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1880

Bill of Complaint.

In Chancery of New Jersey

To his Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey:

10

The Complaint of Mary Iuso and Salvatore Iuso,
of the City of Orange, in the County of Essex and
State of New Jersey, respectfully shows:

1. That on August 5th, 1925, Mary J. Higgins,
of the Town of West Orange, County of Essex and
State of New Jersey, entered into a certain con-
tract in writing, a true copy of which is attached
hereto and made part hereof, whereby she agreed
to convey to the Complainants for the sum of
Thirteen Thousand, Seven Hundred Dollars (\$13,-
700.00) by Deed of Warranty on or before the first
day of November, 1925, all that lot, tract, or parcel
of land and premises, in the Town of West
Orange, County of Essex and State of New Jersey,
being property located on the Northwest corner of
Valley Road and Edisonia Terrace with two and
one-half story house and two-car garage. That in
addition to conveying the realty hereinbefore men-
tioned, defendant agreed to sell, by Bill of Sale,
the personalty or furniture as described in and
pursuant to the terms of the agreement, copy of
which is attached hereto.

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2. That the sum of Seven Hundred Dollars
(\$700.00) of the consideration for said lands and
buildings as mentioned in Paragraph One hereof,
was duly paid by the said Complainants to the said
Mary J. Higgins, upon the execution and delivery
of the Contract above mentioned.

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Bill of Complaint.

3. That on the First day of November, 1925, at the hour of eleven o'clock in the forenoon, Complainants duly attended at the office of George F. Seymour, Jr., with defendant, Mary J. Higgins and made her a tender of One Thousand Three Hundred Dollars (\$1,300.00) on the balance of the purchase money and agreed to assume Mortgages for Eleven Thousand Seven Hundred Dollars (\$11,700.00) or the balance of the purchase money, which Mortgages were to be placed by the defendant, pursuant to the terms of the aforesaid agreement, but the said Mary J. Higgins refused to accept the tender, or place Mortgages in the amount of Eleven Thousand Seven Hundred Dollars (\$11,700.00), the balance of the purchase price and refused to deliver the deed.

4. Complainants have always been ready and willing and now tender themselves ready and willing to perform their part of the said agreement and upon the conveyance of said land and premises by the said Mary J. Higgins by a Warranty Deed duly executed, will pay the remainder of the purchase money pursuant to the agreement.

Complainants are without adequate remedy in the Courts of Law and therefore pray:

1. That Mary J. Higgins who is the defendant in this suit may answer this Bill of Complaint and each statement therein made.

2. That the said Mary J. Higgins may be compelled by the decree of this honorable court, specifically to perform the said agreement with the complainants and to convey the lands and premises by Deed of Warranty, free and clear from any and all encumbrance as by said agreement provided, upon payment of the balance of the pur-

Bill of Complaint.

chase money by the complainants as also in the agreement provided.

3. That a Writ of Subpoena may issue out of and under the Seal of this honorable Court, to be directed to the said Mary J. Higgins, commanding her, by a certain day and under a certain penalty, therein to be expressed, to be and appear before your Honor in this honorable Court, then and there to answer all and singular the said premises, without oath, and to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience. 10

And your orator, as in duty bound, will ever pray. 20

GEORGE F. SEYMOUR, JR.,
Solicitor for Complainants.

THIS AGREEMENT, Made the Fifth day of August in the year of our Lord One Thousand Nine Hundred and Twenty-five.

BETWEEN Mary J. Higgins of the Town of West Orange, in the County of Essex and State of New Jersey, party of the First Part; AND Mary Iuso and Salvatore Iuso of the City of Orange in the County of Essex and State of New Jersey, party of the Second Part; 30

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Thirteen Thousand and Seven Hundred Dollars (\$13,700.00) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into by the said party of the second 40

Bill of Complaint.

part, doth agree to and with the said party of the second part, that she the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty free from all encumbrance on or before the First day of November next ensuing the date hereof, all that lot, tract or parcel of land and premises hereinafter particularly described situate, lying and being in the Town of West Orange, in the County of Essex and State of New Jersey.

Property located on the North West corner of Valley Road and Edisonia Terrace. Said being 93 feet on Valley Road and 120 feet on Edisonia Terrace, with a house, two and a half story, and two car Garage. The following furniture is included in this sale.

Kitchen:

- 1 Gas Range
- 1 Stove
- 6 Chairs

Room No. 7:

- 2 Chairs
- 1 Rocker
- 1 Bed Complete with Sheet & Pillow & Cases & Blankets are included
- 1 Dresser
- 1 Table

Room No. 6:

- 1 Bed Complete
- 1 Dresser
- 1 Wash Stand
- 1 Gas Plate
- 1 Table
- 2 Chairs
- 1 Rocker
- 1 Desk

Room No. 10:

- 1 Bed
- 1 Dresser
- 2 Chairs
- 1 Table

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Room No. 5:	Room No. 11:	
2 Beds Complete	1 Gas Plate	
1 Dresser	1 Stand	
1 Chair	2 Chairs	
2 Rockers	1 Table	
1 Table		10
Room No. 14:	Room No. 12:	
1 Bed Complete	1 Bed Complete	
1 Dresser	1 Table	
2 Chairs	1 Dresser	
1 Table	1 Stand	
	2 Chairs	
Room No. 15:	Room No. 13:	
1 Bed Complete	1 Bed Complete	
1 Dresser	1 Dresser	
1 Gas Plate	2 Chairs	
1 Stand	1 Table	20
1 Table		
2 Chairs		
Room No. 4:	Room No. 8:	
1 Bed Complete	1 Bed Complete	
1 Table	1 Dresser	
1 Gas Plate	1 Table	
1 Stand	2 Chairs	
2 Chairs	1 Gas Plate	
Room No. 9:		
1 Bed		30
1 Dresser		
2 Chairs		

AND THE said Salvatore Iuso and Mary Iuso, for their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that they, 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, the said sum of Thirteen Thousand and

Bill of Complaint.

10 Seven Hundred Dollars (\$13,700) as and for the purchase money of the foregoing described land and premises in the following manner, that is to say: the said party of the first part agrees that she will not start a rooming house within ten blocks in five years.

Deposit Herewith	\$700.00
Cash upon passing of Title	1,300.00
The said Mary J. Higgins agrees to place mortgages for the balance which is to be	11,700.00
	<hr/>
	\$13,700.00

20 the second Mortgage is to be for three years

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and upon the said land and premises on the First day of November next ensuing the date hereof, and from thence take the rents, issues and profits to 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 Oliver T. Stewart or any other place agreed upon. The said Mary J. Higgins agrees to pay to Oliver T. Stewart a commission of 3½% on the purchase price above mentioned due on the signing of this Agreement, between the hours of Ten in the Forenoon and Four o'clock in the Afternoon on the said First day of November next ensuing the date hereof.

40 AND for the performance of all and singular

Answer of Defendant.

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
 which they hereby fix and settle as liquidated damages therefor. 10

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

MARY HIGGINS
 SALVATORE IUSO
 MARY IUSO

Signed, sealed and delivered 20
 in the presence of
 OLIVER T. STEWART [SEAL]
 Notary Public of N. J.

Answer of Defendant.

IN CHANCERY OF NEW JERSEY.

Between
 MARY IUSO and SALVATORE IUSO,
Complainants,
 and
 MARY J. HIGGINS,
Defendant. 30

The defendant, Mary J. Higgins, answering the bill of complaint says:

1. She admits paragraphs 1 and 2 of the bill of complaint. 40

Answer of Defendant.

2. Defendant says that the execution of the said agreement was induced by a fraudulent misrepresentation on the part of the complainants, through their agent, Oliver T. Stewart, who stated to this defendant that the agreement in writing had been submitted to her attorneys, Messrs. Howe & Davis, Orange, New Jersey, for approval and that they had approved the same. This statement was made in response to a statement made by defendant to said real estate agent to the effect that she was unwilling to enter into any contract as she had been advised by her said attorneys not to sign any contract unless they had first seen and approved the same. Thereupon said representation was made. Had this defendant been informed of the truth that the said contract had not been examined and approved by her lawyers, she would not have entered into the said contract.

Defendant therefore prays to be hence dismissed.

HOWE & DAVIS,
Solicitors of Defendant.

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Replication.

IN CHANCERY OF NEW JERSEY.

Between

MARY IUSO and SALVATORE IUSO,
Complainants,

and

MARY J. HIGGINS,
Defendant.

} On Bill, &c.,

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The Complainants join issue on the Answer of
the defendant.

GEORGE F. SEYMOUR, JR.,
Solicitor of Complainants. 20

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Salvatore Iuso, direct.

is, at the time of passing title, they had the money and were prepared to go through with it.

The Court: Then the only thing to prove is tender and willingness to accept.

SALVATORE IUSO, one of the complainants,
sworn: 10

Direct examination by Mr. Seymour:

Q. Your name is Salvatore Iuso? A. Yes.

Q. You and your wife were the owners who started to buy Mrs. Higgins' property? A. Yes.

Q. I show you this paper; did you sign that? A. Yes, sir.

Q. Did you see Mrs. Higgins sign it? A. Yes.

Mr. Seymour: I offer it in evidence. 20
(Marked Exhibit C-1.)

Mr. Fitz Maurice: We admit the signing.

Q. Did you give Mrs. Higgins any money or any deposit? A. \$700.

Q. How much money were you supposed to give her after that? A. \$1,300.

Q. \$1,300 in cash? A. Yes.

Q. Did you offer her the \$1,300 in cash? A. Yes.

Q. Where? A. Up in your office. 30

Q. Do you remember when that was? A. On November first.

Q. And she was there that day for what purpose, down to the office? A. I don't know; she said she didn't want to close the deal or something; I don't know what about.

Q. On that day, on November first, you were in the office? A. Yes.

Q. You and who else? A. My wife and my mother-in-law and myself and you. 40

Salvatore Iuso, cross.

Q. Who else was there? A. Mrs. Higgins.

Q. There was a conversation about the taking of the property, was there? A. Yes.

Q. Did you have any money with you that day?
A. Yes, \$1,300.

10 Q. What kind of money? A. United States money; we had a thousand dollar cashier check and \$300 in cash money.

Q. And that \$1,300, what did you do with it? A. I left it in your hands for her to take, but she would not accept it.

Q. She was right in the room? A. Yes.

Q. Did I hand it to her in your presence? A. Yes.

20 Q. What did she say? A. She said, "I only want to take a one thousand dollar mortgage, and the money I was supposed to raise, I didn't find it yet," and we gave her another— I remember you said, "We will give you another month to try to get this money"; she said she was going to try, but she never did.

Cross examination by Mr. Fitz Maurice:

30 Q. You mean by that that she had another month to raise \$11,700 of a mortgage on this property? A. Yes.

Q. Who was with you the night you went up to get this contract signed? A. My brother-in-law, my brother and Mr. Stewart and me.

Q. Mr. Stewart, is he the agent? A. Yes.

Q. And who else? A. No one else.

Q. Four of you? A. Yes.

Q. What time of the night did you go there? A. About half past seven or eight o'clock.

40 Q. Wasn't your wife there? A. Yes.

Salvatore Iuso, cross.

Q. Then there were five of you? A. Yes; my wife signed that contract.

Q. There were five of you there at Mrs. Higgins' house that night? A. Yes.

Q. How many days previous to that had you been dickering to buy this property? A. I was up there four or five different times; she wanted a big price and I always offered her less. 10

Q. You had been there a number of times trying to make some terms about buying this, the price, and so forth? A. Yes.

Q. Did you know who represented Mrs. Higgins? A. No.

Q. You didn't? A. No.

Q. You got there about half past eight? A. Half past seven or eight o'clock. 20

Q. How long were you there before the contract was signed? A. She took over half an hour before she signed the contract.

Q. She wouldn't sign it at first? A. No.

Q. She said she wanted Mr. Berstecher to look at it? A. No; she went in the back room and counseled there with the sons and then she comes out to the parlor and signs it.

Q. You say she went in the back room? A. Yes. 30

Q. Did she close the door? A. Yes.

Mr. Fitz Maurice: I ask that that be stricken out.

The Court: Strike it out.

Q. You don't know what she was in there for? A. No.

Q. She went in the back room and then came back? A. Yes.

Q. What was the delay of half an hour or so? A. I don't know nothing about her business. I was 40

Salvatore Iuso, cross.

in the front room and the whole family went in the back room.

Q. You bought a number of pieces of property, haven't you? A. No, my father, not me.

10 Q. You are quite familiar with real estate transactions, aren't you? A. No.

Q. What was Mrs. Higgins doing all this time; why did she take all this time before she signed the contract; what was the talk about? A. I do not know.

Q. Weren't you there? A. No, I was in the front room.

Q. She was there, too, wasn't she, when you came in with these four other people and the agent? A. Yes.

20 Q. You talked to her, didn't you? A. Yes.

Q. What did he say when he came in, the agent? A. He said "This man is ready to give you a deposit on this property." She said, "All right; read the contract." And Mr. Stewart read the contract. She said, "Let me see one of the copies," and they went in the back room and then she came out and I signed it. She signed it first, I am sure, and my wife second, and I was the last one to sign.

30 Q. Were there any additions made to the contract then? A. No.

Q. Anything put in there by you, anything written into the contract after you got to the house, beside the signature? A. No.

Q. Sure of that? A. Yes.

Q. This man Stewart witnessed it, didn't he; isn't that his signature? A. Yes.

Q. Was it all signed at that time? A. Yes.

Q. This is your signature, isn't it (indicating)? A. Yes.

40 Q. When was this put in (indicating writing

Salvatore Iuso, cross.

other than typewriting, on the second page of the contract): "The second mortgage is to be for three years"? A. I don't remember.

Q. Was it there when you signed it? A. Sure it was there when I signed it.

Q. Why don't you remember when it was put in? A. I just signed the contract; he read it in my presence; I didn't go over the contract; Mrs. Higgins did. 10

Q. What did that mean, "The second mortgage is to be for three years"? A. If she couldn't raise the money, we had an understanding between her and I, she could take a second mortgage for three years.

Q. Mr. Iuso, you were buying this woman's property for \$13,700? A. Yes. 20

Q. On which she was to pay a commission to Mr. Stewart out of it, and she was to raise a \$11,700 mortgage, at her expense, on the property; was that your understanding? A. No, she said she would leave the first mortgage as it was.

Q. Eleven was the first mortgage? A. \$7,800, if I am not mistaken. She raise the second mortgage or take a second mortgage.

Q. The terms of this is that she agreed to place \$11,700 mortgage there? A. She tells me she wanted to clean maybe the first mortgage. 30

Q. We must confine ourselves to this agreement. Your understanding of this agreement was, then, that the woman that was selling you this property was to put \$11,700 worth of mortgage on there, and that she was to pay for it? A. Yes; that is what she signed for.

Q. You have been in a number of real estate transactions with your father, haven't you? A. Yes. 40

Salvatore Iuso, cross.

