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Petition of Appeal.

Filed July 8, 1920.

10

COURT OF ERRORS & APPEALS OF THE STATE OF NEW JERSEY.

**TO THE HONORABLE, THE COURT OF
ERRORS AND APPEALS, IN THE LAST
RESORT IN ALL CAUSES:**

The petition of Oscar Schwabinger, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin R. Walker, Chancellor of the State of New Jersey, bearing date the 20th day of May, in the year 1920, wherein the said Oscar Schwabinger was complainant and the said John Saxon and Susie Saxon were defendants, in this respect, to wit:

20

That the said decree adjudges and decrees that:

1. The "complainant is not entitled to the relief prayed for in his bill of complaint and that the defendants are entitled to have the contract, which is the subject matter of this suit, decreed to be null and void and delivered up to them for cancellation"; and that

30

2. "Defendants do forthwith pay to the complainant's solicitor \$200 with interest thereon from March 7, 1919, and in case of refusal of complainant's solicitor to accept same, the same to be paid to the Clerk of the Court of Chancery."

40

Petition of Appeal.

3. That the contract made between the complainant and the defendants, dated March 7, 1919, "be and the same hereby is declared null and void, to be forthwith delivered up by complainants to defendants for cancellation."

10 4. That the lis pendens filed by complainant, May 16, 1919, "be and the same is hereby discharged, and said Register is hereby directed to cancel the same record."

5. "That no costs be allowed either party as against the other."

20 And your petitioner humbly appeals from the aforesaid portions of said decree of the Chancellor upon the ground that the same are erroneous for that:

1. The preponderance of the evidence showed that the contract in question was duly executed, acknowledged and delivered by both of the defendants, according to law and the Statutes in such case made and provided.

30 2. The preponderance of the evidence showed that the complainant was at all times and still is, ready, willing and able to fulfill the terms of the said contract, and so expressed and tendered himself to the defendants at the proper time.

3. The preponderance of the evidence showed that both defendants, without cause, failed and refused and still do refuse to fulfill their part of said contract, and to make conveyance in accordance with the terms thereof.

40 4. That even if the contract was not executed and delivered by the defendant Susie Saxon, in a

manner sufficient to warrant a decree of specific performance against her, the complainant would or might have an action for damages at law against the defendants John Saxon and Susie Saxon or one of them, on said contract, which is or will be defeated by the said decree, declaring said contract to be null and void and directing complainant to surrender the same for cancellation. 10

5. That there was no evidence sufficient to warrant the Court in decreeing that the contract was null and void and that it be surrendered by complainant for cancellation.

6. That if it be determined that preponderance of the evidence disclosed that certain portions of said contract, to wit: (the contract was a printed form and the following underscored portions represent the portions which defendants allege were filled in subsequent to the acknowledgment thereof by the defendant Susie Saxon). 20

“AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, *his* heirs and assigns, may enter into and upon the said land and premises on the *first* day of *May* next ensuing the date hereof, and from thence take the rents, issues and profits to *his* and their use. 30

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at *the Office of Lawyer Willderoder at No. 31 Clinton Str. in the City of Newark, N. J.*, between the hours of *nine* in the forenoon and *five* o'clock in the afternoon of the said *first* day of *May*, next ensuing the date hereof. 40

Petition of Appeal.

10 AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of *Two hundred* \$200 *Dollars*, which they hereby fix and settle as liquidated damages therefor."

were filled in and inserted subsequent to the acknowledgment thereof by the defendants, nevertheless the said contract as originally drafted, executed and acknowledged, should have been enforced against the defendants, pursuant to the prayer of the bill of complaint.

20 7. That even if it be determined that the preponderance of the evidence showed that the aforesaid portions of said contract were filled in and inserted subsequent to the execution and acknowledgment thereof by the defendant Susie Saxon, nevertheless the preponderance of the evidence disclosed that such insertions, if any there were in fact, were made pursuant to her direction and authority and the contract as originally executed and acknowledged by both defendants should therefore have been enforced against the defendants, pursuant to the prayer of the bill of complaint.

30 Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable court shall seem meet.

HARRY A. SCHER,
Solicitor of Appellant.

40

D. FREDERICK BURNETT,
Of Counsel with Appellant.

Answer to Petition of Appeal.

(Endorsement)

Service of within petition and copy thereof is hereby acknowledged this 11th day of June, 1920.

STEIN, STEIN & HANNOCH,
Solicitor for and of counsel with Respondents 10

Answer to Petition of Appeal.

Filed July 8, 1920.

COURT OF ERRORS AND APPEALS OF THE
STATE OF NEW JERSEY.

Between

OSCAR SCHWABINGER,

Appellant,

and

JOHN SAXON and SUSIE SAXON,
Respondents.

On Appeal.
Answer to
Petition of
Appeal.

20

The answer of the above-named respondents to the petition of appeal of the above-named appellant. 30

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the 20th day of May, 1920, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto 40

Amended Notice of Appeal.

when the same shall be produced. And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

10

STEIN, STEIN & HANNOCH,
Solicitors and of counsel with Respondents.

Amended Notice of Appeal.

Filed June 14, 1920.

IN CHANCERY OF NEW JERSEY,

20

Between

OSCAR SCHWABINGER,

Complainant,

and

JOHN SAXON, et al.,

Defendants.

On bill, etc.,

30

The complainant, Oscar Schwabinger, hereby amends the notice of appeal heretofore filed by him in the above entitled cause, so that the same shall read as follows:

The complainant, Oscar Schwabinger, hereby appeals from so much of the final decree made in this court in the above stated cause, as declares—

That the complainant is not entitled to the relief prayed for in his bill of complaint, and that the defendants are entitled to have the contract,
40 which is the subject matter of this suit, decreed to

Amended Notice of Appeal.

be null and void and delivered up to them for cancellation, as prayed for in their counterclaim, upon payment by them to the complainant of sum of \$200.00 paid by the complainant on said contract, with interest; and also from so much thereof as orders and decrees.

That the defendants pay to complainant's solicitor the sum of \$200. with interest, etc., and in case of the refusal by complainant's solicitor to accept such payment, when tendered to him, that such sum with interest, be forthwith paid to the Clerk of this Court; and also from so much thereof as orders and decrees. 10

That the contract dated March 7, 1919, entered into between the complainant and defendants, be null and void and be forthwith delivered up by the complainant to the defendants for cancellation; and also from so much thereof as orders and decrees. 20

That the lis pendens filed by complainant on May 16, 1919, be discharged and cancelled of record; and also from so much thereof as orders and decrees.

That no costs be allowed either party as against the other, to the Court of Errors and Appeals in the last resort in all cases. 30

HARRY A. SCHER,
Solicitor of Complainant.

Dated, June 1, 1920.

D. FREDERICK BURNETT,
of Counsel.

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

D. FREDERICK,
Of counsel with the Complainant. 40

Notice of Appeal.

(Endorsement on back).

Filing of within amended notice, as within time,
is hereby consented.

10 STEIN, STEIN & HANNOCK,
Solicitors for and of counsel with Defendants.

Notice of Appeal.

Filed June 1, 1920.

IN CHANCERY OF NEW JERSEY,

20	Between	}	On bill.
	OSCAR SCHWABINGER,		
	Complainant,		
	and		
	JOHN SAXON, et al.,		
	Defendants.		

30 The complainant, Oscar Schwabinger, hereby
appeals from the final decree and from the whole
and every part thereof made in this Court in the
above stated cause as declares the complainant is
not entitled to the relief prayed for in his Bill of
Complaint and that the defendants are entitled
to have the contract, which is the subject matter
of this suit, decreed to be null and void, and de-
livered up to them for cancellation, and further
that the complainant's Bill of Complaint be dis-
missed, and further that the lis pendens filed by
40 the complainant in this cause be discharged, and
your petitioner appeals to the Court of Errors and

Bill of Complaint.

Appeals on the ground that the same is erroneous because it is contrary to the weight of evidence as shown by the record in the above entitled cause.

HARRY A. SCHER.

Dated, June 1st, 1920.

10

Solicitor for and of

Counsel with Complainant.

Bill of Complaint.

° Filed—May 9, 1919.

IN CHANCERY OF NEW JERSEY.

20

To His Honor, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:—

The complainant, Oscar Schwabinger, of Newark, New Jersey, respectfully shows that:—

1. On March 7, 1919, John Saxon and Susie Saxon, his wife, the defendants herein, entered into an agreement in writing for the sale to complainant, of the following described lands and premises:— 30

Premises in the City of Newark, County of Essex and State of New Jersey:—

Beginning on the westerly side of Fairmount Avenue, at a point therein distant three hundred and forty-seven feet six inches southerly from the southerly line of Sixteenth Avenue; thence running westerly parallel with Sixteenth Avenue. 40

Bill of Complaint.

one hundred and five feet; thence southerly twenty-seven feet three inches, more or less; thence Easterly one hundred and five feet; thence Northerly along the Westerly line of Fairmount Avenue, twenty-seven feet three inches, more or less, to the place of Beginning.

10

2. Said agreement was made and executed on behalf of complainant by his father Joseph Weitzenhoff, his duly authorized agent, who had complainant's authority to make said contract and sign his (complainant's) name thereto.

20

3. By the terms of the said agreement the defendants John Saxon and Susie Saxon, his wife, agreed to convey said premises for the sum of \$8,350.00 to the complainant on or before May 1, 1919; that said agreement was acknowledged on May 7, 1919, and recorded in the Essex County Register's Office on March 31, 1919, in Book H-61 of Deeds on page 121.

30

4. Complainant further shows that May 1, 1919, between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon, was appointed for closing the title to the said premises, and the same was to be closed at the office of Frederick W. Wilderotter, 31 Clinton Street, Newark; that on the said first day of May, 1919, complainant attended at the office of said Frederick W. Wilderotter between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon, for the purpose of closing title, ready and prepared to perform all the terms of the said contract, to which complainant begs leave to refer, should it be necessary.

40

5. Complainant further shows that prior to May 1, 1919, defendants, through their attorneys, ten-

Bill of Complaint.

dered back to Joseph Weitzenhoff, complainant's agent, the \$200.00 paid to defendants on behalf of the complainant on the execution and delivery of the above mentioned contract, said attorneys stating that defendants would not perform their contract; and on May 1, 1919, complainant was again informed by defendants' attorneys that the defendants would not perform the contract, and that they repudiated and refused in any way to perform the terms thereof (as they had agreed). 10

6. Complainant further shows that under the terms of the contract \$200.00 was paid to the defendants on the execution of the contracts, receipt whereof is acknowledged by the defendants, and \$8,150.00 to be paid on the closing of title, subject to the usual adjustments, to all of which terms complainant begs leave to refer, in said contract, should the same be necessary. 20

7. Complainant further shows that he is at all times ready and willing to comply with the terms of the contract, but defendants have repudiated the same.

WHEREFORE complainant prays that the defendants may be compelled to specifically perform the said contract and to make conveyance to the said complainant upon the complainant's performing the terms of the said agreement as to payment, and complainant prays for such other and further relief as in the premises may be equitable and just. 30

Complainant further prays that a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

HARRY A. SCHER,
Solicitor of Complainant. 40

ROSE F. ALBERT,
of Counsel.

Answers of Defendants.

Filed, May 26, 1919.

10	Between OSCAR SCHWABINGER, Complainant, and JOHN SAXON, et al., Defendants.	} On Bill &c. } Answers of } John Saxon } and Susie } Saxon.
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The joint and several answers of John Saxon and Susie Saxon to the bill of complaint of the complainant.

20 These defendants, answering the bill of complaint, state:

1. Paragraph 1 of the bill denied.

2. These defendants have no knowledge of the second paragraph of the bill and leave the complainant to make such proof as he may be advised to be necessary.

30 3. Paragraph 3 of the bill denied.

4. Defendants have no knowledge of the 4th paragraph of the bill and leave the complainant to make such proof as he may be advised to be necessary.

40 5. Paragraph 5 of the bill is admitted except that the defendants deny ever having made any contract with the complainant, but that on the contrary their dealings were had with one Joseph Weitzenhoff, mentioned in said paragraph of the

bill, with whom defendants dealt as principal, but whether the said Joseph Weitzenhoff was in fact the agent of the complainant these defendants have no knowledge and leave the complainant to make such proof as he may be advised to be necessary.

6. Paragraph 6 of the complaint is denied, except that these defendants admit the receipt of \$200.00 under the terms of the alleged agreement made by them; a copy of said agreement is annexed hereto and made part hereof and marked schedule "A". 10

7. These defendants have no knowledge of the 7th paragraph of the complaint and leave the complainant to make such proof as he may be advised to be necessary. The defendants state, however, that upon discovering, as hereinafter set forth, that the person with whom they had been dealing was not the complainant, but was in fact the said Joseph Weitzenhoff, they declined to carry out said agreement and offered to return to the said Joseph Weitzenhoff, who had paid the same to the defendant, John Saxon, the said sum of \$200.00. 20

8. The premises mentioned in said alleged agreement and bill of complaint consists of a three-family dwelling house, one of the apartments of which was at the time of the making of said alleged agreement, and is now, occupied by these defendants. On or about March 6, 1919, one Steve Zeleny, who was then a bar tender in a neighboring saloon, and to whom the defendant, John Saxon, had previously spoken concerning a possible sale of said premises, brought to said premises the said Joseph Weitzenhoff and his wife, without making known their names to these defendants, and introduced them to these defendants as prospective pur- 30 40

chasers of said premises. The selling price of said premises was then agreed upon between these defendants, and the said Joseph Weitzenhoff, and arrangements were thereupon made to execute an agreement of sale for the same on the following day at the office of Emil Germanus, a commissioner of deeds of New Jersey.

9. On the following day the said Joseph Weitzenhoff met the defendant, John Saxon, at the office of Emil Germanus who then and there inquired of the said Weitzenhoff as to his name, and the said Joseph Weitzenhoff thereupon replied, in the presence and hearing of the said defendant, John Saxon, that his name was Oscar Schabinger, and said agreement of sale was thereupon drawn between these defendants as party of the first part, with the party of the second part, under the name of Oscar Schabinger; the defendant John Saxon, then and there believing that the true and correct name of said Joseph Weitzenhoff was Oscar Schabinger.

10. These defendants further state, that while said alleged contract was being prepared by the said Germanus, the defendant, Susie Saxon, arrived at the office of the said Germanus and signed the said alleged agreement before the same was half finished, and thereupon left said office and thereafter said Emil Germanus completed the preparation of said alleged agreement.

11. For several weeks after the execution of said alleged agreement, these defendants were under the impression that the true and correct name of the Joseph Weitzenhoff was Oscar Schwabinger, and that the person with whom they had been dealing was Oscar Schwabinger, and not until several

weeks had elapsed did these defendants learn that their dealings had in fact been had with the said Joseph Weitzenhoff, whose true and correct name they then learned for the first time.

12. These defendants further state that they have never had any dealings with the complainant, Oscar Schwabinger; that their dealings in connection with the sale of said property were only with the said Joseph Weitzenhoff, though at that time they were under the mistaken belief, induced by false statements made to them by the said Joseph Weitzenhoff, that in fact their dealings had been with one Oscar Schwabinger. 10

13. Upon making the discovery mentioned in the foregoing paragraph, these defendants at the same time learned that a person by the name of Oscar Schwabinger, and who was either an adopted or foster son of the said Joseph Weitzenhoff, was in fact then and had at the time of the signing of said alleged agreement, been in the United States Army in Texas. 20

14. These defendants further state that the real Oscar Schwabinger never signed said alleged agreement; that said alleged agreement was in fact signed by the said Joseph Weitzenhoff falsely representing himself to be Oscar Schwabinger; that after said alleged agreement was signed by all parties these defendants believed that they were bound to convey to the very person with whom they were then dealing, and that that very person was bound to purchase said premises from them. 30

15. The defendants further state that the person with whom they had dealt, and the one who they later discovered to be in fact Joseph Weitzen- 40

hoff, is a resident of the City of Newark, and in business in that city, and at the time of the making of said alleged agreement, they believed him to be financially able to carry out the terms thereof, and which reasons, in part, prompted them to enter into the said alleged agreement. These defendants state, however, they have no information concerning the financial responsibility of the said Oscar Schwabinger; that they do not know the said Oscar Schwabinger, nor what is his present residence or whereabouts, nor, in fact, whether the so-called Oscar Schwabinger has any real existence.

