New Jersey Court of Errors and Appeals

Between GRACE RIESENBERGER, *Complainant-Appellant,* *and* RICHARD C. SHELTON, JR., *Defendant-Respondent.*	On appeal from final decree of the Chancellor.

APPELLANT'S BRIEF.

The final decree in Chancery, which is the subject of this appeal, was entered on November 9, 1915, in a suit wherein this appellant was complainant, and Richard C. Shelton, Jr., and J. W. Rufus Besson and George A. Berger as executors of the estate of Melissa A. Fonda, deceased, were defendants. The executors were made defendants *pro forma*, and the only real party defendant in interest is Richard C. Shelton, Jr.

The complainant is the only child, and the sole residuary devisee, of Melissa A. Fonda, deceased, and her bill was filed for the purpose of securing a decree that Richard C. Shelton, Jr., was and is a trustee for her as to certain real property, the legal title to which is vested in him, that he has no beneficial interest or estate therein, and that the full beneficial ownership is in equity the property of the complainant, and requiring Shelton to convey the legal title and deliver the possession thereof to her.

Statement of facts.

Melissa A. Fonda, now deceased, was a married woman, her husband's name being Martin Fonda. She lived separate and apart from her husband from 1909 until her death on December 28, 1914, not, however, under any order or decree of any Court. Her husband is still living. The complainant is the issue of this marriage.

In the summer of 1909, Mrs. Fonda was occupying, with her maid, the first floor of the two story and attic house known as 111 Shippen street, in the township of Weehawken, Hudson County, which property is the subject of this suit. The second floor and garret were occupied by the then owner of the property, one Adelheid Rippe, and her family. Mrs. Fonda was making arrangements to go to the country for the summer. She had previously met Shelton and had become interested in him. He was at this time in such poor health that he had been obliged to give up his employment in New York City, where he had had a situation in a wholesale silk establishment paying him $70.00 per month.

Mrs. Fonda, desiring to do something to improve his health, proposed to him that if he would go away with her to the country for the summer, for the purpose of regaining his health, she would pay all of his expenses, and in return he might render her such perfunctory services as writing letters and checks. Shelton was then, and still is, unmarried and with no one depending upon him. He was then 27 years of age, and Mrs. Fonda 64. Shelton was then living with his father and mother, a brother and sister, at 328 Palisade Avenue, in the Town of West Hoboken, Hudson County, which was 8 or 10 blocks away from Mrs. Fonda's place of residence at 111 Shippen Street, Weehawken.

Shelton accepted Mrs. Fonda's offer, and spent the summer with her. Upon their return to the city in the fall of that year, 1909, Shelton did not go back to business, but lived with his family in West Hoboken, and spent some part of almost every day with Mrs. Fonda at her place of residence in Weehawken. He says that he was at her beck and call all the time and that if he failed on any day to go to her she summoned him on the telephone. He did very little, if any, work for her. Such slight personal services as writing letters and checks seem to have been rendered, but she was not engaged in business, and there was but little of such work to be done.

Shelton does not claim that there was any new arrangement entered into by him with Mrs. Fonda, either at this, or at any subsequent time. The understanding had theretofore been, and now was, that she would pay his expenses, but no other consideration. The avowed purpose of the arrangement was to benefit his health by making it unnecessary for him to work for his living. Such small secretarial service as he performed was merely incidental and perfunctory. While no new agreement was made, nevertheless the effect of the existing arrangement was varied from this time on by his acceptance from her hands of valuable gifts of money and personal property.

These peculiar relations of Shelton with Mrs. Fonda continued until her death in December, 1914, without substantial change. In the Spring of 1912, Mrs. Fonda again desiring Shelton to go to the country with her for the summer, he again assented, on account, as he says, of the benefit which would accrue to his health, for at this time he says he was threatened with tuberculosis. Shelton testifies that he told Mrs. Fonda at this time that in the fall he would be obliged to take a position, to which he says she replied that she intended to buy a house for him. Mrs.

Fonda thereupon called on Shelton's mother, with whom she was very friendly, and said to her "I will buy the house at 111 Shippen street, if you will come down there to live; I want you to come; if you come I will buy the house for Richard; but if anything happens to Richard it will be yours; you will always have a home."

Upon Mrs. Shelton's consenting to this proposal, Mrs. Fonda arranged through George A. Berger (the same person who as executor is one of the defendants in this suit) that he negotiate for her the purchase of the house at 111 Shippen street. His negotiations were successful. Upon Mrs. Fonda's instructions, he entered into a contract with Adelheid Rippe on April 10, 1912, for the purchase of the property for a cash consideration of $10,200; and on May 1, 1912, in pursuance of the contract, the legal title passed to Berger by a deed absolute in form, Mrs. Fonda paying the consideration of $10,200. No money of Berger's and no money of Shelton's went into the property, and both Berger and Shelton knew all the facts in connection with the transaction which are here detailed. The purchase money was not paid to Berger, by Mrs. Fonda, and then in turn by him to Rippe. The fact is not, as the Court expressed it "she simply furnished Berger with the money to hold as her trustee" (p. 18 l. 19), or "Mrs. Fonda gave him the cash to pay for it." (p. 17 l. 1). There is no such evidence, and the bill alleges, and the answer admits, that Mrs. Fonda paid the purchase money herself, but procured the deed to be taken in the name of Berger (p. 2, l. 32; p. 9, l. 4).

Mrs. Fonda's instructions to Berger, prior to the purchase, were that Berger was to purchase it for her; and immediately after the purchase, she instructed Berger "to hold this property until she was ready to have it transferred to Richard Shelton."

Berger at once executed a deed in blank, which was left with Mr. Besson, the purpose of which was to vest the legal title in Mrs. Fonda in case of Berger's death. This blank deed was subsequently destroyed by Mr. Besson.

Berger continued to hold the legal title, pursuant to his instructions from Mrs. Fonda, from May 1, 1912. On June 6, 1912 she wrote him (Exhibit C-1):

> "Will you kindly write me * * * in regard to deed for property purchased for me. Would like same deeded to Richard C. Shelton, Jr., as soon as you can arrange to have same done."

Pursuant to this written direction, and on August 9, 1912, Berger executed a deed to Shelton for the property, the first deed, in blank, having been destroyed. The deed of August 9, 1912, was subsequently recorded and formally delivered, Shelton paying one dollar as consideration. The Vice Chancellor is mistaken in his observation that the letter of June 6 directed Berger "to put the deed to Shelton on record" (p. 17, l. 11). He confused it with the letter of July 27 (Exhibit D-4½).

During this interval from May 1, to September, 1912, Mrs. Fonda and Shelton were away together for the summer season. But on May 10, 1912 Shelton's family moved into the occupation of the upper two floors of the house 111 Shippen street, and have ever since continued to live there. Mrs. Fonda until her death continued to reside in the first floor of the house.

Up to December, 1913, no conversation had taken place as to how the property should be maintained. The Vice Chancellor is mistaken in saying that there had been an arrangement made, prior to May 10, 1912, concerning the manner of maintaining the property (p. 16, ll. 17-22). The testimony of Shelton himself (and there is

no other evidence) is that there was no such arrangement, or even any conversation on this subject, until Christmas of 1913 (p. 50 l. 22; p. 53, l. 3). Shelton had no money except what he was receiving from Mrs. Fonda in the form of gifts (p. 53 ll. 18-28). His parents were poor people (p. 54 l. 8). The only evidence that anything was ever said about the method of maintaining the property is Shelton's testimony, to the effect that about Christmas time, 1913, more than a year and a half after the purchase of the property by Mrs. Fonda, it was arranged between her and himself, at a conversation overheard by no one else, that she should pay the taxes, water and coal bills as her part of the running expenses of the house (p. 50 ll. 12-18). Previously all these expenses had been met by Mrs. Fonda (p. 49 ll. 4-18). Mrs. Shelton paid her son $20.00 per month by way of rent, and he claims to have used some of this money in and about maintaining the property. The total amount claimed by him to have been so paid, prior to Mrs. Fonda's death, is $142.95, an average of $4.50 per month during the period of his occupation prior to Mrs. Fonda's death (p. 49, l. 30 to p. 50, l. 10).

From 1909 until Mrs. Fonda's death in December, 1914 Shelton received a considerable amount of money and other personal property from her, in the form of gifts. As a Christmas present on one occasion he received $500 in cash (p. 53, l. 40).

Mrs. Fonda bought for him a piano at a cost of $1050. (p. 55 l. 2). On another occasion she gave him a diamond ring (p. 56 l. 3). He admits having, in addition, received amounts aggregating $200 a year in cash, and numerous gifts of clothing (p. 55, l. 9; p. 55, ll. 30-40). By her will, Shelton receives $2000 in cash (p. 70 l. 22).

On May 12, 1910, Mrs. Fonda had made a will by which she bequeathed to Shelton the sum of $10,000. On April 22, 1914, she made another

will by which Shelton was left the sum of $2,000, and the complainant was made residuary devisee. This latter will was Mrs. Fonda's last will, and was admitted to probate on January 8, 1915. It contained a power of sale in her executors as to any real estate of which she might die seized or possessed. There was no real estate other than the house at 111 Shippen street. Shelton continues to live there with his family and refuses to convey or to give up possession to complainant. The bill prays that he be decreed to be a trustee, holding the property in trust for the complainant, without interest in him, and that he be decreed to convey the same to the complainant, and to account to her for the rents thereof. The estate of Mrs. Fonda consists of personal property sufficient in amount to pay all debts and legacies without resort to the real estate in question.

A decree *pro confesso* was entered against Berger and Besson. Shelton answered. At the final hearing the complainant waived her prayer for accounting and for rents, and pressed her suit for the impressing of the trust upon the property.

Specification of grounds of appeal.

The final decree dismisses the bill and awards $300 counsel fee to defendant's (Shelton's) counsel as a part of the costs.

The whole of this decree is appealed from.

The ground of the appeal is that the Court should have adjudged and decreed that Shelton never acquired the beneficial ownership of the property, but only the naked legal title; that the beneficial estate was vested in Mrs. Fonda on May 1, 1912, continued in her until her death, and then passed to the complainant by virtue of the residuary clause of the will; and that the decree should therefore have followed the prayer of the bill, and should not have awarded costs or counsel fees to the defendant's solicitor and counsel.

BRIEF OF ARGUMENT.

POINT I.

The beneficial estate, or equitable fee, became vested in Mrs. Fonda upon her purchase of the property in Berger's name on May 1, 1912, by a resulting trust.

The first important question is,

Where was the beneficial estate on May 1, 1912?

It was not in Adelheid Rippe, for she had conveyed to the use of Berger, and had received full consideration. It was admittedly not in Berger. Hence, it must have been vested either in Mrs. Fonda or in Shelton.

The theory of complainant's bill is that on and after May 1, 1912, Berger held the property upon a resulting trust for Mrs. Fonda, because her money purchased the land, without any intent on her part to benefit the nominal purchaser; that the beneficial estate so vested in her was not divested during her lifetime; and that at her death her estate became vested in the complainant by virtue of the residuary devise in Mrs. Fonda's last will and testament.

Shelton's answer admits that Berger took the title subject to some trust, that Berger had no beneficial interest in himself, that Mrs. Fonda's money paid for the land, and that both Berger and Shelton had full knowledge of all the facts surrounding the purchase (p. 10, l. 18, & seq.).

Upon these admissions in the answer, if there were nothing more in the case, it is clear that Berger held the title subject to a resulting trust in Mrs. Fonda, based upon the fact that she furnished the purchase money without intent to benefit Berger.

In the leading case of *Dyer v. Dyer* (2 Cox, 92,

S. C. 1, Watk. Cop. 216) Lord Chief Baron Eyre in his judgment observes: "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others, jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or successive, results to the man who advances the purchase money; and it goes on a strict analogy to the rule of the common law, that, where a feoffment is made without consideration, the use results to the feoffor."

In *Baldwin v. Campfield,* 8 N. J. Eq. (4 Halst.) 891, this Court, through its President, Chancellor Williamson, observed (p. 892) that the trust there alleged resulted from the fact of the payment of the purchase money, and not from any parol agreement; and through Justice Elmer, who wrote a concurring opinion, that it was a well established doctrine in equity, that if a man buys land, in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who pays the consideration money.

In the case of *Botsford v. Burr,* 2 Johns. Ch. 405, Chancellor Kent observes (p. 414) that a resulting trust can arise only from the payment of the purchase money by the party setting up the trust; that the trust is founded on the actual payment of money, and on no other ground.

Mr. Justice Depue, in the case of *Cutler v. Tuttle,* in this Court, 19 N. J. Eq. (4 C. E. Gr.) 549, 558 says: "It is a settled principle, that where one person purchases property for a stranger, and the purchase money is paid by the stranger, or out of his funds, although the title is taken in the name of the person making the purchase, a trust results, and the land is held in trust for the party whose money is paid." The

same rule was followed, and Justice Depue's language quoted by Chancellor McGill in *Krauth v. Thiele,* 45 N. J. Eq., (18 Stew.) 407, 409, and by Vice Chancellor Backes (who does not, however, use the exact language) in *Yetman v. Hedgeman,* 82 N. J. Eq. (12 Buch.) 221, 223.

The foundation of the resulting trust is the payment of the purchase money. It arises solely out of the circumstance that the moneys of the real and not of the nominal purchaser formed at the time the consideration of the purchase and became converted into the land. The trust results from the fact that the purchase is made with the proper moneys of the *cestui que trust* and the deed taken in the name of another. It is founded on the actual payment of money and on no other ground.

From the admissions of the answer alone then, there was a resulting trust in Mrs. Fonda, and this conclusion is strengthened by the evidence, documentary and parol, produced at the hearing.

The first writing proved was a deed made and executed by Berger and his wife immediately upon taking title to the property on May 1, 1912. This deed did not contain the name of the grantee, but was delivered to Mr. Besson, Mrs. Fonda's attorney, in order that in case of Berger's death "it would go to Mrs. Fonda" (p. 30, l. 3). The deed was subsequently destroyed, but its contents as a lost document were proved (p. 35, l. 25). It was intended by Berger to constitute a declaration of trust, in Mrs. Fonda's favor (p. 30, l. 3), and was valid as such in all respects save that the name of the grantee was wanting.

The next writing proved was Mrs. Fonda's letter to Berger of June 6, 1912, (Exhibit C-1,) the relevant portion of which is: "Will you kindly write me * * * in regard to deed for property purchased for me. Would like same deeded to Richard C. Shelton, Jr., * * * " (p. 61 l. 10).

Here the trust is declared by the *cestui que trust*, specifically and clearly, in the words *"property purchased for me."* Since, admittedly, Berger held upon some trust, the letter of June 6, 1912, shows with certainty that the trust was for Mrs. Fonda.

There were next proved other letters of Berger to Mrs. Fonda, of Mrs. Fonda to Berger, and of Mrs. Fonda to Besson, concerning the property, (Exhibits D-4½, D-5½, D-6½, D-9: Testimony p. 35 ll. 13-28) which show that the trust was solely for Mrs. Fonda, that her directions with regard to it were controlling, and that no other person was recognized as having any interest therein or right to direct the disposition thereof. Shelton himself recognized Mrs. Fonda's sole ownership and power of disposition, for as her agent he wrote letters to Berger, one of which he signed (Exhibit D-9) and two of which she signed, (Exhibits C-1, D-4½) containing directions regarding the land, and at no time assumed, except as her agent, to give any directions himself. While the legal title remained in Berger, Mrs. Fonda had sole control of the property. After the conveyance to Shelton on August 9, there was no change in the relative situation of the parties. It is difficult to see how any person in her position could have more consistently, at all times, controlled the property. There is therefore no basis for the Vice Chancellor's finding that "At no time did Mrs. Fonda ever exercise any dominion over the Shelton property" (p. 18, l 14).

In addition to this documentary proof, the defendant put Berger on the stand as his witness. Berger testified (as of a time prior to May 1, 1912). "She (Mrs. Fonda) asked me if I would purchase it *for her* and I said I would," (p. 26, l. 32) and (as of a time subsequent to the purchase) "Mrs. Fonda told me to hold this property

until she was ready to have it transferred to Richard Shelton" (p. 28, l. 12). There was never any doubt in Berger's mind that his trusteeship was for Mrs. Fonda. He executed the blank deed for the very purpose, as he testifies, of vesting the legal title in Mrs. Fonda in case of his (Berger's) death (p. 30 l. 3). In view of these facts, there is no foundation for the Vice Chancellor's conclusion that "Berger realized that Shelton was his cestui que trust" (p. 18, l. 21).

Equally inaccurate is the Vice Chancellor's paraphrase of Berger's testimony in the words:

"His story of the purchase of the property is that Mrs. Fonda told him that she desired to buy the house at 111 Shippen street for Richard Shelton." (p. 16, l. 31). ~~Shelton's~~ Berger's actual testimony was "She told me she desired to buy a "house at 111 Shippen street, Weehawken,—and "she asked me *if I would buy it for her,* * * * "She said she was going to buy the house *to give "it* to Richard Shelton" (p. 26, ll. 29-38).

There can be no doubt, from this evidence, that the intent of the parties was for Berger to hold the title in trust for Mrs. Fonda, until and unless she should subsequently determine to give it to Shelton. The manifestation and proof of the trust, produced at the hearing, though it is sufficient to satisfy the Statute of Frauds, does not relate back to change the resulting trust into an express trust.

Warren v. Tynan, 54 N. J. Eq. (9 Dick.) 402;
Adams v. Carey, 35 N. J. Eq. (8 Stew.) 334.

But in spite of the admissions of fact in Shelton's answer, and in spite of the uncontradicted evidence, Shelton claims that there was no resulting trust in Mrs. Fonda, but that Berger held, from the beginning, upon a trust for him. In

support of this claim, Shelton sought to show that Mrs. Fonda intended, when she bought the property, to make a gift of it to him. For this purpose Shelton adduced parol proof, to the admission of which objection was duly made.

1. All evidence offered by Shelton for the purpose of proving an intent, on Mrs. Fonda's part, on May 1, 1912, and prior thereto, to benefit him, is irrelevant and incompetent, and should not be considered.

The basis of the offer of this testimony is the rule that resulting trusts are saved and left as they were before the Statute of Frauds, and that since a bare declaration by parol before the act would prevent a resulting trust, so now it is sufficient in order to defeat a resulting trust, to adduce parol proof showing an intent incompatible with the resulting trust.

But this rule has no application in favor of any person except the nominal purchaser. The sole question in an inquiry as to the existence of a resulting trust is whether the person advancing the purchase moneys intended that the nominal purchaser should be benefitted.

Chancellor Kent, in the case of *Botsford v. Burr,* 2 Johns. Ch., 405, 409, following the cases of *Bartlett v. Pickersgill,* 4 East. 577, and *Hughes v. Moore,* 7 Cranch., (11 U. S.) 176, holds that to permit parol proof of an intent to benefit a third party would be to overturn the Statute of Frauds.

In *Baldwin v. Campfield,* 8 N. J. Eq. (4 Halst.) 891, 892, it was held that parol proof offered to show an intent to benefit a third person was wholly inadmissible for any other purpose than to show who furnished the purchase money.

Shelton having in his pleading admitted that Mrs. Fonda furnished the purchase money, without intent to benefit Berger, it follows that there was a resulting trust in her, whether or not she

intended to benefit a third person. The parol evidence was therefore inadmissible because irrelevant (there being no issue) and incompetent (because not in writing as required by the Statute of Frauds).

Rejecting the parol evidence, there is no proof in the case that Mrs. Fonda, on and prior to May 1, 1912, intended a result other than the result which the law implies where one furnishes the purchase money and the title is taken in the name of a stranger, admittedly without interest.

II. Shelton secured no estate by the resulting trust on May 1, 1912.

Shelton claims a trust of some sort in his favor as of May 1, 1912.

Assuming that Mrs. Fonda intended such a situation, there could have been no *resulting* trust (as distinguished from an express trust) in Shelton's favor:

1. Because no money of Shelton's went into the land.

This fact is admitted by the pleadings.

The rule of law is that "one who sets up a resulting trust in himself, the conveyance being to another, must show that the land was bought with his money, and not merely that the purchase was made for his benefit or on his account."

Ostheimer v. Single, 73 N. J. Eq. (3 Buch.) 539, 542;
Botsford v. Burr, 2 Johns. Ch. 405;
Bartlett v. Pickersgill, 4 East. 578 (note);
Jackmann v. Ringland, 4 W. & S. 149;
Baldwin v. Campfield, 8 N. J. Eq. (4 Halst.) 891, 892;
Washburn: Real Prop. Vol. 11 (Star pages) 137, 176.

2. Because Shelton bases his claim upon alleg-

ed *express directions or declarations* by Mrs. Fonda, made on or before May 1, 1912.

The whole gist of Shelton's claim is that Mrs. Fonda expressed a desire that he should have the property, and an intent to give it to him. But this fact, if true, would prevent a trust from *resulting* to Shelton.