Q. And he is a property owner of some note in the Oranges, isn't he? A. Yes.

Q. Did you ever hear of an arrangement like this in any of those purchases? A. Yes, sure, contract.

10 Q. Where the purchaser is to put on almost the amount of the purchase price in mortgages, and the seller was to pay for it? A. Yes.

Q. You have heard of such deals? A. Yes, if the price were satisfactory.

Q. What deal in particular? A. I have heard of several, but I don't myself know personally.

Q. I ask you what you know; you don't know of any personally? A. No, rumors.

20 Q. The deals that you and your father were in never happened? A. No.

Q. As a matter of fact, isn't this what happened there: Stewart came in with all these people that you said, and said that you wanted to buy the property, and he drew the contracts, and he had the contracts with him, and Mrs. Higgins said, "I won't do anything about it until I see Mr. Berstecher"? Did she or didn't she say that? A. I didn't hear her say that.

Q. You were there? A. Yes.

30 Q. And didn't Stewart, the agent, then say, "It is all all right; I have seen Mr. Berstecher today and it is all right," and didn't she say, "Well, I want to see him"? A. I didn't hear her say that; I didn't hear Mr. Stewart say that.

40 Q. Didn't Stewart say then, "Mrs. Higgins, you are going to lose this sale if you don't get this deposit tonight; these people are tired coming around; if you don't sign it tonight, you will lose this sale," or words to that effect; didn't he say that? A. No.

Salvatore Iuso, cross.

Q. Didn't Stewart say further, "If there is anything in this contract that isn't right, and you don't understand, you can see Mr. Berstecher tomorrow morning, and it will be straightened out"; do you recall that? A. No, I didn't hear him say that.

Q. And didn't Mrs. Higgins raise the question of the size of the mortgage that she was to take back, being \$2,000, and the length of time that it was to run, because she needed the money to buy another piece of property; you knew that, didn't you? A. No.

10

Q. Then why was this written in there, "The second mortgage is to be for three years"; what was said about a second mortgage? A. I said, "In case you cannot raise this money, you should take a second mortgage for three years, but you can raise it," and she agreed, "if it is a thousand or a hundred, you can raise the balance of the money"; she was supposed to take the balance of what she couldn't raise.

20

Q. Who did? A. Mrs. Higgins.

Q. When was this put in the contract, "The said party of the first part agrees that she will not start a rooming house within ten blocks in five years"? A. That same night.

30

Q. And why was that put in? A. I was buying that property to run a rooming house, and she couldn't start the same thing right near me.

Q. You wanted to run a rooming house? A. Yes.

Q. What do you work at? A. I have a grocery store at present.

Q. Have you ever run a rooming house? A. No.

Q. You knew that she was going to buy another piece of property to start another rooming house, didn't you? A. No, I did not.

40

Salvatore Iuso, cross.

Q. Didn't she tell you that? A. No, she was telling me that it was too much work for her for that rooming house, if I ain't mistaken.

Q. How did Mrs. Higgins get down to Mr. Seymour's office; did you bring her down? A. No.

10 Q. She was there? A. Yes.

Q. Did she have any lawyer with her? A. No.

Q. You knew who her lawyers were, didn't you? A. No.

Q. You didn't then even? A. No.

Q. In November? A. Oh, yes, at that time I did. Mr. Berstecher represented her.

Q. Stewart told you that she wasn't going to go through with this a couple of days after it was signed? A. No.

20 Q. When did you first learn it? A. When she didn't accept the money.

Q. Is that the first time you knew that Mrs. Higgins wasn't going to go through with this deal?

A. That is right.

Q. This was signed August fifth— A. Yes.

Q. —and the following November first was the first intimation you had that she wasn't going to go through with this? A. Yes.

30 Q. Who was this check made out to? A. Mrs. Higgins.

Q. What name was it made out to? A. Her name.

Q. What is it; what was it? A. I don't remember her first name.

Q. Where did you get the check? A. I got a check account.

Q. Where? A. In the Orange National Bank.

Q. Who drew the check? A. I drew it.

40 Q. You drew the cashier's check? A. No, my mother. You are talking about the deposit; that

Oliver T. Stewart, direct.

is my check. The cashier's check, my mother-in-law gave me to buy this house.

Q. Whose order was that check made to? A. Mrs. Higgins.

Q. What was the first name on it? A. I don't remember the name; I only remember the last name. 10

Mr. Seymour: I have nothing further.

The Court: You have proved a *prima facie* case. I think the defense is put on their defense now.

OLIVER T. STEWART, sworn for defendant, testified as follows:

Direct examination by Mr. Fitzmaurice:

20

Q. What is your business? A. Real estate broker.

Q. How long have you been a real estate broker?

A. About six years.

Q. Where is your office? A. 448 Burnside Street, at present.

Q. Orange? A. Yes.

Q. I show you a contract in evidence; this is a copy of it, isn't it? A. Yes (referring to C-1).

Q. Did you draw that? A. I did. 30

Q. Yourself? A. I did.

Q. When? A. About the fifth of August, I think, if I remember the date right, 1925.

Q. You drew it on the date of it? A. Yes.

Q. And then you brought it up to Mrs. Higgins' house that evening, did you? A. I did.

Q. And you brought with you the people Mr. Iuso has already testified? A. I did.

Q. Do you know Mr. Berstecher of Howe & Davis? A. I do. 40

Oliver T. Stewart, direct.

Q. Did you have a talk with him that day on the phone? A. Not that day.

Q. When? A. Sometime that week, I think, if I recollect right.

10 Q. Did you show him this contract? A. I did not.

Q. When you got up to Mrs. Higgins' house you told her you drew the contracts and these people were there to buy the property, didn't you? A. I told her I drew the contracts, and told her of it before I went and got the people; she was satisfied to go through with the deal before I brought the people there.

20 Mr. Fitzmaurice: I ask that that be stricken out.

The Court: Strike it out.

Q. That night when you got there, Mr. Stewart,—that is what we are concerned with now,—what did you say to Mrs. Higgins when you came in with these other people? A. We went right in; I said, "Well, I brought the people along to go through with the deal with you." She said, "All right."

Q. Then what did you do? A. They all sat down in the room and read the contracts over.

30 Q. Who read the contract? A. I read them, and they all listened; in fact, there were three contracts, and I suppose Mr. Iuso had one and Mrs. Higgins had one.

Q. Never mind that; we want to know what you did and said. You read the contract? A. Yes, I did.

40 Q. Then what happened? A. Then there was a little something that they didn't just seem to be satisfied with in the contract, that they wanted

Oliver T. Stewart, direct.

changed, in regard to the rooming house and second mortgage that was written in with ink there.

Q. Tell us about it. A. I cannot just recollect, but they were talking between them, and they decided they wanted it put in that way.

Q. When you say "they"— A. Mrs. Higgins and Mr. Iuso. 10

Q. What did Mrs. Higgins say? A. What do you mean?

Q. What did she say about the mortgage? A. Oh, she was to get the mortgages; she was going to get mortgages.

Q. Do you know about this second mortgage? A. She said—there wasn't anything particularly said, only she was going to hold what she couldn't get on first mortgage. 20

Q. How did the conversation come up about the second mortgage? There was nothing in the contract until you wrote it in; you wrote it in. There was nothing in the contract until you wrote it in, about the second mortgage? A. Mr. Iuso was to pay \$2,000 cash; she understood that. And Mrs. Higgins said that she could get \$10,000 private mortgage or \$12,000 Building and Loan on the property, and then we said, "That will make it you will at least have to hold a second mortgage, if there is any." 30

Q. Mrs. Higgins said she could get a \$10,000 private mortgage on this property she was selling for \$13,700? A. That is what she said.

Q. What else did she say? A. That particular night, I don't know as she said anything more that night.

Q. Did she ask you whether you had seen Mr. Berstecher? A. No, sir. 40

Oliver T. Stewart, direct.

Q. You had talked to Mr. Berstecher? A. I talked to him twice on that subject.

Q. Previous to going up there? A. Previous to this contract.

10 Q. Didn't she tell you that she wouldn't sign anything until he had looked it over? A. No, sir, she did not.

Q. And didn't you tell her then that you had seen Mr. Berstecher and that the contract was all right, and that if she didn't sign it then, she would lose these people? A. I didn't tell her that I had seen Mr. Berstecher.

20 Q. Did you tell her that if she didn't sign the contract, that night, she would lose this sale? A. I said, "I have these people here, and if you don't want to go through with the deal tonight, I am not going to bother any more."

Q. You didn't tell her then if she didn't sign it that night, she would lose the sale, or words to that effect? A. I had no control over that.

Q. Did you? A. I did not.

Q. How long would you say you were there before this contract was signed? A. Perhaps half an hour or so.

30 Q. She didn't want to sign it, did she? A. It wasn't—

Q. Just that; she didn't want to sign it? A. She did and she didn't; she didn't know whether she did or not. Her boys, one of them urged her to go ahead and sign, another said not to sell it; there didn't seem to be any question about the contract, it was the house.

Q. But she didn't want to sign it? A. She didn't say she wouldn't sign it.

40 Q. What did you finally say to her as a result

Oliver T. Stewart, direct.

of which she signed the contract? A. What do you mean?

Q. How did she finally come to sign it? A. She came in and said, "All right," she would sign it; she had been out in the other room.

Q. That is what she said, was it? A. Yes, and was to give me my commission out of the check that she had, the next day; I got \$100 about three days after. 10

Q. There is nothing in this agreement about you to get that, is there? A. Yes.

Q. Simply you were to get three and one-half per cent. commission? A. On the signing of that contract.

Q. She was to meet you down at Mr. Berstecher's office the next morning? A. No, sir, no such arrangement. 20

Q. You did meet her the next morning? A. No; I went to her house the next evening and she told me she was to have the check cashed and give me the money, and she told me she didn't have it cashed, and the next day she didn't get it cashed, the third day I took her down and she got it cashed and she gave me \$100.

Q. Where did you take her? A. The third, to the Orange National Bank. 30

Q. And she held this check all this time? A. No, she cashed the check the day before she gave me the money; she said so anyway.

Q. You have just said that you took her down the third and she cashed the check and gave you the hundred dollars? A. No, I said I took her down and she gave me \$100.

Q. Then you were not with her when she cashed it? A. No. I made a mistake there when I said that. 40

Oliver T. Stewart, direct.

Q. You don't know whether she cashed the check or not? A. No, I don't know if she cashed it yet or not.

Q. She took you down to the Orange National Bank and gave you \$100? A. Yes.

10 Q. In the Savings Department? A. No, I stayed out in the car; she came out and gave it to me in the car.

Q. You had been after her, hadn't you, for this hundred dollars? A. I had been after her for all my money that she agreed to give me, not the hundred dollars.

20 Q. She told you when you came to her for your commission, that she wasn't going to do anything with this check on the contract, as she had already told you, until she saw Mr. Berstecher; isn't that right? A. I don't remember whether she mentioned Mr. Berstecher at that time, but I think she did.

30 Q. And as a matter of fact, you knew that she went down to see Mr. Berstecher the next day, and that he was out, and that when you came there for your commission that night, she told you that she wouldn't pay any commission, and she wouldn't use the check until she had seen Mr. Berstecher? A. No, she hadn't told me anything like that.

Q. How many deals in your experience, Mr. Stewart, have you put through where the seller was to supply about ninety per cent. of the purchase price in mortgages, at his or her expense? A. I don't know; other deals have been put through that way; there was one put through in your office where the purchaser supplied the mortgages.

40 Q. By you? A. By me.

Q. You put through a deal where the seller sup-

Oliver T. Stewart, direct.

plied the mortgage? A. Where the seller took the mortgage on the property.

Q. What do you mean? A. The mortgages were on the property, and they turned them over.

Q. In other words, the purchaser took the property subject to mortgages? A. Yes. 10

Q. That is done in your experience nine out of ten times? A. Yes.

Q. I am not talking about that. How many times in your experience have you been the broker in a sale, in the six years you have been in business, where the seller supplied about ninety per cent. of the purchase price by mortgages at his or her expense? A. I don't know that I can just recall how many times, but I have done it.

Q. In what particular case? A. There was one on Ridge Avenue, West Orange, the same thing done, but there was no court case over it. 20

Q. You were down at the closing of this? A. No, there hasn't been any closing.

Q. You were down the day it was to close? A. No, I was not.

Q. Why not? A. Because I had engaged an attorney to look after it for me.

Q. Who was that? A. Ralph Giordano.

Q. Was he there? A. I don't know. 30

Q. But you were not there? A. No, I wasn't there.

Q. Were you notified to be there? A. I was not.

Q. You know that Mr. Berstecher did see Mrs. Higgins two days after this was signed, didn't you? A. No, but I know he did before it was signed.

Q. What is that? A. I didn't know he saw her after, but I know he did see her before it was signed.

Q. Mrs. Higgins hadn't the contract then? A. No. 40

Oliver T. Stewart, direct.

Q. I am talking about after it was signed. A. I don't know when she saw him.

Q. You know that afterwards she refused to go through with it, don't you? A. Sure, she must have saw him, but I don't know when she saw him.
10

Q. How did you know, then, that this wasn't going to go through? A. If I remember, Mr. Iuso was the first man told me that she had changed her mind and wasn't going through with it.

Q. When was that? A. I think that was in November, 1925, sometime the last part of November, sometime in November.

Q. So that you never knew until some time in November, after November first, the day set for the closing, that it wasn't going to go through? A. I knew that it wasn't going through; that is what they told me; not until then.
20

Q. Iuso told you sometime in November that the thing wasn't going to go through? A. Yes.

Q. And it was to have closed the first of November? A. On or before the first of November.

Q. And the first that you knew about it was when Iuso told you it wasn't going to go through? A. Yes.
30

Q. Why did you hire a lawyer? A. To collect my commissions. My commission was due when I signed. I started my proceedings before that was going to go through.

Q. How did you come out? A. It hasn't come off yet, through your good management.

Q. You mean that we demanded a jury trial? A. Yes. It hasn't come up yet.

Q. Mr. Stewart, did you have any talks with Mr. Berstecher after this was signed? A. No, I didn't,
40

Oliver T. Stewart, direct.

not in regard to that contract, if that is what you are talking about.

Q. Nothing at all? A. No.

Q. Didn't Mrs. Higgins tell you when you kept coming up for the commissions that she had seen Mr. Berstecher and after he explained to her what this contract meant to her, that she wasn't going to have any part in it? A. No, that isn't what she told me; she told me, she wouldn't go through with that unless I would agree to pay half what I agreed, half of the bonuses. 10

Q. What was that to be? A. She told me I had agreed to pay for half of it, whatever it might be.

Q. You do know that when this thing began to string along she did make an effort to go through with this, didn't you? A. I suppose that she was going through. 20

Q. You know, don't you, that she applied for a mortgage somewhere in the neighborhood of \$9,000, for which it was to be charged the sum of \$600, don't you? A. I don't know nothing about it.

Q. Didn't you go to Ovidio Bianchi's office with her to raise money on this property, so she could go through with it? A. No, I did not.