16. These defendants further state that immediately upon discovering the fraud practiced upon them, they endeavored to return the deposit of \$200.00 paid them, and within two or three days after the discovery of said fraud, and before the institution of this suit, to wit, on April 23, 1919, succeeded, through their attorneys, in tendering to the said Joseph Weitzenhoff repayment of said sum of \$200.00, which the said Joseph Weitzenhoff then and there refused to accept.

17. These defendants further state that these defendants are husband and wife respectively, and that the premises mentioned in said alleged agreement are held by them as tenants by the entirety under a deed of conveyance made to them as husband and wife by Charlotte Mierau, widow, which deed is dated March 15, 1910, and recorded in Book A.47 of deeds for Essex County on pages 71-72.

18. These defendants further state that notwithstanding any acknowledgement that may have been certified to by the said Emil Germanus, the said alleged agreement of sale was not in fact acknowledged in due form of law, or at all, by the said de-

fendant, Susie Saxon; that at the time of the signing of the said instrument by the defendant, Susie Saxon, the said instrument was incomplete and the preparation thereof was not half finished by the said Emil Germanus; that the defendant, Susie Saxon, spent but a few moments at the office of the said Emil Germanus, and just sufficiently long to enable her to affix her signature to said instrument in its incompleted state, whereupon she forthwith left the office of the said Emil Germanus. 10

19. These defendants further state that a notice of lis pendens has been filed by the complainant in this cause in the office of the Register of Essex County, which not operates as a cloud upon the title to said premises. 20

20. These defendants hereby tender themselves ready to reply to the said Joseph Weitzenhoff the said sum of \$200.00 so received by them from him, or in lieu thereof, if so directed by this court, to pay the same either to the said Oscar Schwabinger or to pay the same to the clerk of this court.

By way of COUNTER-CLAIM against the complainant and Joseph Weitzenhoff, these defendants state: 30

1. That in lieu of repetition thereof, these defendants repeat paragraphs 8 to 20 inclusive of the answer.

2. These defendants, therefore pray that the complainant may answer this counter-claim and each statement herein made.

3. That Joseph Weitzenhoff may be brought in as a party defendant to this suit. 40

Answers of Defendants.

4. That the said Joseph Weitzenhoff may answer this counter-claim and each statement herein made.

5. That the alleged agreement entered into between these defendants and the said Joseph Weitzenhoff, under the name of Oscar Schwabinger,
10 may be rescinded, cancelled and for nothing holden.

6. That an order may be entered directing that said lis pendens be discharged.

STEIN, STEIN & HANNOCH,
Solicitors of defendants,
John Saxon and Susie Saxon.

20

Schedule "A."

ARTICLES OF AGREEMENT, made the seventh day of March, in the year of Our Lord One Thousand Nine Hundred and nineteen between John Saxon ^{and Susie Saxon} his wife, of the City of Newark, in the County of Essex and State of New Jersey of the First Part; and Oscar Schwabinger of the City of Newark in the County of Essex and State of New Jersey of the Second Part:

30

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Eight thousand three hundred fifty Dollars, \$8,350 lawful money of the United States of America to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and
40 with the said party of the second part, that they the said party of the first part, will well and suffi-

Schedule "A"—Annexed to Answers of Defendants.

ciently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty fee from all encumbrance on or before the first day of May next ensuing the date hereof, all the lot, tract, or parcel, of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey. 10

BEGINNING on the westerly side of Fairmount Avenue at a point therein distant three hundred and forty seven feet six inches southerly from the southerly line of Sixteenth Avenue; thence running westerly parallel with Sixteenth Avenue one hundred and five feet; thence southerly twenty seven feet three inches more or less; thence easterly one hundred and five feet; thence northerly along the westerly line of Fairmount Avenue twenty seven feet three inches more or less to the place of BEGINNING. 20

Being the same premises conveyed to John Saxon and Susie Saxon by deed recorded in Book A 47 of deeds for Essex County on pages 71-72.

And the said Oscar Schwabinger for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of Eight thousand three hundred fifty \$8,350 Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: Two hundred and fifty Dollars on the execution and delivery of these presents, the Eight thousand one hundred and fifty Dollars on the execution and delivery of the deed. 30 40

Schedule "A"—Annexed to Answers of Defendants.

The parties of the first part agree to deliver to the party of the second part all the awnings and screens on the first floor and also all the screens of the front windows on the second and third floor of said premises.

10

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the first day of May, 1919 next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

20

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the office of lawyer Willderoder at #31 Clinton St., in the City of Newark, N. J., between the hours of nine in the forenoon and five o'clock in the afternoon on the said first day of May next ensuing the date hereof.

30

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of Two hundred \$200 Dollars which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

JOHN SAXON,
SUSE SAXON,
OSKAR SHWABINGER

40

Signed, Sealed and Delivered
in the presence of

EMIL GERMANUS.

Notice of Motion to Strike Out.

IN CHANCERY OF NEW JERSEY.

Between

OSCAR SCHWABINGER,

Complainant,

and

JOHN SAXON, et al.,

Defendants.

On Bill, Etc.

10

To Messrs. Stein, Stein & Hannoch,
Solicitors of Defendants.

Please take notice that on Friday, June 10, 1919,
at 10 o'clock on the forenoon, or as soon thereafter
as counsel can be heard, I shall apply to the Hon-
orable John E. Foster, Vice-Chancellor of the State
of New Jersey, at the Chancery Chambers, Newark,
New Jersey, for an order striking out your answer
and counter-claim in the above entitled cause, for
the following reasons:

1. The said answer is sham and frivolous and
discloses no defense to the said action.

30

2. Said counterclaim is sham and frivolous, and
discloses no counterclaim to the said action.

HARRY A. SCHER,
Solicitor of complainant.

40

Order Denying Motion.

IN CHANCERY OF NEW JERSEY.

10	Between OSCAR SCHWABINGER, Complainant, and JOHN SAXON, et al., Defendants.	}	On Bill, Etc.
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20 This matter coming on to be heard in the presence of Harry A. Scher, solicitor of the complainant, and Stein, Stein & Hannotch, solicitors of the defendants on application by the complainant to strike out the answer and counterclaim heretofore filed by the defendants; and the argument of counsel having been heard, and the Court being of the opinion that the application should be denied;

30 IT IS ON THIS 10th day of June, Nineteen hundred and Nineteen, on motion of Stein, Stein & Hannotch, solicitors of defendants, Ordered, that the complainant's said motion be and the same is hereby denied with costs to abide final hearing.

Respectfully advised,

JOHN E. FOSTER, V. C.

Answer of Joseph Weitzenhoff.

Filed—June 30, 1919.

IN CHANCERY OF NEW JERSEY.

Between

OSCAR SCHWABINGER,

Complainant,

and

JOHN SAXON, et al.,

Defendants.

10

On Bill, Etc.

The answer of Joseph Weitzenhoff to the counterclaim of the defendants, John Saxon and Susie Saxon, his wife, as set out in the answer, paragraphs 8 to 20. 20

1. This defendant, Joseph Weitzenhoff, admits paragraph 8 of the answer and counterclaim, except as to the allegation that the said Steve Zeleny did not make known the names of this defendant, Joseph Weitzenhoff, and his wife, which allegation this defendant denies, and alleges the fact to be that said Zeleny introduced this defendant and his wife, as Mr. and Mrs. Weitzenhoff, to the said John and Susie Saxon. 30

2. As to paragraph 9 of the answer and counterclaim, this defendant admits that said contract was drawn between said John Saxon and Susie Saxon, his wife, and the complainant, Oscar Schwabinger, as the parties of the first and second parts, respectively in the office of Emil Germanus, but denies the remainder of paragraph 9.

3. This defendant denies paragraph 10 of the answer and counterclaim, and alleges the fact to 40

10 be that the agreements were prepared in duplicate on regular printed forms, for the sale of property, and the defendant, Susie Saxon, signed and acknowledged one copy after the same had been fully completed, and read and explained to her, and that she signed the other printed form before the same was fully completed.

4. This defendant denies paragraph 11 of said answer and counterclaim.

5. This defendant denies paragraph 12 of said answer and counterclaim.

20 6. This defendant denies paragraph 13 of said answer and counterclaim, and alleges the fact to be that the complainant was in fact in Newark at the time of the execution of said agreement, and had been in Newark since February 8, 1919.

30 7. As to paragraph 14 of said answer and counterclaim this defendant admits that complainant did not personally sign said agreement, but alleges the fact to be that the agreement was signed by this defendant for complainant, by authority of complainant; this defendant denies the other allegations of paragraph 14.

40 8. As to paragraph 15 of said answer and counterclaim this defendant admits that he dealt with the said defendants, John Saxon and Susie Saxon, in reference to the purchase of said property, but alleges the fact to be the he informed said defendants, John Saxon and Susie Saxon, that the property was being purchased by the complainant herein through this defendant, and the said defendants, knowing this, dictated the terms of the agreement, and received a substantial amount

on the execution thereof, as a deposit on the purchase price of the said premises.

9. As to paragraph 16 of said answer and counterclaim this defendant admits that on April 23, 1919, he was tendered the sum of \$200.00, but denies the remainder of said paragraph 16.

10

10. This defendant has no knowledge as to paragraph 17, of said counterclaim, and leaves said defendants, John Saxon and Susie Saxon, to make such proof thereof, as they may be advised is necessary.

11. This defendant denies paragraph 18 of said counterclaim.

20

12. This defendant alleges that he carried on the negotiations for the purchase of said property for his son, the complainant herein, under and by virtue of authority given him by his said son; that this was made known to the said defendants, John Saxon and Susie Saxon, at the time of said negotiations, and previous to the drawing of said agreements.

13. This defendant prays to be hence dismissed, with his reasonable costs and charges in this behalf sustained.

30

HARRY A. SCHER,
Solicitor for Defendant, Joseph Weitzenhoff.

40

**Replication and Answer to Counter-
claim.**

Filed—July 3, 1919.

IN CHANCERY OF NEW JERSEY.

10

Between

OSCAR SCHWABINGER,

Complainant,

and

JOHN SAXON, et al.,

Defendants.

20

The complainant joins issue on the answer of the defendant.

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

30

1. As to paragraph 8, complainant admits that the said property is a three family dwelling; that the selling price of said premises was agreed upon and that an agreement was made to meet at the office of Emil Germanus, for the purpose of executing contracts for the sale of same, but he denies the remainder of said paragraph.

2. As to paragraph 9, of the answer and counterclaim complainant admits that said contract was drawn between said John Saxon and Susie Saxon, his wife, and complainant, as the parties of the first and second parts respectively, at the office of Emil Germanus, but denies the remainder of paragraph 9.

40

3. Paragraph 10, of the answer and counterclaim is denied.

Replication and Answer to Counterclaim.

4. Paragraph 11, of the said counterclaim is denied.

5. Complainant denies paragraph 12, of said counterclaim, and alleges the fact to be that although negotiations in reference to said property were carried on by Joseph Weitzenhoff, said negotiations were carried on for complainant and by his authority, and the same was known to said defendant, John Saxon and Susie Saxon, his wife. 10

6. Complainant denies paragraph 13, and alleges the fact to be that he was not in the Army since February 8, 1919, and was living with his parents, in Newark, N. J., previous to and at the time of said purchase. 20

7. As to paragraph 14, complainant admits that said contracts were signed by said Joseph Weitzenhoff, but denies the remainder of said paragraph; and alleges the fact to be that said Joseph Weitzenhoff, signed said contracts *for complainant*, by virtue of complainant's authority so to do.

8. Complainant denies paragraph 15, and alleges the fact to be that the defendants, John Saxon and Susie Saxon, his wife, dictated the terms of the agreement; and that complainant was at all times, and is now, ready, willing and able to carry out the terms thereof. 30

9. As to paragraph 16, complainant admits the tender by said defendants, John Saxon and Susie Saxon, his wife, to Joseph Weitzenhoff of the \$200 deposit, but denies the balance of said paragraph.

10. Complainant has no knowledge as to paragraph 17, and leaves said defendants, John Saxon 40

11. Complainant denies paragraph 18, of said counterclaim.

13. Complainant has been informed that said defendants have received an offer for more money for said property and it is due to that fact that they repudiate the contract with complainant.

HARRY A. SCHER
Solicitor of Complainant.

20

Replication of Defendants.

Filed—July 3rd, 1919.

IN CHANCERY OF NEW JERSEY.

30 Between
OSCAR SCHWABINGER,
Complainant,
and
JOHN SAXON, et al.,
Defendants.

40 The defendants John Saxon and Susie Saxon, join issue in the answers of the complainant Oscar Schwabinger and of the defendant Joseph

Conclusions of Court.

Weitzenhoff, to the counterclaim of the defendants
John Saxon and Susie Saxon.

STEIN, STEIN & HANNOCK,
Solicitors of Defendants,
John Saxon and Susie Saxon.

10

Conclusions of Court.

Filed—Mar. 22, 1920,
March 19, 1920.

IN CHANCERY OF NEW JERSEY.

Between

OSCAR SCHWABINGER,
Complainant,
and
JOHN SAXON, et al.,
Defendants.

46-408.
On bill for
specific per-
formance.
Conclusions.

20

HARRY S. SCHER, Esq., for complainant.

STEIN, STEIN & HANNOCH, Esqrs., for defendants. 30

Fielder, V. C.

Without expressing an opinion on any other
question raised in the case, I conclude that com-
plainant must be denied the relief he seeks because
Section 39 of the Conveyance Act, Compiled Sta-
tutes 1547, as amended by P. L. 1918, page 119,
has not been complied with. That section provides
that no estate of a married woman in lands shall
pass by her deed without a previous acknowledg-

40

ment made by her that she signed, sealed and delivered the same as her voluntary act and deed, the officer having first made known to her the contents thereof. A contract for the sale of her interest in lands must comply with this statute (Chassman vs. Wiese, 106 Atl., 19). Although
10 the contract in this case bears a certificate of acknowledgment in due form, I find from the testimony including that of the officer who signed the certificate, that the acknowledgment required by the statute was in fact not made by Mrs. Saxon. The blank form of agreement to convey was not entirely filed in when she signed it and although it may be that she told the scrivener, who was the officer who certified the acknowledgment, that she
20 knew what terms and conditions were to be inserted and authorized him to complete the the draft and that when completed, the agreement was in the form she understood it was to be, the officer could not have complied with the statute by making the contents known to her and she did not acknowledge that she signed, sealed and delivered a completed contract as her voluntary act and deed.

Our law guards the conveyance by a married woman of any interest in her lands, with a special care. It makes it the duty of the officer taking
30 her acknowledgment to explain to her the contents of a completed instrument and then to ascertain from her whether she has willingly affixed her signature thereto and it gives her up to the point when she is made acquainted with the actual contents of the instrument, an opportunity to declare any objection she may have to executing and delivering it.

The defendants must return to complainant the
40 amount of the deposit paid by him on the contract, with interest from the date of payment and

the complainant must deliver up the contract to the defendants for cancellation.

No costs will be allowed either party.

Final Decree.

10

Filed—May 22, 1920.

IN CHANCERY OF NEW JERSEY.

Between

OSCAR SCHWABINGER,

Complainant,

and

JOHN SAXON, et al.,

Defendants.

On Bill, Etc.