A trust never results where there is an express direction, even by parol; for resulting trusts, though saved by the Statute of Frauds, are only saved and left as they were before the act; and a bare declaration by parol, before the act, would prevent any resulting trust.

Baldwin v. Campfield, 8 N. J. Eq., (4 Halst.) 891;
Bellasis v. Compton, 2 Vern., 294;
Bacon: Ab. V. 389.

Such is the true application of the rule, urged by Shelton as the basis for his offer of parol testimony to defeat the resulting trust in Mrs. Fonda.

3. Because a benefit can accrue to a *third* party only by means of an *express* trust.

Baldwin v. Campfield, 8 N. J. Eq., (4 Halst.) 891;
Botsford v. Burr, 2 Johns. Ch., 405, 409;
Bartlett v. Pickersgill, 4 East. 577;
Lewis v. Lewis, 2 Rep. in Chanc., 77;
Jackmann v. Ringland, 4 W. & S., 149;
Hughes v. Moore, 11 U. S. (7 Cranch.) 176;
Caken v. Richardson, 7 Gray, 369;
Walker v. Locke, 5 Cush., 90;
Gen'l Conv. v. Smith, 52 Ind. App., 136 (1912);
Rooker v. Rooker, 75 Ind., 571;
2 Washburn; R. P., 137, 176;
1 Spence; Eq. Jur., 451;
Browne; Stat. Fr., Sec. 83, seq.;

Reporter's Note to *Botsford v. Burr* in Law Ed. of 2 Johns. Ch., 405.

But Shelton claims also that, failing a resulting trust in him, there was an express trust in his favor on May 1, 1912. This claim he bases solely upon parol testimony (which we have objected to as inadmissible), by which he argues that Mrs. Fonda is proved to have intended, on and prior to that date, that Berger should hold the property for Shelton's benefit, though he should not convey it to Shelton until directed by her. In reply to these contentions, we urge:

III. There was no express trust in Shelton's favor on May 1, 1912.

1. Because such was not Mrs. Fonda's intention.

The evidence shows that Mrs. Fonda intended the purchase primarily, or at least largely, for her own benefit. On May 1, 1912, and prior thereto, her intention regarding Shelton was indefinite. She wanted him to live near her, instead of eight or ten blocks away, and it is clear enough that she desired to give Shelton and his family the *use* of a part of the house. But as to giving him any *estate* in the land, she had not then determined either the quantum of the estate, or the time the proposed gift should take effect.

She had not determined what sort of an estate she would give him. Whatever it was to be, it must be subject to a life estate in her (p. 41, l. 10; p. 42, l. 40) and was to be limited so as to provide for his mother after his death (p. 58, l. 31). What Mrs. Fonda at this time had under consideration, as a gift which she might at some future time, perhaps, make to Shelton, was nothing more than an estate for life, subject to an antecedent estate for life in herself.

Whatever the character or quantum of the

estate was to be, it was not to vest at once, but only upon her pleasure. She expected at some future time to make a gift, but she was not yet ready to make it, and had not determined how much of an estate she would give Shelton, if she should determine to give him anything. Berger says: "She asked me if I would purchase it for her" (p. 26, l. 33), and "told me to hold this property *until she was ready to* have it transferred to Richard Shelton (p. 28, l. 13). On June 6, she wrote Berger characterizing the property as having been "purchased for me." (Exhibit C1.)

The sole purpose of the trusteeship of Berger was, as Berger testifies, to enable Mrs. Fonda to purchase the property at a lower price than she otherwise could (p. 26, l. 30). It is not claimed that the trusteeship had any significance beyond this. The inference is that if Mrs. Fonda could have purchased economically herself, she would not have had a trustee, but would have taken title in her own name. There is absolutely no foundation in the evidence for the Court's conclusion that "Her reasons for negotiating through Berger are quite apparent. It was her desire evidently to arrange it in such a manner as to prevent future complications for Shelton, so that he might be undisturbed in his possession of the property" (p. 18, l. 23). The pleadings alone, without reference to the testimony, exclude such an inference (p. 11, l. 22).

From a careful consideration of all the evidence, the most reasonable conclusion is that Mrs. Fonda's purpose was to make a gift which should take effect only at her death. She intended to live on the premises for the rest of her life, and to keep to herself the dominion and management of the property. Both of these intentions were carried out. She had previously made a will leaving $10,000. to Shelton, but shortly before her death she reduced the legacy to $2,000. It seems

clear that whatever gift she desired to make to Shelton beyond the bare use of part of the property, was not intended to take effect during her lifetime. If such was her intent, the gift was, of course, invalid because not made with the formalities required by the Statute of Wills.

However, this may be, one fact stands out beyond any question from the evidence, and that is that on May 1, 1912, Mrs. Fonda had not yet made up her mind to give Shelton any interest in the land, and that not until June 6 did she make up her mind.

Hence, Shelton had no interest as of May 1, 1912. Until Mrs. Fonda should positively make up her mind to give him something, and should determine exactly what to give him, and should then do some act intended to carry out her purpose, there was not even an imperfect trust for Shelton's benefit.

Shelton does not claim any more than a *voluntary* trust. He has no equity which as of May 1, 1912 can be predicated upon consideration.

Shelton's witness, Berger, testifies that Mrs. Fonda said she was going "to *give* it to Richard Shelton" (p. 26, l. 36), and that "she had *given* it to Mr. Shelton *for a present* (p. 32, l. 27). Shelton's witness, Callen, testified that Mrs. Fonda told her "she had bought it and *given* it to Richard Shelton," (p. 40, l. 3), and Shelton himself said that it was Mrs. Fonda's intention to *give* it to him (p. 47, l. 23).

The Vice Chancellor had no basis in the testimony to support the conclusion that "what Mrs. Fonda did was to pay Shelton for his services that he had rendered and was to render in the future" (p. 18, l. 8).

And the Court is mistaken in saying that "Witnesses were produced to show that Mrs. Fonda had said she had purchased the property for Shelton and the reason she did it was that she had

never paid him any salary and she wanted to give him something for his services" (p. 17, l. 23). The only witness who testified to such a declaration, was the defendant's witness Mrs. Callen, and what she said was that Mrs. Fonda "said she had never paid him a salary, and she wanted to *give him something*" (p. 40, l. 13). Not, it will be noted, *"for his services."*

Shelton's arrangement with Mrs. Fonda had been one made primarily for the benefit of his health, to enable him to spend his summer in the country, and to give up his position in New York (p. 43, l. 30 to p. 44, l. 3). Beyond the payment of his expenses, there was to be no other compensation (p. 44, l. 13). On the other hand, the services rendered were to be merely perfunctory (p. 54, l. 20.) Clearly, neither party considered them in the light of services at all. Mrs. Fonda wanted to be a "mother" to Shelton, and to give him the opportunity to get well. The arrangement first made continued only until the fall of 1909. Shelton's health was not then substantially improved. Even in 1912 he was threatened with tuberculosis. Naturally, he did not go back to business. Mrs. Fonda desired his society, and it is natural that he should have done such little things for her as there were to do, while he spent part of almost every day in her society. There was no arrangement made to compensate him (p. 45, l. 21), for the natural reason that neither party considered what he was doing in the light of "services." This explains why she was continually giving him money and clothing, and why in the spring of 1912, Mrs. Fonda asked him if he would spend the summer of that year with her (p. 46, l. 15). Had he been in her employ, such a question would not have been asked.

Shelton consented, because "it would benefit my health" (p. 46 l. 20)—not because he expected compensation.

Such moneys and personal property as he received from her were accepted not as compensation under an agreement, but purely as gifts.

Shelton says that in the Spring of 1912, he told her that in the fall he would have to seek a position, and that she then said she intended buying a house for him. But he does not claim that it was on account of this promise that he did not seek another position when fall came (p. 46, l. 20). On the contrary, he testifies that there was no new arrangement about compensation, and that he continued until her death to render the same services upon the same arrangement that was first made (p. 44, l. 40).

These "services" consisted in writing checks and letters (p. 54, l. 24). She had no business of her own, but lived upon the interest from her invested capital (p. 53, l. 36). She was a woman of no particular education (p. 54, l. 32). The services were merely nominal. What she desired was Shelton's society. Shelton testified:

"She (Mrs. Fonda) made an offer to go with her for the summer (of 1909), with the idea that I would regain my health * * * and also render services to her in whatever way she might need me, writing checks and letters, &c." (p. 44, ll. 1-8).

Shelton's mother testified:

"She (Mrs. Fonda) called at the house and told me that she would like to have him (Shelton) go with her, and she said to me at the time —she called me 'Mother'—she said, 'Now, Mother, I would like to take him with me; cannot I be a mother to him, too?' She said, 'I consider him my son'" (p. 57, l. 35).

Mrs. Fonda would not even have purchased the property if she had not first been certain that Shelton would *live* there, where she could have him with her night and day (p. 58, l. 30).

The Vice Chancellor's conclusions, therefore,

that Mrs. Fonda "engaged him to act as secretary for her" (p. 15, l. 38), that "he practically attended to all her business" (p. 16, l. 1), that "he accompanied her as secretary on her trips during the summer" (p. 16, l. 3), are not sustained by the evidence. Admittedly, her legal business was transacted by Besson (p. 35, l. 12), and her financial business by Berger (p. 26, l. 16). She was not in business herself. The only checks to be drawn were to pay for ordinary living expenses and the only letters to write were to her friends. She had no occasion to use a "secretary."

Mrs. Fonda was not hiring a secretary or "general factotum," but was securing the society of a boy for whom she professed a motherly feeling, and Shelton seems to have spent a portion of nearly every day in her company.

His position in New York had paid him only $70.00 per month (p. 53, l. 12). His health required his relinquishing even that (p. 43, l. 36). His earning capacity, therefore, was less than $70. per month. His arrangement with Mrs. Fonda enabled him to live an inactive life without expense, and her gifts to him amounted to more than he could have earned even if he had been well.

He paid nothing for the land. As of May 1, 1912 there was admittedly no consideration.

If there was an express trust in Shelton's favor then, it must have been created subsequently. As of May 1, 1912, there was no such trust, because Shelton was a volunteer, and Mrs. Fonda had no intention as of that time that he should benefit at once, nor had she then determined how much, or when, or in what manner he should benefit, nor had she then done a single act with the purpose of carrying into effect any intent to benefit him.

If the parol evidence of intent is admissible (and we submit, for reasons already stated, that it is not), such is its effect.

2. But even if Mrs. Fonda had intended Shelton to have a present immediate estate, she did no act designed to carry into effect such intent. The investiture of Berger with the legal title was merely for convenience in purchasing the land. It is not claimed that Mrs. Fonda intended to or in fact did put the property out of her power and control by that act. Not until June 6, 1912 was there any act whatever designed to effect a transfer of interest to Shelton. As of May 1, 1912, Shelton can claim no trust or interest in himself, in the absence of any tangible act by Mrs. Fonda, even if it be conceded that her intent was to benefit him, and that that intent was sufficiently definite, certain and positive. From May 1 to June 6, 1912 there was *locus penitentiae* during which there was no execution of the alleged intent—during which Mrs. Fonda might have changed her mind (if, indeed, she had made it up), and during which, had she died, Shelton could not have recovered any estate in the land against the trustee or against her devisee.

Landon v. Hutton, 50 N. J. Eq., (5 Dick.,) 500.
2 Kent Com. 439.
Cotteen v. Missing, 1 Madd., 176;
Autrobus v. Smith, 12 Ves. 39;
Edwards v. Jones, I My. & Cr., 226.

We do not understand that Shelton claims by gift, as distinguished from the creation of a trust in his favor. His theory is that Berger was constituted a trustee for him. It is scarcely necessary to observe that there could be no gift without a contemporaneous transfer, as well as intent, &c.

Matthews v. Hoagland, 48 N. J. Eq., (3 Dick.,) 455;
Dilts v. Stevenson, 17 N. J. Eq., (2 C. E. Gr.), 407;
2 Washburn: R. P., 102;
12 L. R. A. N. S., 547, note.

3. Because it would be to permit a married woman to charge her separate estate, without a corresponding benefit.

We have pointed out that Shelton does not claim that there was any consideration moving from him, but that the alleged trust was purely by way of gift to him. During the *locus penitentiae* (until June 6, 1912) he had no interest. He could not during that interval have *required* any act to be done to clothe him with an estate.

But had his claim been founded upon a definite contract, so as to give him the right, against a person *sui juris,* to require the doing of such an act, still as against Mrs. Fonda, a *feme covert,* he could not have asserted such an equity unless there had also been a valuable consideration moving to her.

In the words of Chief Justice BEASLEY:

> "To the extent the feme does any act which enables her to use or enjoy her separate estate, the principles of equity will validate such act, but beyond this limit she is not discovert, and cannot bind herself or her possessions."
>
> *Perkins v. Elliott,* 23 N. J. Eq., (8 C. E. Gr.) 534.

The Vice Chancellor's conclusion that "Her estate was benefited by the step she took" (p. 18, l. 10) was based upon the assumption, not warranted by the testimony, that "what Mrs. Fonda did was to pay Shelton for his services that he had rendered and was to render in the future" (p. 18, l. 9).

4. Even upon Shelton's theory that an express trust was created in his favor on May 1, 1912, still there was an *antecedent* estate in Mrs. Fonda.

If a trust existed in Shelton's favor on May 1, 1912, it was a trust created by Mrs. Fonda. To have created it, she must have been vested with the beneficial estate.

An express trust cannot be created or declared by one who has no estate in the land.

Washburn: Real Property, Vol. II., p. 195, Section 12; p. 114, Section 8;
Willis: Trusts—55;
I. Cruise Dig., 353;
Tud. Lead. Cas., 259;
Crop v. Norton, 2 Atk., 76;
Merrill v. Brown, 12 Pick., 220;
Galliers v. Moss, 9 B. & C., 267;
39 Cyc., 35.

Therefore, even had Mrs. Fonda's intent on May 1, 1912, been to immediately invest Shelton with the full and complete equitable fee in the premises, that intent could have become operative only upon an antecedent equitable fee in her.

That the alleged trust in his favor was *created by Mrs. Fonda,* is the very basis of Shelton's argument, and it necessarily postulates an antecedent estate in her, at least as large as the trust estate alleged to have come to him.

For these reasons, we claim that on May 1, 1912, there was vested in Mrs. Fonda an estate in the land, an estate full and complete, lacking only the bare legal title to render it an estate in fee simple absolute. The fact that she paid the purchase moneys and took title in Berger's name without intent to benefit him, was admitted by the pleadings, and there was consequently no issue to which parol testimony of intent was relevant. Excluding such parol testimony, there was a resulting trust in Mrs. Fonda; but even considering the parol evidence in this connection, it is not shown that she had any intention that Shelton should at once take any estate, nor is it shown, even if she had such intent, that she did or attempted to do any act whatever calculated to give such intent validity and effect.

POINT II.

The equitable estate in Mrs. Fonda was not divested during her lifetime.

The defendant insists that Mrs. Fonda created a trust in his favor, as is shown (he argues) by the parol evidence of her intention prior to and at the time of the purchase; that the direction of June 6, 1912 is evidence of the creation of such a trust; and that the trust was executed by Berger on August 9 by his conveyance to Shelton.

We have already shown, in Point I, that there was no trust in Shelton's favor, prior to or upon the purchase of the land by Mrs. Fonda on May 1, 1912. Does the written direction of June 6 amount to the creation of a trust?

A person *sui juris* in Mrs. Fonda's position might doubtless have aliened the beneficial estate, in such manner as in effect to create a new trust, by executing a grant of the equitable estate to a new trustee.

Sloane v. Cadogan, Sug. Vend. & P. Append;
Kekewich v. Manning, 1 De G. M. & G. p. 188;
Voyle v. Hughes, 2 Sm. & Gif., 18;
Lambe v. Orton, 1 Dr. & Sm., 125;
Gilbert v. Orton, 2 H. & M., 110;
Woodford v. Charnley, 2 Beav., 99;
Donaldson v. Donaldson, 1 Kay, 711.

And where the owner of the equitable estate has been content with the old trustees, and instead of granting the equitable estate to new trustees, has directed the old trustees to stand seized upon the new trusts, it has been considered entirely within the same principle; the direction amounts to a grant or assignment.

Rycroft v. Christy, 3 Beav., 238;
M'Fadden v. Jenkyns, 1 Hare, 458;
Lambe v. Orton, 1 Dr. & Sm., 125;

Cases where the equitable estate is simply assigned or granted direct to a stranger for the stranger's own benefit, without the intervention of a trustee, are likewise held to be within the principle of *Sloane v. Cadogan.*

Cotteen v. Missing, 1 Mad., 176;
Collinson v. Pattrick, 2 Keen, 123;
Wilcocks v. Hannyngton, 5 Ir. Ch. Rep., 38;
Gilbert v. Overton, 2 H. & M., 110;

and see *Godsal v. Webb,* 2 Keen, 99.

The principle is that it is competent for the *cestui que trust* to deal in equity with the trust estate, in the same manner as at law he might deal with the legal estate, to wit, by a grant—or in the case of a trust of personal property, by an assignment.

Pomeroy: Eq. Jur., Section 989.

He cannot properly be said to *create* a trust, for a trust as to the whole equitable fee already exists. There has been a complete severance of the legal from the equitable titles, so that there is left no legal fee to support a second trust. To consider the *cestui que trust* competent to create another trust, in the strict sense of the word "create" would be to ignore the fourth section of the Statute of Frauds, for if that section does not relate to transactions of this sort, it is without meaning.

It is upon this principle that it is held that no one may *create* a trust who has not the *legal* estate in the lands, for his act is the source or origin of the two estates which flow on afterwards, independent of each other in point of

ownership, until they merge by being again united in one person.

> Washburn: R. P. Bk., II, p. 195, Section 12;
> Willis, Trusts, 55;
> *Crop v. Norton,* 2 Atk., 76.

To say, then, that Mrs. Fonda attempted to *create a trust* in Shelton is inaccurate. What she attempted to do was to grant the beneficial estate to him.

The distinction is important. Much confusion has arisen in the cases by failing to carefully preserve it. Said Sir John Stuart in *Voyle v. Hughes* (2 Sm. & Gif., 18):

> "As to treating an assignment by deed as a declaration of trust, or refusing to it any operation because it cannot be properly treated as a declaration of trust, there seems to be no legitimate ground for such an argument. If a deed of actual assignment of an equitable interest has any operation in equity as divesting the assignor of his equitable right, it is an operation no more in the nature of declaring a trust than any other actual conveyance of any equitable estate or interest in real or personal property."

The transaction does not bear any of the ear marks of an attempt to *create* a trust. Mrs. Fonda bought in Berger's name, not for the purpose of constituting him trustee for another, but for the admitted purpose of purchasing cheaper. All parties thereafter, until June 6, 1912, recognized her as the real owner. Her direction of June 6 was not a direction to hold for another, but to *convey to another.* Had Mrs. Fonda been *sui juris,* and had the direction of June 6, 1912 been formally unexceptionable, the result of Berger's conveyance to Shelton in obedience to that mandate would have been to *execute the existing*

trust, as modified by the assignment, and not to accept and carry out a new trust.

In a very similar case, which involved a trust of personal property, it was held that a letter from the *cestui que trust* to the trustee directing him to pay certain money to a third person, was an *assignment* and not the creation of a new trust.

Lambe v. Orton, 1 Dr. & Sm., 125;
(Sir R. T. Kindersley, V. C.).

The direction of June 6, then, must be regarded as an attempt by Mrs. Fonda to convey her equitable estate to Shelton.

A. That attempted conveyance was ineffective, because the instrument of conveyance (the letter of June 6) was not a sufficient "grant" under the statute of frauds to pass any estate.

The Statute of Frauds provides:

> "Section 4—That all grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or by his or her last will in writing, or else shall be utterly void and of no effect."

Comp. Stat. 2612:

This section is in marked contrast to the preceding section of the Statute, which relates to the proof of trusts, and which provides "that all declarations and creations of trust or confidence * * * shall be *manifested and proved* by some writing, etc."

Under the third section, it is sufficient if the terms of the trust, its subject and object, be indicated informally by a signed writing or series of writings. But under the fourth section, the writing is itself the constitutive thing. It is not evidence of some other fact, but is itself the fact.

The statutory requirement is that the fact itself shall be in writing—not merely evidenced by a writing.

Wigmore: Evidence—Sections 2454, 2456.
II Washburn: R. P. 192—Section 5.

The provisions of Section 4 (Section 9 of the English Statute) refer to the estate of the *cestui que trust.*

Jerdein v. Bright, 2 J. & H., 325;
Darling v. Butler, 45 Fed., 332; 10 L. R. A., 469;
Morgart v. Smouse, 103 Md., 463, 63 Atl., 1070;
Greenleaf: Cruise: R. P., Tit. 12, Ch. 2. Section 6;
Pomeroy, Eq. Jur. Sections 989, 1006;
Encyc. Laws of England (Sweet & Maxwell). 2d. Ed., page 269;
20 Cyc. 221.