Q. You are sure of that? A. I didn't go there with her. 30

Q. What did you do? A. In the beginning, Mr. Iuso had Mr. Bianchi for his attorney; she showed him the contract or something, and then Mr. Bianchi called me up and asked me if I send Mrs. Higgins to him, he thought he could arrange for the mortgages, and I told Mrs. Higgins what he told me, and I think she went there. I asked later if she went there and she said yes, to see about another mortgage affair, but not that. 40

Q. When was all this? A. I cannot just remem-

Oliver T. Stewart, cross.

ber the date when it was, but it was before it was supposed to be closed, if I remember right.

Q. Are you sure of that? A. I wouldn't swear when it was, because I don't think anything has been done since November first.

10 Q. You heard the testimony that she was given a month's extension after the date? A. It may have been after that; I don't know.

Cross examination by Mr. Seymour:

Q. Who engaged you to sell this property? A. The engaging party, a boy came to my office at different times and said his mother wanted to sell the property, and I went up to see her in regard to it.

20 Q. You went up to her house? A. Yes.

Q. And you and she made some kind of an arrangement? A. No; I sold the house once before her; she said, "Go ahead and sell it, if I got her price."

Q. Did you say you sold a house for her before? A. A house for her.

Q. Not this house? A. No, another one.

Q. And did you bring anyone there to see the house prior to the time the Iusos went there? A. 30 Yes, I took three different parties there.

Q. At different times? A. Yes.

Q. Over a period of what? A. Probably in about three months time.

Q. And these times that you took people there to see her, would she talk with people about selling the house? A. Yes.

Q. Why wasn't the sale made? A. The offers were too small, I guess.

40 Q. They couldn't get together on price? A. Yes.

Q. How did you come to get in contact with the

Oliver T. Stewart, cross.

Iusos? A. I had known them for quite a while; he told me he wanted to buy a piece of property, and I went around there, and he asked me if I had anything; I mentioned this, and I took him up to show it to him; she was there at that time.

Q. Did they talk about the property and selling of it? A. Yes. 10

Q. They couldn't come to terms? A. No.

Q. What happened then, as a result of that; did anything happen? A. Mr. Iuso, I took him back home, and then I later on took his wife up and showed it to her.

Q. Did she talk to Mrs. Higgins, too, when she went up,—Mrs. Iuso? A. Yes, she talked to her.

Q. What happened? A. And then Mr. Iuso went up again and offered a little more, and kept on until we got up to I think it was thirteen-five; we got up to thirteen-five and she wouldn't take that, and the deal was dropped, and we forgot all about it, and Mrs. Higgins' son came to my office and told me that his mother was ready to go through with the deal. 20

Q. How long after the deal was dropped, was it that Mrs. Higgins' son came to your office? A. About a week; maybe a little more. 30

Q. And in that time Iuso was out of it, was he? A. I even thought he had bought another place.

Q. And then Mrs. Higgins' son came to you? A. Yes.

Q. Then what did you do? A. I went right up and saw Mrs. Higgins; when I got up there, I said, "Your son tells me that you are ready to take thirteen-five," and she said, "No, I cannot take that and supply the mortgages." I said, "I will try and get a little more towards the mortgage, and if not, I will give you \$100 off my commission," and Mr. 40

Oliver T. Stewart, cross.

Iuso came up to thirteen-seven, which is two hundred more.

Q. Do you know how many times Iuso was up there to this house with you? A. I should judge about three or four times.

10 Q. Was there any one of those times when Mrs. Higgins said that she had been to see Mr. Berstecher or anyone else? A. No.

Q. You started to answer and said you talked to Mr. Berstecher about this thing before the making of the contract? A. I did.

Q. Do you remember when that was? A. Sometime about two weeks before the deal went off.

Q. And were you talking about this Iuso contract? A. Yes.

20 Q. What did you say to him and what did he say to you? A. At that time was when Mr. Iuso offered twelve-five, and I called Mr. Berstecher on the phone and I told him about it, and he said he would have to talk with Mrs. Higgins, and I asked him what he thought about the price, and he said he thought it was a good price for it; and then the next day, or day after, I called him again and asked him if he saw Mrs. Higgins, and he said she had been there and that I should go up and see what I could do with her, as he couldn't do anything with her.

30

Q. That was on the Iuso contract? A. Yes.

Q. That was before it became a contract? A. Yes.

Q. Did you ever talk with Mr. Berstecher about it afterwards? A. I did not.

Q. When you went down to the bank with Mrs. Higgins, you went to the Orange National Bank?

40

A. Yes.

Oliver T. Stewart, cross.

Q. Isn't that the bank building in which Howe & Davis have their office? A. Yes.

Q. That is the office Mr. Berstecher is connected with? A. Yes.

Q. You sat out in the car while she went in the bank? A. Yes.

10

Q. Did she say anything to you at that time about seeing Mr. Berstecher or anyone else? A. No, she didn't say nothing to me.

Q. Who was it that originated the idea of Mrs. Higgins supplying these mortgages; where did that suggestion come from? A. Mrs. Higgins, when I first went there to show the property, when Mr. Iuso made her an offer of around twelve-five or \$12,000, she thought it was ridiculous, because she could get a private mortgage of \$10,000 and a Building and Loan of \$15,000; she said that at the time.

20

Q. Who supplied you with the information from which you drew this contract? Where did you get that information? A. I talked with both parties and had them both agree upon it, before I drew up the contract.

Q. Those were the terms they told you to put in the contract? A. Yes.

30

Q. How is it that you made a change in there about a rooming house, about a restriction on her? A. They talked that over before we signed the contract that night, and they wanted it put in.

Q. At that time did Mrs. Higgins say anything to you about she had to get more money because she wanted to buy another rooming house? A. No. In fact, I showed her houses after that.

Q. Did she say anything that night? A. No.

Q. About buying another house? A. No.

40

Q. What did Mrs. Higgins tell you was the rea-

Oliver T. Stewart, cross.

son why she wanted to sell the house? A. If I understand right, she said it was too—

The Court: No; repeat what she said.

The Witness: It was too much work for her.

10

Q. Did she say that—what she would do after she passed the house over? A. She said she would purchase another house.

Q. Did she say she would buy another rooming house? A. Not particularly.

Q. Did she say she wouldn't buy a rooming house? A. No, not that she would or wouldn't, but she would buy another house.

20

Q. This clause, in which she agreed that she would not go in the rooming house business within a short distance—you wrote in this contract, in pen writing, "The said party of the first part agrees that she will not start a rooming house within ten blocks in five years"; was that put in there before the contract was signed? A. Yes, it was.

Q. And was that agreed upon between Mrs. Higgins and Iuso by reason of their talking together? A. It was.

30

Q. In your presence? A. It was.

Q. Did Mrs. Higgins agree that she would not start a rooming house within ten blocks within a period of five years? A. She did.

Q. And then that was written in with her permission and knowledge and consent? A. It was.

40

Q. Where you wrote in the contract that "The second mortgage is to be for three years," why was that written in? A. Mr. Iuso wanted it put in there just exactly how long the second mortgage would stand, as he didn't know what amount it would be, and he didn't want it called within a year.

Oliver T. Stewart, cross.

Q. Was that because she was going to raise a first mortgage or continue the mortgage that was on? A. The understanding was she could raise the mortgage and Mr. Iuso told her he didn't care what kind of mortgages she got, that he had \$2,000 to put into it, and he wanted a second mortgage, whatever it may be, that it must be for three years. 10

Q. He was to give her \$2,000 cash? A. Yes.

Q. And the difference between that \$2,000 cash and the selling price was to be covered by a mortgage? A. She was to get a mortgage what she could, and the difference she was to take for second mortgage.

Q. Was that understood? A. Yes.

Q. After you talked that over, and agreed on these things, Mr. Stewart, what did Mrs. Higgins do with the contract before she signed it, anything? A. She was reading it when I read the other one. 20

Q. After she read it, what did she do? A. She laid it down and she talked with her son, and she went out in the other room with her son.

Q. Do you know her son? A. She had all three of them there.

Q. Were they all there? A. Yes. 30

Q. Was the boy there that came down to your office and told you that his mother wanted to do business with the Iusos? A. Yes, he was there.

Q. Could you hear what their conversation was out in the other room? A. No.

Q. Where were you; in the parlor? A. Yes.

Q. You folks were all in that room? A. Yes.

Q. And where did she go; in the kitchen? A. In the kitchen.

Q. Do you know if there was anyone there out- 40

Oliver T. Stewart, cross.

side of Mrs. Higgins and her three sons, other than they? A. In the kitchen? I cannot tell you.

Q. You didn't go in there? A. I was in the kitchen, too. I don't remember who was there, outside of her and her sons.

10 Q. You know the children were all there? A. Yes.

Q. They are all grown? A. No, they are all young men, sixteen years up.

The Court: How high up?

The Witness: Not more than twenty-five, I don't think, the oldest.

Q. And she took this \$700 check, did she not? A. She did.

20 Q. And when you came around the next night what did she tell you about your commission? A. She said she hadn't had the check cashed.

Q. That night, the night she got the \$700? A. She would get the check cashed the next morning and give me my commission.

Q. Did she say anything about what part of the commission you were going to get? A. She did not.

Q. She didn't say how much or how little? A. No.

30 Q. Did she say when she would give it to you? A. The next day I was to get it.

Q. What was she going to do? Were you going to go up for it? A. I was to go up the next night.

Q. And she was to get you the check cashed during the day, and you went the next night? A. Yes.

Q. You saw her? A. Yes.

40 Q. Anything said about the contract or Mr. Berstecher? A. No.

Q. Or she being unwilling; anything said like

Oliver T. Stewart, cross.

that? A. No, the only thing she said the next night was—she spoke something about she didn't know whether she could get these mortgages; she stated right then that I would have to help her about the mortgages, and I told her—I said, "I will go out and help you get those," but I didn't say I would help pay for them. 10

Q. Not at that time? A. No.

Q. When did you go back again? A. The next night.

Q. The first night when you went back was anyone in the house with her, except herself; any of the family there? A. I don't remember.

Q. You went back the next night; was there any of her family there at that time? A. The boy was there, but she sent him to the store. 20

Q. You and she talked? A. Yes, we did.

Q. You asked her about your commission, I suppose? A. I sure did.

Q. What did she say? A. She hadn't got the check cashed the second night.

Q. Did she say anything about Mr. Berstecher or anyone else? A. No.

Q. When did you see her the next time? A. I said I would come up the next morning, and I went then. 30

Q. You went up in the car? A. Yes.

Q. What did you do? A. I took her to the bank.

Q. The Orange National Bank? A. Yes.

Q. Do you know how long, approximately, you were sitting out there in the car while she was inside? A. Not more than five minutes.

Q. When she came out she gave you \$100 cash? A. Yes.

Q. Did she at that time say anything about Mr. Berstecher or the contract? A. No. 40

Oliver T. Stewart, redirect.

10 Q. When was it you knew that you were not going to get your commission? A. She told me at that time she didn't want to give it to me all at once, and a week after I called up for some more money, then she turned me off and said I wasn't going to get any more money; I would have to help pay for the bonuses on the money.

Redirect examination by Mr. Fitzmaurice:

Q. You say that the three boys were there that night; you are sure of that, are you? A. Which night; the night of the signing of the contract?

Q. Yes. A. They were.

Q. You talked to them? A. Yes, I talked to first one and then the other.

20 Q. Are you sure that three of them were there? A. They were there.

Q. The reason you called up Mr. Berstecher was to get Mr. Berstecher's assistance, if you could, to put this deal through? A. That is right.

Q. She wanted \$15,000 for the property; you had made an offer of twelve-five? A. Yes.

Q. Then he spoke to her? A. That is what he told me.

30 Q. And said, "You had better go up and see her yourself"? A. That is right, yes; that he couldn't do anything with her.

Q. Then you did know that she consulted with Mr. Berstecher, of Howe & Davis, about this transaction with Iuso? A. At the price of twelve-five.

Q. But you did know, Mr. Stewart, that she was consulting Howe & Davis about the sale to Iuso, didn't you? A. Yes.

40 Q. Before the contracts were drawn by you? A. Yes.

*Oliver T. Stewart, redirect.**Examination by the Court:*

Q. You said on your direct examination, that the first you knew that this deal was not going through, was sometime after the first of November? A. Yes.

10

Q. You said a moment ago that a week after you received the hundred dollars on account of your commission, Mrs. Higgins told you that you wouldn't get any more, there was nothing else coming to you. Why do you say that you knew you were not going to get any commission a week after and that you didn't know that the deal wasn't going through until some months after?

A. She just simply told me—she didn't tell me I wasn't going to get any more money, but she wouldn't give me any more unless I would pay half of the bonus for the mortgage. It wasn't said that she wasn't going through with the deal.

20

Q. Had you told her before that she would be obliged to pay bonuses for mortgages? A. Yes, I also told her.

Q. When did you tell her? A. Even before she signed the contract.

Q. How much bonus did you tell her she would have to pay? A. I don't know; I didn't know where she was going to apply for it.

30

Q. You knew what bonus she would have to pay and what kind of bonus? A. You can pay different prices, one, two or three per cent.

Q. Did you know what was being exacted in that neighborhood? A. Only with her; she was well acquainted with the Orange Building and Loan; that was one per cent. they charge bonus. I probably knew that she would have to pay that if she got it there. In regard to the mortgages, I told her

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Mary Higgins, direct.

before she signed it, that I couldn't get over \$8,500 Building Loan on the property, and if she could, she was a better real estate man than I was.

Further examination by Mr. Fitzmaurice:

10 Q. Why did you send her to Bianchi? A. That was after the contract was signed.

Q. Why did you send Mrs. Higgins there? A. Because he asked me to send her.

Q. Because Mr. Bianchi asked you? A. Yes.

MARY HIGGINS, defendant, sworn.

Direct examination by Mr. Fitzmaurice:

20 Q. You are the defendant in this case? A. Yes.

Q. Where do you live? A. 35 Valley Road, West Orange.

Q. Is that property mentioned in this contract with Iuso? A. Yes.

Q. What do you conduct there? A. I have a rooming house.

Q. Do you recall the night Mr. Stewart—you know him? A. Yes.

30 Q. Do you recall the night he came in there with the Iusos? A. Yes, I do, well.

Q. What time of the night was it when they got there? A. After nine o'clock, or maybe quarter past nine.

Q. Who was in the house besides yourself? A. Myself and one of my boys.

Q. Which one of the boys was it? A. My son Jack; he is right here in court.

Q. Is this Jack here? A. Yes.

40 Q. How many boys have you? A. Three.

Q. Were the other two there? A. No, James

Mary Higgins, direct.

was there and he went right out. Mr. Stewart and Mr. Iuso entered my house and I was in the kitchen and I hadn't finished up my work at the time, and I heard these people coming in, I said to my—

Q. You cannot tell what you said to your boy.

A. No, this was the idea of it; my boy was studying in the kitchen, doing his lessons, and I said to him— 10

Mr. Fitzmaurice: You cannot tell us what you said to your boy.

The Court: She can if she said it in the presence of other people.

