal.
>
> (Exhibit D-6 is read to the jury.)"
>
> (See State of Case, p. 28, lines 20 to 36.)

For the reasons stated by counsel for plaintiff-appellant at the trial as hereinabove quoted, the admission of said letter in evidence was manifestly erroneous.

Fifth Ground of Appeal.

The Fifth Ground of Appeal is as follows:

> "The Court erroneously refused to strike out the following answer of the defendant-appellee's witness, Harry Miller:
>
> 'Q. When Mr. Levy came over to Newark and received this check which you handed him, what did he hand you at that time? A. A note signed by Helen Levy before a New York Notary.' "

It is obvious that the said answer embodied an inference of fact of which the witness had no personal knowledge, viz., that the said note had been actually signed by Helen Levy (plaintiff-appellant). The question merely called for the identification of a document which was then in court, viz., the promissory note in question. The Court's said ruling was clearly erroneous.

Sixth Ground of Appeal.

The Sixth Ground of Appeal is as follows:

> "The Court erroneously admitted in evidence Exhibit D-2."

Exhibit D-2 purported to be a promissory note for the sum of $900 dated January 20, 1927, bearing the signature—"Helen Levy" (see State of Case, p. 46, Exhibit D-2).

Said exhibit was offered in evidence in connection with the testimony of defendant's witness, Harry Miller, as follows:

> "Q. I show you a note dated January 20, 1927. Is the Crosstown Building & Loan Association the holder of that note? A. Yes, they are.
>
> Mr. McGlynn: I offer this note in evidence.
>
> Mr. Bilder: I object to its admission unless the signature is proved.
>
> (Note is received for identification and marked Exhibit D-2.)
>
> Mr. McGlynn: Note dated January 20, 1927, in the sum of $900, to the order of Crosstown Building & Loan Association. It is a collateral form of note purporting to

be signed by Helen Levy and witnessed by one M. Somers, Commissioner of Deeds of the State of New York.

Mr. Bilder: I object to counsel reading it into the record."

(See State of Case, p. 21, lines 13 to 32.)

* * * * * *

"Mr. McGlynn: I offer the note and check marked D-2 and D-3 respectively for identification."

(See State of Case, p. 29, lines 32 to 34.)

* * * * * *

"Mr. Bilder: I object to the admission in evidence of D-2 for identification on the ground that it has not been shown that this paper was signed by this plaintiff, nor that the words 'Helen Levy' appearing on the back are in her handwriting, nor that those words were put upon this instrument by her authority.

The Court: I will admit it.

(Exhibit D-2 for Identification is received in evidence and marked Exhibit D-2.)

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal."

(See State of Case, p. 30, lines 16 to 30.)

There was no proof, of course, that the words "Helen Levy" signed to said note was the signature of plaintiff-appellant, and indeed there was no testimony as to what person had signed said note. Without such proof, it is elementary that the note was inadmissible in evidence.

Seventh Ground of Appeal.

The Seventh Ground of Appeal is as follows:

> "The Court erroneously admitted in evidence Exhibit D-3."

Exhibit D-3 was defendant-appellee's check dated January 19, 1927, payable to the order of Helen Levy for $882. Said check contained the following endorsement on the back thereof:

Pay to the order of
Louis Cleveland Levy
Helen Levy

Pay to the order of
The Chase National Bank of City of N. Y.
Maiden Lane Branch
Louis Cleveland Levy.

The defendant-appellee's witness, Harry Miller, testified that he had delivered said check to plaintiff-appellant's husband, Mr. Levy, personally. There was no proof that the signature "Helen Levy" on the back of said check was the signature of plaintiff-appellant and there was no testimony offered by defendant-appellee to show what person had signed the words "Helen Levy" on the back of said check. Plaintiff-appellant in her testimony denied that the signature was hers, and plaintiff-appellant's witness, John V. Harring, the handwriting expert, testified that it was not her signature.

In the absence of proof as to the signature, "Helen Levy," said check should not have been admitted in evidence.

We respectfully submit that the verdict and judgment of the Court below should be reversed.

Respectfully submitted,

BILDER & BILDER,
Attorneys of Plaintiff-Appellant.

WALTER J. BILDER,
of Counsel.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HELEN LEVY,
Plaintiff-Appellant,

vs.

CROSSTOWN BUILDING AND LOAN ASSOCIATION, a corporation,
Defendant-Appellee.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE.

Statement of Facts.

With no intention of violating the rules of this Honorable Court, appellee would respectfully like to restate the facts in this case from its viewpoint.