Is the direction of June 6 a "grant" within the requirements of Section 4? It contains no words of grant, and no words to show an intent to vest anything but the legal title in Shelton. It is entirely consistent with a desire by Mrs. Fonda merely to change trustees. Words of consideration are absent. These missing elements of a grant are not to be supplied by parol. Either the direction is in itself a grant, or it is "utterly void and of no effect".

Trust estates are alienable in the same manner as legal estates, and in construing the limitations of a trust, courts of equity adopt the rules of law applicable to legal estates.

Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689, 695;
Brown v. Brown, 82 N. J. Eq. (12 Buch.), 40, 41;

Addlington v. Cann, 3 Atk., 141, 151;
Pomeroy: Eq. Jur.—Section 989;
Greenleaf; Cruise: R. P., Tit. 12, Ch. 2, Section 8;
Bacon: Ab. "Uses & Trusts", 387, 403;
Story: Eq. Jur. Vol. 1. Section 177;
Perry: Trusts—Vol. 2. Section 656;
Lewin; Trusts—746, Section 10, 748, Section 17.

The rules of law, applicable to the granting of legal estates in New Jersey, as now simplified by the Conveyancing Act (Comp. Stat. 1570), require that every instrument, to operate as a grant, shall contain granting words, and words of consideration.

The direction of June 6, 1912 is not a sufficient "grant" under the Statute of Frauds, because it lacks granting words, words of consideration, and words showing an intent to vest a beneficial estate in Shelton. The letter cannot be aided by parol proof, and there is no other proof in writing which tends in any degree to supply the missing essential elements.

But the defendant argues that if the trust estate in Mrs. Fonda arose by implication of law from the fact that her money paid for the property (such resulting trusts being excepted by Section 3 of the Statute of Frauds), Mrs. Fonda's estate might have been granted by parol.

In making this argument, Shelton necessarily admits that there was a resulting trust in Mrs. Fonda, which was what we undertook to prove as the first point in this brief. But though the admission is welcome, the argument which he bases upon it is unsound.

Following *Botsford v. Burr* (2 Johns. Ch. 405),

Warren v. Tynan (54 N. J. Eq. (9 Dick.) 402), is authority for the rule that a resulting trust may be "rebutted, put down, or discharged by parol". In that case, by a new consideration, the relationship of the original parties to the transaction was changed, and the new consideration was allowed to be shown by parol. The inquiry is always as to the ownership of the purchase moneys, and changes in the situation of the original parties by which the ownership of the purchase moneys is changed are upon this theory allowed to be shown by parol.

The *rationale* of this rule lies in the doctrine of abandonment, or release.

15 Am. & Eng. Encyc., 1208 (2d Edition) & cases;
1 Greenleaf: Evidence, 302;
2 Story: Eq. Jur., 770;
Cumming v. Arnold, 3 Met., 494;
Gorrell v. Alspaugh, 120 N. C., 362; 27 S. E., 85.

It has never been extended beyond the question of the ownership of the purchase money, or so as to include an inquiry as to a third person's rights. To so enlarge the rule would, in the words of Chancellor Kent in *Botsford v. Burr,* "be to overturn the Statute of Frauds," for the fourth section contains no exception with respect to implied trusts.

But whether the transaction amounted to an attempted grant or to an attempted creation of a trust; and if the latter, whether it be considered that such attempted trust was created on June 6 or prior thereto, there is one element in this case absolutely dispositive of Shelton's claims:

B. Mrs. Fonda was disabled by coverture to divest herself of any estate in the land, except by an instrument in writing, separately acknowledged by her.

Whatever theory may be invoked to supply the means of carrying out her attempt to clothe Shelton with a beneficial interest in the land, in any case she was attempting to act in a manner forbidden to her, the legal consequence of which was a complete nullity.

We have referred above to the rule that no one can declare a trust who has not some estate in the land. The declaration of a trust is as much the alienation of an estate as a grant of it. In the words of Lord Langdale, M. R., in *Collinson v. Patrick,* 2 Keen 123: "A declaration of trust is considered in a Court of Equity as equivalent to a transfer of the legal interest in a Court of Law". And so, where the right to control realty is limited, the right to create a trust is limited to the same extent.

Beach: Trusts & Trustees, Sections 5, 10;
Underhill: Trusts & Trustees, Section 91;
Bacon: Uses, Section 66;
1 Lewin: Trusts, Section 21;
1 Perry: Trusts, Sections 28, 49.

The Court of Equity will apply the same rules to the alienation of equitable estates as does the Court of Law to the alienation of legal estates. And with respect to the disability of a married woman, the same statutory requirements obtain in equity as at law.

Armstrong v. Ross, 20 N. J. Eq. (5 C. E. Gr.), 109, 112;

Cushing v. Blake, 30 N. J. Eq. (3 Stew.), 689, 695;
Brown v. Brown, 82 N. J. Eq. (12 Buch.), 40, 41;
(and authorities previously cited).

At the common law, the married woman's disability to alien her property, real or personal, was absolute.

Butler v. Rosenblath, 42 N. J. Eq. (15 Stew.), 651;
Armstrong v. Ross, 20 N. J. Eq. (5 C. E. Gr.), 109;
Peake v. La Bow, 21 N. J. Eq. (6 C. E. Gr.), 282;
Hopper v. Demarest, 21 N. J. L. (1 Zab.), 525;
Johnson v. Parker, 27 N. J. L. (3 Dutch.), 239;
Wilson v. King, 23 N. J. Eq. (8 C. E. Gr.), 150, 155;
22 L. R. A., 780 note;
21 Cyc. 1328, 1331, 1344, 1345.

In equity, she was allowed at first to alien her property, as an incident to her right of enjoyment, but later the right to alien was taken away.

Perkins v. Elliott, 23 N. J. Eq. (8 C. E. Gr.) 526.

The statutes provide a method by which married women may alien their separate real estate. Unless the statutory method be strictly followed, the attempted alienation is void and of no effect.

Moore v. Rake, 26 N. J. L. (2 Dutch.), 574, 578;
Marsh v. Mitchell, 26 N. J. Eq. (11 C. E. Gr.), 497, 499;
(Aff'd. 27 N. J. Eq., 631).

The legislation in New Jersey is contained in the Married Women's Act of 1852, with its amendments and supplements (Comp. Stat. 3222) and in the Conveyancing Act of 1746 and 1799, together with its amendments and supplements (Comp. Stat. 1532). Section 39 of the Conveyancing Act was amended by P. L. 1912, p. 158; and Section 21 of the same act was amended by P. L. 1913, page 346, and by P. L. 1914, page 306.

I. The Married Women's Act changed the status of the married woman by giving her the use and enjoyment of her separate property, but it did not legislate upon her disability to alien that property.

Armstrong v. Ross, 20 N. J. Eq. (5 C. E. Gr.), 109;
Moore v. Rake, 26 N. J. L. (2 Dutch.), 574;
Naylor v. Field, 29 N. J. L. (5 Dutch.), 287;
Butler v. Rosenblath, 42 N. J. Eq. (15 Stew.), 651;
Pentz v. Simonson, 13 N. J. Eq. (2 Beas.), 232;
Vreeland v. Schoonmaker, 16 N. J. Eq. (1 C. E. Gr.), 512;
Belford v. Crane, 16 N. J. Eq. (1 C. E. Gr.), 265;
Phelps v. Morrison, 24 N. J. Eq. (9 C. E. Gr.), 195;
Vreeland v. Ryno, 26 N. J. Eq. (11 C. E. Gr.), 160.

The disability of the married woman extends even to the "putting down, releasing or discharging" of an implied trust. For section 14 provides: "Nor shall any conveyance, deed, contract or act of such married woman—in any respect impair or affect the right of the husband

in her lands as tenant by the courtesy after her death."

Estates by the resulting trust are subject to the incidents of dower and courtesy, just as other estates.

Cushing v. Blake, 30 N. J. Eq. (3 Stew.), 697 (distinguishing *Porch v. Fries,* 18 N. J. Eq. (3 C. E. Gr.), 204);
Mershon v. Duer, 40 N. J. Eq. (13 Stew.), 333;
Brown v. Brown, 82 N. J. Eq. (12 Buch.), 40;
Sweetapple v. Bindon, 2 Vern., 536;
Pomeroy: Eq. Jur., Section 1166.

Therefore, if a married woman could by parol "put down" or "discharge" a resulting trust, it would follow that when she exercised such power she would not die seized of the estate, a result not simply "affecting", but completely destroying the husband's estate by the courtesy. And in this case, the husband's estate by the courtesy was completely vested, because there was issue of the marriage.

Doremus v. Paterson, 69 N. J. Eq. (3 Robb.), 188, 193;
Trade Ins. Co. vs. Barracliff, 45 N. J. L. (16 Vr.), 543, 550.

II. The Conveyancing Act allows married women to alien their property by written instruments, in certain circumstances, without joining their husbands, but does not dispense with their separate acknowledgments.

Whalen v. Manchester Land Co., 65 N. J. L. (36 Vr.), 209;
Corby v. Drew, 55 N. J. Eq. (10 Dick.), 387;
Goldstein v. Curtis, 63 N. J. Eq. (18

Dick.), 454; aff'd 65 N. J. Eq. (20 Dick.), 383;
Schwartz v. Regan, 64 N. J. Eq. (19 Dick.), 139;
Ten Eyck v. Saville, 64 N. J. Eq. (19 Dick.), 611;
Wolff v. Meyer, 75 N. J. L. (46 Vr.), 181.

The language of the Conveyancing Act (Section 39) is positive as to the disability. It reads:

> "No estate or interest of a feme covert in any lands * * * shall hereafter pass by her deed or conveyance, without a previous acknowledgment made by her on a private examination, apart from her husband * * * and a certificate thereof written on, or under, or annexed to the said deed or conveyance * * *."

Section 21 includes "declarations of trust," "releases", "written consents to the execution by a trustee of a power of sale or conveyance", and "writings to declare or direct any use or trust of real estate", which, by the provisions of Section 39, if contained in a deed or instrument *duly acknowledged and certified,* are good and effectual.

If an estate by the resulting trust may be granted to a third person by parol in spite of the provisions of Section 4 of the Statute of Frauds, where the grantor is *sui juris,* still such attempted alienation by a married woman is void unless in writing, duly acknowledged separate and apart from her husband, by virtue of the Conveyancing Act.

And if Mrs. Fonda attempted to declare a trust, or to execute a written consent that Berger convey to Shelton, or to declare or direct any use or trust of the real estate, her attempt was abortive and her act a nullity, for the same reason, such acts being *expressly* enumerated in Section 21.

Hence, even had the evidence been conclusive that Mrs. Fonda attempted to create a trust for Shelton, there must still have been a resulting trust in her, predicated upon the failure of such express trust.

Linton v. Hyde, 2 Madd., 94;
Priddy v. Rose, 2 Meriv., 102;
Page v. Broom, 4 Russ., 6;
Lemon v. Whiteley, 4 Russ., 427;
Gerard v. Lord Lauderdale, 3 Sim., 1; S. C., 2 Russ. & Myl., 451;
Dearle v. Hall, 3 Russ., 1;
Walwyn v. Coutts, 3 Meriv., 707; S. C., 3 Sim., 14;
Jackson v. Myers, 3 Johns., 388;
Light v. Scott, 88 Ill., 239;
Perry: Trusts—Sec. 159;
II Story: Eq. Jur., Sec. 979, 1156, 1196;
Beach: Trusts & Trustees, Sec. 87, 122;
II Washburn: Real Prop., 116.

Shelton admittedly had notice of all of the transactions, and admittedly paid nothing for the land. He knew that Mrs. Fonda's money had purchased it, and he must be held to have had knowledge of the resulting trust in her.

Wherever property already impressed with or subject to a trust of any kind, express or resulting, is conveyed or transferred by the trustee, or devolves from a trustee to a third person who is a mere volunteer or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. The only exception to this rule is in the case of express trusts whose terms

require a sale by the trustee in furtherance of the objects of the trusts.

Pomeroy: Eq. Jur., Section 1048.
Lewin: Trusts, p. 246.

Therefore, even had Shelton paid a valuable consideration for the land, still he took it subject to the trust estate in Mrs. Fonda, because he had full knowledge of the fact that her money had gone into the land. His remedy is against the trustee, Berger, to recover the purchase price, in this case one dollar.

It is therefore submitted that Mrs. Fonda in her lifetime was not divested of her estate in the property, but that that estate remained in her until her death.

POINT III.

The equitable fee upon Mrs. Fonda's death vested by devise in the complainant.

The complainant is the residuary devisee under Mrs. Fonda's last will and testament, duly proved. The personal estate is sufficient to satisfy all debts, legacies and expenses of administration.

POINT IV.

The final decree of the Chancellor should be reversed, and it should be decreed that the defendant, Richard C. Shelton, Jr., is without beneficial interest or estate in the lands and premises described in the bill of complaint, that he holds the same in trust for the complainant, who is the sole owner of the equitable fee therein, and providing that he convey the legal fee therein to the complainant by a good and sufficient conveyance in the law; and that the complainant have costs.

Respectfully submitted,
SMITH, MABON & HERR,
Solicitors of Complainant-Appellant.

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New Jersey Court of Errors and Appeals

June Term, 1916.

Between

GRACE RIESENBERGER,

Complainant-Appellant,

and

RICHARD C. SHELTON, Jr.,

Defendant-Respondent.

Case No.
On Appeal
From
Chancery.

RESPONDENT'S BRIEF.

The Facts.

The appellant is the only daughter of Melissa A. Fonda, who, prior to 1910, had not lived with her husband for several years (p. 64, l. 28, p. 65, l. 16). In May, 1910, Mrs. Fonda had no affection for the appellant (Exhibit D-8, p. 65, l. 17 p. 66, l. 9). Mrs. Fonda was a member of the First Reformed Church of West Hoboken in 1905, when she met the respondent, who was an officer of the church (p. 43, ll. 1-30). He later (1909) entered her employ, giving her all his time without compensation, as will appear later in this review of the testimony.

George A. Berger, vice-president of the Trust Company of New Jersey, knew Mrs. Fonda for seven or eight years before her death. He is one of the executors of her will. His testimony (pp. 25-34) is to this effect: (p. 26) In the Spring of 1912, Mrs. Fonda came to his office in the Trust Company, and said she desired to buy the premises in suit and asked him to purchase them for her.

explaining that the owner (her landlord) of the house thought she had a lot of money and wanted more money than the house was worth. She stated, too, that *she intended buying the house to give it to the respondent* (p. 27), who, as Mr. Berger testifies, generally accompanied Mrs. Fonda, and wrote her letters and checks. Mr. Berger communicated with the owner and a contract was made which resulted in a conveyance from the owner to Mr. Berger on May 1, 1912, for $10,000. After the conveyance Mrs. Fonda told Mr. Berger (p. 28) to hold the property until she was ready to transfer it to the respondent.

Within a very short time after taking the deed, and for the purpose of having it clearly appear, should he die, that he had no interest in the property, Berger and his wife executed a deed with the grantee in blank. This deed, as appears later by Judge Besson's testimony, was destroyed at the time that the deed from Berger to the respondent Shelton was executed.

On June 6, 1912, Mr. Berger received from Mrs. Fonda a letter from Albany, asking him to deed the property to the respondent as soon as he could arrange to do so. On receipt of this letter Mr. Berger spoke to Mr. Besson, counsel for Mrs. Fonda (p. 29), and who is now an executor of her estate, and on his advice, wrote Mrs. Fonda that if she wanted the deed to go on record, he, Berger, would send it to her, and she should directly request Mr. Besson to have the deed recorded. On July 19th, Berger received a letter (Exhibit D-9, p. 72) from the respondent, who was acting for Mrs. Fonda, stating that Mrs. Fonda would be glad to know what had been done about the deed. On July 25th, Berger stated that the deed had been drawn and executed and was ready for delivery, and inquired whether she wished the deed to be recorded immediately, or whether

he should await her return to the city. On July 27th, Berger received a letter, signed by Mrs. Fonda (p. 30, ll. 29 to 32, Ex. D. 4½, p. 62), in which Mrs. Fonda said that she preferred that the deed should be recorded at once. The letter of Mr. Berger of July 25th referred to the deed which he had executed in blank.

When Mr. Berger consulted Judge Besson with reference to the deed, Judge Besson advised him, (p. 38) that the deed with the grantee in blank was of no validity, and that a new deed should be drawn, and thereupon a new deed was executed on August 16th, 1912. On August 19th, 1912, Mr. Berger sent to Mrs. Fonda a letter enclosing this deed, and calling her attention to the fact that Judge Besson had suggested that the executed deed be mailed to her before recording and that if she wished the same recorded before her return that she mail it to Judge Besson, (p. 31 to p. 32, l. 4, Ex. D-6½). The deed was thereafter recorded on September 4th.

Mr. Berger's testimony (p. 32, ll. 20-35) is to the clear effect that Mrs. Fonda often said that she had given the property to Mr. Shelton for a present. Mr. Berger further testifies that about Christmas, 1914, (p. 33, ll. 10-30) Mrs. Fonda, who was then unable to write, executed a power of attorney in favor of Mr. Berger, who carefully refused to sign a check for the taxes upon the property until he had directly communicated with her, and she told him that she intended to make the tax money a Christmas gift to the respondent.

Mr. Besson's testimony begins at page 35. He testifies that for a year or two preceding Mrs. Fonda's death he had looked after her legal matters. He remembers a letter from her in August, 1912, in reference to the deed to the respondent. He testifies (p. 35, l. 20) that he has searched everywhere in his office where it would be likely to

be and is unable to find it. He thinks he destroyed it. His recollection is that it contained an instruction to put on record the deed in question (Exhibit D-3, p. 61, which is the conveyance by Berger and wife to Shelton). After the deed was returned from the register's office it was (p. 36) delivered to Mr. Shelton. He remembers the blank deed and that he was shown by Mr. Berger the letter of June 6, and advised Mr. Berger that the blank deed amounted to nothing since there was no grantee named. He remembers (p. 38, ll. 15-16) having torn up the blank deed.

Oscar Hauger, testified (pp. ~~28-29~~ 38-39) to the execution on May 12, 1910, of a will of Mrs. Fonda, which is Exhibit D-8 p. 63. (Note that on p. 39, this Exhibit is numbered 8½, wrongly.) By this will Shelton is given $10,000 and all the household furniture of the decedent.

Mrs. Augusta Callen, a friend of Mrs. Fonda's for thirty-five years, who often called upon her, testified (p. 40, ll. 1-20) that *Mrs. Fonda told her after she bought the house that she had bought it and given it to Richard Shelton*, that Mrs. Fonda said she had never paid him a salary and wanted to give him something. Mrs. Callen further testified that Shelton spent all his time with Mrs. Fonda for six or seven years preceding her death. Mrs. Callen repeats (p. 41, ll. 4-10) that at Westport, in the Summer of 1912, Mrs. Fonda told her that she had given Richard the house and that she, herself, expected to live there as long as she lived. On cross examination (p. 42) she testifies again that Mrs. Fonda said at Westport, in the Summer of 1912, that she had given the house to Mr. Shelton, and she repeats, too, (p. 42, ll. 39-41) that Mrs. Fonda said she expected to live in the house until her death.

The testimony of Richard Shelton, the respondent, begins on page 43. He says that he became

acquainted with Mrs. Fonda, through church work, about 1905, and entered her employ about 1909 when he was in bad health. Mrs. Fonda in the summer or late spring of that year was departing for the country and she made an offer to him in view of the fact that he had been ill and forced to discontinue his work as a salesman in a wholesale silk establishment in New York City. Her idea (p. 44) seems to have been that he might regain his health, and in return he might render services to her, in whatever way she needed him, by writing checks and letters and acting as secretary and factotum. It was her agreement to pay his expenses while in the country and in return he was, without further compensation, to do the indicated work. There was no family dependent upon Mr. Shelton. He went to the country with Mrs. Fonda and on their return he continued to do the same work for her in the fall. There was no change in the situation until her death in December, 1914. He did no other work and (p. 45) gave up all his time to her work, although his residence was not at the place where she resided. He was then about 27 years old, when he entered her employment. In February or March, in 1912, they went together to Albany and she stayed with her people there while he went (p. 46) up-state to find a summer cottage for her use the following summer. On the train, coming home from Albany, she asked him if he would go to Westport the following summer, and he told her he would like to go for it would benefit his health. At the same time he gave her to understand that upon their return in the fall his health would probably be better and he intended to seek another position. She then said that she intended buying the house for him. This came to him as a surprise.

Until after her death he did not know (p. 47) that she had made any provision for him by will.