Q. Were other people there when you said this?

A. Just as I heard them coming in, I said, "This is Mr. Stewart and Mr. Iuso; I didn't expect them tonight" at that time, and I didn't expect them, because he was in my house that evening between three and four o'clock, if I remember right; he told me at that time that he had a buyer for the place, and I said, "Well, all right"; I said, "It will be perfectly all right," and he said, "All right"; he said, "I am going back to the Iusos and find out if I can get a deposit from them, and if I do so, I will come right up here tonight." I said, "All right." He went home, and as he went out through the hall he said, "They are going to give \$500 deposit and I am going to try to get seven out of them"; he went home at that time and I didn't see him any more until nine o'clock, it was really quarter past nine. 20 30

Q. Did you have an appointment with him then?

A. He said perhaps he might come if he could get Mr. Iuso and his wife to consent to come along.

Q. Did he tell you he was going to come back with the Iusos and with the contracts? A. If he 40

Mary Higgins, direct.

possibly could; he didn't say nothing about the contracts.

Q. Was there anything said about the contracts?

A. Well, no, not at all in the afternoon; he went with the intention of getting the deposit, the last I saw of him.

Q. Then Mr. Iuso and Mrs. Iuso and two or three others came? A. Yes.

Q. They all went into the parlor? A. Yes.

Q. You went in there and sat down? A. Yes.

Q. And what was said? A. Mr. Iuso and Mrs. Iuso, and I don't know was it her brother-in-law or her brother, I cannot tell, but I know there was five of them there, and they took seats around, but Mr. Stewart did not take a seat; he stood at the end of the table and he was very pleasant and very happy, and he said, "I have an agreement made out, and also a deposit; I increased it; I got seven." I said, "That is all right," and in the meantime I went out to straighten up something in my kitchen, and I said, "I will be right back," and Jack was doing his lessons in the kitchen—that is my son; he will be eighteen—he went out through the hall; right as I left the kitchen he went out.

Q. Was there anyone in the kitchen? A. Of my children that night only one of my boys.

Q. Mrs. Higgins, did you read the contract that night? A. No, sir.

Q. Who read the contract? A. Mr. Stewart; because, in fact, if I read the contract, I wouldn't know what it meant; I didn't read it; he read it.

Q. Did he ask you to sign it? A. Yes.

Q. What did he say? A. He went along and he said everything would be the same, and I said, "Well, now," I said, "I didn't really expect you

Mary Higgins, direct.

tonight, Mr. Stewart, by any means"; I said, "It is quite late," and he started to read the contract, and when he had read the contract, he said, "Now, sign it." I said, "No, Mr. Stewart, I will sign no contract until we go to see Mr. Berstecher in the morning."

10

Q. Who was Mr. Berstecher? A. My lawyer.

Q. Had you seen him previously to this? A. No, I hadn't seen him in two or three days.

Q. But you had seen him sometime before? A. Yes.

Q. Consulted with him? A. Yes, but there was no sale made or no contract.

Q. You told him you wouldn't sign until you saw Mr. Berstecher; what did he say then? A. He said, "Now, what do you do that for? You see how much work I have done trying to sell your property, and now you don't want to sign the contract. Why don't you?" I said, "Because I don't want to sign the contract until Mr. Berstecher sees it, because I know nothing about it." He said, "Now, don't dread that at all," he said, "because anything that isn't in the contract is going to be perfectly ratified when Mr. Berstecher sees it," and I went out—I got awfully nervous and I went out in the kitchen, and he followed me out there; he said, "By a sport, sign it"; I said, "No," and Jack got excited.

20

30

Q. Who was in the kitchen? A. Jack, my son, and of course he saw that I got very excited, and he came in. "Mr. Iuso and his folks are there," I said, "I don't want to do any business tonight, because" I said "I want to feel that everything that I do is perfectly safe and right, and the idea is to go down to Berstecher's in the morning; there is only just a few hours' difference, and we will go

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Mary Higgins, direct.

the first thing in the morning," and Mr. Stewart cut me right off just at that moment and he said, "Why, I was talking to Mr. Berstecher since I saw you," he said, and that would be after three o'clock, "and Mr. Berstecher told me to come direct up here and go ahead with the sale, and anything that isn't perfectly all right, come down in the morning to his office, and it will be rectified"; he put it that way, and then I considered it for a few minutes, and I said, "You have been talking with Mr. Berstecher?" And he said, "Yes," and encouraging me about that he spoke to Mr. Berstecher, and then I signed it, but as I signed it, before I signed it, I turned around to the five that was in the room, and also to Mr. Stewart, and I said, "Now, as long as you are so persistent to sign it, I will sign it, and this means that Mr. Berstecher has to look over it and see that it is perfectly all right before anything else goes on."

Q. Then you signed it, did you? A. Yes.

Q. When did you sign it? A. I don't know; somebody spoke up and asked how the check should be made out, the deposit, and Mr. Stewart smiled a very big smile, and said, "Make it out to me, I will take care of it, and I will go down in the morning and get it cashed." Then I did get very suspicious, I will admit, and I said, "No," I said, "Stewart, that check cannot be made out to you; I am just after explaining to you folks, and that check has got to be made out to me. Supposing when Mr. Berstecher says it is not perfectly all right enough, that check, and it will be returned back," and he said, "There will be nothing at all about that, because it will be perfectly safe," so then he got over—he said, "Where is the difference?" I said, "A lot of difference; I will take

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care of the check," and handed it back to the Iusos, and Mr. Iuso answered and he said, "That is perfectly all right; that is all right."

Q. They gave you the check? A. And it was either Mrs. Iuso's brother or Mr. Iuso's brother that asked what the name was, and I turned around and I told him my name. 10

Q. Mary Higgins? A. Yes, and he started to—and Stewart said the check ought to be made out to him, and my Jack jumped out of the kitchen and came in and said, "You are trying to fool my mama," and he said, "No, I am not trying to fool your mama; children like you ought to be in bed and don't butt in business, and the likes of you ought to be in bed." 20

Q. Is this the boy (indicating)? A. Yes. Then Jack got very excited, he turned around; I said, "Never mind, Stewart, you remember it is no more about the sale until Mr. Berstecher sees it." 20

Q. Then did they go out and leave you the check for \$700? A. Yes, of course, the talk went on until I said, "Well"—I said, "Well, that is all there is to it; I am not at all trying to do anything, only what I know."

Q. Mrs. Higgins, you continued to talk that over for a little while sociably and then they went out? A. Yes. 30

Q. The next morning what did you do? A. The next morning I got along with my housework, just at eight o'clock, about quarter past eight, Mr. Stewart was back to my house.

Q. In the morning? A. Yes. When he came back there was no one in my house at all but myself, and he came in and he talked and bid me good morning; we were very sociable, and he said, "How about that check?" I said, "The check is 40

Mary Higgins, direct.

perfectly all right, as far as I know," and I said, "I have the check." He said, "How about paying a commission? You know you made the admission to give me some of that commission?" I said, "Yes, and I intend to," and he said, "Well, why not go down and get that check cashed," and I said, "Well, I will tell you what I will do"; then, of course it was getting on twenty minutes after eight that very next morning. I said, "Yes, it will be all right, but in the meantime we will go down and go up and see Mr. Berstecher," and he smiled with a very big smile and said, "All right"; so we went down. He had his car outside; I had no one to protect me then, because my children had gone to school, and my other two boys had gone to work, but I had a friend who lived nearby, and in the meantime I called her and asked her if she would go with me.

Q. Who was that? A. Mrs. Gibbons.

Q. She is the lady sitting here? A. Yes. I told Mrs. Gibbons when I called her—I didn't have very much to tell her, but I told her—I left Mrs. Gibbons—we went down opposite Howe & Davis' office.

Q. You say "we"; whom do you mean? A. Mr. Stewart, and Mrs. Gibbons and myself; we went down and he drove up right opposite Howe & Davis' office—Mr. Berstecher's office.

Q. Where, in the Orange National Bank Building? A. Yes, right opposite Mr. Berstecher's building. I said, "I am going up to see Mr. Berstecher and see what he thinks of the sale. He said, "Well, all right; there is no need of my going up until I see you go up and find out if he is up there." I went up there and Mr. Berstecher wasn't there. I came down, and he asked me if he was there;

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I said, "No, sir, he isn't." Then he said, "How about that commission? I am very hard up for money and I want some money. You know you promised me some." I said, "I didn't promise you any money, but being you are so hard up for the money, and that you want it so badly, that you want the money so badly"—he said, "You had better give me \$100 anyway, \$200"; "No," I said, "I will give you \$100, and I will give it in front of Mrs. Gibbons until such time as I see Mr. Berstecher." He said, "All right," and he took the \$100. 10

Q. Where did you get the \$100? A. I took it out of my own money.

Q. Did you cash the check? A. No, sir, I did not; and Mrs. Gibbons was witness. I said, "Mrs. Gibbons, I am giving Mr. Stewart \$100 commission; we had a little difficulty up in our house last night, and we thought we were settling it this morning by seeing Mr. Berstecher, and he isn't there." Stewart said, "\$100 is all right; it is \$200." He said, "The first opportunity we can get, we will call on Mr. Berstecher," and I said, "I wish it was now." So we got out of the car, Mrs. Gibbons and myself, and he turned around and he went away and I didn't see no more of him that day. I went back again to Mr. Berstecher's office and he hadn't come in, and he wasn't in all day, to my knowledge, because I went there twice. 20 30

Q. Then you did see him finally? A. Then the next morning I went down and I saw him, and he told me—

Q. Did you show him the contract? A. I brought it with me.

Q. Did he explain it to you? A. Yes, he explained it to me. 40

Mary Higgins, direct.

Q. Then what happened? A. And told me—he asked me my arrangement, I had made, and I told him as far as I knew and as far as I already paid, and he said, “Well, Mrs. Higgins, this is a very poor contract for you.” He asked me if I read it; I said, “No, Mr. Stewart read it.” I came here and he knew well that I had done wrong to sign it then, and he thought over it, and I didn’t see no more of Stewart until the third morning; on the third morning he telephoned to my house between nine and ten o’clock, and that was on the third morning, and he was very pleasant, and asked how things were coming. I said, “All right.” He said, “How about some more commission?” I said, “Well, I guess it will be all right.” He said, “I will tell you; I have a couple of houses for sale; why not go out and see about them?” I said, “Well, I don’t know about that,” and he said, “You want to get settled, don’t you?” I said, “Yes.” He said, “I want some more of that commission.” I said, “No, you can not get no more of that commission until we see further and until I see how things go,” and he said, “I want that money; I need it.” I said, “We have to wait”; he said, “We will drop it anyway, but,” he said, “you had better come out and see the houses”; so he came up and I went around to see the houses, and he showed me a couple of houses and also a rooming-house down in East Orange, I don’t remember the name of the street; so I came home and he said, “Well, now, I will tell you, Mrs. Higgins”—no, he said, “I want more of that money, and you might as well give it to me.” I said, “I will give no more money until we see how things are going to go.” So he went home, and about two days after, if I remember, he telephoned and told me—he asked me “How is

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things?" I said, "All right, as far as I know." He said, "Have you got busy on getting that mortgage?" I said, "Well, Mr. Stewart, I didn't know nothing about getting mortgages. As far as I know—of course, I don't know very much about business, but I always understood that it was the fellow who takes the house that gets the mortgages." And he said, "Oh, no, that is altogether wrong; you had better go out and get that mortgage quick, because these people will be into your house in a few days, or in a few weeks, I mean; you had better go out and get a few rooms for yourself and the boys and get busy and get it." I said, "I know nothing about getting a mortgage." He said, "I will tell you what I will do. I will bring you down to Newark, and show you those places to get it." I said, "No thank you; you have to talk to Mr. Berstecher about it." So he went off the phone. He hung up then; that is all he said.

Q. Did he take you any place about mortgages?

A. No.

Q. Did you go any place? A. Yes.

Q. Did he send you there? A. No.

Q. How did you come to see about it? A. I was to Mr. Yeomans, in Orange.

Q. The Orange Building and Loan? A. Yes, and he said that he never heard of such a thing, and it couldn't be granted.

Q. He told you what? A. He couldn't do anything on getting a loan like that.

Q. Did you go anywhere else to get the loan? A. I came down to the Wiss Building one time, and he said to bring the fellow who sold the house and also the people that was going to buy it, and he would see them. He said, "You don't own any

Mary Higgins, direct.

property after you sell it," and I said "No." That was the only two places I went.

Q. Did you find out what it was going to cost you to get mortgage on the property? A. Yes.

Q. How much? A. Around \$600.

10 Q. Where did you get that information? A. Mr. Berstecher told me about the amount it would be and also Mr. Yeoman, of the Orange Building and Loan.

Q. Did you go to Mr. Bianchi, in Orange? A. Yes, I went in to Mr. Bianchi.

Q. How did you come to get there? A. Three or four weeks after, I went in to Mr. Bianchi; he sent word to me and asked me to come and see him, through Mr. Stewart.

20 Q. Mr. Stewart told you? A. Yes, through Stewart, I heard it, and through the Iusos, but I went in there and brought the contract with me, and Mr. Bianchi, when he looked at it, he said, "I don't think you could get that much." I said, "I never agreed to get it." He said, "Well, that is all," and that is all that went on between us.

Q. Then on November first did you go down to Mr. Seymour's office? A. Yes.

30 Q. How did you come to go there? A. I knew that was the day that the agreement was to be settled, that that was to be closed, and I went down and explained it to Mr. Seymour and also to Mr. Iuso I couldn't get it, and I promised to get it. I said that when the sale started that Mr. Stewart was to get the commission, and I was to get \$2,000 cash, and I was to take \$2,000 of a second mortgage for three years. I said, "Three years is a long time." That is what went on between Stewart and I and Mr. Iuso, and he said, "Why not make it three years?" I said, "All right, I will for

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Mary Higgins, cross.

the second mortgage, I will make it three years.” So I told Mr. Seymour that in his office that day, and that was all I heard about it, and on another occasion I went—I don’t remember what day it was—they was worrying me to get it settled, and I went to Mr. Iuso’s house in Orange and I said, “It is terrible that this thing is hanging on; why not go and try to make some arrangement to get this mortgage? Stewart said that I had to get it.” He called him up and he brought him to his house. I thought we would come to some agreement. Mr. Iuso did call him up and he came to Iuso’s home, and I was inside and he was in the store outside, and just as he came in, Mr. Iuso said, “Why, Mrs. Higgins is here,” and he said, “Is that so?” And he said, “Well, what is it now?” And he said, “Well, to make some arrangement about getting this mortgage the same as you have talked about, and get it settled,” but he said, “To hell with Mrs. Higgins, I don’t want to see her.” I said, “I trust you, Mr. Stewart, but I didn’t come here on that intention. I came here for you and I to go and see if we get the mortgage, the same as you have placed on this agreement.” He said, “I have nothing to do with it. You can go and get it and pay my commission, and that is all that the sale has to do with me.” Right in Mr. Iuso’s home that happened, and I walked out; I said, “All right, Mr. Stewart,” and thanked him, and came right home and I was not able to walk home.