20

This cause coming on to be heard in the presence of Harry A. Scher, solicitor and Philip J. Schotland, of counsel with complainant, and Stein, Stein and Hannoch, solicitors and of counsel with defendants, and the pleadings and proofs and the arguments of the respective counsel having been read, heard and considered, and the Court having duly considered the same, and the complainant having in open court declined to accept a deed from the defendant, John Saxon alone, and the Court being of the opinion that the complainant is not entitled to the relief prayed for in his bill of complaint, and that the defendants are entitled to have the contract, which is the subject matter of this suit, decreed to be null and void, and delivered up to them for cancellation as prayed for in their counterclaim, upon payment by them to the com-

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40

plainant of the sum of Two hundred Dollars (\$200) paid by complainant on said contract, with interest;

10 It is on this 20th day of May, 1920, ORDERED, ADJUDGED AND DECREED, that the complainant's bill of complaint be and the same is hereby dismissed.

20 It is further ORDERED, ADJUDGED AND DECREED, that the defendants do forthwith pay to complainant's solicitor, the sum of \$200.00 with lawful interest thereon from March 7, 1919, to the date of such payment and in case of the refusal of complainant's solicitor to accept such payment when tendered to him, that such sum with interest, be forthwith paid to the clerk of this court.

It is further ORDERED, ADJUDGED AND DECREED, that a certain contract bearing date March 7, 1919, made and entered into between the defendants of the first part and the complainant of the second part, for the sale of certain land and premises situate in the City of Newark, in the County of Essex and State of New Jersey, therein described as follows:

30 Beginning on the westerly side of Fairmount Avenue at a point therein distant three hundred and forty-seven feet six inches southerly from the southerly line of Sixteenth Avenue; thence running westerly parallel with Sixteenth Avenue one hundred and five feet; thence southerly twenty-seven feet three inches, more or less; thence easterly one hundred and five feet; thence northerly along the westerly line of Fairmount Avenue twenty-
40 seven feet three inches more or less to the place of beginning. Being the same premises

Final Decree.

conveyed to John Saxon and Susie Saxon by deed recorded in Book A. 47 of deeds for Essex County, on pages 71-72.

which said contract was recorded at the office of the Register of Essex County on March 31, 1919, in Book H. 61 of Deeds for said county on page 121, be and the same is hereby declared null and void and be forthwith delivered up by complainants to defendants for cancellation. 10

It is further ORDERED, ADJUDGED AND DECREED, that the lis pendens filed by complainant in this cause in the office of the Register of said County of Essex on May 16, 1919, be and the same is hereby discharged and said Register is hereby directed to cancel the same of record. 20

It is further ORDERED, ADJUDGED AND DECREED, that no costs be allowed either party as against the other.

Respectfully advised,

JAMES F. FIELDER,
V. C.

30

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Minutes of Final Hearing.

IN CHANCERY OF NEW JERSEY.

10	Between	OSCAR SCHWABINGER,	}	On Bill, Etc.
		Complainant,		
		and		
		JOHN SAXON et als.,		
		Defendants.		

Chancery Chambers, Newark, N. J.
March 16th, 1920.

20 Before—Hon. JAMES F. FIELDER, Vice Chancellor.

APPEARANCES:

HARRY A. SCHERR, Esq., and Philip J. Schotland, Esq., for the complainant.

MESSRS. STEIN, STEIN & HANNOCH, for the defendants.

30 JOSEPH WEITZENHOFF, sworn:

Direct Examination by Mr. Schotland:

Q. Do you know John Saxon and Susie Saxon, his wife? A. Yes, sir.

Q. Do you know Oscar Schwabinger? A. Yes, sir.

Q. What relation is he to you? A. He is my step son.

40 Q. Where does he live? A. 374 Springfield Avenue, Newark, in the same house where I live.

Q. Is he a member of your family? A. Yes, sir.

Q. Did you have any dealings with John Saxon and Susie Saxon regarding the property on the westerly side of Fairmount Avenue in this city?

Mr. Stein: I object to that question on the ground that that is not the proper way to prove authority, that it is hearsay, and that it tends to vary the agreement. 10

A. Yes, sir.

Q. For whom? A. For my step son.

Q. Who was the broker that arranged the transaction? A. Steve Zellerz.

Q. Is he in court? A. Yes, sir.

Q. I show you an agreement, bearing date March 7th, 1919, purporting to be signed by John Saxon, Susie Saxon and Oscar Schwabinger? A. Yes, sir. 20

Q. Who signed Oscar Schwabinger's name to that agreement? A. I did.

Q. And this agreement was taken in the name of Oscar Schwabinger? A. Yes, sir.

Q. Who authorized you to sign Oscar Schwabinger's name to this agreement?

Mr. Stein: I object to that question on the ground that that is not the proper way to prove authority, that it is hearsay, and that it tends to vary the agreement. 30

The Vice Chancellor: How does it vary the agreement?

Mr. Stein: Argues.

The Vice Chancellor: I don't get you at all. This contract is made with a man named Schwabinger.

Mr. Stein: No, it is not, this contract was made with a man named Weitzenhoff, who falsely represented his name to be Schwabinger. 40

The Vice Chancellor: The agreement is made between Saxon and Schwabinger, and he is now asked by what authority he signed it.

10 The objection is overruled. You have got to show that they are going to vary this agreement, and I will overrule the objection on the ground raised.

Q. By whose authority did you sign the name of Oscar Schwabinger? A. My step son's.

Q. Your step son's? A. Yes, sir, my step son's.

Q. And a \$200, deposit was paid at the time this agreement was made—for whom did you pay that \$200? A. For my step son, Oscar Schwabinger.

20 Mr. Schotland: I offer the agreement in evidence.

Mr. Stein: I object to its admission in evidence.

The Vice Chancellor: The agreement will be admitted in evidence.

(Agreement marked C-1.)

30 ARTICLES OF AGREEMENT, made the seventh day of March, in the year of our Lord One thousand nine hundred and nineteen, BETWEEN John Saxon and Susie Saxon, his wife, of the City of Newark in the County of Essex and State of New Jersey, of the First Part; AND Oscar Schwabinger, of the City of Newark, in the County of Essex and State of New Jersey, of the Second Part; WITNESSETH, That the said party of the first part, for and in consideration of the sum of Eight thousand three hundred and fifty Dollars \$8,350 lawful money of the United States of America, to
40 be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agree-

ments hereinafter mentioned made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed and Warranty, free from all encumbrances, on or before the first day of May ensuing the date hereof, all the lot, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey. 10

Beginning on the westerly side of Fairmount Avenue at a point therein distant three hundred and forty-seven feet six inches southerly from the southerly line of Sixteenth Avenue thence running westerly parallel with Sixteenth Avenue one hundred and five feet, thence southerly twenty-seven feet three inches more or less, thence easterly one hundred and five feet, thence northerly along the westerly line of Fairmount Avenue twenty-seven feet three inches more or less to the place of beginning. 20

Being the same premises conveyed to John Saxon and Susie Saxon his wife, by deed recorded in Book A. 47 of deeds for Essex County, New Jersey.

AND the said Oscar Schwabinger for himself his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of Eight thousand three hundred fifty (\$8,350) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: Two hundred Dollars on execution and delivery of these presents, and Eight thousand one hundred and fifty Dollars on the executing and delivery of the deed. 30 40

The parties of the first part agrees to deliver to the party of the second part all the awning and screens on the first floor and also all the screens of the front windows on the second and third floor of said premises.

10 AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the first day of May next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

20 AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the office of lawyer Willderoder at No. 31 Clinton Street in the City of Newark, N. J. between the hours of nine in the forenoon and five o'clock in the afternoon on the said first day of May next ensuing the date hereof.

30 AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of Two hundred (\$200) Dollars which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Signed, Sealed and Delivered
in the presence of

EMIL GERMANUS.

40 (Seal) JOHN SAXON,
(Seal) SUSE SAXON,
(Seal) OSKAR SHWABINGER.

(Acknowledgment)

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

BE IT REMEMBERED, That on this seventh day of March in the year of our Lord One thousand nine hundred and nineteen before me, Emil Germanus, a Commissioner of Deeds for Essex County, New Jersey personally appeared John Saxon and Susie Saxon his wife who, I am satisfied are the Grantors in the within Agreement named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; 10

And the said Susie Saxon being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband. 20

(Seal) EMIL GERMANUS,
 Commissioner of Deeds. 30

(Endorsement)

Received in Register's Office, County of Essex, N. J. on the 31st day of March, 1919, at 12:56 o'clock in the afternoon and recorded in Book H. 61 of Deeds for said county on pages 121-122.

WALTER A. EVANS,
 Register. 40

Q. Now, Mr. Weitzenhoff, by referring to Exhibit C-1, I notice that it contains the provision that the title is to pass on or before the 9th of May, 31 Clinton St. in the City of Newark, N. J.? A. Yes, sir.

10 Q. Did you attend at Mr. Willderoder's office at that time? A. Yes, sir.

Q. Did you have the money there to pay for the property? A. Yes, sir.

Q. Whose money was it? A. That was my boy's money.

Q. Who put up the money? A. My wife put up that money.

Q. He is her right son? A. Yes, sir.

Q. She had the money? A. Yes, sir.

20 Q. Was there any mortgage procured on this property? A. \$6500 in the building and loan association.

Q. In whose name was that mortgage procured? A. To Oscar Schwabinger.

Q. This purchaser under this agreement? A. Yes, sir.

Q. And what connection did Mr. Willderoder have with this mortgage? A. He is the lawyer from the Fremont Building and Loan Association.

30 Q. The building and loan association put up this money in his hands? A. Yes, sir.

Q. And who had the balance of this money to pay on this mortgage? A. My wife had the balance of the money at the time in her pocket.

Q. Did the Saxon's show up? A. No, sir.

Q. Did you or your wife or your step son ask the Saxon's for the deed? A. I had asked the Saxons for the deed.

Q. When and where? A. The deed was ready the day before the end of April.

40 Q. What part of April? A. It was on the Saturday, the 30th of April.

Cross Examination by Mr. Stein:

It is admitted on the record that the defendant refused to deliver the deed to Mr. Schwabinger.

Q. The fact is that Mr. Saxon offered to give you the money back that you had paid as a deposit the \$200? A. Not as I know of. 10

Q. Well, the \$200 was offered to be returned to you by one of the clerks in my office? A. There was a clerk came and I said I have nothing to do with it and I referred him to my lawyer.

Q. Isn't it the fact that he actually offered you the return of the money before the 1st of May—isn't that so? A. Yes, he did.

Q. Whose money was that \$200? A. It was my wife's money. 20

Mr. Schotland: That is the complainant's case.

Defendants' Case.

JOHN SAXON, sworn:

30

Direct Examination by Mr. Stein:

Q. Where do you live, Mr. Saxon? A. 395 Fairmount Avenue.

Q. Newark? A. Yes, sir.

Q. Is that in the property which is the subject of this litigation? A. Yes, sir.

Q. What kind of a house is that? A. A three family house, frame.

Q. What floor do you live on? A. The first floor. 40

Q. Did you ever see this man who was on the stand a moment ago? A. Yes, I saw him.

Q. When did you first meet him? A. I think I met him some time the day before, I think it was March 6th.

Q. The day before you signed this agreement?
10 A. Yes, sir.

Q. And where did you meet him? A. Right in my house.

Q. Who brought him there? A. Why, Mr. Zellerz.

Q. Is he the agent? A. He was working—bar-tender in a saloon.

Q. Did he act as agent in this transaction? A. Yes, sir.

Q. What time of the day was it when he came
20 to the house? A. He came in the evening.

Q. Did anybody come with him? A. Mr. Schwabinger and his wife and a little girl.

Q. By "Mr. Schwabinger" you mean the man that was on the stand a minute ago? A. Yes, sir.

Mr. Stein: Is Mr. Schwabinger in the court room?

Mr. Schwabinger answers "yes."

Q. Did you ever see that man before? A. No,
30 sir.

Q. Did you ever have any dealings with him? A. No, sir.

Q. When Mr. Zellerz came in there to your house that evening, what did he say? A. Well, he came in and he said, "good evening; here is a buyer."

Q. Did he mention his name? A. No, sir.

Q. What price were you asking for the prop-erty?

40 Mr. Schotland: I object; the agreement has been reduced to writing.

The Vice Chancellor: How is that material? I will sustain the objection.

Q. As a result of your talk with Mr. Zellerz and the man that you called "Schwabinger" did you make an appointment to meet him on the next day? A. Yes, sir.

10

Q. And where were you to meet? A. Well, at the son's.

Q. Where were you to meet him? A. Well, he was going to come to my house.

Q. And from there where were you going to go? A. From my house we went to Mr. Germanne's house and drew the deed there.

Q. Mr. Germanne is a commissioner of deeds? A. Yes, sir.

Q. Did you go with Mr. Weitzenhoff to Mr. Germanne's office? A. Yes, sir.

20

Q. Did any one else go with you? A. Only his wife.

Q. And did she go with you all the way? A. No, up to Belmont Avenue corner.

Q. To Belmont Avenue corner? A. Yes, sir.

Q. And she stopped off there at the bank? A. Yes, she stopped off there at the bank.

Q. And then you and Mr. Weitzenhoff went the rest of the distance to Mr. Germanne's office? A. Yes, sir.

30

Q. When you got to Mr. Germanne's office, what conversation did you have? A. I didn't have any with him.

Q. Well, did Mr. Germanne ask any questions? A. Yes, sir.

Q. What did he ask? A. He asked for his name.

Q. What did he say? A. Oscar Schwabinger.

Q. And did Mr. Germanne then start to draw the agreement? A. Yes, he did.

40

Q. And a little later did your wife come down to

the office? A. My wife came down later; she passed by; I was told she was needed and I called my wife in.

Q. And when she came in, what happened? A. Mr. Germanne handed her the agreement she got to sign.

10 Q. How far had Mr. Germanne gone in the preparation of the agreement? A. One part was about half done and the other was blank.

Q. There were two copies? A. Yes, sir, there were two copies.

Q. Do you recognize Exhibit C-1 as one of the agreements? A. Yes, sir.

Q. I show you another paper, dated March 7th, 1919; is that the other copy? A. Yes, sir.

20 Mr. Stein: I offer that paper in evidence. It is admitted in evidence and marked Exhibit D-1.

Q. Now, you say that one of those agreements was entirely blank? A. Yes, sir.

By the Vice Chancellor:

Q. You said one part was about half way done and the other part was blank? A. Yes, sir.

30 Q. You mean one of those agreements? A. Yes, sir, one of those agreements and my wife signed it blank.

By Mr. Stein:

Q. How long was your wife in that office? A. Only a few moments.

Q. Did she say anything to Mr. Germanne? A. She said, she was awfully in a hurry and was gone.

40 Q. Did she say she was in a hurry? A. Yes, sir, she said she was in a hurry.

Q. Now, did I understand you to say, that at the time she signed the papers that one of the copies was entirely blank and the other copy was just half finished? A. Yes, sir.

Q. Did your wife sign these agreements in that way? A. Yes, sir.

Q. And then she left? A. Yes, then she left. 10

Q. Did Mr. Germanne ask her whether she acknowledged this agreement as her voluntary act and deed? A. Mr. Germanne said, we are selling the property.

Q. And he didn't say what the property was being sold for? A. No, sir.

Q. And did he tell her what the purchase price was? A. No.

Q. Did he say anything about the purchase price to her? A. She said— 20

Q. Did you send for your wife to come to Mr. Germanne's office? A. I did not.

Q. How did she happen to be there? A. Well, she passed with her niece.

Q. She knew that you were at that office? A. She didn't know, she happened to pass and I said, you come in.

Q. Did she ask what it was that she was to sign? A. Yes, sir.

Q. And who told her what it was? A. Mr. Germanne told her what it was. 30

Q. And did you say anything to her what it was—to her? A. I explained to her it was to sign an agreement.

Q. For what? A. Selling the property.

Q. Didn't you tell her for how much? A. No, I didn't.

Q. Do you mean to tell me that your wife signed an agreement to sell this property without knowing how much she was to get for it? A. Oh, we make that all out at home the day before. 40

Q. And you had agreed to sell the property under an agreement and then you made out the agreement and she signed it? A. Yes, sir.