Shortly after the return from Albany, Mrs. Fonda called upon Mr. Shelton's mother to ascertain whether the Shelton family would move to 111 Shippen Street. She stated that it was her intention to buy it and give it to Mr. Shelton. The mother of the respondent said she would talk the matter over with his father, but what the exact conversation was he did not pretend to remember (p. 48). He knew from time to time that Mrs. Fonda was in communication with Mr. Berger who was trying to get the house at as low a figure as he could. About the 10th of May, his family moved into the upper apartment of the premises. Mrs. Fonda left West Hoboken on the first of June, 1912, and in the early part of that month her maid and Mr. Shelton went to Westport, and got to rights the house there, against the arrival of Mrs. Fonda, who was still at Albany (p. 48). The question of the maintenance of the house was discussed by Mrs. Fonda and the respondent, and Mrs. Fonda agreed to pay for all the repairs and (p. 49, ll. 10-20) agreed that he might pay her back, as rent was paid him by his folks for their part of the house. He did this until December, 1913, when they settled and called it even. His mother paid him $20.00 a month. He produced various bills for water boilers, wiring and electric fixtures, water heater, plumbing, carpentering and mason work, all of which he paid out of the money he received from his folks for rent. It was Mrs. Fonda's agreement to pay the taxes, water rent and coal, towards her part of the rent expenses for occupying the first floor of the house. He said (p. 51) that Exhibit D-9 (p. 72) was written by him at the direction of Mrs. Fonda. He obtained the deed from Mr. Berger and his wife to him, from Mr. Berger at Mr. Berger's office some time in the Fall of 1912. He says that he composed all the letters written by her and she would sign the business and he sign the personal letters.

Mrs. Theresa Shelton, the mother of the respondent, attended the same church as Mrs. Fonda and they visited each other (p. 57, ll. 1-30). When her son's health broke down Mrs. Fonda called to see Mrs. Shelton, and told her that she would like to have the respondent go with her. Mrs. Fonda called Mrs. Shelton mother, and asked if she could not be a mother to the young man, because she considered him her son. Mrs. Shelton thought it over and said she was satisfied and thought it very kind of Mrs. Fonda (p. 58). The young man spent his summers with Mrs. Fonda, and was generally with her daily; sometimes she telephoned for him In March, 1912, Mrs. Fonda called upon Mrs. Shelton, lunched with her, *and told her that she would buy the house at 111 Shippen Street for Richard*, if Mrs. Shelton would move. Mrs. Shelton said that she would have to talk the matter over with her husband. Within the next few days Mrs. Fonda called again (p. 59) and it was settled that the Sheltons would go. It was in May that they moved into the house. They are still there. Mrs. Fonda lived down-stairs until the time of her death. For the upper floor and attic Mrs. Shelton paid her son $20.00 as rent, from the first of June, 1912.

From the wills of Mrs. Fonda may be gathered significant facts bearing upon the present cause. The earlier will is Exhibit D-8 and is found on pages 63-68. Besides the gift of the residuary estate to her nieces at Albany, there are specific bequests amounting to $37,000. To Mr. Shelton there is a bequest of $10,000, and of the household furniture. The appellant and her father are each given $1.00. Mrs. Fonda's view point as to the father is that through all the years she lived with him, and particularly the latter years, he abused and ill treated her, and manifested no affectionate regard whatever towards her. When separated from her, he lived with another woman. He also wrote

threatening letters to her. These recitals are all contained in the fifth clause of this will. The sixth clause of this will justifies, from Mrs. Fonda's view point, the meagre bequest to the appellant. In it is contained a recital that Mrs. Fonda expended much money in behalf of the appellant, and supported the appellant and her children before her second marriage. Mrs. Fonda's view was that she was treated *most contemptuously* and ousted from the very house which she had bought for the appellant, who, after her second marriage, manifested no due regard towards Mrs. Fonda. The seventh clause of this will clearly shows that Mrs. Fonda was not vindictive, for thereby she bequeaths to the two children of the appellant $10,000 each. This will was dated May 12, 1910.

The later (and last) will of Mrs. Fonda is dated April 22, 1914, is Exhibit D-8½ and is found at page 69. The specific bequests, in this will, amounted to $32,000. In the second clause thereof is contained a bequest to the appellant of all Mrs. Fonda's wearing apparel and the sum of $5,000. There are various bequests of valuable jewelry, books, and furniture to relatives and friends, besides the gifts of $10,000 to each of the grandchildren. To Mr. Shelton the respondent, there is given, by clause ninth, the sum of $2,000. In this will the residuary bequest is made to the appellant. There is no reference to the husband.

The significance of these two wills lies chiefly, so far as this cause is concerned, in two facts: (a) Mrs. Fonda was a woman of large means, and (b) by the second will the respondent receives a benefit of approximately $10,000 less than he would have received under the first will, which sum, it will be noted, is approximately the sum invested by Mrs. Fonda in the purchase of the house.

Before we come to a discussion of the law governing the present cause, we think it important to

direct the attention of this court to the following inaccuracies contained in the appellant's brief, under the heading "Statement of Facts:"

1. It is stated (appellant's brief p. 2, ll. 1-6) that Mrs. Fonda lived separate and apart from her husband from 1909 until her death on December 28, 1914, not, however, under any order or decree of any court. The exact truth of this marital situation, from the veiw-point of Mrs. Fonda herself, is set forth in her will of May 12, 1910, (p. 65, ll. 2-10):

> "My said husband and myself have for several years last past, been living separate and apart, pursuant to an agreement in writing, executed by my said husband and myself, wherein and whereby we agreed to live separate and apart for the remainder of our natural lives."

2. It is stated in effect, by a series of negations, (appellant's brief, p. 4, ll. 25-35) that Mrs. Fonda herself actually turned over the purchase money to Rippe, the former owner of the premses. There is no evidence to this effect. The fact is that there was purposely kept from Rippe any information which might lead him to believe that Mrs. Fonda was concerned in the purchase. Mr. Berger's testimony (p. 26, ll. 28-35) is that Mrs. Fonda told him that the owners thought she had a lot of money and wanted more money than the house was worth, and she asked him to purchase it for her, and accordingly on April 17, 1912, he paid them $1,000 on account (p. 27, ll. 10-30).

3. It is stated (brief p. 4, ll. 35-41):

> "Mrs. Fonda's instructions to Berger, prior to the purchase, were that Berger was to purchase it for her and immediately after the purchase she instructed Berger 'to hold this property until she was ready to have it transferred to Richard Shelton.'"

A proper statement of her instructions is this

(taken from Mr. Berger's testimony, p. 26, ll. 35-40) : that prior to the purchase *she stated that she was going to buy the house to give it to Richard Shelton.*

4. It is stated (appellant's brief p. 5, ll. 1-5) :

> "Berger at once executed a deed in blank which was left with Mr. Besson, the purpose of which was to vest the legal title in Mrs. Fonda in case of Berger's death. This blank deed was subsequently destroyed by Mr. Besson."

The following is a correct statement in regard to this deed in blank. Mr. Berger says (p. 28, ll. 10-14) that Mrs. Fonda told him to hold the property until she was ready to have it transferred to Richard Shelton and the next he heard from her (in regard to the matter) was in the shape of the letter of June 6, 1912, (Exhibit C-1 p. 61) in which she requested the property to be deeded to Richard C. Shelton, Jr., as soon as Mr. Berger could arrange to have the same done. It is true that he testified (p. 30, ll. 1-5) as follows:

> "That the property did not belong to me and in case of my death it would go to Mrs. Fonda;"

but there is no testimony that Mrs. Fonda had ever instructed him to have the legal title vest in her in case of his death. The blank deed remained in Mr. Berger's possession until after June 6. Mr. Besson testified (p. 38, ll. 1-20) that Mr. Berger showed him the letter of June 6, said he had a blank deed and since there was no grantee, Mr. Besson told Mr. Berger the proper thing to do was to draw a new deed and have it executed. It will thus be seen that so far as Mr. Besson is concerned *there was never any blank deed, the purpose of which was to vest the legal title in Mrs. Fonda in case of Mr. Berger's death.* Of course, Mr. Berger was careful enough to have prepared some in-

dication, as against his death, that he was not the beneficial owner of the property, but had the purpose of the deed ever been to vest title in Mrs. Fonda in case of Berger's death, the natural thing to have been done under the circumstances would have been to insert her name. Every fact in the case shows that this was exactly what Mrs. Fonda did not want done.

5. It is stated (brief p. 5, ll. 26-28) that, in the interval from May 1, to September, 1912, Mrs. Fonda and Shelton were away together for the summer season, *but* on May 12, 1912, Shelton's family moved into the house, etc. A careful statement of the testimony is as follows: Mr. Berger says (p. 28) that after the owners executed the deed to him, which was recorded on May 3, he met Mrs. Fonda (p. 28, ll. 20-30) between the making of the deed and the receipt of the letter of June 6, (Exhibit C-1, p. 61). Counsel for the appellant admits (p. 28, ll. 36-37) that Mrs. Fonda was out of town *from June* for the rest of the summer. Mrs. Callen, testified (p. 40, ll. 38-42) that it was about the first of June, 1912, on a Saturday that Mrs. Fonda went up into the country. Mr. Shelton, the defendant, testified (page 48), that Mrs. Fonda left on the *first,* and that he and the maid closed up the house and got up in the country probably a week later, in the early part of June, that Mrs. Fonda was still at Albany and they got the house in Westport to rights, ready for her return. It is thus apparent that on May 10, 1912, when the Shelton family moved into the premises, Mrs. Fonda was not away for the summer season.

The Law.

The theory of the bill of complaint is thus stated at page 8 of the appellant's brief (ll. 18-28):

> "The theory of the complainant's bill is that on and after May 1, 1912, Berger held the property upon a resulting trust for Mrs. Fonda, because her money purchased the land without any intent upon her part to benefit the nominal purchaser; that the beneficial estate so vested in her was not divested during her lifetime, and that at her death her estate became vested in the complainant, by virtue of the residuary devise in Mrs. Fonda's last Will and Testament."

The appellant's argument may be thus summarized: Mrs. Fonda having advanced the purchase money for the premises, Berger thereupon became her trustee, and the conveyance made by him to the respondent, under Mrs. Fonda's instructions, is ineffective because Mrs. Fonda, a married woman, could not divest herself of her equitable title unless her husband and she made a joint conveyance which she acknowledged separately.

The defendant admits that the money for the purchase of the premises was Mrs. Fonda's money but sets up that he is seized both legally and equitably, by virtue not only of her expressed intention to cause the premises to be conveyed to him, either as a gift or as compensation for services rendered and to be rendered by him, but also because she properly executed her intention.

It will be noted that there is not involved in this cause any question which calls for the consideration or application of the principles laid down in the cases in which the courts have dealt with such subjects as improvident donors, donors of irrational minds, gifts obtained by fraud or craft, gifts in meditation of future frauds or in-

jury to others, gifts which are the result of undue influence or imposition, or gifts which are against plain morality.

The simple question to be determined by this Court is: Does the law of New Jersey permit a married woman to use her own funds in the purchase of real estate to be used either as a gift or in payment of her creditors.

There is no other question involved, as the clear undisputed testimony fully demonstrates the settled purpose and executed plan of Mrs. Fonda.

In behalf of the respondent we make these contentions:

I. There was no resulting trust in favor of Melissa A. Fonda.

II. There was an express trust in favor of the respondent.

III. The resulting trust in favor of the respondent, even though created by parol, has been executed, and is not within the statute of frauds.

IV. The limitations as to conveyances, contained in the married woman's act and the conveyance act, do not apply.

V. The decree should be affirmed.

I. There was no resulting trust in favor of Mrs. Fonda.

It is the contention of the appellant (Brief, p. 13, ll. 6-10) that the respondent's evidence to prove Mrs. Fonda's intent to benefit him is irrelevant and incompetent.

This contention is difficult to comprehend, if there be kept in mind the basic contention of the appellant, that the present case calls for the application of the rules governing resulting trusts. In other words in causes concerning a transfer of land as a gift, the donee would not be allowed to show the essential quality of the transaction, while on the other hand, regardless of the apparent effectuated intent of a donor, his representatives, by merely proving that the consideration moved from the donor or that there was no consideration paid by the donee, would thereby establish a title to property with which their decedent had parted. That there is no merit to this contention is shown by the following recent cases in which our courts have dealt with this matter of evidence:

Beck v. Beck, 78 Eq. 544, the Court of Errors through Justice Swayze (p. 548) spoke thus upon the general subject of resulting trusts:

> "There is no doubt that payment of part of the purchase money will create a resulting trust to the extent of that payment, but the amounts paid by the different parties must be shown with certainty, and a resulting trust will not be held to arise upon payments made in common by one asserting his claim and the grantee in the deed, when the consideration is set forth in the deed as moving solely from the latter, unless satisfactory evidence is offered, exhibiting the portion which was really the property of each, *and establishing the fact that the payment was made for some specific part or distinct interest in the estate.* In

Midmer v. Midmer Executors, 26 N. J. Eq., (11 C. E. Gr.) 299 (at p. 304), Vice Chancellor Van Fleet said: 'Nothing short of certain, definite, reliable and convincing proof will justify the court in divesting one man of title to lands, evidenced by a regular deed, and putting it in another.' The rule was applied by Chancellor Runyon in a case of great hardship where the effect was to leave $60,000 worth of property in the name of the wife, the money for which had been furnished by the husband, although they had been divorced for the adultery of the wife and she was permitted to enjoy the property with her paramour. *Lister v. Lister,* 35 N. J. Eq. (8 Stew.) 491, affirmed on Chancellor Runyon's opinion, 37 N. J. Eq. (10 Stew.) 331. In *Reed v. Huff,* 40 N. J. Eq. (13 Stew.) 229, where the heirs of the husband sought to establish a resulting trust in lands, the title to which was in the wife, he said (at p. 234): 'It is also well settled that the proof *which shall rebut the presumption of a gift in favor of a child or wife,* shall be equally satisfactory and explicit with the proof required to establish a resulting trust, the circumstances relied on must be convincing and leave no reasonable doubt as to the intention of the party.' The same rule was recognized in *Duvale v. Duvale,* 56 N. J. Eq. (11 Dick.) 375, although in that case the court held that the proof showed that the settlement upon the wife was not of the whole estate in the land but of a limited estate therein. The present case falls far short of the established standard of proof. It seems rather that the intent of the parties was to vest the absolute title in the wife free of any trust, perhaps with the natural expectation on the part of the husband that they would share the benefits."

In the case of *Wolters v. Shraft,* 69 N. J. Eq., 215, in which the benefit of a resulting trust was claimed, Vice Chancellor Stevens uses this language:

"The statute of frauds requires declarations of trust to be manifested and proved by some writing signed by the party, the exception being of those cases in which the trust arises or results by implication of law. It is obvious that while a trust may result in the *absence* of express declaration, it cannot, under the operation of this rule prevail *against* such a declaration. 'It will not be raised,' says the author of the American note to *Dyer v. Dyer* (1 Lead. Cas. Eq. 278, 3d Am. ed.), 'in opposition to the declaration of the person who advances the money, nor in opposition to the agreement of the parties on which the conveyance is founded, or the obvious purpose and design of the transaction.' This would seem to be so obvious as not to require a citation of authority for its support."

Holton v. Holton, 72 Eq., 312. Here Vice Chancellor Leaming held that to enable the Court of Chancery to decree a resulting trust to a grantor where an absolute deed of conveyance reciting a pecuniary consideration is executed and delivered, the intention that the grantee is not to enjoy the beneficial estate, but that a trust is to result, must appear expressly or by implication from the terms of the deed, and no extrinsic evidence of grantor's intention is admissible unless fraud or mistake is averred. At page 315 he cites the cases which support this proposition.

Baker v. Baker, 75 N. J. Eq., 305, Vice Chancellor Emery, holds that in a case where a resulting trust is claimed, parol evidence is admissible to show what the real trust was.

Thomas v. Thomas, 79 Eq., 461. Here Vice Chancellor Leaming dealt with the question of gift and resulting trusts. He said (464-465):

"An additional element arises, however, when the conveyance, the consideration for which is paid for a father, is made to a son, daughter, wife of other near relative or dependent. The mere fact of supplying the

consideration, in such a case, *does not create a presumption of ownership in the person who supplies the consideration.* On the contrary, *the presumption is the reverse.* The presumption in such a case is that the father supplies the consideration not for his own benefit but for the benefit of the relative, therefore, standing alone, the mere testimony on the part of the father or any other witness that the father supplied the money, will not be sufficient to create a resulting trust, but, on the contrary, such testimony will create a presumptive gift, settlement or advancement. That presumption, however, is a rebuttable presumption, if the presumption of gift, settlement or advancement can be dispelled or overcome by competent evidence, then the conveyance to the son stands exactly on the same plane as a conveyance to a stranger. So the only real question here now is, whether or not the presumption of gift has been dispelled or overcome by competent evidence. The courts have uniformly held that this presumption of gift, advancement or settlement is not only rebuttable, but it may be rebutted by any circumstance precedent to the transaction, or contemporaneous with the transaction, or so nearly contemporaneous with the transaction as to form part of the *res gestae,* but that it cannot be rebutted by circumstances, other than admission of the parties, subsequent thereto."

Baldwin v. Campfield, 8 N. J. Eq., 891, holds that the presumption of a resulting trust may be rebutted by parol evidence, and to the same effect is *Peer v. Peer,* 11 N. J. Eq., 432.

Other authorities are to the same effect.

Cyc., Vol. 39, page 105, paragraph c.

"The doctrine of resulting trusts is founded upon the presumed intention of the parties, and as a general rule such a trust arises where, and *only where,* such may be reasonably presumed to be the intention of the parties, as determined from the facts and cir-

cumstances existing at the time of the transaction out of which it is sought to be established."

Cook v. Patrick, 135 Ill., 499, (11 L. R. A., 573).

"Such a trust is a mere creature of equity, founded upon presumptive intention, and designed to carry that intention into effect, not to defeat it. If it is not the intention that the estate shall vest in him who pays the purchase price, then no resulting trust in his favor attaches to the property."

Klamp v. Klamp, 70 N. W. Rep., 525.

"The statement that where one pays the consideration and title is taken in the name of another, a trust results in favor of the one paying the consideration, is not a statement of an absolute legal proposition, but merely a rule of evidence."

2nd Story's Equity Jurisprudence, Sec. 1202. See also Lewin on Trusts, page 169, Sec. 15.

"There are other exceptions to the doctrine of a resulting or implied trust, even where the principal has paid the purchase money, or, perhaps, more properly speaking, the resulting or implied trust is, in such cases, a mere matter of presumption. It may be rebutted by other circumstances established in evidence, and even by parol proof which satisfactorily contradicts it."

Cyc., Vol. 39, page 112, Section g., citing *Baldwin v. Trowbridge,* 62 N. J. Eq., 468:

"Where property is acquired by a person under circumstances which show that it is conveyed to him on the faith of his intention to hold it for, or convey it to, another, a trust will be held to arise in favor of the latter."

Cyc., Vol. 39, page 145, paragraph n:

"The rule that a resulting trust presumptively arises in favor of the person paying

> for property, title to which is taken in the name of another, does not apply where the purchase price is paid by way of advancement or gift to another, but the trust results, if at all, in favor of the person in whose behalf the payment, as an advancement or gift is made."

The effect of the foregoing authorities, we contend, is to sustain the respondent's position, that he is entitled to prove that the property, sought to be taken from him, is his, and the evidence clearly discloses that there was no resulting trust in favor of Mrs. Fonda.

II. There was an express trust in favor of the respondent.

III. The resulting trust in favor of the respondent, even though created by parol, has been executed, and is not within the statute of frauds.

In this regard (it will bear repetition, we think) it is important to state again that the respondent is not seeking to enforce a right, but that the appellant is seeking to disturb a consummated equity: the respondent is *reus,* not *actor,* and the appellant *actor,* not *reus.* To the ordinary mind, therefore, the situation seems to be quite analogous to that which obtains in a situation where there is by a deed a transfer of real estate without the execution of a preliminary agreement to convey. Could such a deed be successfully set aside upon the ground that there was not an antecedent writing which satisfied the statute of frauds? The law in regard to completed transactions as affected by the statute is well settled.

For instance, in *King v. King,* 9 Eq. 44, Chancellor Williamson said (p 53) in regard to a consummated agreement:

"Nor can I see how the statute of frauds and perjuries can be made applicable, on the ground that this was an agreement not to be performed in one year from the making thereof. The services have been rendered and accepted, and compensation is claimed, and the simple question now is, whether compensation is to be applied to this particular debt under the agreement of the parties, and not whether the execution of an agreement is to be enforced which was not to be performed within a year. The matter in controversy is not in reference to an executory, but an executed agreement."

The point was again discussed and decided by Justice Depue in *Eaton v. Eaton,* 35 Law 290:

"That the original trust, upon which it is alleged the father conveyed the lands to the plaintiff, being simply by parol, was not enforceable in a court of law, is conceded by the defendant's counsel. So long as an express trust, on which lands have been conveyed, without the same being manifested and proved by some writing, remains unexecuted, it is incapable of legal recognition with a view to compelling its performance by action."