Q. You did nothing further about it? A. No, I never saw Stewart after that or heard from him.

Cross examination by Mr. Seymour:

Q. How did you come down to my office first?

A. I went down by trolley.

Mary Higgins, cross.

Q. Who told you to come down? A. You wrote me a letter.

Q. Do you remember about when that was? A. Around November first.

Q. Around the last week of October? A. Yes.

10 Q. I asked you to come to the office for the sake of passing title? A. Yes.

Q. You came? A. Yes.

Q. Do you remember what you told me? A. Yes, I do, if I remember.

Q. You remember you told me that you had found it impossible to get these mortgages? A. Yes.

Q. You couldn't get them? A. No.

Q. You tried all over? A. Yes.

20 Q. Do you remember I asked you who your lawyer was? A. Yes.

Q. You remember you told me that you didn't have any lawyer in this transaction? A. I never said such a thing; I said that Mr. Berstecher was my lawyer.

Q. Didn't you tell me that Mr. Berstecher had done some things previously for you? A. Yes, he did all my business.

30 Q. What did I tell you to do? A. You suggested for him to try and get a loan.

Q. The first time you came in, didn't I tell you to go right back to Mr. Berstecher? A. Yes.

Q. Didn't I, while sitting in my office, call his office on the telephone? A. Yes.

Q. And didn't I tell him what you had said to me and what I knew about it? A. Yes.

40 Q. Do you remember my saying in your presence that I was writing a letter to Mr. Berstecher explaining all the details? A. Yes.

Mary Higgins, cross.

Q. Following that, did you go in and see him?
A. I took that letter right up.

Q. You carried it up to him? A. Yes.

Q. As a result of that letter, do you know if anything happened? A. If I remember right, Mr. Berstecher telephoned to you and explained and talked things over with you in answer to that letter, if I remember; I don't know anything about that. 10

Q. You came back to my office again, didn't you?
A. Yes, and told you that I couldn't do nothing about it and how Stewart had treated me.

Q. You were down to my office two or three times? A. Twice; just once and after that—

Q. Do you remember November first when you were there with Mr. Iuso and Mrs. Iuso? A. Yes. 20

Q. And do you remember whether or not any money was offered to you? A. Yes, there was money offered to me.

Q. Do you remember how much money? A. \$1,000 check, from Mrs. Iuso's mother—\$1,300 altogether.

Q. That was a thousand dollar cashier's check, bank check? A. Yes.

Q. And \$300 in cash? A. Yes, it was pushed over on your desk. 30

Q. Mr. Iuso handed it to me and I counted it out and handed it to you? A. It was a check.

Q. A one thousand dollar cashier's check? A. Yes.

Q. You saw that? A. Yes.

Q. And \$300 in bills? A. Yes. It was on your desk.

Q. And I offered you that? A. Yes.

Q. And I asked you for your deed? A. Yes.

Q. You told me you didn't have the deed? A. Yes. 40

Mary Higgins, cross.

Q. That you had found it impossible to get these mortgages? A. Yes.

10 Q. And then do you remember we all sat there and talked about how the Iusos could possibly help you raise these mortgages; do you remember that? A. Yes.

Q. Do you remember that it was my suggestion that we do nothing and give you thirty days more and we try to help you raise the money? A. Yes.

Q. Do you remember you went away with that idea in mind? A. Yes. And I would talk it over with Mr. Berstecher.

Q. I also insisted that you go right back and tell Mr. Berstecher? A. Yes.

20 Q. Do you remember I called my stenographer and I wrote a letter to Mr. Berstecher, telling him in your presence what we had done? A. Yes.

Q. And that letter was given to you and you carried it up to his office? A. Yes.

Q. Do you know whether or not the Iusos have done anything to try and get these mortgages? A. No.

Q. Do you know what they have done since that time to get this settled? A. Nothing.

30 Q. Have you ever done anything towards getting mortgages on this property of yours, other than see Mr. Yeoman of the Orange Building and Loan and some other people whom you mentioned? A. No.

Q. Did you ever do anything more than that? A. No.

40 Q. Did you ever tell Mr. Stewart before the Iusos came around there anything about how much money you could get on mortgage? A. No, I did not. I told him I was going to take \$2,000 cash and he was supposed—I don't know nothing more about it.

Mary Higgins, cross.

Q. Your understanding was that you were to get \$2,000 cash? A. Yes, and that is all I had to furnish.

Q. You didn't have to furnish that? A. I was to get \$2,000 of a deposit.

Q. Of deposit? A. \$2,000 altogether.

Q. Then you understood the night that you signed this contract,—and you admit you signed the contract? A. Yes. 10

Q. You understood you got \$700 in cash that night? A. Yes.

Q. And you expected that you would get \$1,300 more in cash? A. Yes.

Q. That is all the cash you were going to get out of the property? A. From Mr. Iuso, but I expected that I was going to get the remainder what was left over, that would be coming out of that money, because I never agreed to get the mortgage. 20

Q. Whom did you have that understanding with? A. Mr. Stewart.

Q. Mrs. Higgins, do you read English? A. No, sir, I don't, nor I didn't read it.

Q. You write? A. Just barely sign; I never read it and don't know how to read it.

Q. Is this your boy who was there with you (indicating)? A. Yes. 30

Q. How old is he? A. Seventeen.

Q. What class is he in, in school? A. He was in the Commercial; he is past the Commercial Grade, in St. John's.

Q. He is in High School?

Mr. Fitzmaurice: Commercial Grade is not in the High School; there is no Commercial Grade in St. John's.

A. He was in the Commercial Grade at that time. 40

Mary Higgins, cross.

Q. How old was he at that time? A. He was sixteen years.

Q. Had he gone through the eighth class in the grade? A. Yes.

10 Q. After this eighth class he starts a commercial course? A. Yes.

Q. And the night this contract was signed, he was in the kitchen studying his lessons? A. Yes.

Q. When it came time to fill out the check he came in from the kitchen to the parlor, the front room where you were, and he had some conversation with Mr. Stewart about the check? A. Yes.

20 Q. Isn't it a fact that after this contract was made in your presence and in the Iusos', in the front room, you took the contract and went in the kitchen where your son was? A. No, Mr. Stewart never gave it to me; he never gave the contract out of his hand.

Q. There were three copies of it? A. Yes.

Q. All three copies were on the table in the parlor? A. Yes.

Q. And while Mr. Stewart was reading one, did you have possession of one? A. He passed me one over after he had read.

30 Q. Where were the other two while he was reading? A. He gave one to Mr. Iuso and kept one himself.

Q. Where was the third? A. He handed it to me after the check was made.

Q. When Mr. Stewart was reading the signed contract, Iuso had a contract and Stewart had a contract; where was the third one? A. There were three on the table, and Stewart picked them up and gave one each to us.

40 Q. You had a contract while Mr. Stewart was reading his? A. No.

Mary Higgins, cross.

Q. Where was it then? A. On the table; I didn't take it; I said, "Stewart, can I depend on you?" He said, "Yes, it is perfectly all right."

Q. Did he read out what was in this contract? A. He read it out as far as I knew. He understood, and that was the idea. 10

Q. Did you hear him read out anything about what in room number five? A. No, I don't remember at all what he said.

Q. Did you know that on that contract you have a number of items? A. It was the day after that contract was filed that he came back and put that on, if I remember right.

Q. The day after it was signed? A. Yes, I believe it was.

Q. Was he up to your house the day after the contract was signed? A. Yes. 20

Q. Who was with him? A. Myself.

Q. He was all alone? A. Yes.

Q. And you were alone? A. Yes.

Q. There wasn't anybody in your house? A. There was a few roomers.

Q. They were upstairs? A. Yes.

Q. No part of your family was there? A. No.

Q. At that time you were annoyed at Mr. Stewart? A. I wasn't, no, but I didn't see Mr. Berstecher at the time, and I was in doubt. 30

Q. You were in doubt? A. Yes.

Q. You didn't feel good about the transaction? A. No, because I didn't understand anything about it.

Q. You didn't like it? A. I was waiting for Mr. Berstecher.

Q. You say that at that time, the second day, he went there and put these things in the contract, these items? A. No, not the day after, that even- 40

Mary Higgins, cross.

ing—not that night that it was signed up; that afternoon before the contract was signed, I mean that is when he came up and put those things in.

10 Q. Then before the contract was signed that afternoon, he came to you and he told you that he had the Iusos up to thirteen-five? A. Yes.

Q. And he wanted to bring them up that night? A. Yes.

Q. And was that the time that you gave him these details of what was in these various rooms? A. Yes.

Q. You and Mr. Stewart went through your house and wrote down what was in the rooms? A. Yes.

20 Q. At that time there weren't any Iusos there at all? A. No.

Q. Did you know that he was taking that information for the purpose of making this contract? A. Yes.

Q. And you also authorized him that day after giving him this information, to go to the Iusos and get the deposit, didn't you? A. Yes.

30 Q. You knew that if it were possible for him to get the deposit, he was going to bring the Iusos to your house that night with the money? A. Yes, that night or down to Mr. Berstecher's office the next morning.

The Court: On that night.

Q. Isn't it a fact that you testified on direct examination that when you heard them coming, you said to your son, "Here is Stewart with the Iusos"? A. Yes.

40 Q. Then before you saw him you knew the Iusos and Stewart were there? A. I expected that that night. He told me when he went out—he said,

Mary Higgins, cross.

"If I can get the deposit, I will come back," but I didn't expect him to come after nine o'clock.

Q. What time was he there in the afternoon?

A. Between three and four, as far as I remember.

Q. Did you say anything to him that afternoon about Mr. Berstecher? A. Yes; I said, "We will have to see Mr. Berstecher about it; I am not going to do no business until we see Mr. Berstecher." He said, "You need not worry because I was just speaking to Mr. Berstecher."

10

Q. He said that in the afternoon? A. Yes.

Q. He said in the afternoon, "I was just speaking to Mr. Berstecher"? A. Yes.

Q. On direct examination you said that during the night you said, "I don't want to sign until I see Mr. Berstecher"? A. Yes.

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Q. "And Mr. Stewart said, 'I saw Mr. Berstecher this afternoon, after I saw you.'" Which is correct?

Mr. Fitz Maurice: I object to the last few words.

The Court: What do you mean by the last few words, "after I saw you"?

Mr. Fitz Maurice: Yes.

The Court: Wasn't that what she testified to?

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Mr. Fitz Maurice: My recollection is that he said that he saw Mr. Berstecher, but I don't recollect "after I saw you."

The Court: She testified on direct examination as Mr. Seymour has recited, as I recall it.

The Witness: He said he had telephoned to Mr. Berstecher; he said, "I have telephoned to Mr. Berstecher and everything is

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Mary Higgins, cross.

perfectly all right." He said that in the afternoon, too.

The Court: Madam, what do you mean? Do you mean he said it in the afternoon and also said it at night?

10 The Witness: Yes, both times he said it, but at the time then he left and I didn't quite expect—he left my house with the intention of going and talking over with him and getting it; at that time he had gotten a memorandum of them things.

Q. You have a telephone in your house? A. Yes.

20 Q. And in point of distance how far is your house on Valley Road from the office of Howe & Davis,—Mr. Berstecher's office? A. I should think about ten minutes or fifteen minutes in the bus or trolley.

Q. And had you talked with Mr. Berstecher prior to this day about this Iuso talk or dickering? A. No, not on that day at all.

The Court: Before that time.

The Witness: No, I told them that anything we would have to do, we would have to go to Mr. Berstecher.

30 Q. Did Mr. Berstecher talk to you and say that Mr. Stewart had spoken to him about this sale to Iuso? A. Yes.

Q. When was that? A. A few days before that; I don't know how many days.

40 Q. Did you go to Mr. Berstecher's office and talk to him? A. Yes, he told me to come there; he said, "Mrs. Higgins, you come there"; he said something to me about that Mr. Stewart said something to him about the sale.

Q. What was different about the sale at that

Mary Higgins, cross.

time; why didn't you make it at that time? A. That was the first time that he came to the conclusion that he had the deposit, on that evening.

The Court: You misunderstand. He says when you first talked with Mr. Berstecher, why didn't you go through with the sale then? 10

The Witness: He hadn't the deposit and the sale wasn't convinced at the time.

Q. You mean that it wasn't positive that he would take it? A. Yes.

Q. It was a question of price only, Mrs. Higgins? A. Yes, and he was trying to get the price that I was asking.

Q. He hadn't offered you enough? A. Yes, at that time; and he came back and said all right, that he had got the price—that was in the afternoon, and there was very little time between three o'clock in the afternoon, and I didn't think anything more about it. 20

Q. Two or three days before this was made, you talked to Mr. Berstecher about the deal? A. Yes.

Q. At that time the price wasn't high enough? A. No.

Q. And was that all that was the matter with the transaction, the price wasn't enough? A. Yes. 30

Q. How much was that price, do you remember? A. Thirteen-seven; thirteen-five first, and then he said thirteen-seven.

The Court: You understand, Mrs. Higgins, that Mr. Seymour asks you what price you had in mind, or what price you were asking for this property at the time that you first saw Mr. Berstecher. 40

The Witness: Thirteen-seven.

Mary Higgins, cross.

The Court: Was that your original price?

The Witness: Yes. That is what I told Mr. Stewart is the lowest I would sell it for.

10 The Court: You told him that when he came to you?

The Witness: Yes, the first time he ever came to me, that that would be the lowest I would sell it for. He came back and forth three or four times.

Q. But the price of thirteen-seven was agreeable to you? A. Yes.

20 Q. And that price was to include not only the land and building, but also to include the furniture that was enumerated in the contract? A. Yes.

Q. Were you selling that furniture? A. Yes.

Q. You understood that? A. Yes, I certainly did.

Q. And were you looking for another rooming-house at the time? A. Yes, I was. Mr. Stewart suggested another rooming-house down in East Orange.

30 Q. Were you selling this property to get out of the rooming-house business? A. No, I was not.

Q. Your intention was to sell the house and then buy another rooming-house? A. Yes.

Q. You were selling the furniture? A. Yes, I was, and I was buying the furniture for a large house.

Q. Did you know that they had written in this contract of yours that you could not go in the rooming-house business for five years within ten blacks? A. Yes, I did; we talked that over.

40 Q. And that was agreeable and understood by you? A. Yes.

Mary Higgins, cross.

Q. And did you know that Mr. Stewart in your house had written in there that the second mortgage is to be for three years? A. Yes, I did.

Q. And you agreed to that? A. No.

Q. You didn't agree to that? A. I didn't read it.

Q. But you did agree to it? A. I did agree to it. 10

Q. And the Iusos? A. Yes.

Q. Both of those things, the restrictions as to your going into the rooming-house business and the three-year mortgage, that was the result of conversation between all you people? A. Yes.

Q. That was all agreeable; you understood that thoroughly? A. Yes.

Q. Did you make any effort the next morning to get in touch with Mr. Berstecher when Mr. Stewart came to your house? A. Yes, I did; I went right down at eight o'clock that morning, or twenty minutes past eight. Mr. Stewart came to my house that morning, and he came along and he came right in, and he was very pleasant; he said, "Well, how about that check?" 20

The Court: You have gone all over that. He asked you if you made any attempt to see Mr. Berstecher the next morning; you said yes. That answers the question. 30

The Witness: Oh, yes, I did, most decidedly.