Q. And after she signed it did Mr. Germanne ask her any questions? A. No, sir.

10 Q. What did your wife do? A. She signed it and walked out right away.

Q. She didn't stay until the writings were finished? A. No.

Q. You had in fact discussed the matter with your wife the night before? A. What?

Q. She knew that she was going to sell the property? A. Yes, sir.

20 Q. After this agreement was signed, you learned that the man that you had done your business with was a man by the name of Weitzenhoff, didn't you? A. Yes, sir.

Q. And how long after the signing of this agreement was it that you found out that he was Weitzenhoff? A. Not very long; a few weeks.

Q. About a few weeks afterwards? A. Yes, sir.

Q. And after you got that information what did you do? A. Well, I started to talk; I said, we are selling the property to a wrong man.

Q. Whom did you say that to? A. To my wife.

30 Q. What did you do after you found out that you were selling the property to wrong man? Who did you say it to? A. Just between me and my wife.

Q. What did you do? Did you go to consult a lawyer? A. Yes, sir.

Q. And did you arrange to hand your money back; to give your money back? A. Yes, sir.

40 Q. And did you go with a clerk from my office to Mr. Weitzenhoff's store to point out the man with whom you had done your business? A. Yes, sir.

Q. And later on and before the first day of May,

1919, the two hundred dollars was offered to be returned to Mr. Weitzenhoff? A. Yes, sir.

Cross Examination by Mr. Schotland:

Q. Mr. Saxon, the night before the agreement was drawn Mr. Weitzenhoff and his wife and the broker Zellerz were all in your house? A. Yes, sir. 10

Q. And you and your wife were both there? A. Yes, sir.

Q. And you talked over the selling of the property, did you? A. Yes, sir.

Q. And you agreed upon all the terms; you agreed upon the price; you agreed upon getting all the money in cash; and everything else; that is right? A. Yes, sir. 20

Q. And then you made an appointment—that the next day you would go in the day time and have the contract drawn at the office of your friend, Mr. Germanne? A. Yes, sir.

Q. You wanted to go to Mr. Germanne's office to have the contract drawn, didn't you? A. Yes, sir.

Q. He was your representative in this contract? A. Yes, sir.

Q. And the way Mr. Germanne drew the contract, is that exactly the way you and your wife and Mr. and Mrs. Weitzenhoff and Mr. Zellerz agreed on the night before; in other words is everything in the contract exactly the same way as you agreed? A. Yes, sir. 30

Q. And you and your wife were both satisfied with the contract after you got it home; were you not? A. Yes, sir.

Q. Your wife was satisfied with it, too? A. Yes, sir.

Q. She saw it after you got your copy home, after it was all over? A. Yes, sir. 40

Q. And did she look it over? A. Yes, sir.

Q. And she was satisfied with it; is that right?

A. Yes, sir.

Q. The only objection is that you had found out that the man who gave you the deposit and signed the contract was not Oscar Schwabinger, but it was
10 Mr. Schwabinger's stepfather, is that right? A. Yes, sir.

A. Well, we found out that we were not dealing with the right man.

Q. And that is the only reason you refused to give a deed? A. Yes.

Q. Are you willing to give a deed to Mr. Weitzenhoff?

Mr. Stein: I object; I do not think that
20 is material at this time.

The Vice Chancellor: I will sustain the objection.

Q. You were never only to give a deed to Oscar Schwabinger, were you not? A. I didn't see young Oscar Schwabinger.

Q. You were asked to make out and sign a deed to Oscar Schwabinger?

Mr. Stein: I object.
30

Mr. Schotland: I will withdraw the question.

Q. You had an attorney by the name of Byro to represent you in this matter? A. Yes, sir.

Q. And did he report to you that the attorney for Oscar Schwabinger—was the deed in the name of Oscar Schwabinger? A. I don't remember that.

Q. You don't remember that? A. No, sir.

40 Q. You knew that they wanted the deed in the

name of Oscar Schwabinger, didn't you? A. Yes, sir.

Q. Did you refuse to give that deed because it was Oscar Schwabinger's stepfather who gave you the deposit and made the deal instead of Oscar Schwabinger? A. I never knew that.

Q. But that is the reason you refused to give the deed? A. I refused to give the deed because I saw that I was dealing with the wrong man. 10

Q. What difference did that make to you? You were getting your cash? A. Well, I didn't have any trouble in my family with anybody and I was thinking the other man could come around and—

Q. Then the only reason that you refused to give a deed to Oscar Schwabinger was because you were afraid that if you gave a deed to Oscar Schwabinger and get the money for the property Mr. Weitzenhoff could come around and demand another property; that is the only reason? A. Yes, sir. 20

Q. Well, now if you are assured that Mr. Weitzenhoff will not come around and demand another property are you willing to give a deed according to the agreement to Oscar Schwabinger?

Mr. Stein: I object.

The Vice Chancellor: I will sustain the objection. 30

Q. If you got a writing from Mr. Weitzenhoff that he will not ask for another deed or make any claim on you, are you willing to give a deed to Oscar Schwabinger for this property? A. No, sir.

By the Vice Chancellor:

Q. Did you and your wife ever sign a deed for this property to Oscar Schwabinger? A. (No answer.) 40

Q. On May 1st, 1919, the time named in the contract for the delivery of the deed, were you ready then to give a deed to Oscar Schwabinger? A. I was not there.

Q. And you did not have any deed ready? A. No, sir.

10

Mr. Stein: I offer the deed of the property from Charlotte Mieran to John Saxon and Susie Saxon, his wife, dated March 15th, 1910, recorded March 29th, 1910, in the Essex County Register's office, in Book A47, page 71, etc., which conveys the premises in question.

(Deed admitted in evidence and marked Exhibit D-2.)

20

MRS SUSAN SAXON, sworn:

Direct Examination by Mr. Stein:

Q. You are the Susie Saxon, mentioned in this deed? A. Yes, sir.

Q. And the gentleman that just left the stand is your husband? A. Yes, sir.

30 Q. Were you at your home on the evening of March 6th, 1919, when a man by the name of Zellerz came there? A. Yes, I was home.

Q. Who else was there at your house that evening? A. My niece.

Q. What is her name? A. Annie Pulike.

Q. How long had your niece been staying there with you? A. Three days.

Q. She works out as a domestic? A. Yes, sir.

40 Q. And did you see anybody come there to the house with Mr. Zellerz? A. Mr. Schwabinger and—

Q. By that do you mean Mr. Weitzenhoff; was it that gentleman? A. Yes, sir.

Q. And this lady? A. Yes, sir.

Q. She came there also? A. Yes, sir.

Q. And Mr. Zellerz? A. Yes, sir.

Q. Now, while Mr. Weitzenhoff was there was this young man there (pointing out Oscar Schwabinger)? A. No, I never saw him, I don't know him. 10

Q. Did you see him any time before to-day? A. No, to-day is the first time I see him.

Q. Now, when Mr. Zellerz came into your house what did he say? A. He said, he brought a buyer for the house.

Q. Did he mention their names? A. No.

Q. Do you know whether Mr. and Mrs. Weitzenhoff are in business in Newark? A. She tells me she has a store. A hat store, a millinery store, on Springfield Avenue. 20

Q. And how far away is that from your place? A. About a block and a half.

The Vice Chancellor: How is that material?

Q. They do conduct a millinery store there? A. Yes, sir. 30

Q. Is there any name on the outside of the store? A. The New York Millinery.

Q. Any other name? A. No, sir; I never heard of any other name but that.

Q. The following day did you go down to the office of Mr. Germanne? A. I only pass by with my niece.

Q. You passed by? A. Yes, sir.

Q. And you stopped at Mr. Germanne's office? A. Yes, sir, they called me in and I went in. 40

Q. You knew that your husband was going to Mr. Germanne's office to sell the property? A. Yes, sir, I knew that.

Q. How did you happen to go into Mr. Germanne's office? A. Some one called me in.

Q. And you went in? A. Yes, sir.

10 Q. And did your niece go in with you? A. Yes, sir, she came also with me.

Q. And how long did you stay there? A. About two minutes.

Q. And what took place when you went in? A. Well, Mr. Germanne handed me a paper and said I should sign it; one had some writing on it; I do not know what was on it, and the other one was blank, what I signed.

20 Q. And before you signed it, he told you what you were signing? A. He told me about selling the property.

Q. Is that all he said? A. That is all.

Q. The Fairmount Avenue property? A. Yes, sir, my husband told me the night before.

Q. And after you signed it, did Mr. Germanne ask you any questions? A. No, I was in a hurry to go out with my niece.

30 Q. Why were you in a hurry? A. We were shopping; she was buying a trunk; she was going to take a place at Mrs. Levy's.

Q. She was taking a place the next day? A. Yes, that same day.

Cross Examination by Mr. Schotland:

Q. The night before you signed the agreement, you were at home when everything was arranged? A. Yes, sir, I was home.

40 Q. And you agreed to make this sale for the price and on the conditions contained in the agree-

ment? A. Well, my husband, know all about it more.

Q. You agreed with him to do it? A. No, I was in the front room and my husband was in another room; we were not in the same room; we were in the house but not in the same room.

Q. Didn't your husband tell you that he had decided to sell the property? A. I agreed to sell according to the way he decided. 10

Q. Is that right; you agreed with him selling it on those terms? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. And you knew that the next day he would be at Mr. Germanne's office to sign the contract? A. Yes, sir, he was there but I was not there.

Q. And you were to be there? And you were called in and you signed the contract, and after that you saw a copy of the contract at home? A. Yes, sir. 20

Q. You had no objection to the contract, had you? A. Only when I found out his name was different.

Q. That is the only objection you had? A. Yes, sir.

Q. But to the contract—to everything that was in the contract you had no objection? A. Well, certainly that contract was not read over to me. 30

Q. After you saw the contract at home and it was all complete and you had a complete copy at home, you had no objection to the contract; you only objected to the wrong man? A. Yes, sir.

Q. Is that right? A. Yes, sir.

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

Q. Did you read the contract that you had at home? A. No, sir.

Q. Didn't you look it over yourself? A. No. 40

By the Vice Chancellor:

Q. Your husband says that you did? A. My husband?

Q. Did he read it over to you? A. I guess he read it to me.

10 Q. He says that you did read it over; is that true or not? A. I can't read English.

Q. Well, did he or somebody else read the contract to you? A. Yes, sir.

Q. He read it to you? A. Yes, sir.

Q. Did he tell you that the man who was buying the property was named Oscar Schwabinger? A. Yes, sir, he told me that.

Q. Did he tell you that the selling price was \$8,350? A. Yes, sir.

20 Q. You knew that the night before? A. Yes, sir.

Q. And did he tell you that the deed was to be delivered on the 1st day of May, 1919? A. Yes, sir.

Q. And that you were to convey this property on Fairmount Avenue, where you lived, under the contract? A. Yes, sir.

Q. And did he tell you that \$200 was to be paid on account of the contract? A. Yes, sir.

30 Q. And did he tell you that he had the \$200? A. Yes, sir.

Q. And did he say that the balance of \$8150 was to be paid in cash when the deed was given? A. Yes, sir.

Q. And that was all satisfactory to you? A. Yes, sir.

Q. Well, what part of it was not satisfactory to you, if any? A. Because he had a different name in the contract.

40 Q. Well, the only thing that you were dissatisfied with came up after when you saw that Schwab-

inger was not Schwabinger but was Weitzenhoff?

A. Yes, sir.

Q. That was the only objection you had to the contract? A. Yes, sir.

By Mr. Schotland:

Q. Now, before you signed the contract didn't Mr. Germanne explain to you every part of that contract in Hungarian language? A. No, sir.

Q. Didn't he? A. No, sir, I was in a hurry and I didn't have any time.

Q. Didn't he explain to you what was in this agreement in the Hungarian language? A. No.

Q. Didn't he speak to you in Hungarian? A. He spoke to me.

Q. Hungarian is your language? A. Yes, sir, 20 that is my language.

Q. And he spoke Hungarian?

Q. And didn't ask you if you were satisfied with this agreement? A. No, because they were not filled up.

Q. What was not filled up? A. I seen an empty blank; one was filled up only a little at the start.

Q. Where was it filled out; indicate the place? A. I don't know; Mr. Germanne knows better than me how much was filled out. 30

Q. You think that he knows better than you do how much was filled out? A. Yes, he knows better than me how much was filled out.

ANNA PULIK, sworn:

Direct Examination by Mr. Stein:

Q. You are a niece of Mrs. Saxon? A. Yes, sir, 40 I am.

Q. And on the 6th of March, 1919, were you living with her at her home on Fairmount Avenue?

A. Yes, sir.

Q. And were you present on that evening when Mr. Zellerz came to the house with Mr. Weitzenhoff? A. Yes, sir.

10 Q. Did you see them come through the room?

A. Yes, sir; they came through the kitchen; I was in the kitchen.

Q. What did Mr. Zellerz do when he came in?

A. Well, when he came in, I don't know if he said "good evening."

Q. Did he mention any names? A. I didn't hear any names.

Q. The next day were you and your aunt walking down Springfield Avenue? A. Yes, sir, I was.

20 Q. You were out to buy a trunk? A. Yes, sir.

Q. Did you have occasion to pass Mr. Germanne's office that day? A. Yes, we must.

Q. Did you stop in the office? A. No, we were just going down Springfield Avenue and my uncle saw us from the window.

By the Vice Chancellor:

30 Q. You went in the office? A. Yes, sir, we were called in.

Q. Did you go in the office? A. Yes, sir.

By Mr. Stein:

Q. How long were you in the office? A. About two minutes.

Q. What happened while you were there? A. As soon as we came in my aunt says she is in a hurry and she went to the window and signed two papers.

40 Q. Who asked her to sign? A. Mr. Germanne.

Q. Did you see the papers yourself? A. No, I

didn't see the papers; I know she signed something, but I don't know what it was.

Q. Did he tell her what the papers were? A. No, I didn't hear anything.

Q. After she signed the papers what did he say, if anything? A. All he said, we are selling the property. 10

Q. When did he say that? A. When she signed it.

Q. After she signed it did he say anything more? A. No.

Q. What did you and she do? A. We walked out and went to do our shopping.

Q. You went to buy a trunk? A. Yes, sir; we went to buy a trunk.

Cross Examination by Mr. Schotland: 20

Q. Were you right alongside of your aunt when she signed? A. No, I was a little bit far from her.

Q. You didn't listen to everything that was said to her? A. Well, no, nobody told her anything; we just went in because we were in very much hurry and Mr. Zellerz said, we are selling your property.

Q. Did Mr. Saxon say anything to his wife? A. No. 30

Q. You were right alongside of her to hear everything that was said? A. Oh, yes.

By the Vice Chancellor:

Q. When she came to sign the papers did Mr. Germanne say anything to her that they were not ready? A. No, she just went to the window and she signed. 40

Q. Didn't she say that the papers were not finished yet, why should she sign? A. Well, she didn't say anything about it; she signed it because she was in a hurry.

Q. Did anybody say anything about the papers not being finished at the time she signed them? A.

10 No, sir.

Q. Nobody said anything about it? A. No, sir.

Q. You knew that they were not finished? A. No, I saw the papers but I didn't know what was on them written.

EMIL GERMANNE, sworn.