"But if the trust has been executed by the performance by the trustee of the fiduciary obligation, which rested merely in parol, no action can be maintained to recover back the money paid by way of such performance. The statute of frauds is an insuperable bar to an action to enforce parol contract, within its provisions, but it does not make the transaction illegal, and parties are at liberty to act under such contracts if they see proper. (Cases cited.)"

"Where a person with a full knowledge of the facts, voluntarily pays money which the law would not compel him to pay, but which, in equity and conscience, he ought to have paid, he had no remedy to recover it back. From a payment made under such circumstances, no promise will be implied to refund the money, there being nothing against con-

science in the party who received it retaining it. The authorities to this effect are numerous. (Cases cited.) The principle stated is general, and is applicable as well to voluntary payments in performance of moral obligations which are not enforceable, as legal liabilities, by reason of the statute of frauds, as to cases where the obligation, though at one time legal, has been discharged by positive law, as where, the debt was barred by the statute of limitations, or discharged by bankruptcy. (Citing cases.)

"A person performing services under a parol contract for compensation by the conveyance of lands, may recover the value of such services, if the other party, taking advantage of the statute of frauds, refuses to complete the contract, for the reason that, under such circumstances, it would be inequitable to retain the promised consideration and enjoy the benefit of the services without compensation. (Case cited.) But so long as the other party is willing to carry out his contract by making the conveyance, no action can be maintained to recover back a consideration voluntarily paid."

Vice Chancellor Greene, in *Silver v. Potter,* 48 Eq., 539, regarded the law as well settled. He said (542, 543, 544, *passim*) :

"The statute of frauds covering this point is a rule of evidence. It provides that the trust must be manifested or proved by a sufficient writing, but a trust can still be created by parol. It cannot be enforced in a court while it rests in parol alone, because the statute intervenes and says that it must be manifested or proved by writing. There is, however, nothing which requires that the writing should be executed at the time that the trust is created—in fact, it may continue to rest in parol and not be declared until the trustee dies and then may be declared so by his will."

* * * * * * *

"We have, then this condition, Mrs. Potter conveyed this property by an absolute deed to her son. It may have been that, at the time of such conveyance, a trust was created by parol, which trust would continue impressed upon Lewis's estate in conscience, but which could not be enforced in any court because not manifested in writing. He does not make any declaration of the trust in writing. He however, says that he has executed the trust, that so far as he is concerned he holds the title no longer, and that his trust has been discharged.

"The effort, then, of the defendants is not to enforce a trust. They say the trust is at an end so far as Lewis is concerned, and the question which is then presented is the same as that which would have been presented had Lewis made a declaration of trust in writing, namely, was any trust, in fact, created by parol at the time his mother conveyed the property to him.

"This is a question which must be settled by parol testimony."

Thus again in *Bacon v. Fay,* 63 Eq., 411, Vice Chancellor Pitney said (p. 419):

"With regard to the proof of the partial partition of the Hammonton property, by conveyance of portions of it to Mrs. Fairchild, Mrs. Bacon and Thornton, that rests wholly in parol. The conveyances, or certified copies thereof, were not produced, but no objection was made to that mode of proof at the hearing. Mrs. Fairchild testified to it, as against herself, Mrs. Geishaker admitted it by her answer, and at the hearing testified to it; Mrs. Bacon also testified to it, as did Mrs. White. In so doing those persons were all swearing in their own favor. The heirs of George were represented by Mr. Pancoast, and he as I said made no objection to parol proof. The only other person interested was Thornton, and he did not appear, but his interest, be it more or less, was vested in Mr. Pancoast. So that the only person interested in objecting to parol proof was Mr. Pancoast. If objection had

been made on that score, of course, the copies of the conveyances could have been produced. The only point upon which there could have been the least room for contest was as to whether those conveyances were made by way of partition, or, in other words, in satisfaction of the interest of the grantees in the Hammonton property. That I think was satisfactorily proven. It is true that the proof was by parol, but it was proof of the disposition of a purely equitable interest, and the parol contract established was executed by conveyances made, and such execution of the contract saves it from the effect of the statute of frauds."

The language of the New York Court of Appeals in *Robbins v. Robbins,* 89 N. Y. 251 (258) upon this topic is in point:

"The trust was executed and whether the defendant could have compelled it or not is immaterial" * * *.

"It is not necessary to inquire whether the defendant could by any legal proceeding have compelled the plaintiff to convey the lands. * * *.

"He has done so without compulsion."

With such pertinent authorities, it seems hardly necessary to set forth this rule as stated in 20 Cyc. 302:

"Where an oral contract which is unenforceable by reason of the statutes of fraud has been entirely performed, the rights of the parties are no longer affected by the statute, and it is immaterial that either party might have refused to perform."

The rule, it will be observed, is eminently sensible. Any other rule would not only invite litigation in the face of the most solemn settlements between parties, but it would also disturb the security of rights beyond number.

IV. The limitations as to conveyances, contained in the married women's act and the conveyance act, do not apply.

In *Leaycraft v. Hedden,* 4 N. J. Eq., 512 (1845) Chancellor Haines said (550-551) that: "I am not aware that this question (the disposition by a *feme covert* of her separate estate) has ever been judicially considered in New Jersey; and in the midst of such a conflict of opinions, it is clear that we are left to the determination of it upon what may appear to be sound principles of equity."

"And I think it may safely be said, that a *feme covert* is a *feme sole* as to her separate estate, so far as to dispose of it in any way, not inconsistent with the terms of the instrument under which she holds. Any danger apprehended from such rule, can be avoided by words restraining the disposition, or directing the precise mode in which it may be made."

The Married Women's Act did not purport to make any change in this particular. In safeguarding to married women their separate estates, it simply provided that nothing in the act should enable any married woman to execute any conveyance of her real estate, etc., without her husband joining therein as *heretofore.* This proper application of the act was distinctly recognized in *Ross v. Armstrong,* 20 N. J. Eq., 109, in which it was held that where the property was conveyed to the use of a married woman without the intervention of a trustee (p. 112) she could not convey without joining her husband, but that the Married Women's Act did not change her condition where she holds an equitable estate (p. 122).

What Vice Chancellor Reed said in *Rosenbaum*

v. Garrett, 57 Eq., 186 seems applicable. He said (194):

> "The decision of Chancellor Kent in *Methodist Episcopal Church v. Jaques, supra,* was reversed by the Court of Errors, that court holding that a married woman's power to dispose of separate property given to a trustee for her use, from the debts and intermeddling of her husband, was absolute and she could give it to her husband if she so chose. This view of the power of a married woman over her separate property was adopted by this court in *Leaycraft v. Hedden,* 3 Gr. Ch., 512. The modern doctrine of the British courts of equity also is that the creation of a separate estate in a married woman, unless coupled with a restraint upon alienation or anticipation, confers an absolute interest in the equitable estate. Whether the interest of the married woman is limited to a right to receive the income during her coverture, or she has the right to receive the entire estate, depends upon whether the trustee has any active duties to perform in respect to the trust estate. If he has not, then he can be called upon to convey the estate to the *cestui que trust* or to her appointee, even if such appointee is the husband of the married woman.
>
> "So it is assumed that by the law of this state this trust, the trustee having no active duties to perform, is a passive trust and the trustee can be called upon to transfer the *corpus* of the trust fund to whomsover the *cestui que trust* may designate."

The general rule is again set forth by Vice Chancellor Grey in *Bishop v. Bourgeois,* 58 Eq., 417, (420) in these words:

> "But in order to enforce payment of her debts they must have been contracted for the benefit of her separate estate or for her own use on the credit of it. The general rule that the contracts of a married woman are void at common law is practically undisputed. One of the elementary principles on which this

rule is founded is that the wife is presumed to be in the power of the husband and her contracts to have been made under his coercion. It is only when every presumption of any possible coercion is removed out of the way that the wife is held to be bound. The cases in which the contracts of a wife are enforced stand under this exception, and it is held that if she ceases to be under this exception, and it is held that if she ceases to be under his power by reason of his absence from the realm, or in case of his civil death, she may be held to answer separately. *When, however, the wife acts with reference to her separate estate she may lawfully separately dispose of it in any manner not inconsistent with the terms of the instrument under which she holds.*"

In *Adams v. Schmidt*, 68 Eq., 168, Vice Chancellor Pitney dealt with the contention that a power of attorney, concerning the land of a married woman, would have no force and effect as to real estate because it was not executed by her separate from her husband. He stated the law to be that the court has established liens on the separate estate of *married women based on a defective instrument, because although the instrument defectively executed or acknowledged was absolutely impotent of itself to create any lien,* it had the effect taken in connection, with its consideration, to invest the beneficiary with an equity to come into Chancery to ask for the creation of a lien in his favor.

The application of this case lies in the fact that equity will give effect to the equitable right of parties, regardless of the method of its creation.

A succinct statement of the law in this regard is set forth in Bispham's Principles of Equity, at page 184, section 101. It follows:

"This construction was that a *feme covert* was, as to her sole and separate estate, to be regarded as a *feme sole,* and that therefore she had the same power of disposition over

the estate, and was subject to the same liabilities in regard to it, as if she were unmarried.

"Her power of disposing of her estate was settled by many authorities.

" 'The first case upon the subject,' said Lord Thurlow in *Fettiplace v. Gorges,* 'is a very old one in Tothill, that where a woman from her separate stock has saved a sum of money, she may dispose of it. * * * I know there is a vast number of cases upon it, but I have always thought it settled that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it.' And this right may be exercised by a disposition *inter vivos,* or by will. This power of disposition was formerly supposed to apply only to personalty, and to a life interest in realty, but it is now held in England that the *feme* is entitled to dispose of the *corpus* of her real estate, and that, too, by will or by deed not acknowledged according to the formalities of the statute. In other words, a gift of a fee-simple estate or a gift of a capital sum of money to the separate use of a married woman gives her the same power of alienation over it as if she were a single woman. This was decided in the year 1865, in the leading case of *Taylor v. Meads,* just cited, and the rule upon the subject was there stated by the Chancellor (Lord Westbury) in the following language: 'With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris.* To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine

of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control or interference. The whole lies between the married woman and her trustees, and the true theory of her alienation is that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest and when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity.' "

Homeopathic Mutual Life Ins. Co., v. Marshall, 32 N. J. Eq., 103, is to the same effect. There Chancellor Runyon said (p. 112):

"As before stated, the loan was *bona fide* made and almost all the money used in discharging encumbrances on the two properties. The complainant cannot be regarded as a volunteer. Those encumbrances were on the property when it lent the money, and it lent it to enable the Marrenners to remove them. In appropriate proceedings, subrogation might be obtained.

"And again, the debt to secure which the mortgage in suit was given, was for the benefit of the separate estate of Mrs. Marrenner, and if the mortgage was not acknowledged at all, the debt would, in equity, be charged on her estate generally (Cases cited).

"And it would be charged on the mortgaged premises as part of her estate, for the mortgage would, in equity, operate as an appointment of that property for the payment of the debt. (Case cited.)"

And we wish to direct the attention of the court to this point: *that the object of this entire transaction was a benefit to Mrs. Fonda's separate estate.* By this arrangement she secured the future services of the respondent. There was thus a consideration and a benefit to her.

V. The decree should be affirmed.

It is the appellant who seeks to disturb a situation brought about by her mother, willingly, without the slighest wrongful suggestion or influence upon the part of the respondent. The testimony, moreover, discloses that Mr. Berger and Judge Besson, both men of integrity, were active in the matter as agents of Mrs. Fonda, who implicitly confided in them, and who made them executors of her estate. Mrs. Fonda lived for two years and a half after the transaction without indicating in the slightest way that she considered this property hers. In fact all her acts regarding it show her clear intention not to concern herself with it, and particularly significant is the difference between the benefits given to the respondent by her first and second wills.

It seems unnecessary to cite cases upon the proposition that one may use his own property as he pleases, but since an argument *a fortiori* is often illuminating, we submit the following as cases in which our courts have sustained gifts, although the donors were persons of questioned capacity.

1. *Wilkensen v. Sherman,* 45 Eq., p. 413 (Chancellor McGill), affirmed 47 Eq., p. 324 upon the opinion below. Here a man of ample fortune provided by gift a valuable contingent interest in real estate. Although there was an issue raised as to the mental capacity of the giver, the Chancellor held that the deed would be sustained since the uncle, to whom it was made, was an intimate friend of the maker, and the deed was executed and acknowledged before a reputable lawyer, and immediately recorded, and for the reason that had been a delay of some six years before attacking the conveyance, during which interval an important witness died.

2. *Rottenburgh v. Fowl,* 20 Atl., p. 338 (not officially reported). There the complainant sought to cancel his deed of land paid for by him, but made to one of the defendants. His ground for the cancellation was his intoxication and the exercise of undue influence upon him at the time of the execution. It appeared that he was without family ties, had made his home with the defendants, was attached to their child, had remarked that he intended to buy property in the child's name, that the negotiations were conducted by his agent, and that because of the child's youth, the title was taken in its mother's name. The plaintiff directed how the deed should be drawn, read it himself and after its execution gave it to the defendants and requested them to record it. Vice Chancellor Green held that the complainant had failed to sustain the allegations of the complaint as to the intoxication and undue influence: He said:

> "The conveyance to the defendant, Mrs. Fowl, was made by Mr. Summerill by the direction of the complainant, who paid all the consideration money. So far as these parties are concerned, it was a voluntary conveyance. Mrs. Fowl paid no consideration for the property. But if the complainant was in the possession of his mental faculties, understood what he was doing, and was not imposed on, or subjected to undue influence, this court cannot nullify his executed gift. James, L. J., in *Hall v. Hall,* L. R. 8, Ch. App., 430, at page 437: 'The law of this land permits any one to dispose of his property gratuitously if he pleases, subject only to the special provisions as to subsequent purchasers and as to creditors.' Justice Dixon, in *Carpenter v. Carpenter's Ex'rs.,* 27 N. J. Eq., 502, at page 503, quoting from Story, Eq. Jur. F. 356: 'There is nothing inequitable or unjust in a man's making a voluntary conveyance, either to a wife or child, or even to a stranger, if it is not at that time preju-

dicial to the rights of any other persons, nor in meditation of any future fraud or injury to other persons.' Van Fleet, V. C., in *O'Connor v. Rempt,* 29 N. J. Eq., 156, at page 158, says: 'However, if this deed was the act of a rational mind, voluntarily done, without artifice or fraud on the part of those to be benefited by it, this court has no power to invalidate it. The courts cannot protect the rash against the consequences of their acts, no matter how disastrous they may be, if they are done voluntarily, and are not induced by craft or fraud.' In *Dutton v. Thompson,* 23 Ch. Div., 278, Sir George Jessel, M. R., says (page 281): 'It is not the province of a court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a court of justice to set aside a settlement which he chooses to execute, on the ground that it contains clauses which are not proper. No doubt, if the settlement were shown to contain provisions so absurd and improvident that no reasonable person would have consented to them, or if provisions were omitted that no reasonable person would have allowed to be omitted, that is an argument that he did not understand the settlement. But in no other way would it be a reason for setting it aside.' *Garnsey v. Mundy,* 24 N. J. Eq., 243, *Mulock v. Mulock,* 31 N. J. Eq., 594, 602, *Le Gendre v. Goodridge,* 46 N. J. Eq., 419, 19 Atl. Rep. 543."

In *James v. Aller,* 68 Eq., 666, Chief Justice Gummere, speaking for the Court of Errors and Appeals, said (669):

"But assuming this to be so (that the donor had acted improvidently) it does not, in our view, afford any ground for declaring such a transaction voidable at his option. The law permits anyone to dispose of his property gratuitously, if he pleases, provided the rights of creditors are not injuriously affected

thereby. He may, if he sees fit, reserve to himself the right to revoke his gift, or, if he desires, he may make the gift absolute and irrevocable and his *power* in this regard does not depend upon the providence or improvidence of his act."

It is respectfully submitted that the decree in this matter should be affirmed.

M. T. ROSENBERG,
Of Counsel.

ALBERT LEULY,
Solicitor.

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TESTIMONY.

FOR COMPLAINANT:

FOR DEFENDANT:

EXHIBITS.

Bill of Complaint.

(Filed, Jan. 10, 1915.)

In Chancery of New Jersey.

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

Humbly complaining shows unto your Honor your oratrix, Grace Riesenberger, of the City of Hoboken, in the County of Hudson and State of New Jersey:

1. Your oratrix' mother, Melissa A. Fonda, late of the Township of Weehawken, in said County and State, died on the twenty-eighth day of December, A. D. Nineteen Hundred and Fourteen, testate; and in and by the last will and testament of the said Melissa A. Fonda your oratrix is sole residuary devisee of said testatrix. Said last will and testament was admitted to probate by the Surrogate of Hudson County on the eighth day of January, A. D. Nineteen Hundred and Fifteen, and on the same day J. W. Rufus Besson and George A. Berger, the executors designated in said will, duly qualified, and are now acting as such executors. To the record of said probate and qualification your oratrix for greater certainty begs leave to refer.

2. The lands and premises hereinbelow described were not specifically devised by said last will and testament, the only specific legacies therein having been of personalty.

3. The said Melissa A. Fonda during her lifetime and on or about the first day of May, A. D. Nineteen Hundred and Twelve, purchased from one Adelheid Rippe, widow, ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Weehawken, in the County of Hudson and State of New Jersey, and which

on a map of property entitled "Map of property belonging to The Palisade Land Company of West Hoboken, made by Charles B. Brush, Surveyor", filed in the office of the Register of the County of Hudson, on June 28th, 1894, is known, marked and distinguished as parts of lots numbered 14 and 15, in block lettered "M" and more particularly described as follows, to wit:

Beginning at a point on the southerly side of Shippen Street, distant 154.09 feet westerly from the southwest corner of Gregory Avenue and Shippen Street; and running thence westerly along the southerly line of Shippen Street 29 feet; thence southerly and parallel with Gregory Avenue 96.28 feet; thence easterly 29.03 feet to a point; and thence northerly and parallel with Gregory Avenue 94.93 feet to the point or place of beginning.

Said premises were purchased from said Adelheid Rippe subject to a mortgage of Six Thousand Dollars ($6,000.00), which was a lien thereon while said premises were the property of said Adelheid Rippe, but said mortgage was, on or about said first day of May, A. D. Nineteen Hundred and Twelve, and as a part of the transaction of said purchase, paid and satisfied by said Melissa A. Fonda.

4. Said Melissa A. Fonda paid for said premises, and satisfied said mortgage, with her own funds, but procured the conveyance of said premises to be made and delivered by said Adelheid Rippe to one George A. Berger as grantee, the said George A. Berger not having paid any part of said purchase price, and then and there agreeing to receive and accept said title, and to hold the same in trust for said Melissa A. Fonda. Said conveyance from said Adelheid Rippe to said

George A. Berger was dated May first, Nineteen Hundred and Twelve, was duly acknowledged, and was recorded in the Register's office of Hudson County in Book 1117 of Deeds for said County at page 206, &c., to which record your oratrix for greater certainty begs leave to refer.

5. And your oratrix shows and charges that by reason of the premises the said George A. Berger was seized of said lands and premises upon a resulting trust for the benefit or the said Melissa A. Fonda, and that said George A. Berger had no beneficial interest or estate therein whatsoever, but said Melissa A. Fonda was the sole beneficial owner thereof.

6. That after the said purchase of said lands and premises from the said Adelheid Rippe, the said Melissa A. Fonda went into the occupation thereof, and thereafter at all times until her death as aforesaid occupied the same and was in possession thereof; in all respects treating said property as her own, and paying the taxes thereon, as they accrued, out of her own funds.

7. On or about the ninth day of August, A. D. Nineteen Hundred and Twelve, the said Melissa A. Fonda requested said George A. Berger to convey to Richard C. Shelton, Jr., the legal title to said premises.

8. In accordance with said request of said Melissa A. Fonda, said George A. Berger did, on or about said ninth day of August, Nineteen Hundred and Twelve, convey said lands and premises to said Richard C. Shelton, Jr., by conveyance made by the said George A. Berger and Meta Berger, his wife, to said Richard C. Shelton, Jr., dated August ninth, Nineteen Hundred and Twelve, duly acknowledged and recorded in the Hudson County Register's office on Septem-

ber fourth, Nineteen Hundred and Twelve, in Book 1135 of Deeds for said County at page 72, &c., to which record your oratrix for greater certainty begs leave to refer.

9. The said Richard C. Shelton, Jr., at and prior to the time of the delivery of said conveyance to him, had actual knowledge of said trust, and of the fact, as hereinabove set forth, that said George A. Berger was a bare trustee, without interest, and that the sole equitable and beneficial owner of said lands was the said Melissa A. Fonda; and took said title with such knowledge and subject to said beneficial estate of said Melissa A. Fonda therein, without paying any consideration whatever to said Melissa A. Fonda.

10. The said Richard C. Shelton, Jr., was unrelated to the said Melissa A. Fonda by ties either of consanguinity or of affinity.