Q. You went to his office early, about twenty minutes or half past eight? A. Yes.

Q. And he wasn't there? A. No.

Q. What did you do then? A. Waited around for a little while longer, and stood around and went up to Mr. Berstecher's afterwards, and he wasn't there, and the next morning when I went down to Mr. Berstecher's office— 40

Mary Higgins, cross.

Q. Did you do anything else that day? A. I went right home.

Q. Did you call up Mr. Berstecher's office? A. No, his bookkeeper told me he wouldn't be home that day.

10 Q. And Mr. Berstecher is connected with or a member of the firm of Howe & Davis?

Mr. Fitz Maurice: He is.

Q. Did you know that there were other lawyers connected with that firm right there at that office? A. I didn't know anything about it, but I didn't know who they were, but Mr. Berstecher was the one whom I always depended on.

20 Q. Did you know Mr. Fitz Maurice? A. No, not at that time.

Q. Did you know Mr. Edward Davis? A. No. Mr. Berstecher was the only one that I had confidence in.

Q. What did you do the next day to get hold of Mr. Berstecher? A. About the third day?

Q. Second day. A. The second day I saw Mr. Berstecher on the second day, and he told me—yes, I saw him then.

30 Q. What did he tell you about that contract? A. He took the contract and he read it over and he said, "Well, what does this eleven-seven mean?" I said, "I don't know anything about it, because I am not able to read myself, and all I know is from my children," and I wanted Mr. Berstecher to just see what he thought of it, and he was the one who saw where the mistake was.

Q. He told you that you were supposed to supply the mortgages? A. Yes.

40 Q. And that was the second day, then, the contract was signed? A. Yes.

Mary Higgins, cross.

Q. Did you tell Mr. Berstecher that you had received the \$700 deposit? A. Yes.

Q. Did you ask Mr. Berstecher to do anything? A. I said, "What are we going to do about it?" and he asked me—he said, "You have it signed," and asked me what did I agree to do, and I told him and explained to him. 10

Q. Did he advise you to do anything? A. The only thing, "We will have to leave it and see what we can do."

Q. That was the second day? A. Yes.

Q. You knew on the second day after you had talked with Mr. Berstecher that this contract was not what you wanted at all? A. Yes.

Q. You knew that? A. Yes, and that I never agreed to it. 20

Q. You knew you had never really agreed to it? A. Yes.

Q. And then on the third day you saw Mr. Stewart? A. Yes.

Q. He came around to your house again? A. Yes.

Q. And he wanted more commission? A. He did.

Q. What did you tell him? A. I told him that I didn't think anything more; I said, "You have a certain amount and you will not get any more until we see what Mr. Berstecher thinks about it, because I think, Stewart, to be very frank with you, you have made a very poor sale for me." And he said, "I wouldn't do anything like that with you." I said, "Mr. Berstecher thinks that it is." Then he said, "Go on and forget about it, and there is a rooming-house down on some place in East Orange, and come along and we will buy it and we will see about it, and you try and buy that 30 40

Mary Higgins, cross.

and get into the rooming-house again." I said, "That is all I have for a living."

Q. You went out in Mr. Stewart's car on the third day and looked at property? A. Yes.

Q. For the purpose of buying? A. Yes.

10 Q. And you would have bought it if the price was right and you liked it? A. Yes.

Q. That was the day after Mr. Berstecher told you that this contract was not what you agreed to? A. Yes.

Q. Did Mr. Berstecher tell you what he was going to do, or did you tell him to do something? A. I said, "It is up to you, Mr. Berstecher, to see what can be done about it, because I know nothing more about it, and I can do no more."

20 Q. Did you tell him to do anything? A. I told Mr. Berstecher, "You can see what you can do about it"; that is all I knew about it.

Q. What did you want him to do about it? A. Not to let the sale go on on that contract.

Q. You wanted him to stop the sale? A. Yes.

30 Q. You didn't want the contract to go on? A. No, not as far as I knew; I said, "I never can get that amount of money, so, Mr. Berstecher, what am I going to do about it?" He said, "He done it and you didn't agree to it, and you agreed to get the \$2,000 on second mortgage"; I said, "Yes, and that is all," and he said, "We will see what we can do about it."

Q. When you left Mr. Berstecher, did you have in your mind that the contract was going through or not? A. I didn't know how it was going; I didn't know what would be done about it, because as I told Mr. Stewart, I know nothing more about it.

40 Q. That was the second day? A. Yes.

Mary Higgins, cross.

Q. The third day you went out with Stewart?
A. Yes.

Q. What did you do after that regarding this contract? A. I went right home and pondered about it and left it to Mr. Berstecher to take care of; that is all I did.

10

Q. When did you next see Mr. Berstecher about it? A. I cannot tell you; maybe two or three weeks after that again.

Q. Isn't it a fact you didn't see Mr. Berstecher about it the second day until after you had been down to my office? A. I saw him before that.

Q. The next time you saw him, then, you don't remember about when it was? A. No.

Q. What did you and he do that day, the second time you saw him? A. On the day after I came home from your office, if I remember right, Mr. Berstecher telephoned to you—

20

Q. No, before that. The second day after the contract you saw Mr. Berstecher; when was the next time you saw him? A. Maybe three or four weeks after, I don't remember the date.

Q. Did you see him before you had been to my office or after? A. Yes.

Q. The second time you saw Mr. Berstecher what did you talk about? A. We talked about getting it.

30

Q. Getting what? A. Getting a mortgage, and I told him that I had tried those two Building and Loans and they said it would be impossible for me to get a loan like that, but they said that the real estate fellow and the buyer might have some chance to get it, and asked me if I agreed to do that, and I said, "No," and they said, "You did agree to do it"; I said, "No, I agreed to take a \$2,000 mortgage," and they said the real estate fel-

40

Mary Higgins, cross.

lows want to get it with the people who is buying property, and I told Mr. Berstecher then that I would do no more about it.

10 Q. Did you tell him to do anything? A. I said, "Mr. Berstecher, it is up to you to see what you can do now."

Q. The next thing happened, you came to my office? A. Yes, on the day it was to be closed and one time after.

Q. The only thing that has prevented you from making this deed or delivering the property I think you were unable to get that mortgage? A. That was up to Mr. Berstecher—yes, sir, I could not get it.

20 Q. Had you been able to get the mortgage, you would have delivered the property at that price? A. At that time.

Q. The price was acceptable? A. Yes, at that time.

Q. What is the difference now? A. I was satisfied to deliver the property at that time, and at that date, if I get the money and if I wasn't fooled on the contract, I was satisfied to do so.

30 Q. What is the difference between November first, 1925, and this day?

Mr. Fitz Maurice: I object to that.

The Court: Let me ask you, please. I understood there was a \$7,800 mortgage on the property at the time the contract was signed.

Mr. Fitz Maurice: Two mortgages aggregating \$7,700.

Mr. Seymour: Forty-five, thirty-eight and seventy-eight.

40 The Court: I am anticipating. If she had

Mary Higgins, cross.

been willing to take a \$3,900 third mortgage, that would have complied with the terms of the contract literally, except that there would have been a third mortgage instead of second, because there is nothing specified in the contract as to how the mortgages were to be divided, was there? 10

Mr. Fitz Maurice: No, nothing at all.

The Court: The only difference between you, as I understand it, is that it would have required the payment of a considerable bonus to have gotten a second mortgage of a sufficient size to put this deal through, is that correct?

Mr. Fitz Maurice: No, plus the fact, as I understand Mrs. Higgins and Mr. Berstecher as a result of their talks and the explanation of this, that she didn't anticipate taking a second mortgage greater than \$2,000; that she was to get the difference in cash. In other words, she was to get all cash over \$2,000 on a second mortgage, as far as she was concerned. She realized there was \$7,800 on there. 20

The Court: That would have been a third mortgage. 30

Mr. Fitz Maurice: That isn't the way I understand it. She was to get \$2,000 cash and \$2,000 mortgage.

The Court: That would have left \$1,900 in cash she was to get. You mean that she was going to get \$1,900 more in cash out of mortgages to be placed?

Mr. Fitz Maurice: That is right.

Q. On November first when you were offered 40

Mary Higgins, cross.

10 \$1,300, was there anything else offered to you? A. Yes, you suggested,—if I remember, you suggested Mr. Seymour, that you put on some more cash on that, I think for seven months; in some way you explained that that amount would be \$1,000—instead of a year. I said, “I don’t want to have no more to do with any deal, because I am in wrong now, and I don’t want to have any more to say until I go back to Mr. Berstecher,” and you agreed, you said, “All right”; you were very nice about it. You agreed to it, and you gave me a letter to bring to Mr. Berstecher. I said, “I will have nothing more to do, because Stewart has fooled me right and left, and I know nothing about it.”

20 Q. In everything that happened after the signing of the contract, you knew that the Iusos and myself had nothing to do with Stewart? A. No, I didn’t know anything about it.

Q. On the day we offered you the \$1,300 you remember I offered you a second mortgage for the balance and the cash you were getting to the amount due to you? A. Yes, but I didn’t quite catch that; that is why I wanted Mr. Berstecher to see about that.

30 Q. Do you remember that I talked on the phone with Mr. Berstecher right then and there—

Mr. Fitz Maurice: We have been all over that.

Q. —and offered, if it was agreeable to you and Mr. Berstecher, that my people would agree to pay a thousand dollars on the mortgage within seven months; do you remember that? A. No.

40 Q. Was there anything said about more money than the \$1,300? A. Yes, you said something about it, but I don’t remember just what you explained,

J. Fred Berstecher, direct.

but you explained they would pay more. I said, "That is all right, but I know nothing about any more agreement, or I will have no more to do with any more arrangement until I see Mr. Berstecher."

Q. And you said that you would take the letter and go to Mr. Berstecher? A. I did.

10

Q. And then you would have Mr. Berstecher arrange with me, do you remember that? A. Yes.

Q. And did you take that letter to Mr. Berstecher? A. Yes.

Q. Did you and Mr. Berstecher talk about it? A. Yes.

Q. Did you do anything after that? A. No, I didn't do anything after that, because I was to hear—I was waiting to hear about it; in the meantime I didn't do nothing, not that I remember.

20

Q. Did you receive any letters from me after that time? A. Maybe I did, but I don't remember exactly because I said I would have nothing more to do with the sale, and asked to leave it all to Mr. Berstecher.

Q. Do you remember that as late as almost the first of December, we offered to take the property subject to the \$7,800 mortgage?

Mr. Fitz Maurice: I object.

30

Mr. Seymour: I withdraw that.

J. FRED BERSTECHEER, sworn for defendant:

Direct examination by Mr. Fitz Maurice:

Q. You are a counsellor at law of this state, Mr. Berstecher? A. I am.

Q. And a member of the firm of Howe & Davis? A. I am.

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J. Fred Berstecher, direct.

Q. And were such on August 5, 1925? A. I was.

Q. Previous to that date, did Mrs. Higgins, the defendant in this case, consult with you about her Valley Road property? A. Yes.

10 Q. In what way? A. She had anticipated selling it and consulted with me on what she could get for it.

Q. Did you have any talks with Oliver T. Stewart? A. I did.

Q. He was the agent endeavoring to sell the property? A. He was.

20 Q. And what was the nature of those conversations with Stewart? A. Negotiations were pending, and Mr. Stewart came in to my office and told me that he had this offer of twelve-five and Mrs. Higgins wouldn't take it, and asked me if I would do what I could to help the deal along. I told Mr. Stewart that on the purchase price of the property, it was entirely up to Mrs. Higgins; that if Mrs. Higgins would take twelve-five, she could do so.

Q. Subsequent to that did you see Mrs. Higgins about the price of twelve-five? A. I don't think so.

30 Q. When did you next see her? A. I don't think I saw Mrs. Higgins again until after the contracts had been signed. I did, however, see Mr. Stewart.

The Court: How many times did you see Mr. Stewart?

The Witness: I think that Mr. Stewart either consulted with me or telephoned to me three or possibly four times.

The Court: Do you recall whether he had been in communication with you on August fifth?

40 The Witness: I don't recall the date, but I do recall the circumstance. He telephoned

J. Fred Berstecher, direct.

me one afternoon that he had a buyer for Mrs. Higgins' house, and that he thought he could get him up to Mrs. Higgins' figure, and he was going to see Mrs. Higgins that night about it.

The Court: Did he tell you what the terms of the contract were? 10

The Witness: No, we never discussed the terms of the contract.

The Court: He didn't show you the written contract?

The Witness: I never saw it until afterwards.

The Court: When did you first see it?

The Witness: It was after it was executed. 20

The Court: Do you remember how long after?

The Witness: I don't remember.

Q. I show you a paper and ask you if that is the contract you are referring to as having seen after its execution? A. Yes, that is the contract.

Q. Did Mrs. Higgins bring it to you? A. Mrs. Higgins brought it to me.

Q. And ask you what? A. To look it over and explain to her what it meant. 30

Q. You did so? A. I did so.

Q. What happened then? A. When I explained to her the meaning of the clause regarding the mortgages, she was very much surprised; she stated to me that all she was to do was to take a \$2,000 mortgage, and I told her that wasn't what she had agreed to do in the contract at all.

Q. Did she say how much cash she agreed she was going to take? A. That I don't remember; the contract speaks for itself on that. 40

J. Fred Berstecher, direct.

Q. She was to take \$2,000 on second mortgage?

A. Yes.

Q. And you explained to her that the contract didn't provide that? A. I explained to her that the contract did not provide what the amount of the second mortgage was to be.

10

Q. Did you explain what it meant to her, the purpose of the contract, in so far as the furnishing of the money was concerned? A. Yes, I did.

Q. Then what happened? A. I told Mrs. Higgins that I didn't think that she had to go through with the contract the way it was.

Q. Say anything about seeing what you would do about it? A. She seemed to take a liking to the Iusos and said that if she could go through with it the way it was, she would like to do it. I explained to her that the cost of these mortgages would be on her, and I think she afterwards tried to get these mortgages; I know she consulted me about it; I told her that I couldn't get any mortgage like that at all.

20

Q. Subsequently did you have any conference or correspondence with Mr. Seymour representing the Iusos? A. Yes.

Q. When was that, with respect to closing the title? A. I think that I had a talk with Mr. Seymour just about the time the title was to close, in which I told him that we could not go through with the deal.

30

Examination by the Court:

Q. Did you ever give the purchaser any notice of Mrs. Higgins' desire to rescind the contract? A. I never gave them any direct notice.

Q. Did you ever give them any kind of a notice? A. I don't think so.

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J. Fred Berstecher, direct.