Plaintiff, the widow of a New York attorney, instituted suit against the defendant Building and Loan Association for the surrender value of ten shares of its stock which had been issued on May 13th, 1919. The surrender value was admittedly $1,517.90.

The defendant paid the plaintiff $617.90 and refused to pay the balance amounting to $900.00, contending that on January 17th, 1927 it had loaned $900.00 to the plaintiff, taking as collateral security for the repayment of the loan plaintiff's certificate of stock described herein.

Plaintiff contended that the delivery of the stock certificate to the defendant association by her husband was unauthorized, that the note purported to be signed by her which was delivered by her husband to the association simultaneously

with the delivery of the stock certificate, was forged; and the check which had been issued by the defendant to the order of the plaintiff for the proceeds of the $900.00 loan was also forged by her husband and then deposited by him in his own bank account.

It appeared that in 1919 the plaintiff's husband had applied to the association for ten shares of stock in the name of his wife and that the association had delivered the original certificate to the plaintiff's husband upon her written request. That from 1919 to 1927 the original stock certificate had remained in the possession of plaintiff's husband in a safe deposit vault in New York City, and although the plaintiff had access thereto, she never exercised that right of access and in fact, had never even seen the stock certificate.

It also appeared that from 1919 to 1927 all dealings in connection with the shares of stock, such as monthly payments, etc., were had by the husband of the plaintiff, who had mailed each month to the association his checks covering the monthly dues on plaintiff's stock and other stock in which the husband either had a personal interest or which belonged to friends or relatives of his.

It further appeared that in January 1927 the husband applied to the defendant association for a loan on his own stock and the stock of his wife, the plaintiff herein, and in accordance with instructions given him by the defendant association, he produced the original stock certificate belonging to the plaintiff, a note purporting to be executed by her and witnessed by a notary of New York State, and that in exchange for the stock certificate and note, an officer of the defendant association had delivered to the plain-

tiff's husband a check to the order of plaintiff for the proceeds of this loan; that thereafter, and up to the date of plaintiff's husband's death, which was in May 1928, the husband had continued to make regular monthly payments of dues on the plaintiff's stock certificate and had also each month paid interest at the rate of six per cent. on the amount of the $900.00 loan.

It further appeared that the plaintiff did not discover where her stock certificate was or that the defendant association had made a loan on the security of her stock, until subsequent to her husband's death, when she desired to surrender the shares and secure the withdrawal value thereof.

There is no dispute as to any of the facts involved in this case, and the sole question seems to be whether or not the plaintiff had, by her voluntary act, placed her husband as her agent in such a situation that the defendant, exercising ordinary prudence conversant with business usages and the nature of its business, was justified in presuming that the husband as the agent of the plaintiff had authority to deliver the stock certificate and obtain a check representing the proceeds of the loan which the defendant association made on the strength of the same.

The learned Trial Judge submitted this question to the jury as a question of fact, and by their verdict, they resolved this question in favor of the defendant and rendered a verdict accordingly.

ARGUMENT.

Appellee respectfully contends that all of the grounds of appeal set forth in the notice of appeal, which are actually argued in the brief of the plaintiff-appellant, will upon analysis be found to center around one single question, namely: *whether or not there was any conduct on the part of the plaintiff which justified the defendant in dealing with her husband as it did.* It is significant, and we deem it of sufficient importance to point out to this Honorable Court, that the check issued by the defendant association, representing the proceeds of the loan made by it on the security of plaintiff's shares of stock in the defendant association, was not made to the plaintiff's husband, but was made to the plaintiff.

We do not believe that what happened subsequent to the delivery of that check has any relevancy or materiality in the decision of the issues of this case. Either the defendant was justified in delivering its check to the plaintiff's husband at that time, or it was not justified.

If it was justified in delivering the check to him at that time under the circumstances as they existed, then the fact that the plaintiff's husband forged her endorsement and appropriated the proceeds of the check to his own use, is a loss which must be assumed by the plaintiff and not by the defendant. If the defendant was not justified in delivering its check to the plaintiff's husband when it did and under the circumstances as they existed, then the fact that plaintiff's husband forged the check does not add to or detract from the defendant's right to set up the amount of its loan against the surrender value of plaintiff's stock.