11. And your oratrix shows and charges that by reason of the premises, the said Richard C. Shelton, Jr., took the title to said lands and premises as a bare substituted trustee in the place and stead of the said George A. Berger, and without any beneficial interest or estate therein whatsoever, but held the same in trust for said Melissa A. Fonda, the sole beneficial owner thereof.

12. After the making of said last mentioned conveyance, said Melissa A. Fonda continued in possession of said lands and premises, treating the same as her own property, and controlling the same, until her death as aforesaid.

13. No moneys were ever expended by the said Richard C. Shelton, Jr., in and about the maintenance of said property, the taxes and bills for repairs thereon having been paid by the said Melissa A. Fonda.

14. And your oratrix shows and charges that the said lands and premises are now held by the said Richard C. Shelton, Jr., in trust for your oratrix, as devisee thereof under the said last will and testament of the said Melissa A. Fonda, and that said Richard C. Shelton, Jr., has no interest or estate therein beyond the bare legal title, which he holds in subservience to the beneficial estate vested in your oratrix, as aforesaid.

15. That said Richard C. Shelton, Jr., has been since the death of said Melissa A. Fonda on December twenty-eighth, Nineteen Hundred and Fourteen, as aforesaid, and now is, in the occupation of said lands and premises, or some part thereof, and refuses to convey the same to your oratrix or to yield unto your oratrix the possession thereof, or to pay any rent therefor, and that he was indebted to said Melissa A. Fonda in her lifetime and is now indebted to your oratrix for the fair rental value of said premises during the period of his occupancy thereof.

In consideration whereof and forasmuch as your oratrix is without adequate remedy in the premises at the common law.

To the end therefore that the said George A. Berger and J. W. Rufus Besson, as executors of the last will and testament of Melissa A. Fonda, deceased, and said Richard C. Shelton, Jr., may without oath, full true and perfect answers make to all and singular the matters aforesaid, and that the said Richard C. Shelton, Jr., may be decreed to be without beneficial interest or estate in or to said lands and premises, and to hold the same in trust for your oratrix, and that your oratrix is the sole owner thereof in equity; and that the said Richard C. Shelton, Jr. be decreed to convey said lands and premises to your ora-

trix by a good and sufficient deed of conveyance in the law; and that the said Richard C. Shelton, Jr. be enjoined and restrained from in any manner or to any extent whatever, conveying, alienating or encumbering said lands and premises, except in compliance with the decree of this honorable Court; and that said Richard C. Shelton, Jr. be decreed to account to your oratrix for the rents, issues and profits of said lands and premises during the period of his occupancy thereof, and to pay over to your oratrix such sum or sums as shall be found to be due to her from said Richard C. Shelton, Jr., for such rents, issues and profits; and that a receiver may be appointed by this Court to collect the rents, issues and profits of said premises pendente lite and to pay over the same in accordance with the orders and decrees of this court, and for such other and further relief in the premises as the case may require and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your oratrix not only the State's writ of injunction, issuing out of and under the seal of this honorable Court, to be directed to the said Richard C. Shelton, Jr., restraining and enjoining him from in any manner or to any extent whatever conveying, alienating or encumbering said lands and premises, except in accordance with the orders and decrees of this Court; but also the State's writ or writs of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said Richard C. Shelton, Jr., and to the said J. W. Rufus Besson and George A. Berger as executors of the last will and testament of Melissa A. Fonda deceased, commanding them and each of them, on a certain day and under a certain pen-

alty therein to be expressed, to be and appear before your Honor in this honorable Court, then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

And your oratrix will ever pray, &c.

SMITH, MABON & HERR,
Solicitors of and of counsel with Complainant.

Decree Pro Confesso.

(Filed, Feb. 11, 1915.)

IN CHANCERY OF NEW JERSEY.

Between

GRACE RIESENBERGER,

Complainant,

and

RICHARD C. SHELTON, JR., *et als.*,

Defendants.

On Bill, &c. Decree Pro Confesso and Order for Proofs.

Upon opening the matter to the Court by Smith, Mabon & Herr, of counsel with the complainant, and it appearing to the Chancellor that process in this cause has been duly issued and personally served upon the defendants, Richard C. Shelton, Jr., and J. W. Rufus Besson and George A. Berger, as executors of the last will and testament of Melissa A. Fonda, deceased, and that the said defendants have not nor have either or any of them appeared and pleaded, answered or demurred to the bill of complaint herein within the time limited by law, or at any other time.

It is thereupon, on this 11th day of February,

Nineteen Hundred and Fifteen, ORDERED, that the bill of complaint be taken as confessed against the said defendants, Richard C. Shelton, Jr., and J. W. Rufus Besson and George A. Berger, as executors of the last will and testament of Melissa A. Fonda, deceased.

And it is further ORDERED that the complainant proceed to take depositions and other evidence to substantiate and prove the allegations in his said bill and to bring on the hearing of the cause ex parte.

E. R. WALKER.
C.

Answer of Shelton.

(Filed March 2, 1915, as if within time.)

IN CHANCERY OF NEW JERSEY.

Between

GRACE RIESENBERGER,
Complainant,
and
RICHARD C. SHELTON, JR., *et als.*,
Defendants.

On Bill, &c.

THE ANSWER OF RICHARD C. SHELTON, JR., ONE OF THE DEFENDANTS, TO THE BILL OF COMPLAINT OF GRACE RIESENBERGER, COMPLAINANT.

This defendant for answer unto so much and such parts of the said bill of complaint as he is advised it is material or necessary for him to make answer unto, answering says:

(1) This defendant admits the contents of the first paragraph of the bill of complaint.

(2) This defendant admits the contents of the second paragraph of said bill of complaint.

(3) This defendant admits the contents of the third paragraph of the said bill of complaint.

(4) As to the fourth paragraph of the bill of complaint, this defendant admits that the said Melissa A. Fonda paid for the premises in question, and satisfied the said mortgage with her own funds, and procured the conveyance of said premises to be made and delivered by said Adelheid Rippe to one George A. Berger, and he admits that the said George A. Berger did not pay any part of the said purchase price, but he denies that the said George A. Berger did then and there agree to accept said title and hold the same in trust for the said Melissa A. Fonda. This defendant says that the intention of the parties was at the time that the said George A. Berger should hold the said premises in trust for for this defendant, and should convey the said premises to this defendant when he should be thereafter requested by the said Melissa A. Fonda. This defendant admits the date and the place of record of the conveyance from Adelheid Rippe to the said George A. Berger, as set forth in the bill of complaint.

(5) As to the fifth paragraph of the said bill of complaint, this defendant admits that the said George A. Berger was seized of said lands and premises as trustee, but says that the said Berger was trustee for this defendant.

(6) As to the sixth paragraph of the said bill of complaint, this defendant denies that the said Melissa A. Fonda went into the occupation of the said premises, and thereafter at all times until her death occupied the same and was in possession thereof, or that she treated said property as her own. This defendant avers that the said premises were a two story and attic house, of

which the said Melissa A. Fonda occupied the first floor, and this defendant and his father and mother and sister and brother occupied the second floor and the attic; that under an agreement between this defendant and the said Melissa A. Fonda, the said Melissa A. Fonda in lieu of rent paid the taxes and fire insurance premiums on the said premises, and the water rents and paid for the coal for heating the premises.

(7) This defendant admits the contents of the seventh paragraph of the said bill of complaint.

(8) This defendant admits the contents of the eighth paragraph of the said bill of complaint.

(9) As to the ninth paragraph of the said bill of complaint, this defendant admits that he knew that the said George A. Berger had no beneficial interest in the said premises, but he denies that the sole equitable and beneficial owner of the said lands was the said Melissa A. Fonda. And this defendant further answering the said ninth paragraph of the bill of complaint, says that the circumstances leading up to the conveyance of the said lands and premises to him, and under which he took title are the following:

That about the month of June, nineteen hundred and nine, this defendant, at the request of the said Melissa A. Fonda, entered her employ as secretary and general factotum, and at her request gave his whole time to the management of her affairs; that from time to time thereafter, until the time of the conveyance of the premises in question, this defendant received from the said Melissa A. Fonda small sums of money, which altogether did not represent the value of the time which he had expended on her affairs. That in the month of February, nineteen hundred and twelve, this defendant represented to the said Me-

lissa A. Fonda that he could no longer remain in her service, but that he would be compelled to look out for some remunerative occupation; that the said Melissa A. Fonda thereupon urged him to stay with her, and said that she would make some provision for this defendant; the said Melissa A. Fonda then stated to this defendant and to other persons that she did not consider that he ought to go out to try to find work because she thought that he was not in such a condition of health that he could do hard work, and that if he would stay with her and continue to work for her as theretofore, she would give him a house, where he might live, and have his mother with him. That thereupon she entered into negotiations for the purchase of the premises in question through the said George A. Berger; that the reason for having the conveyance made to the said George A. Berger was that the said Melissa A. Fonda was then living on the premises, and thought that if the grantor knew that she was buying she could not get it at as low a figure as if someone else negotiated for it, and furthermore, that the said grantor well knew that this defendant was an employee of the said Melissa A. Fonda, and that if the title were to be taken in the name of this defendant that she would have to pay a higher price than if the title were taken in the name of a stranger; that almost immediately upon the acquisition of the said premises by the said George A. Berger, the said Melissa A. Fonda requested the said George A. Berger to make a conveyance of the said premises to this defendant, but the summer vacation having intervened, and the said Melissa A. Fonda being away from town, the deed was not actually executed until sometime in the month of August, nineteen hundred and twelve. Thereafter this

defendant continued in the employ of the said Melissa A. Fonda until her death, receiving, however, from her very much less in the way of compensation than he had been accustomed to receive theretofore; and this defendant says that it was the intention of the said Melissa A. Fonda to have the said premises conveyed to this defendant either as a gift or as compensation for services theretofore rendered or thereafter to be rendered.

(10) And this defendant further answering in this connection says, that as early as the twelfth day of May, nineteen hundred and ten, the said Melissa A. Fonda had made a will in which she had bequeathed to this defendant the sum of Ten thousand dollars and all her household furniture, which household furniture, this defendant avers, was of the value of several thousand dollars; that the value of the lands and premises in question does not exceed Ten thousand five hundred dollars.

(11) As to the tenth paragraph of the said bill of complaint, this defendant admits that he was unrelated to the said Melissa A. Fonda by ties either of consanguinity or of affinity.

(12) As to the eleventh paragraph of the said bill of complaint, this defendant denies that he took the title to said lands and premises as a bare substituted trustee and without any beneficial interest or estate whatsoever, or that he held the same in trust for the said Melissa A. Fonda, but says that the entire beneficial ownership became vested in this defendant.

(13) As to the twelfth paragraph of the said bill of complaint, this defendant denies that the said Melissa A. Fonda continued in possession of the said lands and premises, treating the same as her own property and controlled the same until her death, but says that this defendant con-

trolled the same; that the said Melissa A. Fonda occupied a part thereof and paid the taxes and water rents and the coal bills for heating instead of rent, as hereinbefore set forth.

(14) As to the thirteenth paragraph of the bill of complaint, this defendant denies that no moneys were ever expended by him in and about the maintenance of said property, but on the contrary he shows he has expended in and about the repair of the said premises a sum of money of upwards of six hundred and twenty-two dollars.

(15) For answer to the fourteenth paragraph of the said bill of complaint, this defendant denies that he holds the said premises in trust for the complainant, or that he has no interest or estate therein beyond the bare legal title, but this defendant says that he is the owner of the entire beneficial estate in and to the said lands and premises.

(16) As to the fifteenth paragraph of the said bill of complaint, this defendant admits that he has been, since the death of the said Melissa A. Fonda, and is, in possession of the said lands and premises, and admits that he refuses to convey the said lands and premises to the complainant or to yield to the complainant the possession thereof, or to pay any rent therefor, and he denies that he was indebted to the said Melissa A. Fonda in her lifetime, or is now indebted to the complainant for the rental value of the said premises during the period of his occupation thereof. but on the contrary thereof, this defendant repeats that he is and has been since the month of August, nineteen hundred and twelve, the owner of the legal and equitable title in and to the said lands and premises.

This defendant prays to be hence dismissed

with his reasonable costs and charges in this behalf most wrongfully sustained.

ALBERT LEULY, Solr.,
and
M. T. ROSENBERG,
Of Counsel with Answering Defendant.

Replication.

(Filed, March 25, 1915.)

IN CHANCERY OF NEW JERSEY.
39-222.

Between
GRACE RIESENBERGER,
Complainant,
and
RICHARD C. SHELTON, JR., *et als.*,
Defendants.

On Bill, &c.
Replication.

The replication of Grace Riesenberger, complainant, to the answer of Richard C. Shelton, Jr., defendant.

The complainant joins issue on the answer of the defendant, Richard C. Shelton, Jr.

SMITH, MABON & HERR,
Solicitors of Complainant.

Conclusions of Lewis, V. C.

(Filed, March 1, 1916.)

IN CHANCERY OF NEW JERSEY.

Between GRACE RIESENBERGER, *Complainant,* *and* RICHARD C. SHELTON, JR., et als., *Defendants.*	On Bill, &c. Memo.

Messrs. Smith, Mabon and Herr, for the complainant.

Messrs. Albert Leuly and Maximilian T. Rosenberg, for the defendant.

V. C. LEWIS:

The Complainant in this case is the daughter of Melissa A. Fonda. She files a bill in this court to have a resulting trust declared in favor of her mother. The property in question is now in the possession of Richard C. Shelton, Jr., one of the defendants. It was the money of Mrs. Fonda that bought this property and the complainant contends that the estate that her mother had in it descended under the residuary clause of the will to her.

Mrs. Fonda died in December, 1914, her husband surviving her. Shelton, the defendant, had been in her employ since the late spring of 1909. He met her first while they were active in the work of the First Reformed Church of West Hoboken. At that time he was employed as a salesman in a wholesale silk house in New York City. She engaged him to act as a secretary for her and it appears from the evidence that for a num-

ber of years he practically attended to all her business, such as writing checks and letters, and so forth. He accompanied her as secretary on her trips during the summer and she paid his expenses. His testimony is that he was at her beck and call all the time. In the year 1912 Mrs. Fonda and he had some conversation with reference to his continuing to work for her and he stated it was necessary for him to seek another position if his health which had been delicate would warrant it. She is said to have told him not to leave her and said that she intended doing something for him. Later she told him that she would buy the house at 111 Shippen Street, West Hoboken for him. Subsequently she discussed the matter with Shelton's mother and made arrangements for the maintenance of the house. These arrangements having been agreed upon the Sheltons removed to the premises at 111 Shippen Street. This was about the tenth of May, 1912. Shelton's parents paid rent for the house at the rate of twenty dollars a month for some time, which Shelton turned over to Mrs. Fonda. On the first of May, 1912, a deed for the property 111 Shippen Street was made to George A. Berger, Vice President of the Trust Company of New Jersey. Mr. Berger is executor of Melissa A. Fonda's will and had transacted affairs for her at the bank. His story of the purchase of the property is that Mrs. Fonda told him that she desired to buy the house at 111 Shippen Street for Richard Shelton; that the people that owned it thought that she had a lot of money and they wanted more than the house was worth and she therefore desired him to purchase it for Shelton. He says in consequence of his conversation with Mrs. Fonda he entered into communication with the owners of the property and finally bought it

for $10,200. Mrs. Fonda gave him the cash to pay for it. Berger entered into a contract with the owners of the property and thereafter took a deed from one Adelaide Rippe for it. This deed was recorded May 3rd, 1912. After he had received this deed he says he told Mrs. Fonda about it and she asked him to hold the property until she was ready to have it transferred to Richard Shelton. He received a letter on June 6th, 1912, from Mrs. Fonda, from Albany, New York, directing him to put the deed to Shelton on record. He says he then notified Mrs. Fonda that if she wanted it recorded he would send it to her. He subsequently executed the deed to Shelton and on August 19th, 1912, sent it to Mrs. Fonda, writing her that Mr. J. Rufus Besson had suggested that he mail it to her and that if she wished it recorded before her return from Westport, at which place she was then stopping, that she could mail it direct to Mr. Besson. Mr. Besson received the deed in due course of time and recorded it. Witnesses were produced to show that Mrs. Fonda had said she had purchased the property for Shelton and the reason she did it was that she had never paid him any salary and she wanted to give him something for his services. It appears also from the evidence that a legacy of $10,000 and furniture and personal property amounting to several thousand dollars more which Mrs. Fonda had given to Shelton was cut down to $2,000 by her last will. It seemed apparent that she had done this owing to the gift of the property to Shelton.

The contention of the complainant is that there is a resulting trust in favor of Melissa A. Fonda. I cannot under any view of the case reach this conclusion. My opinion is that when Berger took title he took it as trustee under an express

trust, not for Mrs. Fonda, but for Shelton. If there was any resulting trust in favor of Mrs. Fonda her interest was conveyed to Shelton by the letters of instruction which are all in evidence and which were sent to Mr. George A. Berger. Berger acted upon these instructions. The trust was executed. What Mrs. Fonda did was to pay Shelton for his services that he had rendered and was to render in the future. Her estate was benefited by the step which she took. The legacy and the valuable furniture gifts were cut down to a bequest of $2,000 by her last will. At no time did Mrs. Fonda ever exercise any dominion over the Shelton property. There is nothing in the testimony that indicates that she considered it as her property or that she considered herself as having any interest in it. She simply furnished Berger with the money to hold as her trustee. Berger realized that Shelton was his cestui que trust.

Her reasons for negotiating through Berger are quite apparent. It was her desire evidently to arrange it in such a manner as to prevent future complications for Shelton so that he might be undisturbed in his possession of the property.

The doctrine of resulting trust is founded upon the presumed intention of the parties. Certainly there can be no intention spelled out of Mrs. Fonda's conduct in any respect to create a resulting trust in her favor.

It is further contended by the complainant that Mrs. Fonda could not convey any equitable title to the defendant without her husband joining. It is true that in the case of *Cushing vs. Blake* cited by counsel for the defendant it is held that the husband would have an estate by the courtesy in the property held by the wife under an express trust, but in this case Mr. Fonda is not a party

nor is his courtesy at all in question. The Married Womens' Act did not change her condition where she holds an equitable estate. In safeguarding to married women their separate estates it simply provided that nothing in the act contained should enable any married woman to execute any conveyance of her real estate, and so forth, without her husband joining *as heretofore.*

I do not find any basis in the decisions of this State for this latter claim of the complainant. In the case of *Leaycraft vs. Hedden,* 4 N. J. Equity, 512, the Chancellor said:

> "I think it may safely be said, that a feme covert is a feme sole as to her separate estate, so far as to dispose of it in any way, not inconsistent with the terms of the instrument under which she holds. Any danger apprehended from such rule, can be avoided by words restraining the disposition, or directing the precise mode in which it may be made."

I will advise a decree dismissing the bill.

Final Decree.

(Filed, Nov. 8, 1915.)

IN CHANCERY OF NEW JERSEY.

Between

GRACE RIESENBERGER,

Complainant,

and

RICHARD C. SHELTON, JR., *et als.,*

Defendants.

On Bill, &c.
Final Decree.

This cause coming on to be heard before the Court, on the pleadings and proofs taken in open Court, in the presence of Dougal Herr, Esquire, of counsel with the complainant, and Albert Leuly and M. T. Rosenberg, of counsel with the defendant, Richard C. Shelton, Jr., and the court having considered the matter, and being of opinion that the defendant, Richard C. Shelton, Jr., is the owner of the entire beneficial interest or estate in and to the lands and premises described in the bill of complaint, and that said complainant has no interest therein, and is not entitled to any relief;

IT IS, on this eighth day of November, nineteen hundred and fifteen, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor doth by virtue of the power and authority of this Court, ORDER, ADJUDGE and DECREE that the complainant's bill of complaint be and the same is hereby dismissed.

And it is further ordered that the complainant pay to the said defendant, Richard C. Shelton, Jr., his costs of this suit to be taxed, and a coun-

sel fee of three hundred $300.00 dollars, which is hereby allowed to the said defendant, Richard C. Shelton, Jr., to be included in the said taxed costs.

E. R. WALKER,
C.

Respectfully advised,
VIVIAN M. LEWIS,
V. C.

Notice of Appeal.

(Filed, Nov. 17, 1915.)

IN CHANCERY OF NEW JERSEY.

Between

GRACE RIESENBERGER,
Complainant-Appellant,
and
RICHARD C. SHELTON, JR., *et als.,*
Defendants-Respondents.

On Bill, &c.
Notice
of Appeal.

The complainant hereby appeals from the whole and every part of the final decree made in this Court, in the above-stated cause, to the Court of Errors and Appeals in the last resort in all causes.

SMITH, MABON & HERR,
Solicitors of and of Counsel
with Complainant.

Dated, November 16, 1915.

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

DOUGAL HERR,
Of Counsel with Complainant.

Petition of Appeal.