Q. Why after your discovery that Mrs. Higgins did not understand the terms of this contract and she left the matter in your hands, didn't you advise the purchasers that you would rescind the contract? A. My understanding was that Mrs. Higgins was in contact and touch with the Iusos almost daily; that was the impression I got from what had happened, and when I told Mrs. Higgins that she couldn't go through with the transaction, I thought that she would convey that to them. 10

Q. Did you understand that you were to do anything? A. When Mrs. Higgins expressed her desire, if she could, to go through with this transaction, I did what I could to help her.

Q. When did she express that desire? A. When she had signed this contract—after she had signed the contract; I told her that she had signed it, and she had done so, and that if she could go through with it, it was the proper thing for her to do. 20

Q. Did she tell you at the time that Mr. Stewart had told her that this matter had been submitted to you, and that you had approved of it? A. I cannot recall; there has been so much talk about it that I cannot recall. 30

Q. I know, but the basis of attacking this contract now is the misrepresentation made by Stewart—an alleged misrepresentation, and that misrepresentation was to the effect that the matter had already been submitted to you and that you had passed upon it, and if anything was not agreeable to your liking, it would be corrected when you saw the contract. Was anything like that said to you by Mrs. Higgins when she called on you after signing the contract? A. I don't recall that she said that. 40

J. Fred Berstecher, cross.

Cross examination by Mr. Seymour:

10 Q. Mrs. Higgins was perfectly willing to perform that contract when she first spoke to you, except that she couldn't get the mortgages, wasn't that the matter? A. The contention at the time was that she wouldn't get the amount of money out of the contract which the contract called for.

Q. Do you recall about when it was she first spoke to you and showed you the contract? A. As to the date, no.

Q. Fixing the date according to the time of the execution of the contract. A. Very shortly after, one or two days.

20 Q. And did she that day tell you that you were to do anything? A. No.

Q. Did she tell you that the contract had been made by misrepresentation and that she wanted to rescind it, she wanted to get out? A. I say I don't recall whether she did or didn't.

Q. Wouldn't that be the most important part of what she said? A. At that time I don't know that it was the most important part; I think the most important part was to, if possible, consummate the sale, so that she would get the—

30 Q. Whatever she said to you that day, the only lasting impression you have of that interview is that the thing she objected to in the contract was putting upon her the obligation of getting mortgages for \$11,700, isn't that so? A. That is my recollection.

Q. That was the first time she saw you and she asked that day for mortgage money? A. No, I don't think so.

40 Q. Isn't it a fact that Mrs. Higgins has obtained mortgages through your firm? A. Yes.

Q. Several times? A. Yes.

J. Fred Berstecher, cross.

Q. In fact your firm has put on the mortgages that are on there now? A. Yes.

Q. She didn't ask you that day to get money for her? A. I don't think she did that day; I think she did at a later day.

Q. Can you recollect how the consultation ended; what was she to do and what were you to do? A. I don't recall; I see probably twenty people every day on just such things as this. 10

Q. Did you tell her to do anything? A. I don't recall that.

Q. The next time you saw her, do you remember when that was? A. I saw her many times after that.

Q. About this same transaction? A. Yes.

Q. And the gist of all of those interviews was that if she could get this \$11,700 mortgage she would go through with the contract? A. In so far as I was concerned, yes. 20

Q. Did she ever tell you that she would not perform the contract?

The Court: What difference does it make if she told him?

Q. Do you remember my talking to you on the telephone on November first about this matter? A. I presume, several conversations. 30

Q. Do you remember I said it was time to pass title and Mrs. Higgins was in the office and the other folks were there? A. Yes.

Q. And she carried to you a letter which I wrote? A. Yes.

Q. Have you the original letter?

Mr. Fitz Maurice: Were we served with notice? 40

Mr. Seymour: No.

J. Fred Berstecher, cross.

Q. Do you remember Mrs. Higgins bringing that letter to you? A. Yes.

Q. Several times she brought letters to you and we had several talks about it? A. Yes.

10 Q. Was there ever any time when we had a long conversation together that you ever said that Mrs. Higgins was going to rescind her contract and try to get out by reason of misrepresentation or any other thing? A. I don't recall of any.

Q. Isn't it a fact that during this whole transaction, right up to the time of the filing of the bill, you and I talked about what you could do and I could do about helping Mrs. Higgins get this mortgage loan money? A. That I think was our desire.

20 Q. There was never anything said about misrepresentation? A. There was talk about it; whether there was talk about it with you or not, I don't know.

Q. So far as your firm was concerned or you, you never brought to the attention of the complainants, Mr. and Mrs. Iuso, the fact that Mrs. Higgins wanted to rescind by reason of misrepresentation? A. I never have.

30 The Court: Mr. Berstecher, if Mrs. Higgins had told you at her first interview after this contract was signed, that her signature had been procured by a misrepresentation, amounting to fraud, on her, the most natural thing for you to have done would have been to immediately rescind the contract on her behalf, wouldn't it?

The Witness: Yes.

The Court: And you didn't do it?

40 The Witness: I didn't do it, I think, be-

John Higgins, direct.

cause of the relations that I understood to be there between the parties. I thought I was always in a position on this contract—

Q. The relation between complainants and the defendant? A. Yes. Mrs. Higgins expressed to me that she thought that the Iusos were very fine people and that she wanted to do what she could for them.

10

JOHN HIGGINS, sworn for the defendant:

Direct examination by Mr. Fitz Maurice:

Q. You are the son of Mary J. Higgins, the defendant in this case? A. Yes.

Q. You lived with your mother up in Valley Road? A. Yes.

20

Q. In the house involved in this suit? A. Yes.

Q. Do you know Mr. Stewart, the real estate expert? A. Yes.

Q. Do you recall the night he came to your house? A. I don't remember the exact date, but I remember the occasion.

Q. Where were you? A. In the kitchen doing shorthand.

Q. And who else was in the kitchen? A. Myself. I think I was the only one there; my brothers was in the other room, and as soon as Mr. Iuso and Mr. Stewart came in, my two brothers went out.

30

Q. How old were they? A. One was about eighteen and the other nineteen, I think, or twenty.

Q. How old were you? A. At that time I was going on sixteen.

Q. Did you take part in any of the conversation in the room—in the parlor where they were? A. When I went in, I told Mr. Stewart he was try-

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John Higgins, cross.

ing to put something over on my mother; I told my mother not to sign and he told me I should keep out of the business; that I should be in bed.

Cross examination by Mr. Seymour:

10 Q. Your mother had been inside in the room a long time before you went in? A. Yes.

Q. Was the door open between your room and that room? A. No.

Q. How many rooms between the kitchen and parlor? A. A pantry and then a pantry door next and into the parlor.

Q. Just a pantry? A. A pantry door and then kitchen door going into the pantry.

20 Q. And were those doors both closed? A. I don't remember. I know one was closed.

Q. You didn't hear what was going on in there? A. I heard a lot of loud voices.

Q. Were they loud? A. Not loud enough for me to hear, but I didn't understand them.

Q. Were they quarrelling? A. Not exactly.

Q. What made you go inside? A. My mother came out in the kitchen and Mr. Stewart came out after her and then they walked back in.

30 Q. What did your mother and Mr. Stewart say when they were out in the kitchen with you? A. She didn't know whether to sign or not; he said, "Go on, Mrs. Higgins, and be a sport and sign; everything is all right, and if not, Mr. Berstecher will fix it up in the morning."

Q. And then they went back? A. Yes.

Q. When was it that you went in the front room? A. A little while after that.

Q. What brought you in there? A. I went in to see what was going on.

40 Q. What made you feel Stewart was trying to

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put something over on your mother? A. I heard them talking.

Q. Did you hear them say anything like putting anything over on your mother? A. I naturally judged when they come around at night and he was talking so much, and that Mr. Iuso and the rest of the bunch was there, I told my mother, I said, "Ma, don't sign it; he is trying to put something over on you"; he told me to keep my mouth shut.

10

Q. You knew what the business was? A. No.

Q. Didn't you go down and ask Mr. Stewart to come up to your mother? A. No.

Q. Did you know that your brother had done that? A. No.

Q. Didn't you know your brother was there that night when they got there? A. Yes, but he went out as soon as they got there, while they were there.

20

Q. Was your brother in the kitchen when Mr. Stewart and your mother went in the kitchen? A. No.

Q. Where was he? A. Gone out.

Q. That was after he had gone out? A. Yes.

Q. And did he know anything about what was going on that night?

30

Mr. Fitz Maurice: I object.

The Court: What difference does it make?

BOTH SIDES REST.

BERRY, V. C. (orally). This bill is filed for the specific performance of a contract for the sale of land located in Valley Road, West Orange. The contract was the subject of a written agreement dated August 5, 1925. The contract provided for

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10 a purchase price of \$13,700, to be paid \$700 on the signing of the contract, \$1,300 on the delivery of the deed, and the balance in mortgages amounting to \$11,700. The execution of the contract is admitted by all parties. The settlement date fixed by the contract was November first, 1925. On that date the parties met at the office of the solicitor of the defendant, and there a tender of the balance of the purchase price due under the terms of the contract was made and a deed demanded. The defendant, the vendor, refused to go on with the sale, and because of that refusal, or as a result of that refusal, this bill for specific performance was filed.

20 The defense to the action is that the contract was induced by fraudulent misrepresentations of the defendant's agent, and the fraudulent misrepresentations alleged are that the contract had been previously approved by the attorney of the vendor, and that in the event that there was anything unsatisfactory in the terms of the contract, it would be later adjusted by submission to the vendor's attorney. The contract provided that the mortgages to be placed on the property were to be placed at the expense of the vendor, not in terms, 30 but that is the only interpretation which can be placed upon the language used. The defendant vendor is unable to read or write, except that she can write her own name, and I am convinced that at the time the contract was signed, that she did not know the effect of the provision respecting the placing of the mortgages. However, the next day or the day after the next, she consulted her attorney, who advised her of the situation, and of her responsibility under the contract which she 40 had executed. She did not advise him with re-

Opinion.

spect to any misrepresentation. I do not feel that I could find that under the testimony, she advised him that any misrepresentation had been made. If the matter had stopped there and if there had then been a rescission of the contract, on the ground that the vendor had not understood what she had signed, I think I should have been obliged to have held that the minds of the parties had never met on the contract which was executed, but the matter did not stop there; there was no rescission of the contract following the disclosure of the vendor's responsibility under the terms thereof and there was never any suggestion by the defendant or by her attorney to the vendees, the complainants, that there was any dissatisfaction with respect to this provision of the contract, nor that any misrepresentation or fraud in the procurement of the contract was ever alleged or claimed. Under these circumstances, it seems to me that there is but one course left open to me, and that is to advise a decree for specific performance of the contract, because as I see it, whatever may have been the situation prior to the vendor's consulting with her attorney, after that consultation she knew her exact liability under the terms of the contract, and that her acts thereafter ratified the provisions thereof, and I will advise a decree in accordance with these conclusions.

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Decree for Specific Performance.

IN CHANCERY OF NEW JERSEY.

Between

MARY IUSO and SALVATORE IUSO,
Complainants,

and

MARY J. HIGGINS,
Defendant.

} On Bill &c.

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This cause coming on to be heard in the presence of George F. Seymour, Jr., Solicitor of the Complainants, Mary Iuso and Salvatore Iuso, and Richard J. Fitz Maurice, Solicitor of defendant, Mary J. Higgins;

And the Court having examined the pleadings and taken proofs orally and in open Court and having heard and considered the arguments of Counsel, and being satisfied that the said Mary J. Higgins, on or about the 5th day of August, 1925, duly entered into a written agreement with the said Complainants, Mary Iuso and Salvatore Iuso, whereby said Mary J. Higgins agreed to convey by deed of Warranty, on or before the first day of November, 1925, the premises hereinafter described, and the contents thereof by Bill of Sale, all for the sum of \$13,700; that the complainants, Mary Iuso and Salvatore Iuso paid over to the said Mary J. Higgins the sum of \$700 upon the execution and delivery of the aforesaid written agreement; that the complaints, Mary Iuso and Salvatore Iuso duly tendered to the said defendant, the sum of \$1,300 on the first day of November, 1925,

Decree for Specific Performance.

pursuant to the terms of the said written agreement, and demanded the execution of a deed of conveyance for the said premises and a bill of sale for the contents thereof; that the said defendant, Mary J. Higgins refused and still refuses to execute and deliver to said complainants a deed of conveyance for the premises in question and a bill of sale for the contents thereof; and that the said complainants have been and are ready and willing to perform the said agreement on their part by paying the full amount of the said purchase price of \$13,000 upon the delivery to them of a duly executed deed for the said land and premises and a duly executed bill of sale for the contents thereof;

And the Court being of the opinion that the said complainants are entitled to the Specific Performance of said agreement as prayed;

It is, thereupon, on this Fifth day of June Nineteen Hundred and Twenty-eight, ORDERED, ADJUDGED, and DECREED, that the said agreement be specifically performed by the said defendant, Mary J. Higgins, and that she make, execute and acknowledge in due form of law and deliver to the complainants, Mary Iuso and Salvatore Iuso, on the 25th day of June, Nineteen Hundred and Twenty-eight between the hours of Nine in the forenoon and Four o'clock in the afternoon of said day, at the office of George F. Seymour, Jr., Counsellor at Law, 24 Commerce Street, Newark, New Jersey, a good and sufficient deed of conveyance for all those certain lands and premises consisting of house and lot located on the northwest corner of Valley Road and Edisonia Terrace in the Town of West Orange, County of Essex and State of New Jersey, more particularly described as follows: Running along

Decree for Specific Performance.

10 said Edisonia Terrace, North 51 degrees 5 minutes West 120 feet; thence (2) running North 36 degrees 52 minutes East 97.45 feet; thence (3) South 60 degrees 23 minutes East 120.19 feet to Valley Road; thence (4) running along Valley Road South 26 degrees 52 minutes West 93 feet to an angle; thence running still along Valley Road 3 feet to the point or place of BEGINNING, and a good and sufficient bill of sale for all those certain contents of the premises consisting of:

Kitchen:

1 Gas Range
1 Stove
6 Chairs

20 Room No. 7:

2 Chairs
1 Rocker
1 Bed Complete with Sheet & Pillow & Cases & Blankets are included
1 Dresser
1 Table

Room No. 6:

1 Bed Complete
1 Dresser
1 Wash Stand
1 Gas Plate
1 Table
2 Chairs
1 Rocker
1 Desk

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Room No. 10:

1 Bed
1 Dresser
2 Chairs
1 Table

Room No. 5:

2 Beds Complete
1 Dresser
1 Chair
2 Rockers
1 Table

Room No. 11:

1 Gas Plate
1 Stand
2 Chairs
1 Table

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Decree for Specific Performance.