The principle of law which we believe governs the situation in this case is described by the late Justice Kalisch in the case of *Corona Kid Co.* v. *Lichtman,* 84 N. J. L. 369:

> "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. * * * In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true that he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in. * * * With respect to the question of whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

Also, in the case of *Mick* vs. *Corporation of Royal Exchange, etc.,* 87 N. J. L., at page 619, Justice Parker said:

> "We do not overlook the fact that an honest loss may be thus defeated by a dishonest agent. The answer is that he who employs and relies entirely on an agent to deal with others takes the risk of his dishonesty in such dealings."

It is therefore our contention that the plaintiff in this case, having relied entirely upon her husband to take out her shares of stock, to obtain physical possession of her stock certificate, to keep possession of her stock certificate over a period of years, to make her monthly payments, made it possible for her husband to obtain from the defendant in this case the check representing

the proceeds of the loan made by the defendant upon the security of the plaintiff's certificate of stock. This he would not have been been able to have accomplished if she had not placed him in this position by reason of her own actions.

The importance of this particular line of argument becomes significant when it is remembered that the plaintiff in this case could not recover under any circumstances from the defendant for the withdrawal value of her shares, unless she was the holder and owner of the certificate of stock issued by the defendant corporation. In the complaint filed by her, State of the Case, pages 4 and 5, the first paragraph reads as follows:

> "1. Plaintiff is the holder and owner of certificate 1231 of ten shares of the defendant's stock."

It will be noted on page 7 of the State of the Case, defendant, in its amended answer, pleaded to this paragraph as follows:

> "1. It admits the matters in paragraph one of the complaint concerning the ownership of the stock but denies that part saying plaintiff is the holder of the certificate."

Defendant also, under paragraph 5 of the Separate Defense in its amended answer, State of the Case pages 9 and 10, pleaded that under the provisions of Chapter 191, Laws of 1916, it was entitled to retain the certificate until the loan it had made on the security of the same had been repaid.

Appellee therefore contends that the plaintiff, having placed her husband in a position where he had physical possession of the stock certificate, so that he could deliver it to the defendant under the circumstances of this particular case, held ~~her~~ him out as his agent, and as argued herein, the

question of the extent of his authority was one for the jury and its decision on that point should not be disturbed.

Appellee also argues that this same general principle, sometimes referred to as the doctrine of "apparent authority" or as a "conduct evidence" or as being based upon the doctrine of "estoppel *in pais*" which has been referred to in other New Jersey cases, amply justified the action of the Trial Court in submitting this question to the jury in this case. As authority for this position we respectfully refer to the case of *Wysakowska* vs. *Polish American Building & Loan Association,* reported in 95 N. J. L. 352 (Supreme Court opinion) and also in 96 N. J. L. 447 (Court of Errors and Appeals opinion). The following language, taken from the Supreme Court opinion just quoted, is quite pertinent:

> "The rule is fundamental that when one or two innocent parties must suffer by reason of a misplaced confidence, the loss must fall upon him who reposed the confidence, and thereby made the loss possible. *Manchester B. & L. Association* vs. *Geyer,* 71 N. J. Eq. 192; 10 R. C. L. 695, and cases cited; 21 C. J. 1170 and cases cited."

Later in the same opinion:

> "In such a situation the plaintiff, upon well-recognized principles, has created an estoppel *in pais* which debars her from invoking liability against the innocent party to the transaction, who was in nowise the superinducing or proximate cause of the loss. The doctrine of estoppel *in pais* is enforced alike by both courts of law and equity. *Sun Dredging* vs. *Ottens,* 84 N. J. L. 740.
>
> And it arises, in any situation when the parties have acted on the faith of conduct or representations, which causes one of the parties to change his position to his detriment, and results in a case of this character,

as a logical consequence of the fundamental theory of representation underlying the doctrine of agency, so, that if one place another by language or conduct in a responsible position, he thereby holds him out as having authority to do the act within the apparent scope of his authority, and where others relying upon this apparent authority deal accordingly with the agent, the principal is thereby estopped from denying the authority thus apparently conceded.

As early as *Reynall* vs. *Lewis,* 15 M. & W. 517, 528, Chief Baron Pollock declared 'this representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him, and may be made by words or conduct.'

The same doctrine was applied in *Batavia Bank* vs. *New York, etc. Railroad Co.,* 106 N. Y. 195, and in *Fiore* vs. *Ladd,* 29 Pac. Rep. 435.

This principle has been so well settled by uniform authority throughout the union that a mere reference to the statement of such recognition in the leading digests of authority would seem to be all that the disposition of this case requires. 10 R. C. L. 695, and cases cited; 21 C. J. 1172, and cases cited.''