(Filed, Dec. 7, 1915.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

GRACE RIESENBERGER,

Complainant-Appellant,

and

RICHARD C. SHELTON, JR., and J. W. RUFUS BESSON and GEORGE A. BERGER, as executors of the last will and testament of MELISSA FONDA, deceased,

Defendants-Respondents.

Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the last resort in all causes.

The petition of Grace Riesenberger, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the eighth day of November, in the year Nineteen Hundred and Fifteen, wherein the said Grace Riesenberger was complainant and the said Richard C. Shelton, Jr., and J. W. Rufus Besson and George A. Berger were defendants, in this respect, to wit, that the said decree adjudges and decrees that the complainant's bill of complaint be dismissed and that the complainant pay to the defendant, Richard C. Shelton, Jr., his costs of said suit to be taxed and a counsel fee of Three Hundred Dollars, thereby allowed to the said defendant, Richard C. Shelton, Jr., to be included in the

said taxed costs. And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that your petitioner is the beneficial owner of the real property set forth and described in the bill of complaint in said cause and is entitled to a decree that the legal title to said real estate be conveyed to her, and for the other relief prayed for in her said bill of complaint. Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

SMITH, MABON & HERR,
Solicitors of and of Counsel
with Appellant.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between
GRACE RIESENBERGER,
Complainant,
and
RICHARD C. SHELTON, JR., ET ALS.,
Defendants.
} On Bill, etc.

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on Wednesday, the twenty-ninth day of September, nineteen hundred and fifteen, before HON. VIVIAN M. LEWIS, Vice-Chancellor.

APPEARANCES:

SMITH, MABON & HERR, ESQS,
for the Complainant;

ALBERT LEULY and MAXIMILIAN T. ROSENBERG, Esqs., for the Defendant, Richard C. Shelton, Jr.

MR. HERR: I want to put in evidence a letter which Mrs. Fonda wrote to Mr. Berger on June 6, 1912, following which he conveyed the property to Shelton.

MR. ROSENBERG: I think we practically admit that letter; I think the signature of Melissa A. Fonda is admitted to that letter.

Marked "Exhibit C-1."

Grace Riesenberger—Direct—Cross.
George A. Berger—Direct.

GRACE RIESENBERGER, being sworn in her own behalf, testified as follows:

DIRECT EXAMINATION BY MR. HERR:

Q. You are the complainant? A. Yes, sir.

Q. You are the daughter of Melissa A. Fonda, who died in December, 1914? A. Yes, sir.

Q. Is your father living? A. Yes, sir, my father is now living and resides in Albany, New York.

Q. Were he and your mother married up to the time of her death? A. Yes, sir.

CROSS EXAMINATION BY MR. ROSENBERG:

Q. What is his name? A. Martin.

Q. And he is your father? A. Yes, sir.

Q. Not your stepfather? A. No, sir, he is my father.

MR. HERR: We rest.

DEFENSE.

GEORGE A. BERGER, sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

Q. You reside in Hoboken, New Jersey? A. Yes, sir.

Q. And you are the secretary and treasurer of the Trust Company of New Jersey? A. I am the Vice-President of the Trust Company of New Jersey.

MR. ROSENBERG: I presume it is admitted that the estate of Mrs. Fonda, the personal estate of Mrs. Fonda, is large enough to pay all the debts and legacies?

MR. HERR: Yes.

MR. ROSENBERG: Then, there is no necessity to call upon this real estate to pay debts?

MR. HERR: No.

Q. Did you know Melissa A. Fonda? A. Yes, sir.

Q. How long had you known her? A. Probably seven or eight years.

Q. Before her death? A. Yes, sir.

Q. And you are one of the executors of her will? A. Yes, sir.

Q. You knew her very well? A. Quite well.

Q. And you were in the habit of transacting her business affairs for her? A. Any business that came to the bank, yes, sir.

Q. How did you come to know her? A. By her being a depositor of the bank.

Q. Do you remember her coming to you in the spring of 1912 with reference to purchasing the property in question in this suit? A. Yes, sir.

Q. Where did she meet you? A. At my office in the Trust Company.

Q. Tell us briefly, what took place between you and Mrs. Fonda on that occasion? A. She told me she desired to buy a house at 111 Shippen Street, Weehawken; that the people that owned it thought that she had a lot of money, and they wanted more money than the house was worth, and she asked me if I would purchase it for her, and I said I would.

Q. Did she say why she was buying it? A. She said she was going to buy the house to give it to Richard Shelton.

Q. Did she say anything beyond that? A. No, sir.

Q. Did you know him? A. Yes, sir.

Q. He had been in the employ of Mrs. Fonda for some time before that? A. I assume so; he was with her most of the time when she came to the bank.

Q. Did he write her letters and checks? A. Yes, sir.

Q. Some of her business transactions had gone through your hands? A. Yes, sir.

Q. In consequence of that conversation on that day, what did you do? A. I got in communication with the owners of the house and asked them if they wanted to sell, and they said "Yes;" and I dickered with them as to price. Finally, we came to an understanding at the price of $10,200.

Q. Proceed. A. I think I paid them $1,000 on the 17th of April, 1912, payment on account.

THE COURT: That is all admitted, isn't it?

MR. HERR: I want to make a motion as to this testimony—that it is irrelevant under our view of the case.

Q. (By Mr. Rosenberg): I show you the contract between Adelaide Rippe and George A. Berger, an agreement dated the 10th of April, 1912, and that is the contract that was entered into between you and Mr. Rippe for the purchase of this property? A. Yes, sir.

MR. ROSENBERG: I offer this in evidence. Marked "Exhibit D-1."

Q. You thereafter took this deed of Adelaide Rippe, did you? A. Yes, sir.

Q. And that is the deed which you took? A. Yes, sir.

MR. ROSENBERG: I offer in evidence deed

from Adelaide Rippe to George A. Berger, under day May 1, 1912.

MR. HERR: There is no objection.

MR. ROSENBERG: Acknowledged before William F. Burke, Master in Chancery, and recorded in Book 1117 of Deeds for Hudson County, on page 206, etc.

Q. After you had taken that deed, what did you do in reference to the deed of the property? A. Mrs. Fonda told me to hold the property until she was ready to have it transferred to Richard Shelton.

Q. And you took this deed and it went on record on the 3rd of May; the next you heard from her was in the shape of this letter, June 6th, was it? A. Yes, sir.

Deed marked "Exhibit D-2."

BY THE COURT:

Q. You had met her in the interim between the making of the deed and the receipt of this letter? A. I believe I had, yes, sir.

FURTHER DIRECT:

Q. You believe you had? A. Yes, sir.

Q. Where was that letter written from? A. This letter is dated Albany, New York.

Q. Do you remember whether or not she was out of town during that summer? A. I think she was out of town all that summer.

MR. HERR: I will admit she was out of town from June for the rest of the summer.

Q. And when you got that letter, what did you do? A. Why, I spoke to Mr. Besson about the transfer of the property, and asked him what to do.

Q. Mr. Besson had been counsel for Mrs. Fonda? A. Yes, sir, and Mr. Besson told me to notify Mrs. Fonda that if she wanted the deed to go on record, I should send it to her and she should request him directly to have that deed put on record, which was done.

Q. You executed the deed? A. Yes, sir.

Q. I show you a deed dated the 9th of August, 1912, from George A. Berger and wife to Richard C. Shelton, Jr.; is that the deed that you executed? A. It is, yes, sir.

BY THE COURT:

Q. Where was it executed? A. At Hoboken.
Q. Where? A. At Mr. Besson's office.

MR. ROSENBERG: I offer in evidence deed dated August 9, 1912, acknowledged August 16, 1912, before J. Rufus Besson, Master in Chancery, and recorded in Book 1135 of Deeds for Hudson County, on page 72.
Marked "Exhibit D-3."

Q. That deed bears date August 9th; you received this letter from her sometime in June? A. This letter is dated June 6, 1912.

Marked "Exhibit D-3½."
(Same as C-1.)

Q. Now, why was not that deed executed between the 6th of June and the 9th of August? A. I was awaiting Mrs. Fonda's instructions when to put it on record.

Q. You mean you had had the deed drawn, had you? A. Yes, sir.

Q. How quickly after you received the letter, did you direct the deed to be drawn? A. There was a deed drawn immediately upon my taking title to the property, I believe—a blank deed.

Q. You mean a deed drawn in blank? A. Yes.

Q. Why was that deed drawn blank? A. The property did not belong to me, and in case of my death, it would go to Mrs. Fonda.

Q. Before you wrote her—did you write her asking her what she wanted to have done with the deed? A. Not that I remember of.

Q. Well, you did have the deed drawn? A. Yes, sir.

Q. And executed it? A. Yes, sir.

Q. And what did you do with it then? A. I think Mr. Besson held that deed.

Q. Did you get another letter from Mrs. Fonda after that? A. I have several letters that refer to this case.

Q. What are they? A. One of July 19, 1912, and one of July 27, 1912.

By The Court:

Q. Where from? A. Both from Westport, New York.

Further Direct:

Q. This is Mr. Shelton's handwriting? A. Yes, sir.

Q. Signed by Mr. Shelton? A. Signed "Richard C. Shelton, Jr." Here is one of Mrs. Fonda, dated July 27, 1912.

Q. This is her signature? A. It is, yes, sir.

Mr. Rosenberg: Mr. Herr, I will offer these in evidence.

Mr. Herr examines a letter.

Mr. Herr: I have no objection.

Mr. Rosenberg: I offer this letter in evidence. It says, "In reference to deed of house at 116 Shippen Street" (reads letter) —That is dated July 27th—"I beg to say

that I would prefer the same to go on record at once."

Marked "Exhibit D-4½."

MR. ROSENBERG: Now, that was apparently written in answer to a letter from you to her.

Q. That, evidently, was in answer to a letter of July 25th (showing letter to witness). A. That is my signature and my letter.

Q. Now, when you say, "I desire to say that the same has been done and executed, and is ready for delivery to you," what deed were you referring to? A. The deed drawn in blank, I presume.

Q. But that deed to Shelton was not dated until sometime in August? A. There was a blank deed of the property which that refers to; that letter refers to, and the deed later was executed to Mr. Shelton.

Q. So you made another deed after that? A. Yes, sir.

Q. And you wrote her, then, on the 25th, that you had executed the deed in blank? A. Yes, sir.

Q. And she wrote you to have the deed go on record? A. Yes, sir.

Q. Then you and Mrs. Berger executed the deed of August 9th? A. Yes, sir.

Q. After the execution of that, did you write Mrs. Fonda another letter; did you write Mrs. Fonda another letter? A. That is my letter.

Q. August 19, 1912? A. Yes, sir.

Q. In which you write: "I am also enclosing you a deed for the above-mentioned property from myself to Mr. Richard C. Shelton, Jr.; Mr. Besson suggested that I mail you this deed before the same is put on record, and if you wish the

same recorded before your return, you will mail it to Mr. Besson direct, with the request that he place the same on record;" that is your signature? A. Yes, sir.

MR. ROSENBERG: And I offer in evidence the letter of Mr. George A. Berger to Mrs. Fonda, under date of July 25, 1912.

Marked in evidence "D-5½."

The letter of George A. Berger to Mrs. Fonda, August 19, 1912.

Marked in evidence "D-6½."

And I don't know whether I offered that other letter, the letter from Mrs. Fonda to Mr. Berger, under date of July 27; did I offer that?

THE COURT: Yes, you offered that.

MR. HERR: There is no objection to these exhibits, but I would like to see them.

Q. That terminated your connection with reference to this property? A. It did.

Q. Did you have any conversation with Mrs. Fonda after that, with reference to the property? A. With reference to this particular transfer?

Q. Yes. A. Except that she said she had given it to Mr. Shelton for a present.

Q. When did she say that? A. A number of times.

Q. She did speak to you a number of times afterwards about this property? A. Yes, sir.

Q. And said what with reference to it? A. She said she had to pay his taxes for him.

Q. I want to direct your attention to some time around Christmas, 1913; do you remember an interview at that time with Mrs. Fonda in reference to the taxes on this property, in which she said something about having to pay the taxes

on this property? A. My recollection is, that she said she had to pay his taxes, because he hadn't any money to pay them; that was in 1913; that came up in this way: she came down to borrow some money herself—

Q. Did you see her in December of the following year? A. I did, yes, sir.

Q. And have an interview then? A. Yes, sir.

Q. What were the circumstances under which you had an interview with her at that time? A. In December, 1914, she was very ill, and she sent word down to me, through Mr. Shelton, that she wanted some money; so, of course, she could not write, because her hand was so badly swollen, and I called on her in order to execute a power of attorney to sign checks; and I asked to whom she wanted to make the power to, and she said to myself; the power of attorney was executed, and I delivered her the money that she asked for; then some little time after that, before Christmas, Mr. Shelton came down with a number of checks drawn on various people, for Christmas presents, he said; also a check for taxes of the house. I told him I could not sign the check, that I would have to see Mrs. Fonda first; so I called on her, and she said, "Yes," that she would have to pay Richard's taxes and make him a Christmas present of that, because she could not go out and buy any Christmas presents; thereupon I signed the checks.

Q. At that time she was living in this property, occupying part of it, was she? A. Yes, sir, the first floor.

Q. Who was living in the other floors? A. Mr. Shelton.

Q. And his mother and family? A. I imagine so.

George A. Berger—Cross.

CROSS EXAMINATION BY MR. HERR:

Q. This deed that was given in blank by you, do you know what became of that? A. I left that with Judge Besson.

Q. Was this deed that was afterwards executed on August 9th, another deed? A. It was a second deed, yes, sir.

Q. You don't know what became of the first one? A. No, sir, I do not.

Q. Was that first deed a deed with the name of the grantee blank? A. Yes, sir.

Q. Did you and your wife both execute it? A. Yes, sir.

Q. Was it acknowledged by you? A. I am quite sure it was.

Q. Was it acknowledged also by your wife? A. I think it was.

Q. Where was that acknowledgment taken? In Judge Besson's office? A. I don't remember; Judge Besson's office took it, I know.

BY THE COURT:

Q. Do you know who took it? A. No, sir.

FURTHER CROSS:

Q. At whose request or suggestion was that deed in blank made? A. At my own.

Q. Because you did not want to hold the property in such a way as that it would appear to be your own? A. Absolutely.

J. W. RUFUS BESSON, sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

Q. You are a counsellor-at-law of the State of New Jersey? A. Yes, sir.

Q. And did you know Mrs. Fonda—the late Mrs. Fonda? A. Yes, sir.

Q. And had you been doing law business for her for some years before her death? A. For a year or two.

Q. Do you remember whether or not you received a letter from her in August, 1912, or thereabouts, with reference to the deed to Richard C. Shelton? A. I did, yes, sir.

Q. You are under subpoena here to produce that letter; have you got it with you? A. I have not.

Q. Have you looked for it? A. I have looked everywhere in my office where it would be likely to be, and am unable to find it; I think I destroyed it.

Q. Do you remember the contents of the letter? A. Nothing more than that she instructed me to put the enclosed deed on record.

Q. What deed was enclosed in the letter? I show you a deed from George A. Berger and wife, dated August 9, 1912, to Richard C. Shelton, Jr., and ask you whether you recollect whether that was the deed that was enclosed in the letter? A. Yes, sir, that is the deed.

Q. That is the deed that has already been marked "Exhibit D-3"? A. Yes, sir.

Q. In pursuance of that letter, what did you do? A. I placed the deed on record.

Q. And when it came back from recording, what did you do with it? A. It remained in my safe for some time.

Q. Did you deliver it? A. It was delivered to Mr. Shelton.

By The Court:

Q. When, how long after? A. Some time.

Q. As a matter of fact, a paper which is left for recording with the Register, generally stays up there for three or four weeks, doesn't it? A. As a rule.

Further Rirect:

Q. And how long after it came back to your office, did you deliver it to Mr. Shelton? A. I don't remember.

By The Court:

Q. Did you send for him? A. I cannot recall the delivery of the deed to him, the circumstances or the time when it was done.

Q. Who paid the recording fee; do you remember that? A. I think that Mr. Berger must have paid me.

Q. You sent your bill for drawing these deeds? A. Yes, sir.

Q. Whom did you send it to? A. To Mr. Berger.

Further Direct:

Q. Have you sent it at all? A. Have I sent it at all—

Q. Did you ever have any talk with Mrs. Fonda about this particular property, 111 Shippen Street? A. I never did.

By The Court:

Q. Did you draw her will? A. I did, yes, sir.

Q. Was she ill at the time? A. Oh, no; that was four or five months before she was taken.

Q. At that time was there anything said about

the property in question—at the time of the drawing of the will? A. Nothing at all.

FURTHER DIRECT:

Q. Did you ever go up to 111 Shippen Street? A. Not until after her death.

CROSS EXAMINATION BY MR. HERR:

Q. About how long before her death was it that you drew her last will? A. Four or five months.

Q. Had you drawn her previous will? A. No, sir, I had not.

BY THE COURT:

Q. Did you, in drawing the will, take down a memorandum of her estate and take it to your office, or how did she direct you about drawing it? A. I met her in the Trust Company of New Jersey, in the office, with Mr. Berger, and we went in one of the private rooms there, and she told me what she wanted her will to contain, and I made a memorandum of it.

Q. Did she outline to you at that time her estate, the character of it, what it was? A. I don't think she stated what her estate consisted of; she simply made these specific bequests and stated that she wanted her daughter to have the remainder.

FURTHER CROSS:

Q. Did you deliver the deed to Mr. Shelton? A. I cannot recall that at all.

Q. Do you recollect whether any money was paid by Mr. Shelton for it? A. No money was paid to me or to the office.

Q. The deed may, however, have been delivered, not by your office at all, but by Mr. Berger? A. It may have been.

Q. Do you remember anything about this blank deed? A. I remember that there was a blank deed, and when Mr. Berger spoke to me about transferring the property to Mr. Shelton, and showed me the letter of June 6th, he said he had a blank deed, and I told him that in my opinion, that that deed did not amount to anything—that there was no grantee—and that there was no right to fill in any name in that deed, and I thought the proper way to do was to draw a new deed with a specific grantee, and have it executed; and it was by reason of that, that the new deed was drawn, and I tore up the old deed. I remember doing that.

OSCAR HAUGER, sworn in behalf of the Defendants, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

Q. I show you a paper, which purports to be the last will and testament of Melissa Augusta Fonda, under date of May 12, 1910, and I show you your signature "Oscar Hauger, 1132 Bloomfield Street, Hoboken;" is that your signature as attesting witness? A. Yes, sir.

Q. And was Mr. Beachner, the other attesting witness, present at the same time with you? A. Yes, sir.

Q. And I show you the signature and seal of Melissa Augusta Fonda; is that Mrs. Fonda's signature? A. Yes, sir.

Q. Did she execute that in your presence? A. Yes, sir.

Q. And in the presence of Mr. Beachner? A. Yes, sir.

Q. And both of you present at the same time? A. Yes, sir.

Q. Did she, or did she not, request you to be witnesses to it? A. Mr. Fallon asked me to be a witness, asked me in her presence.

Q. Did he state to you what this was? A. Yes, sir, he said it was a will.

MR. ROSENBERG: I offer in evidence a will under date of May 12, 1910, signed by Melissa Augusta Fonda; attested in due form of law.

MR. HERR: There is no objection to that. Marked "Exhibit D-8½."

MRS. AUGUSTA CALLEN, sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

Q. Where do you live? A. New York.

Q. Whereabouts? A. 509 West 140th Street.

Q. You are a friend of Mrs. Fonda? A. Yes, sir.

Q. A very old friend, were you? A. Of 35 years' standing.

Q. And you were accustomed to seeing her frequently or otherwise, during the last few years of her life? A. Pretty often, yes; sometimes once a week, and sometimes once a month.

Q. Do you remember seeing her in the spring of 1912? A. Probably, yes, sir; I saw her every spring.

Q. But fix the time; do you remember about the time of her starting in to buy the house at 111 Shippen Street? A. I was not connected with that transaction at all.

Q. Did she speak to you about buying the house? A. Not before she bought it.

Q. When did she speak to you about it first?

A. She told me she had bought it after she had bought it.

Q. Did she say why she had bought it? A. She said she had bought it and given it to Richard Shelton, that is all.

Q. Was that before she took the deed or after she took the deed? A. I don't know anything about the deed part at all.

Q. Why did she say she had bought it for Richard Shelton; how did she come to say that? A. She said she had never paid him a salary, and she wanted to give him something.