20 Direct Examination by Mr. Stein:

Q. Mr. Germanne, you are a commissioner of deeds? A. Yes.

Q. And you were a commissioner of deeds on March 7th, 1919? A. Yes, sir.

Q. Where is your office? A. 97 Mercer Street.

Q. Newark? A. Yes, sir.

Q. Right off of Springfield Avenue? A. Yes, sir.

Q. And your office is what, a store? A. Yes, sir,
30 a steamship ticket office.

Q. On the 7th of March, 1919, did Mr. Saxon come to your office with Mr. Weitzenhoff? A. Yes, sir.

Q. And was there any one else with them when they came there? A. No.

Q. Those two came alone? A. Yes, sir.

Q. Tell us what conversation took place? A. Well, Mr. Saxon told me he was making an agreement of sale of property, and I asked them the
40 details and their names, and the other gentleman, I asked him to sign down on the paper, and—

Q. Did you ask him his name? A. Yes, sir.

Q. What did he say? A. Oscar Schwabinger.

Q. And then he wrote it down on a piece of paper? A. Yes, sir.

Q. Did you know this man before? A. No.

Q. You never saw him before? A. No, sir.

Q. When did you find out that his name was not Oscar Schwabinger? 10

Mr. Schotland: I object.

The Vice Chancellor: I will sustain the objection.

Q. And while the papers were being drawn did Mrs. Saxon come in? A. Yes, sir, she called in.

Q. How many agreements did you have? A. One at that time; one was not finished. 20

By the Vice Chancellor:

Q. Well, how about the other? A. We didn't start the other at all.

By Mr. Stein:

Q. Well, how far had you gotten with the one when Mrs. Saxon came in; will you look at D-1 and tell us how far you had gotten with it? A. About that far (indicating) "The parties of the first part agree to deliver to the party of the second part all the awnings and screens on the first floor and also all the screens on the front windows on the second and third floors of said premises. 30

Q. That was finished up to that? A. Yes, sir, one copy.

Q. Up to that point was finished? A. Yes, sir.

Q. Now, what did Mrs. Saxon say to you or you say to her? A. I told her she got to wait, I 40

ain't got through with the papers and she told me she is in a great, hurry, she has got to go away, and I asked her if she knew what it was, and I asked her if that was her free will to sign the papers to sell the property, in Hungarian language.

10 Q. When did you ask her that? A. Well, when she signed her name.

Q. Did you ask her that question after she had signed it? A. Yes, sir.

Q. Didn't you tell me that you had never asked her that question? A. Well, I could not tell you if I didn't ask her; the first thing was when she came in, I ask her right away.

Q. Oh, when she came in? A. Yes, sir.

20 Q. I want to get it clear as to when you asked her that question; was it before or after she signed? A. When she came in, and she told me she is in a great hurry.

Q. After she signed it did you have any further conversation with her? A. No.

Cross Examination by Mr. Schotland:

30 Q. You represented Mr. and Mrs. Saxon in this matter, did you not? A. Well, I was representing them; they came to me and asked me to draw the agreement.

Q. Who paid you for drawing it? A. I don't know; one of them paid me \$3; that is all I know.

Q. You filled out this acknowledgment and this is your signature as commissioner of deeds? A. Yes, sir.

Q. Was this acknowledgment true when you filled it out and she signed it? A. It was not true when I made that.

40 Q. I asked you if it was the truth? A. It was the truth.

Q. In the first place did you ask Mrs. Saxon, as you have testified in this acknowledgment whether she signed this agreement for the uses and purposes therein expressed, as her voluntary act and deed? A. I could not ask her; she was not there.

Q. Did you ask her when you filled this out? A. 10
When she came in and she said she was in a very great hurry and I asked her if she knew what she was doing.

Q. Did you tell her what was in the agreement? A. Yes, sir, I told her in Hungarian language, what was in the agreement.

Q. What did you say? A. And she says, I know everything.

Q. On your direct examination you said something about your asking her after she signed this paper if this is her free act and deed? A. Yes, 20
sir, I ask her if she do it of her free will.

Q. You did ask her that? A. Yes, sir.

Q. Now, did you ask her that before she signed her name or while she was signing her name or at the time she finished her name? A. At the time she signed her name I asked her if she knew what she was doing and she signed her name.

Q. And you went out? A. Yes, sir.

Q. And you afterwards filled out this acknowledgment clause? A. Yes, sir. 30

Q. Did you tell her what else you were going to put into the agreement? A. No.

Q. What else did you put into the agreement after she signed? A. This place, where the place of settlement and the filling in the \$200, is.

Q. The entire agreement was complete except the place where title was to pass and filling in the \$200? A. Yes, sir.

Q. Now, did she tell you to finish the agreement, 40

that it would be all right, that she was in too much of a hurry to wait? A. Yes, sir.

Q. She told you to finish it? A. Yes, sir.

Q. That you should finish it and she didn't want to wait? A. Yes, sir.

Q. She told you that? A. (No answer.)

10 By the Vice Chancellor:

Q. Did she tell you to finish the agreements?
A. No, sir.

Q. Then, why did you say she did; now please pay attention to the question and answer it truthfully? A. Yes, sir.

By Mr. Schotland:

20 Q. What did she say? A. She say, I know what the paper was, and I know what it says, and I says, you got to wait, and she says, I am in much of a hurry.

By the Vice Chancellor:

Q. Did anybody say anything to you about finishing up the agreement? A. No, sir.

By Mr. Schotland:

30 Q. Nobody said anything to you about your finishing the agreement? A. No.

By the Vice Chancellor:

Q. Didn't you say that you were going to finish the agreement? A. I was working on it; I didn't say anything.

By Mr. Schotland:

Q. Now, as a matter of fact, was not one copy of the agreement entirely complete before she signed it? A. No, sir.

40 Q. And wasn't it only the second copy which was blank? A. No, the second copy was blank, and

that one was not finished only as far as I have showed you.

Q. Did you examine Susie Saxon separate and apart from her husband? A. No, sir.

Q. Did she acknowledge to you that she signed, sealed and delivered this agreement? A. She was not there.

10

Q. Why did you make a false certificate then? A. Why did I make a false certificate?

Q. Yes. A. I made it.

Q. You made it and you don't know why? A. Yes, sir.

Q. Do you mean to say that this certificate is false? A. I could not say.

Q. Well, is it false or is it true? A. Well, so far as she was there.

Q. Well, is it necessary for the person to be present when you fill out an acknowledgment? A. Yes, sir, but I didn't ask this question.

20

Q. Why did you certify that you did? A. Well, I could not answer that, why.

Q. You could not? A. No.

Q. Well, now as a matter of fact, didn't these people come to you that you should help them get out of this deal? A. No.

Q. And didn't you make an affidavit for Mr. Stein to help them get out of this deal? A. No, sir.

30

Q. Well, what did you make an affidavit for? A. Well, he acknowledged asking me to make an affidavit. The other side wanted me to make an affidavit, too.

Q. Are you in the habit of making false acknowledgments? A. No.

Q. You make a business of drawing deeds and affidavits? A. Not a business.

Q. You make as many as you get? A. Yes, sir.

40

Q. And you are familiar with acknowledgments? A. Yes, sir.

Q. How long have you been a commissioner of deeds? A. About twenty-five years.

Q. And you have been drawing contracts and making deeds for a long time? A. Yes, sir.

Q. And you now say that this certificate is false? A. So far that I didn't ask the last question.

10 Q. What question didn't you ask? A. Well, she was not present when I finished these papers; I have got to say it is false; I am sorry it is but I have not to say it is that way.

Q. Nobody asked you to make this false certificate? A. No, sir, but she said she had got to go away and—

By Mr. Stein:

20 Q. Were there any other signatures on this paper when she signed it? A. No, sir.

Q. She was the first one to sign? A. Yes, sir.

Mr. Stein: That is our case, your Honor.

STEPHEN ZELLERZ, sworn in rebuttal:

30 Direct Examination by Mr. Schotland:

Q. Were you the broker or agent who brought about this deal with Oscar Schwabinger? A. Yes, sir.

Q. Were you present the night before the agreement was drawn? A. Yes, sir.

Q. Did you introduce Mr. and Mrs. Saxon? A. Yes, sir.

Q. What name did you introduce them by? A. Mr. and Mrs. Weitzenhoff.

40 Q. Have you always known them by that name? A. Yes, for four years.

Q. How long have you known the Saxons? A. About twenty years.

Q. Was the name of Schwabinger mentioned that night? A. No, sir, not that night.

Q. When was the first time you heard that name mentioned in this matter? A. The next day at Mr. Germanne's office when I came in they were already present. 10

Q. That was the first time you heard it mentioned? A. Yes, sir.

Q. Did you see Mrs. Saxon sign this paper C-1? A. Yes, sir.

Q. In what condition was the agreement when Mrs. Saxon signed that agreement? A. I don't know.

Q. Did you see whether it was finished or not? A. Well, when he finished everything, he was reading off the agreement. 20

Q. Did he read everything from the agreement? A. As far as I know, yes, sir.

Q. Look at the agreement and tell me if there is anything that he didn't read to her? A. (Witness examines C-1.) Yes, there was everything read off to her in her presence.

Q. In her presence and before she signed it? A. Yes, sir.

Q. And what did Mr. Germanne do with the agreement after she signed it? A. Why he filled up another one. 30

Q. Copying from this one? A. I suppose so.

Q. After you heard Mr. Germanne read off the name of Schwabinger did you ask any questions about Schwabinger? A. Yes, sir, I asked about, who is this "Schwabinger" and Mr. Weitzenhoff says, I am buying this property for my son.

Q. He said he was buying it for his son? A. Yes, sir. 40

Q. Was there any objection made to that? A. No, sir, not at all.

Cross Examination by Mr. Stein:

10 Q. You were a bartender in a saloon at that time, were you not? A. Yes, sir.

Q. Real estate is not your regular business is it? A. Not at all.

Q. Mr. Saxon had agreed to pay you a commission in case you put the deal through? A. Yes, sir.

Q. You have not received that commission? A. No.

Q. What time did you arrive at Mr. Germanne's office? A. A little after one.

20 Q. Who was there? A. Mr. and Mrs. Weitzenhoff and Mr. Saxon.

Q. Who else? A. There were a couple of people there but they were strangers.

Q. They were strangers to you? A. I did not know who they were.

Q. Was not Mrs. Saxon there? A. She came in about two seconds after I got there.

Q. Was it after you got there that she arrived? A. Yes, sir.

30 Q. And how long did she stay there? A. Oh, I can't tell; I can't recollect, it was a very short time, I know that.

Q. You said a little while ago, you did not know how far Mr. Germanne had gotten in the preparation of the agreement? A. No. I only heard him reading it off.

Q. You were present? A. Yes, sir.

Q. And after he read it off Mrs. Saxon signed it? A. Mrs. Saxon signed.

40 Q. You know that it was read off at some time while you were there? A. Yes, sir.

Q. But you are not sure when it was that he did read it off? A. It was read off to her and to all of us.

Q. You are not sure as to whether she was present when he read it off or whether she had gone? A. Oh, yes, I am pretty sure of it.

Q. You would not swear to it? A. I am swearing now. 10

Q. Did he read it off? A. Yes, sir, from beginning to end.

Q. And after he finished did she sign? A. Yes, sir.

Q. When was this discussion with regard to Mr. Weitzenhoff's son; when did that take place? A. When Mr. Germanne began to read off the "party of the first part and second part," and I said, "who is 'Schwabinger,' I never knew by that before." 20

Q. And then he told you? A. Yes, sir, he said, he is my stepson.

JOSEPH WEITZENHOFF, recalled in rebuttal:

Direct Examination by Mr. Schotland:

Q. Did you see Mrs. Saxon sign this agreement C-1? A. Yes, sir. 30

Q. In what condition was it when she signed it? A. The first agreement was complete when she signed it.

Q. That is the original copy? A. Yes, sir, the original copy.

Q. And what about the duplicate copy? A. It was just about half made; they copied the other.

Q. The duplicate was made from that copy? A. Yes, sir. 40

Q. Do you understand the Hungarian language?

A. No, sir.

Q. In what language did Mr. Germanne speak with Mrs. Saxon? A. He translated the agreement in the Hungarian language.

10 Cross Examination by Mr. Stein:

Q. Did you watch Mr. Germanne while he was drawing this agreement? A. I didn't watch him all the time, but I have seen that the agreement was finished while he was reading it over to Mrs. Saxon.

Q. Did he read it over to her in the Hungarian language? A. Yes, sir.

Q. You do not know how much was read? A. Well, it was all finished and the other one was not
20 finished.

Q. Did he read it completely? A. He read the first one completely.

By the Vice Chancellor:

Q. You don't know what he read; he held the agreement in front of her face and read it over?
A. Yes, sir.

30 By Mr. Stein:

Q. Did you pay for the drawing of this agreement or did Mr. Saxon? A. I paid it.

ANNA WEITZENHOFF, sworn in rebuttal:

Direct Examination by Mr. Schotland:

Q. Mrs. Weitzenhoff, you are the mother of Oscar Schwabinger? A. Yes, sir.
40

Q. Were you present when this agreement C-1 was signed? A. Yes, sir.

Q. You were present? A. Yes, sir.

Q. Did you see Mrs. Saxon sign this agreement? A. Yes, sir.

Q. In what condition was this agreement, as to being finished or not, when Mrs. Saxon signed it? 10
A. Mr. Saxon said—

Q. Please answer the question. Was this agreement finished or not when Mrs. Saxon signed it?

A. It was finished; I was standing right by the window; one copy was finished.

Q. What about the other copy? A. It was half finished.

Q. Who explained the agreement to Mrs. Saxon when she signed it? A. Mr. Germanne.

Q. What language did he speak to Mrs. Saxon in? A. In Hungarian. 20

Q. Do you understand Hungarian? A. No, sir, and then afterwards he explained it in English.

Cross Examination by Mr. Stein:

Q. When did you get to Mr. Germanne's office? A. Well, at noon time.

Q. Who was there when you got there? A. I don't know. 30

By the Vice Chancellor:

Q. Did you go there with your husband? A. Yes, sir, and with Saxon.

Q. You didn't actually go to Germanne's office with your husband? A. Yes, sir.

Q. Didn't you go to the bank? A. Yes, sir, I go quickly and I was just going by the door.

SUSAN SAXON, recalled in rebuttal:

Direct Examination by Mr. Stein:

Q. Mrs. Saxon, was Mr. Zellerz in Mr. Germanne's office while you were there? A. No.

10 Q. Was he there at any time while you were there? A. No, I didn't see him there.

(No cross examination.)

ANNA PULIK, recalled in rebuttal:

Direct Examination by Mr. Stein:

20 Q. Was Mr. Zellerz present in Mr. Germanne's office at any time while you were there that afternoon? A. No, sir.

(No cross examination.)

JOHN SAXON, recalled in rebuttal:

30 Direct Examination by Mr. Stein:

Q. Mr. Saxon, did Mr. Zellerz introduce Mr. Weitzenhoff to you at your house on the evening of March 6th, 1919, as "Mr. Weitzenhoff"? A. No, sir.

Q. Did he mention his name at all? A. No, sir.

The Vice Chancellor: That is as far as I will let you go Mr. Stein.

Cross Examination by Mr. Schotland:

Q. What did you do with the \$200 deposit when you got it? A. I took it down to my attorney.

Q. I mean the day when you got it in Mr. Germanne's office; what did you do with it? A. I didn't do anything with it that day.

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Q. Did you put it in the bank? A. No, I had it home.

Q. Did you give it to your wife to put away? A. No, I had it by me.

Q. You didn't give it to your wife? A. No, I didn't give it to my wife.

By Mr. Stein:

Q. You are still ready to return to \$200? A. Yes, sir.

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(Case Closed.)

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New Jersey Court of Errors and Appeals

Between

OSCAR SCHWABINGER,
Complainant-Appellant,

and

JOHN SAXON, et al,
Defendants-Respondents.

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Facts.