Room No. 14:

1 Bed Complete
1 Dresser
2 Chairs
1 Table

Room No. 12:

1 Bed Complete
1 Table
1 Dresser
1 Stand
2 Chairs

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Room No. 15:

1 Bed Complete
1 Dresser
1 Gas Plate
1 Stand
1 Table
2 Chairs

Room No. 13:

1 Bed Complete
1 Dresser
2 Chairs
1 Table

Room No. 4:

1 Bed Complete
1 Table
1 Gas Plate
1 Stand
2 Chairs

Room No. 8:

1 Bed Complete
1 Dresser
1 Table
2 Chairs
1 Gas Plate

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Room No. 9:

1 Bed
1 Dresser
2 Chairs

and deliver at the same time to the said Mary Iuso and Salvatore Iuso, possession of the said land and premises and of the said contents thereof, and that at the same time, and place, the said complainants, upon the delivery of the said deed to them, pay to the said defendant, Mary J. Higgins, the sum of \$13,000, the agreed balance of the purchase price for the said lands and premises and the contents thereof, after deducting therefrom the costs of these proceedings to be taxed, including a counsel fee of One hundred fifty dollars, which is hereby allowed to said complainants and which costs are hereby directed to be paid by said defendant to said complainants,

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Notice of Appeal.

10 And it is further ORDERED, in case said defend-
 ant should not appear at the time and place afore-
 said and perform the said agreement as herein-
 above ordered, that the said complainants have
 execution against the goods and chattels, lands,
 tenements, hereditaments and real estate of the
 said defendant, according to the practice of this
 Court, to make said taxed costs.

E. R. WALKER,
 C.

Respectfully advised.

MAJA LEON BERRY,
 V.C.

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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

MARY IUSO and SALVATORE IUSO,
Complainants,

and

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MARY J. HIGGINS,
Defendant.

The defendant Mary J. Higgins hereby appeals
 from the final decree made in the above entitled
 cause on the 5th day of June, 1928, from the whole

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Petition of Appeal.

and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated, July 11th, 1928.

HOWE & DAVIS,
Solicitors for and of Counsel 10
with defendant Mary J. Higgins.

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

EDWARD L. DAVIS,
Of Counsel for Defendant Mary J. Higgins.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND 20
APPEALS.

Between

MARY IUSO and SALVATORE IUSO,
Complainants-Appellees,

and

MARY J. HIGGINS,
Defendant-Appellant.

On Appeal
from the
Court of
Chancery.

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To the Honorable, the Court of Errors and in the
Last Resort in All Causes:

Last Resort in All Causes:

The petition of Mary J. Higgins, the appellant
in the above entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by a final 40
decree made in the Court of Chancery by his

Petition of Appeal.

Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 5th day of June, 1928, in a certain cause in said Court of Chancery wherein the said Mary Iuso and Salvatore Iuso were complainants and the said Mary J. Higgins was defendant, in this respect, to wit,

10 that the said decree adjudges that the said agreement be specifically performed by the said defendant Mary J. Higgins, and that she make, execute and acknowledge in due form of law and deliver to the complainants, Mary Iuso and Salvatore Iuso, on the 25th day of June, Nineteen Hundred and Twenty-eight between the hours of Nine in the forenoon and Four o'clock in the afternoon of said day, at the office of George F. Seymour, Jr., Coun-

20 sellor at Law, 24 Commerce Street, Newark, New Jersey, a good and sufficient deed of conveyance for all those certain lands and promises consisting of house and lot located on the Northwest corner of Valley Road and Edisonia Terrace in the Town of West Orange, County of Essex and State of New Jersey, more particularly described as follows:—

Running along said Edisonia Terrace, North 51 degrees 5 minutes West 120 feet; thence (2) running North 36 degrees 52 minutes East 97.45 feet; thence

30 (3) South 60 degrees 23 minutes East 120.19 feet to Valley Road; thence (4) running along Valley Road South 26 degrees 52 minutes West 93 feet to an angle; thence running still along Valley Road 3 feet to the point or place of BEGINNING, and a good and sufficient bill of sale for all those certain contents of the premises consisting of:—

Kitchen:

40 1 Gas Range
1 Stove
6 Chairs

Petition of Appeal.

Room No. 7:

2 Chairs
 1 Rocker
 1 Bed Complete with Sheet & Pillow & Cases &
 Blankets are included
 1 Dresser
 1 Table 10

Room No. 6:

1 Bed Complete
 1 Dresser
 1 Wash Stand
 1 Gas Plate
 1 Table
 2 Chairs
 1 Rocker
 1 Desk

Room No. 10:

1 Bed
 1 Dresser
 2 Chairs
 1 Table

Room No. 5:

2 Beds Complete
 1 Dresser
 1 Chair
 2 Rockers
 1 Table

Room No. 11:

1 Gas Plate
 1 Stand
 2 Chairs
 1 Table 20

Room No. 14:

1 Bed Complete
 1 Dresser
 2 Chairs
 1 Table

Room No. 12:

1 Bed Complete
 1 Table
 1 Dresser
 1 Stand
 2 Chairs 30

Room No. 15:

1 Bed Complete
 1 Dresser
 1 Gas Plate
 1 Stand
 1 Table
 2 Chairs

Room No. 13:

1 Bed Complete
 1 Dresser
 2 Chairs
 1 Table

Room No. 4:

1 Bed Complete
 1 Table
 1 Gas Plate
 1 Stand
 2 Chairs

Room No. 8:

1 Bed Complete
 1 Dresser
 1 Table
 2 Chairs
 1 Gas Plate 40

Petition of Appeal.

Room No. 9:

- 1 Bed
- 1 Dresser
- 2 Chairs

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and deliver at the same time to the said Mary Iuso and Salvatore Iuso, possession of the said land and premises and of the said contents thereof, and that at the same time, and place, the said complainants, upon the delivery of the said deed to them, pay to the said defendant, Mary J. Higgins the sum of \$13,000, the agreed balance of the purchase price for the said lands and premises and the contents thereof, after deducting therefrom the costs of these proceedings to be taxed, including a counsel fee of One Hundred fifty Dollars, which is hereby allowed to said complainants and which costs are hereby directed to be paid by said defendant to said complainants.

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And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:—

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1. The said decree directs that the said agreement referred to in the bill of complaint be specifically performed by the said defendant Mary J. Higgins.

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 petitioner may have such other relief in the premises as to this Court shall seem proper.

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HOWE & DAVIS,
Solicitors for and of Counsel with Appellant.

EDWARD L. DAVIS,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

MARY IUSO and SALVATORE IUSO,
Complainants-Appellees,

and

MARY J. HIGGINS,
Defendant-Appellant.

BRIEF FOR APPELLANT.

This is an appeal from a decree of the Court of Chancery, made on the 5th day of July, 1928, directing the appellant to specifically perform a contract, dated August 5th, 1925, in and by which she agreed to convey to the complainants certain premises on Valley Road, West Orange, for the sum of \$13,700.00.

It will be noted at the outset that the terms are somewhat unusual. By the time title is passed, only \$2,000 of the total amount was to be paid in cash. The contract then provides:

“The said Mary J. Higgins agrees to place mortgages for the balance, which is to be \$11,700.”

Ordinarily, the purchaser arranges about the mortgages. It would be a rather unusual thing for the seller to place the mortgages without a very clear and definite understanding to that effect.

The appellant, while able to write her name, is not able to read (S. C., p. 53, line 20):

“Q. Mrs. Higgins, do you read English? A. No, sir, I don’t, nor I didn’t read it.

“Q. You write? A. Just barely sign; I never read it and don’t know how to read it.”

This testimony was not denied by anyone.

It is claimed on the part of the appellant that the real estate agent was responsible for this whole situation. The testimony in regard to the manner of signing was described in great length by Mrs. Higgins. Boiled down, however, it amounts to this: Mr. Stewart, the agent, accompanied by complainants, called on Mrs. Higgins at her home and produced the agreement, which he requested her to sign. There was considerable discussion about details of the contract. Mrs. Higgins says (S. C., p. 41, line 3) that after Mr. Stewart had read the contract, he said:

“ ‘Now, sign it.’ I said, No, Mr. Stewart, I will sign no contract until we go to see Mr. Berstecher in the morning.’ ”

Mr. Berstecher was a member of the firm of Howe & Davis, and her attorney. Again, a few lines further on, she says as follows (S. C., p. 41, line 14):

“Q. You told him you wouldn’t sign until you saw Mr. Berstecher; what did he say then? A. He said, ‘Now, what do you do that for? You see how much work I have done trying to sell your property, and now you don’t want to sign the contract. Why don’t you?’ I said, ‘Because I don’t want to sign the contract until Mr. Berstecher sees it, because I know nothing about it.’ He said, ‘Now, don’t dread that at all,’ he said, ‘because anything that isn’t in the contract is going to be perfectly ratified when Mr. Berstecher sees it,’ and I went out—I got awfully nervous and I went out in the

kitchen, and he followed me out there; he said, 'Be a sport, sign it'; I said, 'No,' and Jack got excited."

Mrs. Higgins' account of the transaction is somewhat substantiated by the testimony of the complainant Salvatore Iuso, who says as follows (S. C., p. 14, line 20):

"And Mr. Stewart read the contract. She said 'Let me see one of the copies,' *and they went in the back room* and then she came out and I signed it."

Further testimony of this complainant is somewhat corroborative of her story by the manner in which he testified (S. C., p. 16, line 21). Mr. Salvatore Iuso was asked this:

"And Mrs. Higgins said 'I won't do anything about it until I see Mr. Berstecher.' Did she or didn't she say that? A. *I didn't hear her say that.*

"Q. You were there? A. Yes.

"Q. And didn't Stewart, the agent, then say, 'It is all all right; I have seen Mr. Berstecher today and it is all right,' and didn't she say, 'Well, I want to see him?' A. *I didn't hear her say that; I didn't hear Mr. Stewart say that.*"

It will be noted that the witness does not say that Mrs. Higgins *did not* say that. He attempts to shift responsibility by saying he did not *hear* her say it.

The witness Stewart, the real estate agent, admitted that he had talked to Mr. Berstecher about the matter (S. C., p. 30, line 17):

"A. At that time was when Mr. Iuso offered twelve-five, and I called Mr. Berstecher on the phone and I told him about it, and he said he would have to talk with Mrs. Higgins, and I asked him what he thought about the price,

and he said he thought it was a good price for it; and then the next day, or day after I called him again and asked him if he saw Mrs. Higgins, and he said she had been there and that I should go up and see what I could do with her, as he couldn't do anything with her."

It is quite plain from this that he knew Mrs. Higgins was represented by an attorney and it would also have been logical, if he succeeded in getting terms agreed upon, to have his contract approved by her attorney. The fact that he submitted to her a contract already prepared and induced her to sign it, and she actually did sign it, is strongly indicative of the fact that he very probably told her the contract had already been approved of. Mr. Berstecher also says (S. C., p. 70, line 7) that Mr. Stewart had been consulting him about the deal, but that he did not see Mrs. Higgins again until after the contract had been signed, and when she brought in the contract to him for his approval, he explained to her the meaning of the clause regarding the mortgages and she was very much surprised. It is quite plain from this testimony that the paper which she signed (and which she could not read) contained terms that were not intended by her to be inserted in the contract.

The Vice-Chancellor, in his opinion says:

"The defendant vendor is unable to read or write, except that she can write her own name, and I am convinced that at the time the contract was signed, she did not know the effect of the provision respecting the placing of the mortgages. However, the next day or the day after the next, she consulted her attorney, who advised her of the situation, and of her responsibility under the contract which she had executed. She did not advise him

with respect to any misrepresentation. I do not feel that I could find that under the testimony, she advised him that any misrepresentation had been made. If the matter had stopped there and if there had then been a rescission of the contract, on the ground that the vendor had not understood what she had signed, I think I should have been obliged to have held that the minds of the parties had never met on the contract which was executed."

The error which we charge that the Vice-Chancellor fell into is in assuming that the contract which never existed could be ratified.

If a contract had been actually entered into but subject to rescission on the ground of fraud, then it could undoubtedly be ratified. However, if no actual contract had been completed, then it could not be ratified, and the Vice-Chancellor found that up to a certain point he would "have been obliged to hold that the minds of the parties had never met."

It would be possible for such a contract to be partially performed and yet be subject to cancellation. In the case of *Smith-Austermuhl Co. v. Jersey Railways Advertising Co.*, 89 N. J. Eq., page 12, it is held that where an advertising contract to run twelve months is later superseded by another contract to run for sixty months, procured through misrepresentation, that the term named was only twelve months, equity would reform or cancel contract, even though monthly installments for the first twelve months had been paid, as such payments would not affirm the contract as of a sixty months' term.

But even could this contract have been ratified, it is respectfully insisted that the conduct of the appellant did not constitute such a ratification.

It will be remembered that the appellant was not dissatisfied with the amount of the purchase price. The difficulty lay with the terms of payment. The contract was for \$13,700 and of this amount \$11,700 was to be raised by mortgages, an unusually large amount to raise on property of that value. The difficulty of raising that amount by mortgage can be seen immediately. Apparently \$3,900 of a third mortgage was to be raised (S. C., p. 67, line 1), there being two mortgages on the property aggregating \$7,800. Mrs. Higgins apparently was expecting that she would have to take back a mortgage herself of not over \$2,000 (S. C., p. 67, line 18). She was to receive \$2,000 and a \$2,000 mortgage, \$1,900 to be raised in some other manner. Apparently the Vice-Chancellor thought that her actions ratified the contract, but an examination of these actions will show that it was only an attempt on her part to see if the money could be raised in such a manner as to make the contract possible of performance. If this could be done, Mrs. Higgins would have been satisfied to carry it out. Her subsequent efforts, therefore, were not toward performance of the contract, but for the purpose of ascertaining whether or not its performance was within the bounds of possibility, in which event she might have been induced to enter into a new contract.

Let us examine these events. Subsequent to the signing of the agreement, she went to see her attorney, Mr. Berstecher, and there first learned what the contract really was. Mr. Berstecher's testimony (S. C., p. 71, line 28):

“When I explained to her the meaning of the clause regarding the mortgages she was very much surprised. She stated to me that all she was to take was a \$2,000 mortgage and I told her that that was not what she had agreed to do in the contract at all.”

At that time, Mr. Berstecher told her that he did not think she had to go through with the contract the way it was. She went around to several places to see if the money could be loaned, the Orange Building & Loan Association, the Wiss Building and Mr. Bianchi, of Orange (S. C., p. 47, line 23). Invariably she found that a mortgage of that amount could not be obtained on the property or that a large bonus would be necessary in order to secure it. Mrs. Higgins apparently had interviews with Mr. Seymour, the attorney for the complainants, in which the matter was thoroughly thrashed out. Mrs. Higgins says on her cross examination (S. C., p. 50, line 29) that after having a talk with Mr. Seymour, Mr. Seymour called up Mr. Berstecher at his office and that he then sent her back to Mr. Berstecher; that Mr. Berstecher then telephoned to Mr. Seymour and explained things to him. Then Mr. Seymour talked things over with Mrs. Higgins to see if the Iusos could not help raise the mortgages. Mrs. Higgins never did anything toward getting the mortgages except to see Mr. Yeomans of the Orange Building & Loan Association and the people mentioned in her testimony.

It is respectfully contended that these efforts to see if such a loan could not be procured, does not constitute ratification.

Respectfully submitted,

HOWE & DAVIS,
Of Counsel with Defendant.

[9669]

THE CHRONICLE PRESS, PRINTERS, ORANGE, N. J.

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