It will be noted from a reading of the Court of Errors opinion just quoted, that the Supreme Court was affirmed, but on a different principle.

''But this is a case where Josefa's conduct in implicitly trusting her sister Catherine and never dealing with the association herself—never even disclosing her identity to it—made her one of two innocents who must suffer, because her lack of care and culpable negligence enabled Catherine to occasion the loss.'' 96 N. J. L. at page 449.

This same principle was referred to by Vice-Chancellor Church in the case of *Wilson* vs.

Walsh, reported in 148 Atlantic Reporter, 7, in which opinion the following statement was made:

> "Moreover, it is a well-known principle of law that, when one of two innocent persons must suffer a loss, it is to be borne by the one who first rendered the injury possible. See 'Estoppel' 10 R. C. L. Chap. 23, p. 695."

Appellee also contends that the following quotation from an opinion of this Honorable Court is an authority sustaining the action of the Trial Court in this case:

> "As between the principal and third persons the true limit of the agent's power to bind the principal is the apparent authority with which the agent is invested. The principal is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. And the reason is that to permit the principal to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. *Law* vs. *Stokes*, 32 N. J. L. 249.
>
> *The question in every such case is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages, and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question, and when the party relying upon such apparent authority presents evidence which would justify a finding in his favor, he is entitled to have the question submitted to the jury."* (Italics ours.) *J. Wiss & Sons Co.* vs. *H. G. Vogel Co.*, 86 N. J. L. at page 621.

In this connection, we also refer to the case of *Marx & Rawolle* vs. *Standard Music Roll Co.*, 98 N. J. L. 529; *Doyle* vs. *Loft*, 98 N. J. L. 516, Court of Errors and Appeals 1923, Kalisch, J.;

The "White" Door Bed Company vs. *United States Mortgage & Title Guaranty Co. of N. J.*, (VII A. R. 862, Court of Errors and Appeals 1929), Gummere, C. J.; *Crescent Ring Co.* vs. *Travelers Indemnity Company*, 102 N. J. L. 85, Court of Errors and Appeals 1926 Walker, Chancellor; *Manhattan Upholstering Co.* vs. *Epstein*, 6 Misc. 103, N. J. Supreme Court 1928; *Feist & Feist* vs. *Spitzer*, VIII A. R. 429 Court of Errors and Appeals 1930, Bodine, J.

The only argument advanced by appellant which we deem of sufficient importance to answer, is that advanced in its first ground of appeal, set forth in its brief, pages 5 to 16. Appellee does not believe that the cases of *Harter* vs. *Mechanics National Bank* and *Economy Auto Supply Co.* vs. *Fidelity Union Trust Co.* have any application to the present situation now before the Court. As we have said before and again repeat, either the defendant building and loan association was justified in dealing with the plaintiff's husband as it did, or it was not justified. If it was so justified, what happened subsequent to the delivery of the building and loan association's check to the plaintiff's husband, has no relevancy in connection with the legal issues involved in the decision of this case. Whether or not the building and loan association's bank was or still is liable because it paid to plaintiff's husband the proceeds of the defendant's check which, for the purpose of this argument we assume was forged by the plaintiff's husband, cannot be of any assistance in determining whether the Trial Court in this case should have granted a judgment of non-suit or whether it was justified in leaving this case to the jury on a question of fact.

Surely the case of *Pannonia Building & Loan Association* vs. *West Side Trust Co.*, cited in ap-

pellant's brief, can have no application here, because it will be found from an examination of that case, that the checks in question were drawn first, to fictitious payees and secondly, were forged by the treasurer of the plaintiff association and were cashed or deposited by the treasurer, and his endorsement appeared on all of them. This fact alone was surely sufficient notice to put both the bank and the plaintiff association on inquiry. It is apparent there is no such factual situation in the case now under review. Certainly, no bank or building and loan association should be put upon inquiry because a wife's check going through the bank, bears first her endorsement and then that of her husband.

Appellee strenuously and seriously contends that the action of the Trial Court in submitting this case to the jury for a decision of the question *whether or not the plaintiff, by her voluntary act placed her husband as agent in such a situation that a person of ordinary prudence, conversant with business usages, and the nature of the particular business, was justified in presuming that such agent had authority to perform the particular act in question* is amply supported by reason, logic and by the citations set forth in this brief, and therefore urges that the judgment herein in favor of the defendant be affirmed with costs.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant-Appellee.

E. R. McGlynn,
Of Counsel.