This is an appeal from a decree of the Court of Chancery (page 31) by which complainant's bill was dismissed and the contract (page 36) thereby sought to be specifically enforced, was rendered null and void and ordered cancelled.

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The Bill of Complaint prayed for the specific performance of a contract (page 36) by which the defendants, John and Susie Saxon agreed to convey to the complainant, certain real estate in the contract described.

The defendants resisted enforcement of the contract on two grounds:

30

1. Because of an alleged misrepresentation as to the identity of the purchaser.

2. Because of an alleged want of a proper acknowledgment of the contract by Mrs. Saxon.

POINTS.

Point I. (a) There was in fact no misrepresentation as to the identity of the purchaser, (b) but if so, the misrepresentation was of such a char-

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acter as not to render the contract unenforcible specifically.

Point II. The contract in question was acknowledged by Mrs. Saxon in accordance with the Statute in such case made and provided, and there should therefore have been a decree for the specific performance thereof.

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ARGUMENT.

POINT I.

(a) There was in fact no misrepresentation as to the identity of the purchaser,—

20 As to the question of alleged misrepresentation of identity of parties, the evidence was that Weitzenhoff was the agent of complainant Schwabinger, duly authorized to purchase the premises for the latter (page 36); that the broker Zellerz, on the evening before the contract was signed, brought Mr. and Mrs. Weitzenhoff to the Saxon home (admitted by John Saxon (page 42) and by Susie Saxon (page 50); Zellerz says (page 64) that he introduced Weitzenhoff by that name to the Saxons; 30 John Saxon says (page 42) that Zellerz did not mention Weitzenhoff by any name, and Susie Saxon says (page 51):

“He (meaning Zellerz), said he brought a buyer for the house.”

“Q. Did he mention their names?”

“A. No, sir.”

40 Anna Pulik, defendants' niece, says (page 56) that no names were mentioned; both of the defendants, John and Susie Saxon say (pages 47, 52, 53)

that the terms of the proposed sale were then discussed and agreed upon and that an appointment was made for the following day to have the contract drawn and signed at the office of one Germanus; that the parties met, according to appointment, the following day at the office of Germanus, who immediately commenced to draft the contract by filling in the usual printed form. John Saxon says (page 43) that when Germanus commenced to draft the contract he asked Weitzenhoff his name and was told "Oscar Schwabinger."

10

Obviously, what was meant, and undoubtedly what was actually asked of Weitzenhoff, was the name to be inserted in the contract as the purchaser. This is shown by the testimony of Zellerz, who testified (page 65):

"Q. After you heard Mr. Germanus read off the name of Schwabinger, did you ask any questions about Schwabinger?"

20

"A. Yes, sir. I asked about who is this 'Schwabinger' and Mr. Weitzenhoff says I am buying this property for my son."

"Q. He said he was buying it for his son?"

"A. Yes, sir."

"Q. Was there any objection made to that?"

"A. No, sir, not at all."

Germanus testified (page 58):

30

"Q. Tell us what conversation took place."

"A. Well, Mr. Saxon told me he was making an agreement of sale of property and I asked them the details and their names, and the other gentlemen, I asked him to sign down on the paper and—"

"Q. Did you ask him his name?"

"A. Yes, sir."

"Q. What did he say?"

40

"A. Oscar Schwabinger."

"Q. And then he wrote it down on a piece of paper?"

"A. Yes, sir."

Germanus further testified (page 61) :

"Q. Did you tell her (referring to Mrs. Saxon) what was in the agreement?"

10

"A. Yes, sir, I told her in Hungarian language what was in the agreement."

(Germanus on the same page later on testified that the place for the closing of title and the amount of the liquidated damages was filled in thereafter).

Weitzenhoff (page 67) and Zellerz (page 65) both testified that the agreement was read to Mrs. Saxon.

20

The defendants, in paragraph 14 of their answer (page 15) admitted that they knew that they were making the contract with Oscar Schwabinger; that paragraph reads in part:

" * * * that said alleged agreement was in fact signed by the said Joseph Weitzenhoff *falsely representing himself to be Oscar Schwabinger.*"

30

Both defendants say that they "discovered" when they took the contract home that it was made with the "wrong man" and claim to have discovered this form an inspection of the agreement. This was impossible, because the name "Oscar Schwabinger" was the very name which, according to their own story, they should have expected to find, and John Saxon admitted (page 46) that they did not learn Weitzenhoff's identity until "a few weeks afterward." The defendants claim is wholly irreconcilable with their testimony, and is clearly un-

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founded.

It is significant that the court below, in its conclusions (page 29) expressly refrained from sustaining the defendants' claim of "misrepresentation."

We contend that the evidence, taken in connection with the defendants' answer, showed that the defendants intended to make the contract with Oscar Schwabinger, and that since the contract was in fact made with him, through his duly authorized agent, Weitzenhoff, the defense of "misrepresentation" was not sustained by the proofs, and that the defendants did not overcome the burden of proof which rested upon them (Black vs. Purnell, 50 N. J. Eq., 365 [at page 368] chy. 1892) 10

(b) —but if so, the misrepresentation was not of such a character as to render the contract unenforceable specifically. 20

The defendants claim in their answer (paragraph 9, page 14) :

"Said agreement of sale was thereupon drawn between these defendants as party of the first part with the party of the second part, under the name, Oscar Schwabinger, the defendant John Saxon then and there believing that the true and correct name of said Joseph Weitzenhoff was 'Oscar Schwabinger.' " 30

and in paragraph 11 (page 14) that they believed

"* * * that the true and correct name of Joseph Weitzenhoff was 'Oscar Schwabinger' and that the person with whom they had been dealing was Oscar Schwabinger, 40

and paragraph 12 (page 15) :

10 "These defendants further state that they never had any dealings with the plaintiff, Oscar Schwabinger; that their dealings in connection with the sale of said property were only with the said Joseph Weitzenhoff, though at that time they were under the mistaken belief, induced by false statements made to them by the said Joseph Weitzenhoff, that in fact their dealings had been with Oscar Schwabinger."

and in paragraph 14 (page 15) :

20 "* * * that the real Oscar Schwabinger never signed said alleged agreement; that said alleged agreement was in fact signed by the said Joseph Weitzenhoff, falsely representing himself to be Oscar Schwabinger * * *."

John Saxon testified (page 48) :

"Q. The only objection is that you had found out that the man who gave you the deposit and signed the contract was not Oscar Schwabinger, but it was Mr. Schwabinger's stepfather, is that right?"

30 "A. Yes, sir. Well, we found out *we were not dealing with the right man.*"

"Q. And that is the only reason you refused to give a deed?"

"A. Yes."

Mrs. Saxon testified (page 53) :

40 "Q. After you saw the contract at home and it was all complete and you had a complete copy at home, you had no objection to the contract; *you only objected to the wrong man.*"

"A. Yes, sir."

"Q. Is that right?"

"A. Yes, sir."

It is manifest from the defendants' admissions, in their answer and testimony, that the most that can be said in their favor is that they mistook the agent for the principal.

10

Granting for the purpose of argument, the truth of defendants' claim, we contend that this mistake was not so material as to make the contract subject to rescission by them.

It is too well settled to require argument, that a mistake or misrepresentation (there is not the slightest evidence of an intentional or fraudulent misrepresentation) in order to have the effect of making the contract subject to rescission, must be in respect to a material matter.

20

The fact that by their own admissions the defendants agreed upon all of the terms of the sale the night before the contract was signed, *without knowing even the name of the purchaser*, shows that they were interested only in the price and terms of sale, and neither knew nor cared with whom they made their contract.

The reason for this indifference as to the identity of the purchaser, was that a deposit of \$200 was to be paid when the agreement was signed and the balance was to be paid *in cash* when title was closed.

30

Because of the terms of the contract, the question of the financial responsibility of the purchaser did not enter into the transaction. This is further shown by the admission contained in the defendants' answer (paragraph 15, page 16) in which they say:

"* * * that they do not know the said Oscar Schwabinger, nor what is his present resi-

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dence or whereabouts, nor in fact whether the so-called Oscar Schwabinger has any real existence."

(Oscar Schwabinger was in fact in court at the time of the hearing, page 42).

10 By their own admission, the defendants did not know Weitzenhoff, otherwise they would not have mistaken him for Schwabinger, so that it cannot be said that they relied upon his financial responsibility. A feeble attempt (and in fact the only attempt) to show that they did know Weitzenhoff, and did rely upon his responsibility, was made in the examination of Susie Saxon, when she was asked (page 51):

20 "Q. *Do you* know whether Mr. and Mrs. Weitzenhoff are in business in Newark?"

"A. She tells me she has a store, a hat store, a millinery store on Springfield Avenue."

It is to be noted that the question relating to the knowledge of Mrs. Saxon, related only to *the time of the hearing*, which of course does not show that at the time the contract was made she had ever heard of the Weitzenhoffs.

30 That the element of financial responsibility was wholly absent from the transaction, is further shown by the fact that on cross examination John Saxon testified (page 49):

"Q. Then the only reason that you refused to give a deed to Oscar Schwabinger was because you were afraid that if you gave a deed to Oscar Schwabinger and got the money for the property, Mr. Weitzenhoff would come around and demand another property? That is the only reason?"

40 "A. Yes, sir."

Having no acquaintance with Weitzenhoff, and having no knowledge of his financial responsibility, it cannot be said that in making the contract the defendants relied upon it, nor were they in any wise damaged by it because the complainant at the time and place agreed upon, was ready to complete the purchase (page 40). Consequently the mistake, if there was a mistake, afforded no ground for the rescission of the contract. 10

POINT II.

The contract in question was acknowledged by Mrs. Saxon in accordance with the statute in such case made and provided, and there should therefore have been a decree for the specific performance thereof. 20

We concede that a contract for the conveyance of land will not be specifically enforced against a married woman unless it has been acknowledged by her. The questions to be determined therefore, are:—

1. Assuming that the agreement was acknowledged, was it so far completed when so acknowledged, as to render it susceptible of specific performance, and 30

2. Did the defendant, Mrs. Saxon, acknowledge the agreement, as required by the Statute?

The Court below found (page 30):

“ * * * I find from the testimony including that of the officer who signed the certificate, that the acknowledgment required by the statute was in fact not made by Mrs. 40

10 Saxon. The blank form of agreement to convey was not entirely filed in when she signed it, and although it may be that she told the scrivener, who was the officer who certified the acknowledgment, that she knew what terms and conditions were to be inserted and authorized him to complete the draft, and that when completed, the agreement was in the form she understood it was to be, the officer could not have complied with the statute by making the contents known to her and she **did not** acknowledge that she signed, sealed and delivered a completed contract as her voluntary act and deed. * * *

20 The evidence was that the night before the contract was signed, Weitzenhoff, as agent for the purchaser, (complainant, Schwabinger) was brought by the broker Zellerz, to the home of the defendants, Mr. and Mrs. Saxon, and introduced as a prospective purchaser; that they, including Mrs. Saxon, agreed upon all of the terms of sale (pages 47, 53) Mrs. Saxon, as she expressed it, (page 53):

30 "agreed to sell according to the way he (referring to her husband, John Saxon) decided."

40 that they arranged to meet the following day at the office of one Germanus, who "represented" (pages 47, 60) the defendants; that the next day, according to the appointment, they met with the exception of Mrs. Saxon, who arrived late; that Germanus, who was a commissioner of deeds, had already commenced to draw the contract in duplicate (which was the usual printed form, see Exhibit C-1, page 36 and page 61, where Germanus

speaks of "filling in" the agreement, and the conclusions of the court below (page 30, line 15) where it says "the blank form of agreement to convey was not entirely filled in") when Mrs. Saxon arrived and executed the contract.

Weitzenhoff (page 67) and Zellerz (page 65) both say one copy was complete when signed by Mrs. Saxon. The defendant John Saxon, (page 10 44) says it was about "half done." Mrs. Saxon says (page 52) :

"One had some writing on it; I do not know what was on it, and the other one was blank what I signed,"

and again (page 55) :

"I signed an empty blank. One was filled 20 out only a little at the start."

"Q. Where was it filled out, indicate the place."

"A. I don't know. Mr. Germanus knows better than me how much was filled out."

Anna Pulik, did not know whether the contract was completed or not (page 58). Germanus, the commissioner of deeds, who drew the contract, the one whose recollection would naturally be the 30 most clear and whose testimony as a disinterested party and as an officer of the state, is most to be relied upon, testified (page 61)

"What else (he had just previously testified to filling in the acknowledgment certificate) did you put in to the agreement after she signed?"

"A. This place, where the place of settlement and the \$200. is." 40

"Q. The entire agreement was complete except the place where title was to pass and the filling in of the \$200.?"

"A. Yes, sir."

10 In the absence of fraud (and there is not a scintilla of evidence of fraud in this case), a certificate of the certifying officer, substantiated by his testimony, as it is, is entitled to the greatest weight, as against the defendants, whose recollection, the evidence shows, was extremely vague and hazy.

Vice Chancellor Runyon, in a similar case (*Homoeopathic Mutual Life Ins. Co., vs. Marshall*, 32 N. J., Equity, 103, Chancery 1880) said (at page 110).

20 "In the case before me there was no fraud or duress, but, on the other hand, the proof is of entire good faith and perfect freedom. In opposition to the certificate there is only the recollection of husband and wife, after the lapse of more than five years from the date of the execution of the mortgage, in regard to the particulars of a transaction in the details of which they probably took not the slightest interest at the time. And it would be far more surprising to find that they had

30 remembered them than to find that they had entirely forgotten them. The impolicy of admitting such evidence to countervail the official certificate, is obvious. If such testimony were admitted, the danger to titles depending on the deeds of married women would be great indeed, especially where the officer by whom the acknowledgment was taken had died, or, as in this case, had gone beyond reach, so that his testimony could not be obtained. The

40 stability of such titles would manifestly often

depend on the memory or integrity of those whose interest it would be to nullify them."

"Vice Chancellor Green, said in a similar case (*Black vs. Parnell*, 50 N. J. Eq., 365 at page 368 * * * "The burden of proof is on the defendants numerically they are two witnesses against one, there being only the testimony of Mr. Fox against them; but this not controlling. We have in the first place the presumption of law that a public officer has properly discharged his duty. His duties in this regard are judicial * * *."

10

We believe that Germasus' testimony, under all the circumstances, is entitled to the most weight and we accept his testimony in that regard, as representing the actual facts.

The insertion of the name of the place where title was to close was surplusage. The failure to name in the contract a place where title was to close, does not render the contract unenforceable specifically.

20

It is well settled that where no place for the closing of title is agreed upon, the vendor may determine where the payment shall be made (39 Cyc., page 3261). The courts of this State have consistently enforced contracts which made no mention of the place where title was to be closed (*Price vs. McKay*, 53 N. J. E., 588, Chancery 1895). *Richards vs. Green*, 23 N. J. E., 526, Errors & Appeals, 1872).

30

The fact that a place was named in the contract after it was executed by Mrs. Saxon, does not render the contract unenforceable because such insertion was made by her husband, who was her agent (page 53) and Germanus, who was her representative (pages 47, 60) with her authority and to her satisfaction (page 53).

40

Neither of the defendants repudiated the contract because of dissatisfaction as to where title was to be closed, but sought to avoid it solely on the ground of an alleged misrepresentation as to the identity of the purchaser (pages 48, 54, 55).

10 The defendant, John Saxon (page 46) says that when this alleged misrepresentation was discovered, he and his wife consulted a lawyer and offered to return the deposit *before* May 1st, 1920 (the time fixed for the closing of title).

There was therefore, an anticipatory breach of the contract by the defendants on a ground wholly unrelated to the place fixed by the contract for the closing of title, which amounted to a waiver by the defendants of any complaint they might have had by reason of such insertion.

20 That the presence of a liquidated damage clause is not essential to render the contract enforceable specifically, needs no argument. The insertion in the contract of such a clause with her authority, after its execution, does not detract from its enforceability. It *diminished* but did not *increase* her liability (without this clause she would have been liable not only for the return of the \$200 deposit, but also for general damages, including the reasonable expenses of the purchaser in examining the title, etc. P. L. 1915, page 316) it is true that it
30 also diminished the liability of the purchaser. That is, it reduced the amount she could recover from the purchaser *in an action at law for damages*.

The Statute, which requires acknowledgments by a married woman *protects her in respect to conveyance of her lands and not in respect to actions for damages*.

40 Wolf vs. Meyer, 66 Atl. 959 (75 N. J. L., 181, affirmed 70 Atl., 1103, 76 N. J. L., 574).

It must borne in mind that the contract was complete and strictly in conformity with her wishes (page 53) so that in enforcing that contract, the Court will not be in the position of making a contract for her, but of enforcing a contract which she, through her duly authorized agents, made for herself.

It is apparent therefore, that if the contract was acknowledged by Mrs. Saxon, the complainant was entitled to have it specifically enforced, not withstanding the above mentioned insertions after its execution by her. 10

The evidence was that the parties, including Mrs. Saxon, met the night before and agreed upon the precise terms of the contract as subsequently drawn (page 47) Mrs. Saxon came to Germanus' office the following day and signed the contract. 20

John Saxon testified (page 45) as follows:—

“Q. Did she (referring to Mrs. Saxon) ask what it was to sign?”

“A. Yes, sir.”

“Q. Who told her what it was?”

“A. Mr. Germanus told her what it was.”

“Q. And did you say to her what it was—to her?”

“A. I explained to her it was to sign the agreement?” 30

“Q. For what?”

“A. Selling the property.”

Mrs. Saxon testified (page 53):

“Q. Is that right, you agreed with him selling it on those (referring to the terms actually in the completed contract) terms?”

“A. Yes, sir.” 40

"Q. That is right?"

"A. Yes sir."

"Q. And you know that the next day he would be at Germanus' office to sign the contract?"

"A. Yes sir, he was there but I was not there."

10

"Q. And you were to be there. And you were called in and you signed the contract and after that you saw a copy of the contract at home?"

"A. Yes sir."

"Q. You had no objection to the contract, had you?"

"A. Only when I found out his name was different."

20

"Q. That is the only objection you had?"

"A. Yes sir."

Germanus (page 60) testified:

"Q. Now what did Mrs. Saxon say to you or you say to her?"

30

"A. I told her she got to wait, I ain't got through with the papers, and she told me she is in a great hurry, she has got to go away, and I asked her if she knew what it was, and I asked her if it was her free will to sign the papers to sell the property in Hungarian language."

"Q. Did you ask her that question after she had signed it?"

"A. Yes sir."

and at (page 61):

40

"Q. Did you tell her what was in the agreement?"

"A. Yes, sir. I told her in Hungarian language what was in the agreement."

"Q. What did you say?"

"A. And she says I know everything."

"Q. At your direct examination you stated something about your asking her if she signed this paper; if this is her free act and deed?"

"A. Yes, sir, *I asked her if she do it of her free will.*" 10

"Q. You did ask her that?"

"A. Yes, sir."

"Q. Now did you ask her that before she signed her name or while she was signing her name or at the time she finished her name?"

"A. At the time she signed her name I asked her if she knew what she was doing, and she signed her name."

"Q. And *you* went out?" (Typographical error. "You" should have been "she.") 20

"A. Yes, sir."

"Q. And you afterwards filled out this acknowledgment clause" (page 39)?

"A. Yes, sir."

The certificate of acknowledgment (page 39) is in proper form and is not only prima facie evidence of the truth of its contents, but it affords the strongest kind of proof of the correctness of its contents and casts the burden of disproving the truth of the matter therein certified to, upon the defendant (Black vs. Purnell, 50 N. J. Equ., 365; Gould vs. Harley, 75 N. J. Equ., 512). 30

In view of the fact that Mrs. Saxon had, together with her husband, agreed upon all of the terms of the purchase, the night before, and in view of the fact that the contract was drawn strictly in accordance with the terms so agreed upon, a detailed explanation by the acknowledging officer was unnecessary. 40

“WHERE WIFE ALREADY UNDERSTANDS INSTRUMENT. The primary object of such statutory directions is that the woman shall understand the nature of her act and its consequences, and if that object is accomplished, a failure to comply literally with the statute is not material. Therefore, it is generally held that where a wife already understands the contents and effect of the instrument, and so informs the officer, no further explanation on his part is necessary. But the officer must be satisfied that she really understands it, and it seems that her mere statement that she knows its contents is not sufficient.” (Corpus Juris, Vol. 1, page 281, Section 146.)

Mrs. Saxon went to the office of the commissioner of deeds, Germanus, for the express purpose of executing and delivering the contract in question. She freely and voluntarily signed it and delivered it, intending to and believing that she would be bound thereby.

The Statute does not specify in what manner she shall “acknowledge” it. It is the duty of the officer taking the acknowledgment to be satisfied, as a quasi judicial officer, that the executing party does in fact deliver it as her voluntary act and deed. We contend that the executing party may satisfy such officer of such fact, either by an express oral declaration to that effect, or by actions and conduct.

While the proposition appears never to have been passed upon by the courts of this state, we contend that in the absence of fraud, and where the contract is in fact in accordance with the executing parties’ wishes, any unequivocal acts by the executing party, which would satisfy the certifying officer as a reasonable man that the instrument was in fact the voluntary act and deed of the parties,

is a sufficient "acknowledgment" under the Statute, and affords the certifying officer ample justification for making his certificate.

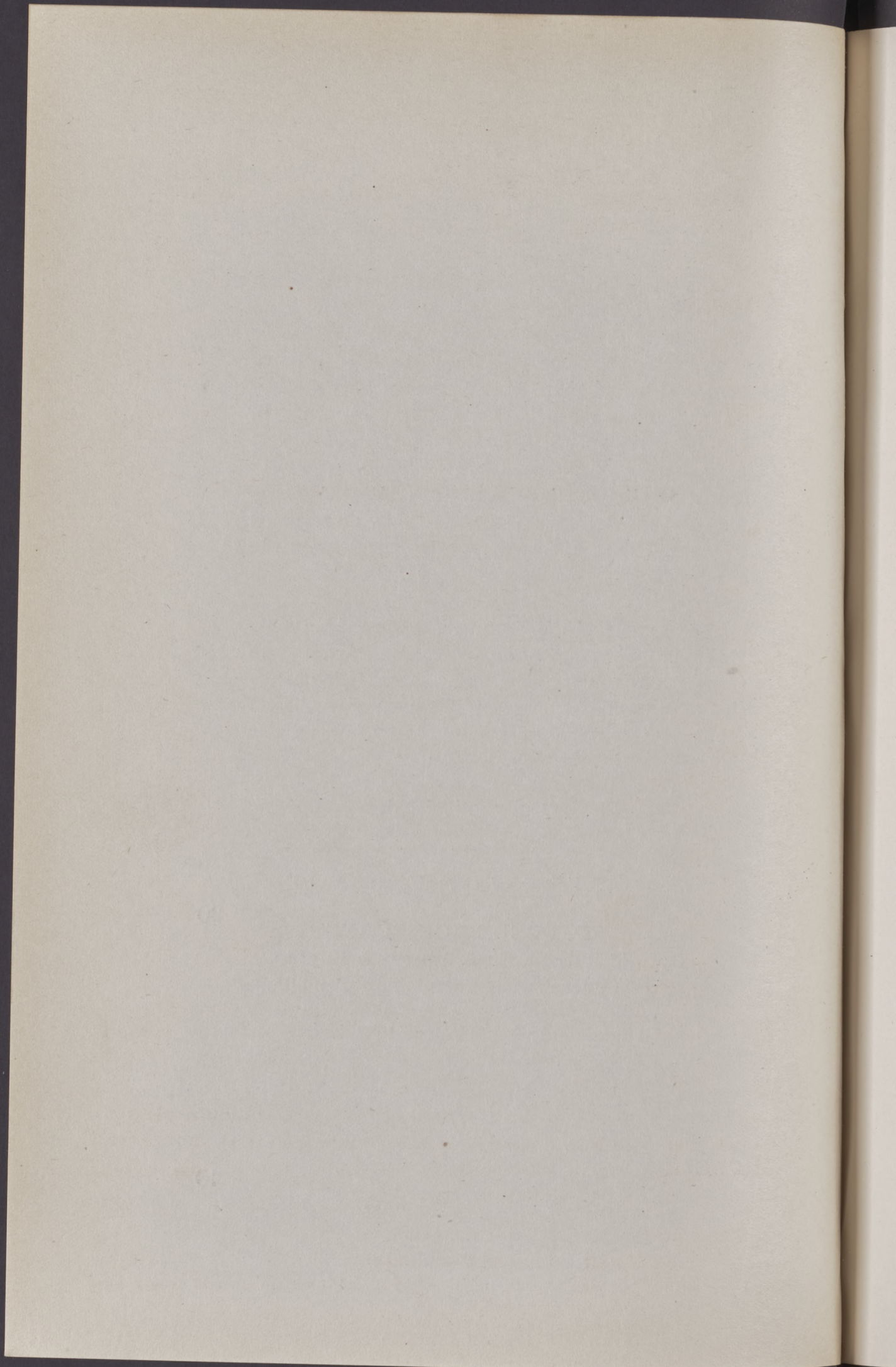
It is submitted that Mrs. Saxon's entire familiarity with the terms of the contract, her visit to the office of Germanus for the avowed purpose of executing in legal form the very contract in question, and her signing it and leaving it with Germanus, for the purpose of completing it as to two inconsequential details, after he had explained it to her and questioned her in regard to it, was a full compliance with the Statute. We ask therefore that the decree of the court below be reversed to the end that a decree may be entered for the specific performance by the defendants of the contract. 10

The purpose of the Statute is to protect a married woman from being imposed upon in respect to transactions affecting her real estate. It is not designed to enable her to avoid from mere caprice, a fair contract, voluntarily executed by her, as was the contract in question. 20

Respectfully submitted,

HARRY A. SCHER,
Solicitor of Complainant-Appellant.

D. FREDERICK BURNETT, 30
of Burnett, Sorg, Murray & Duncan,
of Counsel with Complainant-Appellant.



New Jersey Court of Errors and Appeals

Between

OSCAR SCHWABINGER,

Complainant-Appellant,

and

JOHN SAXON, *et al*,

Defendants-Respondents.

*On Appeal from
Court of
Chancery.*

BRIEF OF DEFENDANTS-RESPONDENTS.

Facts.

This suit was brought for the specific performance of an alleged agreement entered into by the defendants below, husband and wife, for the sale of the three-family house, No. 395 Fairmount avenue, Newark, New Jersey, owned by them as *tenants by the entirety* (p. 50). Defendants resided on the first floor of said house (p. 41).

The respondents, who were the defendants below, by their *answer* set up two defenses:

1. They deny ever having made any contract *with complainant* (p. 12), and allege that any agreement which they might have made was made with one Joseph Weitzenhoff, who falsely called himself Oscar Schwabinger, and who defendants believed was Oscar Schwabinger, that when they discovered the misrepresentations which had been practiced upon them, they rescinded the alleged agreement and offered to return the \$200 deposit which they had received, but this was refused.

2. They state that the alleged agreement was not acknowledged in due form of law or at all by the defendant, Susie Saxon, the wife of the defendant, John Saxon, and one of the tenants by the entirety (p. 16).

The respondents with their answer filed a counter-claim in which they joined one Joseph Weitzenhoff as a party defendant, and prayed for a rescission and cancellation of the alleged agreement (p. 18).

The Court below, in its conclusion (p. 29), stated:

“Without expressing an opinion on any other question raised in the case, I conclude that complainant must be

denied the relief he seeks because Sect. 39 of the Conveyance Act * * * as amended by P. L. 1918, page 119, has not been complied with," citing *Chassman v. Wiese*, 106 Atl. 19.

The Court further concludes (pp. 30-31):

"The defendants must return to complainant the amount of the deposit paid by him on the contract, with interest from the date of payment and the complainant must deliver up the contract to the defendants for cancellation." * * *

Thereby granting to the defendants-respondents, the relief sought by them in their counter-claim.

There is nothing further in the Court's conclusions on the subject of the defendants' claim of "misrepresentation" than its finding in favor of a *cancellation* of the contract. Appellants argue from this that the Court *expressly* refrained from sustaining defendants' claims of misrepresentation (appellant's brief, p. 57). To this we cannot at all accede. The Court by granting defendants their relief can very properly be said to have *impliedly* found the facts to be as urged by the defendants. The Court could have arrived at such conclusion without expressing an opinion, or giving its reasons for the conclusion at all. It is sufficient that the Court came to a correct conclusion irrespective of its reasons therefor.

McCarthy v. Town of West Hoboken, 107 Atl. 265 (Court of Errors 1919).

ARGUMENT.

POINT I.

There is no meeting of the minds, and, therefore, no contract where one of the parties has falsely represented himself to be another, or where one who is merely an agent for an undisclosed principal, falsely represents himself as the principal.

The deal with the defendants was brought about by one, Zellerz (p. 64), a bartender in a saloon (p. 66), who introduced the person with whom defendants made the alleged agreement on the following day, with these words, "Good evening; here is a buyer," without mentioning any name. That person was Mr. Weitzenhoff, who was accompanied by his wife. This introduction took place in defendant's house (p. 42).

It should be noted here that the *person so introduced as the buyer was not Oscar Schwabinger*, the complainant-appellant, but Joseph Weitzenhoff, which fact the defendant, Saxon, did not learn until a few weeks after the signing of the alleged agreement (p. 46). The complainant, the real Schwabinger, was unknown to *Saxon, who had never seen Schwabinger prior to the date of the hearing of this cause*, or had ever had any dealings with him (p. 42).

These facts concerning the manner of introduction, the failure to mention the purchaser's name, and the defendants having never seen the real Schwabinger until the day of the hearing, were fully corroborated by Mrs. Saxon (p. 51), and, on the question of the failure to mention any names, by the latter's niece, Anna Pulik (p. 56).

It is significant that there is absolutely no denial of the foregoing facts by either Joseph Weitzenhoff or his wife.

The agent, Zellerz, it is true, testified that the introduction was by the name of Mr. and Mrs. Weitzenhoff (p. 64), but this was again denied by Mr. Saxon (p. 70).

Mrs. Saxon testified that the woman to whom she was to sell her house and who was designated as Mrs. Schwabinger, but whom, it subsequently developed, was Mrs. Weitzenhoff, conducted a millinery store on Springfield avenue about a block and a half away from defendants' home, under the name of "The New York Millinery," which appears on the outside of the store, no other name appearing (p. 51).

As a result of the talk had at his home that evening, an appointment was made by Saxon with Weitzenhoff to go the following day to the office of Mr. Germanus, a Commissioner of Deeds, to draw the agreement of sale (Saxon speaks of it as the deed), (p. 43). Weitzenhoff went with Saxon, Mrs. Weitzenhoff going part of the way as far as the bank, where she stopped off (p. 43). The two men entered the office of Germanus alone (p. 58). At the office of Germanus, the latter asked Weitzenhoff his name, and the latter replied "Oscar Schwabinger" (p. 43, l. 38). This is fully corroborated by Germanus (p. 59, l. 2), who even asked him to write the name on a piece of paper, which was done (p. 59, l. 3).

None of this testimony is denied by Weitzenhoff, indeed it is difficult to see how he could possibly deny it, in view of the fact that the alleged agreement purports to be made with Oscar

Schwabinger, and was actually signed by Weitzenhoff not in his real name, but in the name "Oskar Schwabinger" (p. 38).

The agent Zellerz, it is true, says that after his arrival at Germanus' office and hearing the reading of the agreement, he asked Weitzenhoff, "Who is this Schwabinger," and received the reply, "I am buying this property for my son" (p. 65); and on cross examination (p. 67) he said his question was "Who is Schwabinger, I never knew by that before." (He apparently intended saying, "I never knew you by that name before.") The words in parenthesis are ours.

None of this is, however, corroborated by either Mr. or Mrs. Weitzenhoff, and it is clear that if this conversation really took place, it must have been out of the hearing of both Saxon and Germanus.

The alleged contract (p. 36) *purports to be a contract between two parties acting as principals.* There is nothing therein to suggest that one of the parties is merely acting as agent for another. From the testimony as already set forth, as well as from the contract itself, the defendants-respondents were justified in believing that the very person with whom they were dealing and to whom, and to whom alone they were bound, was named Oscar Schwabinger, and this only because of the false representations that he was Schwabinger.

It is not contended, either by the defendants' *pleadings or proofs*, that they did not know that they were entering into an agreement for the sale of their property, or that they did not know that they were agreeing to sell to the identical person (Joseph Weitzenhoff) who was representing himself to be "Oscar Schwabinger," or that they were imposed upon in any other way, except that they were lead to believe by the false representation of Weitzenhoff that he himself was Schwabinger. *They believed that the identical person with whom they were dealing was Schwabinger.* As already pointed out, it was only after several weeks had elapsed that they discovered the *mistake* under which they had labored, and then they promptly rescinded, and offered to return the \$200 deposit paid under the alleged agreement (pp. 46-47). The *mistake* was caused through no fault of their own, but through the misrepresentations of Weitzenhoff with whom they dealt as principal.

Defendants-respondents contend that they had the right to select the principal with whom they dealt. They had the right to know that the person to whom they were agreeing to sell their

property was of *full age, mentally sound, financially responsible*, and(if they chose) of *good moral character and socially fit* for their old-time neighbors. It is conceivable that they may have deemed it a moral obligation to their neighbors not to sell their property to a negro, a Chinaman or a Zulu. If they had, with knowledge of the fact, deliberately entered into an agreement to sell to any such person, it is, of course, not contended, that the contract would not have been valid, but they *had the right to choose to whom they would sell their property*. They had, so to speak, the *delictus personarum*. That Schwabinger, himself, may not have fitted in with the description of any of the persons referred to, is beside the point. He might have been *under age*, and surely his boyish appearance in court must have produced some *doubt* as to whether he had at the date of the alleged agreement actually reached his majority. Suppose he were *not financially responsible*? (All the money necessary, except the building and loan funds, seems to have been supplied by Mrs. Weitzenhoff (p. 40).) Both of these things might have been apparent had the real buyer appeared in person before the defendants. If it subsequently developed that either of the contingencies had occurred the defendants' remedy for specific performance against the real Schwabinger would have proven unavailing.

It is elementary that an agreement in order to be effective must be mutually binding on both parties thereto.

If the defendants were absolutely bound to the real Schwabinger at the moment of the execution of the alleged agreement, then the real Schwabinger must at the same moment have been absolutely bound to the defendants. Suppose after the execution of the agreement Weitzenhoff or Schwabinger had regretted of the bargain and Schwabinger had repudiated Weitzenhoff, and truthfully insisted he had never authorized the latter to sign his name; that circumstance would establish that Schwabinger had never been bound by the agreement. It is no answer to say that in such case Saxon might have his remedy against Weitzenhoff for the fraud, or that Saxon should have previously investigated into the question of Weitzenhoff's authority, as it must be *remembered* that Weitzenhoff was dealing with Saxon, not as an *agent*, but as a *principal* in his own *right*.

If by reason of any incapacity on the part of Schwabinger, or any lack of authority on the part of Weitzenhoff, the agreement was *void* or *voidable* as to Schwabinger, then surely the entire

agreement lacked at its inception the element of *mutuality* which was essential to its validity.

It is true that Weitzenhoff, against defendants' objections (p. 35), testified that he was authorized to sign the alleged agreement by Schwabinger. *Schwabinger, himself, however, was not sworn as a witness.*

It is settled, however, that an agent cannot prove his authority merely by his own testimony.

Gifford v. Lanrine, 10 Stew. 127, affirmed 10 Stew. 628;
Dowden v. Cryder, 26 Vr. 329, 332;

Ryle v. Manchester B. & L. Assn., 45 Vr. 845 (Errors 1907).

The matter must not be regarded as a mere *juggling of names*. It is a *juggling of persons*!

It is inconceivable that a Court of Equity will obligate one man to a contract with another with whom he never made any contract, and yet that is exactly what the complainant-appellant in this case, a total stranger to defendant-respondent, seeks to accomplish.

Saxon felt the impossibility of such a situation when he testified in his crude way (at p. 46), "We are selling the property to a wrong man," and again (at p. 49) that he was afraid if he deeded the property to Schwabinger he might thereafter be compelled to deed another property to Weitzenhoff. What, undoubtedly, he tried to say was, that he did not want to be obligated to convey the property to two people, the real and the pretended Schwabinger.

The unusual character of the entire transaction is undoubtedly responsible for the fact that so little law can be found on the subject.

However, the principle of law involved is set forth in 13 *Corpus Juris*, 378, and the cases there cited, to the effect that *there is no agreement where one party enters into the contract under a mistake as to the identity of the other party, as where the party contracted with has falsely represented himself to be another, or has accepted an offer meant for another.*

In the case of *Boston Ice Co. v. Potter*, 123 Mass., p. 128, the Court stated:

"A party has a right to select and determine with whom he will contract, and cannot have another person

thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party."

In the case of *Winchester, et als. v. Howard*, 97 Mass. 303, a sale of oxen was effected by an agent who concealed the fact of his agency representing that he was the owner of the oxen. The Court, in sustaining exceptions filed, stated as follows:

"It is true that an agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own, and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. But on the other hand, every man has a right to elect what parties he will deal with. As was remarked by Lord Denman in *Humble vs. Hunter*, 12 Q. B. 311, 'You have a right to the benefit you contemplate from the character, credit and substance of the person with whom you contract.'"

The case of *Humble v. Hunter*, 12 Queen's Bench 311, seems fairly to cover the case now before the Court. The rule of evidence therein set forth is particularly applicable to this case, namely, that,

"A person who has signed a contract expressly as principal cannot be admitted to prove in contradiction of the written instrument, that he was merely an agent."

This was a case of *assumpsit* on a charter party executed not by the plaintiff but by a third person who, in the contract, described himself as "owner" of the ship. It was held that evidence was not admissible to show that such person contracted merely as the plaintiff's agent.

The charter party was signed not by plaintiff but by her son and the words of agreement were * * * (the son's name) "owner of the good ship," etc. At the trial, the son was called to prove plaintiff was real owner and that he had signed merely as agent. This was objected to on ground that a person who has signed a contract expressly as principal cannot be admitted to prove in contradiction of the written instrument, that he was merely an agent. The evidence was received, and there was a verdict for the plaintiff.

On appeal Lord Denman, *C. J.*, stated:

"We were rather inclined at first to think that this case came within the doctrine that a principal may come in and take the benefit of a contract made by his agent. But that doctrine cannot be applied where the agent contracts as principal * * * *Robson vs. Drummond* (2 B. and Ad. 303) * * * seems the same in principal with the present case. You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract."

Complainant-appellant argues that because there is no evidence of damage to the defendants-respondents arising from or wilfulness in the misrepresentation made by Weitzenhoff, that the relief of cancellation should be denied to them.

But such an argument wholly overlooks the elements of *mistake*, of *lack of mutuality*, and of a complete *failure of a meeting of the minds* of the parties, resulting in a so-called agreement *which in point of law is no agreement at all* and operating, by reason of the recording of the alleged agreement and of the filing of a *lis pendens*, as a cloud upon the title of the defendants-respondents.

POINT II.

An agreement of sale of lands executed by a married woman, but not acknowledged by her, will not be specifically enforced against her.

The Court found as a matter of fact that section 39 of the Conveyance Act, as amended by P. L. 1918, p. 119, had not been complied with (p. 29); that the acknowledgment required by the statute was in fact not made by Mrs. Saxon (p. 30); that the blank form of agreement was not entirely filled out when she signed it; and that "the officer could not have complied with the statute by making the contents known to her and she did not acknowledge that she signed, sealed and delivered a completed contract as her voluntary act and deed."

Great weight should be given to a finding of fact by the Vice-Chancellor, who saw the witnesses, heard them testify and had better opportunity to judge their credibility than this Court has. If his general findings are consistent with the facts as this Court ascertains them by full investigation and analysis, the findings below should not be disturbed.

Riddle v. Clabby, 59 N. J. Eq. 573;

Wright v. Flynn, 69 N. J. Eq. 759;

Cartan v. Phelps, 109 Atl. 291 (Appeals 1920);

Wilson v. Sandall, 111 Atl. 322 (Adv. Sheets, Nov. 11, 1920).

That one of the agreements was totally blank when she signed it, is disputed by no one. That the other copy was only partially completed when she affixed her signature appears from the clear preponderance of the evidence.

Mr. Saxon said it was half finished (p. 45).

Mrs. Saxon said "one had some writing on it; I do not know what was on it; and the other one was blank, what I signed" (p. 52; at page 55, "I seen an empty blank, one was filled up only a little at the start."

Germanus said that when *Mrs. Saxon* came into his office one agreement was not finished, and the other hadn't been started (p. 59); with the one that had been started he had gotten as far as the clause about screens and awnings (p. 59); that after she signed, he filled in the place of settlement and the \$200 liquidated damage clause. (P. 61, and pp. 62-63.) There were no other signatures on the paper when she signed it (p. 64).

Zellerz, the broker, stated at first (p. 65) that he didn't know in what condition the agreement was when *Mrs. Saxon* signed (p. 65); later (p. 67) that she signed after the agreement was read.

Weitzenhoff said one copy was finished and the other half finished when *Mrs. Saxon* signed (p. 67).

Mrs. Weitzenhoff testified to the same effect (p. 69).

Mr. Saxon said that *Mrs. Saxon* was in the office only a few moment, that she was in an awful hurry (p. 44) and so informed *Germanus*. This is corroborated by *Mrs. Saxon* (p. 52), *Anna Pulik* (p. 56) and *Germanus* (p. 60), and denied by no one. *Counsel for the appellant, in his brief (p. 13.) accepts the testimony of Germanus in regard to the incomplete condition of the agreement at the time of its execution by Mrs. Saxon.*

They argue, however, that a contract will be enforced under our adjudications even if *no place* for closing title is mentioned, citing *Price v. McKay*, 53 N. J. Eq. 528, and *Richards v. Green*, 23 N. J. Eq. 526. They might have added that a contract would be similarly enforced even if *no time* is fixed for closing.

Such an argument, however, fails to meet the facts in this case. The difficulty here is that the alleged agreement contains at least three important elements to which Mrs. Saxon did not assent (p. 38) namely, (a) the time when the purchaser may enter into possession, (b) the time and place of closing title, and (c) the liquidated damage clause. If it is argued that none of these clauses as subsequently drawn, worked a hardship on Mrs. Saxon, it is proper to reply, that admitting this to be true, for the sake of the argument, yet any of those clauses *might* have been so framed so as to work a hardship on her, and if the change in the instrument after execution would not bind her in one case, it could not in principle, bind her in any case.

The law on the subject of an acknowledgment by a married woman of an incompleated instrument is laid down in 1 *Corp. Juris*, p. 766, in this language:

“The acknowledgment by a married woman of an instrument in which blanks have been left will not make it valid as against her when the blanks are afterward filled up.”

Citing:

Drury v. Foster, 2 Wall. 24;

Ayres v. Probasco, 14 Kan. 175;

Cole v. Bammel, 62 Tex. 108.

In addition to the execution of an incompleated instrument by Mrs. Saxon, *there is abundant affirmative proof of the falsity of the officer's certificate of acknowledgment so as to exclude all reasonable controversy.*

John Saxon testified (p. 46):

Q And after she signed it, did Mr. Germanus ask her any questions? A No, sir.

Q What did your wife do? A She signed it and walked out right away.

Q She didn't stay until the writings were finished? A No.

Mrs. Saxon testified (p. 52):

Q And after you signed it, did Mr. Germanus ask you any question? A No; I was in a hurry to go out with my niece.

Anna Pulik testified (p. 57):

Q Did he (Germanus) tell her (Mrs. Saxon) what the papers were? A No; I didn't hear anything.

Q After she signed the papers what did he say, if anything? A All he said, we are selling the property.

Q When did he say that? A When she signed it.

Q After she signed it did he say anything more? A No.

The testimony of the officer who was called upon to discredit his own certificate was at first open to some doubt (pp. 60-61). He was in a most embarrassing position, but as he continued his testimony, it became clearer that he was endeavoring to make a clean breast of it.

So that, at page 63, he testified:

Q Did you examine Susie Saxon separate and apart from her husband? A No, sir.

Q Did she acknowledge to you that she signed, sealed and delivered this agreement? A She was not there.

Q Why did you make a false certificate then? A Why did I make a false certificate?

Q Yes. A I made it.

Q You made it, and don't know why? A Yes, sir.

Q Do you mean to say that this certificate is false? A I could not say.

Q Well, is it false, or is it true? A Well, so far as she was there—

Finally, at page 64, he testified as follows:

Q And you now say that this certificate is false? A So far that I didn't ask the last question.

Q What question didn't you ask? A Well, she was not present when I finished these papers; I have got to say it is false; I am sorry it is, but I have got to say it is that way.

Q Nobody asked you to make this false certificate? A No, sir; but she said she had got to go away and—"

There was no rebuttal testimony offered on this subject on behalf of the complainant, other than the agreement was *read* to Mrs. Saxon before she signed.

The Court below had the advantage of seeing the witnesses, of observing their demeanor on the stand, and of determining where the truth actually lay, and from the Court's findings, it is apparent that it was satisfied that the presumption in favor of the Commissioner's certificate had been fully overcome so as to satisfy the test laid down in

Tooker v. Sloan, 30 N. J. Eq. 394;

Block v. Purnell, 50 N. J. Eq. 365;

Marsh v. Mitchell, 11 C. E. Green 497; affirmed in 12 C. E. Green 631.

It is well settled that where a married woman fails to acknowledge an agreement for the sale of real estate, it will not be enforced against her:

Corby v. Drew, 55 N. J. Eq. 387;

Goldstein v. Curtis, 63 N. J. Eq.; affirmed 65 N. J. Eq. 382;

Schwarz v. Regan, 64 N. J. Eq. 139;

Ten Eyck v. Saville, 64 N. J. Eq. 611;

Saldutti v. Flyn, 72 N. J. Eq. 157.

And this is so notwithstanding P. L. 1918, page 119, dispensing with the necessity of a separate acknowledgment by her.

Chassman v. Wiese, 106 Atl. 19.

POINT III.

Points not raised in the argument or in appellant's brief must be considered waived.

Appellant in his amended notice of appeal and petition of appeal sets forth a large number of reasons for reversal, but only two of these are argued in the brief, the rest, therefore, must be considered as having been waived.

Manda v. U. S. Express Co., 85 N. J. L. 720 (Appeals, 1913);

Bradley v. Cleary Co., 86 N. J. L. 338 @339 (Appeals, 1914);

Petrie v. Rosenvinge, 110 Atl. 809 (Appeals, 1920).

The alleged agreement being unenforcible against Mrs. Saxon, and it appearing that the alleged agreement was not one made with the complainant, but with Weitzenhoff, masquerading under the name of the complainant, and that there was never any *meeting of the minds*, or *mutuality of obligation* between defendants and complainant, the Court properly ordered its cancellation. It is, therefore, respectfully urged that the decree of the Court below should be affirmed.

STEIN, STEIN & HANNOCH,

Solicitors for and of Counsel with Defendants-Respondents.

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