Q. Did she say that to you? A. Yes, sir.

Q. Did you know Richard Shelton? A. Yes, sir.

Q. Had he been working for her for some time? A. Yes, sir, ever since I knew him.

Q. How much of his time did he stay there? A. All of his time.

Q. Did he have any other employment that you knew of? A. No, sir, I don't think he did.

By The Court:

Q. How long did you say you had known Mrs. Fonda? A. 35 years.

Q. How long had you known Mr. Shelton? A. Six or seven years.

Q. Was that during his employment with Mrs. Fonda? A. Yes, sir.

Q. Beginning what year, as you recall? A. At the time she moved in Shippen Street.

Q. In the house which she afterwards gave away? A. Yes, sir.

Further Direct:

Q. Do you remember in 1912 when it was that Mrs. Fonda went up into the country? A. About the first of June.

Q. Do you remember the day of the week? A. Saturday.

Q. And did you have any talk with Mrs. Fonda just about that time, with reference to the house at #111 Shippen Street? A. No, sir, I did not.

Q. When was it that you first had your talk with her about the house? A. Sometime during that summer, at Westport; I was up at Westport with her, and she said she had given Richard the house, and she expected to live there as long as she lived.

Q. And after that, when you called on her—before that time who had lived in that house? A. Mr. and Mrs. Rippe.

Q. And Mrs. Fonda had occupied the other part? A. Yes, sir.

Q. And in the fall the Sheltons moved into the part that the Rippes had occupied, and Mrs. Fonda continued to live where she did? A. Yes, sir.

Q. Did Mr. Shelton continue to work for her? A. Yes, sir.

Q. He was there doing the same work that he had before? A. Yes, sir.

CROSS EXAMINATION BY MR. HERR:

Q. What was the nature of the work that Mr. Shelton did for her? A. Draw up her checks and other errands that she wanted done, like buying theatre tickets, anything in that line, don't you know?

Q. Was Mrs. Fonda conducting any business of her own? A. I don't think so.

Q. What did she do? A. She just lived there.

Q. And she lived alone? A. With the maid.

Q. She had a maid, too? A. Always.

Q. So all that Mr. Shelton did there was to run errands, buy theatre tickets, and make out checks, so far as you know? A. Yes.

Q. Now, at the time you had this conversation

with Mrs. Fonda in Westport, in the summer of 1912, she said that she expected to live in this house for the rest of her life, you say? A. Yes, sir.

Q. Did she say that she expected to give it to Mr. Shelton? A. She said she had given it to him.

Q. Did she say anything to you about paying rent for her occupation of it? A. No, sir, she never expected to pay rent, I think.

Q. Did you know that she was paying the water rents and coal bills and the like bills? A. I have heard her make those remarks.

By The Court:

Q. Did she ever speak to you about Mr. Shelton's financial ability? A. No, sir.

Further Cross:

Q. What remark did she ever make about these payments of money? A. Nothing of any account, that I remember; I did not charge my mind with them.

Q. Did she ever say anything to you on the occasion of paying any taxes? A. No, sir, she did not tell me anything of that kind; she never hesitated to say those things before me. Of course, it was none of my business; it was nothing to me.

Q. I want to find out if she ever said anything to you about paying taxes; you knew she paid them, didn't you? A. I don't think she said anything in particular about taxes to me.

Q. Did she say she paid coal bills and like bills? A. No, sir, we did not talk business.

Q. She never said anything to you, then, about paying rent? A. No, sir, I don't think she did.

Q. But she did say she expected to live in the house as long as she lived? A. Yes, sir, I have heard her say that.

RICHARD C. SHELTON, JR., sworn in his own behalf, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

Q. You are the defendant in this suit? A. Yes, sir.

Q. Where do you live now? A. 111 Shippen Street.

Q. Did you know Mrs. Fonda? A. Yes, sir.

Q. When did you first become acquainted with her? A. I cannot remember the exact date, but I became acquainted with her through church work, the church that she attended; I was an officer of the church.

Q. And she was a church member? A. Yes, sir.

Q. What church was it? A. The First Reformed Church of West Hoboken.

Q. And you entered into her employ— A. (No answer).

BY THE COURT:

Q. Don't you remember when you became acquainted with her; when was it? A. About ten years ago.

FURTHER DIRECT:

Q. You entered into her employ; when was that? A. In the summer or late spring of 1909.

Q. Tell us the circumstances under which you entered into her employ? A. At the time Mrs. Fonda was about ready to go to the country; I had had an attack of the grippe, a severe attack; after that, my health was very poor; it was necessary to discontinue my work, and she made the offer to me.

Q. What was your work? A. I was a salesman in the wholesale silk house in New York City of the firm of Greeff and Company.

Q. Proceed. A. She made an offer to go with her for the summer, with the idea that I would regain my health.

Q. Proceed. A. And also render services to her in whatever way she might need me, writing checks and letters, etc.

Q. That is the summer of what year? A. Of 1909.

By The Court:

Q. What arrangements did she make with you about your summer? A. Only that she would pay my expenses while in the country.

Q. Had you any family? A. No, sir, I am single.

Q. Any family dependent upon you; anyone dependent upon you? A. No, sir, no one at all.

Q. So she said to you she would take you and pay your expenses and you would do this work for her in return? A. Yes, sir.

Q. Without compensation? A. Yes, sir.

Further Direct:

Q. And you did go up to the country with her, did you? A. Yes, sir.

Q. And you did her work up there—what she required you to do? A. Yes, sir, and when I came back she wanted me to continue to do that there work.

Q. And you continued to do that work during the fall? A. Yes, sir.

Q. Did you go back to your position with the silk house? A. No, sir.

Q. Did you take up any other position? A. No, sir.

Q. You continued that work how many years? A. Until her death.

Q. Which was in December, 1914? A. Yes, sir.

Q. During that time did you have any other work? A. No, sir.

Q. How much of your time did you give to Mrs. Fonda's work? A. I was at her beck and call all the time.

Q. Any regular hours? A. No, sir.

Q. Up to the time she purchased the house at 111 Shippen Street, you resided where? A. 382 Palisade Avenue, West Hoboken.

Q. That was how far from where she lived? A. Eight or ten blocks, probably.

Q. Did you go around to 111 Shippen Street? A. Yes, sir, and when I did not go, I was often times called up on the telephone at the corner grocery store where they would send in to me, and I was there every day, or a part of each day, unless there was a previous arrangement made the day before.

BY THE COURT:

Q. Now, when you came back, you continued this work for her; now, did you have a new arrangement about compensation? A. No, sir, just went right along in the same way.

Q. How old were you? A. About 27.

Q. How old are you now? A. 34.

FURTHER DIRECT:

Q. We are coming now to the year 1912; did you have any conversation with Mrs. Fonda with reference to your continuing to work for her?

BY THE COURT:

Q. What was that conversation about? In regard to your continuing in her employment? A. Returning from Albany at the end of February or the first part of March—

Q. You had gone up to Albany with her? A.

We both went together, and she stayed at Albany while I went up State to find a summer cottage for her for the following summer.

Q. What had you gone up to Albany for? A. Simply that she wanted to visit her people at Albany, and that while I was looking she could stay there and then return with me and have company both going and returning.

FURTHER DIRECT:

Q. On the way down you and she had a conversation about your employment? A. Yes, sir.

Q. What was that conversation? A. On the train coming home she asked me if I would surely go to Westport with her for the following summer, which was where she had rented the cottage; I told her I should like to go, and felt that it would benefit my health by going away for another summer; I was threatened at the time with tuberculosis; I told her that I would go with her, but that I wanted her to understand at the time that on my return in the following fall, that I felt by that time that my health would be in good condition, and that at that time I would want to seek another position. I did not want her to feel that I was taking advantage of the summer vacation and then would leave her in the fall.

Q. Proceed. A. She, at that time, said, when I knew what she was going to do, that I would not leave her, and she smiled as she said it, and gradually hinted about little things—about the house—

Q. What did she say? A. She finally said, that she intended buying the house for me, which came to me as a surprise; it was the first inkling that I had had. That was either at the end of Feb-

ruary or the first part of March, on the way home from Albany.

BY THE COURT:

Q. Did you know the contents of her wills? A. I never knew what any of her wills contained until after her death.

FURTHER DIRECT:

Q. Now, Mr. Shelton, what was the next conversation you had with her, that you remember, with reference to the matter of the house? A. The nearest that I can remember was, that she called to see my mother.

Q. Were you there at the time? A. Yes, sir.

Q. Fix the date of that, as nearly as you can. A. That was very shortly after returning from Albany; just the date I cannot answer; I don't know; she came over to ascertain whether my mother and family would move into the house at 111 Shippen Street; that it was her intention to buy it and give it to me.

Q. Go on; what was said then; and did you have any conversation about maintaining the house? A. No, sir.

BY THE COURT:

Q. Was your mother a woman of means? A. No, sir, my folks are poor people—

Q. How big a house is this? A. It is a two and a half story, two families.

Q. Did she say anything about maintaining it? A. Not until after it was purchased.

FURTHER DIRECT:

Q. At the time she had this conversation with your mother, nothing was said about maintaining the house, was there? A. Not to my knowledge.

Q. And when she said that to your mother, what did your mother say? A. Mother said she would have to talk it over with my father as to the moving down there. I don't remember just what words passed between her and mother.

By The Court:

Q. Is your father alive yet? A. Yes, sir.

Further Direct:

Q. What was the next thing that happened? A. I know that from time to time, she saw Mr. Berger, and that he was trying to get the house at as low a figure as he could.

Q. What was the next conversation you had with Mrs. Fonda in reference to the house? A. Probably the conversation about moving in.

Q. When was that, about? A. I could not say; I don't remember.

Q. Was it a month or two after that— A. It was probably a month and a half or so elapsed between the time that she first asked mother, and the time we moved in.

Q. When did you move in? A. The 10th of May, 1912.

Q. Now, when did you go to the country that year, 1912? A. As I remember, Mrs. Fonda left on the first, and her maid and I closed up the house and got up there, probably, a week after; I cannot remember the date.

Q. That was the early part of June? A. Yes, sir, and Mrs. Fonda was still at Albany, and we got the house to rights, and it was all ready when she returned to Westport.

Q. And during that summer was anything said with reference to this house at 111 Shippen Street? A. Why, we frequently talked over things, yes; I don't just remember what they were.

Q. Now, was anything said between you and Mrs. Fonda with reference to the maintenance of the house? A. Yes, sir.

Q. When? A. Shortly after the house was bought; shortly after we moved in; the house needed repairing, and the question of repairs was brought up. I had not the money to pay for repairs, and Mrs. Fonda agreed to pay for all the repairs, and that I could pay her back as I received the rent from my people, from my folks, for their part of the house, which I did each month as I received it; until about December of 1913, when Mrs. Fonda said to call it all even or paid; I don't know whether we came out right at that time or not, but she said to call it all off.

Q. Did you collect your rent from your father or mother? A. Yes, sir.

Q. How much did you collect? A. $20.00 a month.

Q. Who paid it to you? A. My mother.

Q. In cash? A. Yes, sir.

Q. What did you do with the money? A. Until December of 1913, I was giving it to Mrs. Fonda to pay off the debt that I owed her for repair bills. After that, I used it to pay bills myself.

Q. Did you give your mother a receipt? A. No, sir, I did not—

Q. You were living in the house with your mother? A. Yes, sir, and I am still.

Q. Now, I show you a number of bills, one of the Hackensack Water Company, dated November 1st, 1914, for $3.85 for water rent; another, February 1st, 1915, for $6.13, for water rent. Another for March 20, 1914, of Riemischneider Bros., for furnishing two copper boilers at $68.00. Another May 13, 1914, of Wehling & Company, for wiring and electric fixtures, of $13.35. Another of C. C. Hoffmeier & Son, for installing a

Lion water heater, dated June 22, 1914, $20.00. Another bill of June, 1914, of Reimischneider Bros., for plumbing work, $3.75. Another bill of December 1, 1914, of F. W. Kleinke, for carpenter work, $12.15. And December 14, 1914, August Lehman, for repairing chimney, $21.85; and I ask you now, did you pay those bills? A. Yes, sir.

Q. Out of the moneys which you received as rent from your people? A. Yes, sir.

Q. Or out of your own funds? A. Yes, sir.

Q. Now, how about the taxes on the property? A. Mrs. Fonda had agreed with me, that is, she said she would pay the taxes, the water rents, and lay in ten ton of coal for the heater of the house, as her part towards the rent expenses, for occupying the first floor.

Q. When did she say that? A. I don't remember just when she said that; that was just before she called the debt off; that was, probably, 1913, about December.

Q. And she said what? A. That she would pay the taxes, the water rent, and the coal bills for the heater, as her part, in lieu of rent.

Q. I show you a letter under date July 19, 1912, signed "R. C. Shelton, Jr.," directed to Mr. George A. Berger, headed "Box 291, Westport, N. Y."; tell me by whose direction, if any, that letter was written; look it over. A. By Mrs. Fonda's direction.

MR. ROSENBERG: I offer it in evidence. (The same being shown to Mr. Herr.)

THE COURT: It is a letter written by this defendant here, he says; at the direction of Mrs. Fonda.

MR. HERR: No objection.

MR. ROSENBERG: The clause that is important in that is, that "Mrs. Fonda would also be glad to know what has been done in

regard to the deed of the house of which she wrote you on June 6th."

Marked "Exhibit D-9."

MR. ROSENBERG: The June 6th letter offered by the complainant is offered and marked "Exhibit C-1."

Q. Did you get the deed for the property from Judge Besson? A. The deed was given to me at Mr. Berger's office by Mr. Berger.

Q. And it has been in your possession ever since? A. Yes, sir.

Q. About when was that? A. Sometime in the fall, after I returned.

Q. What year? A. 1912.

BY THE COURT:

Q. Is the body of these letters in your handwriting? A. This one is not (indicating "Exhibit C-1"). This is my handwrting, and Mrs. Fonda's signature (indicating "Exhibit D-4½").

FURTHER DIRECT:

Q. Were you or not, accustomed to write from her dictation? A. No, sir, she simply told me what she wanted, and I would have to make up the letter—both personal and business letters the same way.

Q. And then she signed them? A. Business letters she signed; personal letters I would sign for her.

Q. How did Mrs. Fonda happen to pay the 1914 taxes on this property? A. The 1914 taxes she told me that she would pay; and when I made out checks I included that in the checks.

Q. How did she happen to say she would pay that? A. The bill had been presented, and it was among the other bills, and in asking her what checks to make out, I took the bills to her, and she told me to make out checks for them.

Q. Did you make out all her checks? A. I did, yes, sir, right to the end; I don't say that I made out every one.

Q. You took the check down to Mr. Berger for his signature? A. With others, for his signature; he had the power of attorney at the time.

Q. What did he say about it? A. He told me, that while he had not any doubt that the check for the taxes was all right, still he preferred asking her himself whether he was to sign it or not; and he came up that same day a little bit later.

Q. Were you there when he talked to her about it? A. Yes, sir.

Q. What did he say? A. He said to Mrs. Fonda, who was in bed at the time, he said to her, "Do you want to pay Richard's taxes?" and she said "Yes"; and he said, "Shall I make out the check?" and she said, "Yes"; she said, "That is all I can do for him—that will have to be his Christmas present."

CROSS-EXAMINATION BY MR. HERR:

Q. How do you reconcile that idea of a Christmas present with your agreement with Mrs. Fonda that she was to pay the taxes as a part of her consideration for occupancy of the premises, in lieu of rent? A. I don't know that I had anything to say about the matter at all; she simply took that on her own shoulders to say that.

Q. Did you say anything to her, then, about her previous agreement? A. No, sir, she was very sick at the time.

Q. Did you ever have any other talk with her about this agreement that she would pay taxes, etc., in lieu of rent? A. Any other from what?

Q. From the one you testified? A. We may have talked it over at other times; I don't remember of any times.

Q. It was not reduced to writing? A. No, sir.

Q. You don't remember when it was, except that it was approximately near Christmas, 1913? A. About that time, yes, sir.

Q. What time did she pay the 1913 taxes; do you know? A. I don't know; the tax bill would probably tell that better than I could.

Q. What wages were you making as a salesman in New York before you went with her—at the time you left the New York firm? A. At the time I left—about $70.00 a month.

Q. And you have, since that time, made no money at all in any other employment? A. No, sir.

BY THE COURT:

Q. Have you a bank account? A. I have a little savings account, that is all.

Q. Where do you keep it? A. At the Trust Company of New Jersey.

Q. Where did you get that money? A. I managed to save a little during the time.

Q. From what? A. From the various checks that Mrs. Fonda had given me during the time of my employment.

Q. How many checks did she give you, on an average? A. Before I went there she gave me a check for $500.00 as a Christmas present; that was the agreement before I went with her.

Q. How much did she give you during the year? A. That I cannot remember, I don't know.

Q. Was she a woman of vast business affairs? A. No, I should say.

Q. What did she have to do in a business way? A. Well, she had no business of her own.

Q. What did she have to do in a business way to require the services of an unusual character; you say she gave you $500.00 one year? A. That was as a Christmas present.

Q. You don't remember what she gave you the next year, or did she give you anything that year? A. I may have had checks for $50.00 or $100.00 during the year; I don't recall.

Q. You bought clothes and shoes? A. That is what it was for.

Q. Your mother and father are in humble circumstances? A. Yes, sir.

Q. They did not support you? A. No, sir.

Q. Who supported you; who gave you the money to buy your clothes? A. The checks that Mrs. Fonda gave me paid for my clothing.

Q. Who gave you the money to live on? A. I paid my folks no board at the time; and in the summer time, of course, while travelling with Mrs. Fonda, Mrs. Fonda paid my expenses.

Q. Just tell me exactly the nature of your services to Mrs. Fonda; I mean, exactly what it was you did; you say she had no business interests; that she lived on the interest of her money, invested capital; what business did you do for her? A. I attended to paying all bills; writing out checks for her; looking over the bills; attending to her private correspondence.

Q. Did you write all her personal letters? A. Yes, sir.

Q. To her friends? A. Yes, sir.

Q. And she simply signed the letters? A. Most of the letters to her friends I signed.

Q. Was she a woman of education? A. No, sir, I would not say so.

Q. How old a woman was she? A. She was in her 70th year when she died.

FURTHER CROSS:

Q. Did she make you a present of a piano at one time? A. Yes, sir.

Q. That was in 1911, February, 1911? A. I believe so, yes, sir.

Q. And she paid a little over $1,000 for that piano? A. $1050.00.

Q. Have you that piano yet? A. Yes, sir.

Q. Now, you have spoken of various checks for small amounts that she may have given to you; have you any idea what those aggregate in the course of a year? A. I should not think more than $200.00 in any year; probably less than that.

Q. Was she in the habit of making checks out to your order for any other purpose than to give to you? A. Yes, sir.

Q. Did you keep any account of money that she paid over to you for your use? A. No, sir.

Q. Did you keep any account for her of that money? A. No, sir, the check book would be account enough.

Q. But you say she was in the habit of making out checks to your order for purposes other than your use? A. Yes, sir.

Q. So, it would not be possible to tell by looking at the vouchers how much money you got, would it? A. No, sir.

Q. Why didn't you keep an account of that, then, if there was nothing else that would show it? A. I felt at the time that that was a matter that concerned only her and I, and I did not feel that I would have need of such a thing.

Q. You sometimes bought things, such as clothing, and the bill was paid for directly by her, wasn't it; at Wanamaker's for instance? A. The only time that anything was bought for me in the clothing line was bought by Mrs. Fonda herself, and while I was with her shopping. Lots of times I did not want the things; many times when we reached home, things would come that I had no knowledge of that they had even been bought.

Q. And as to those clothes, she paid for them? A. On her charge account.

Q. Did she get for you any jewelry, any diamonds or things of that sort? A. Mrs. Fonda made me a present of the diamond ring I am wearing now, before I entered her employ, for compensation for attending to her moving from 53 Hudson Place to 111 Shippen Street; it was given to me at New London, Connecticut.

Q. Do you know the value of this house, 111 Shippen Street? A. I know the amount of money that was asked for it, $10,200 was paid for it by Mrs. Fonda.

Q. Did you have any conversation with Mrs. Fonda concerning this house, in which the amount it cost was mentioned? A. Why, it was an understood fact that it cost that much, between her and I; she probably mentioned it.

Q. Your family, including yourself, occupied the hall and two floors of the house? A. Yes, sir.

Q. Your family paid you $20.00 a month rent for the use of two floors? A. Yes, sir; I took that amount into consideration, that I was not paying any board, and that by having them pay that low rent would pay for the board.

Q. Did you pay any money to Mr. Berger when he delivered the deed to you? A. Yes, sir, one dollar.

Q. In cash? A. Yes, sir.

Q. Why did you pay him that? A. I paid it because I felt that the deed called for it, and it was right to do it.

Q. Didn't he say that he did not want it? A. He did not think it was at all necessary, but he said, "To be on the safe side," he would accept it.

MRS. THERESE SHELTON, sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

Q. You live at 111 Shippen Street, West Hoboken? A. Yes, sir.

Q. You are the mother of Richard C. Shelton, Jr., who has just testified? A. Yes, sir.

Q. Your husband's name is also Richard Shelton? A. Yes, sir.

Q. Did you know Mrs. Melissa A. Fonda? A. Yes, sir.

Q. And how long had you known her before her death? A. Six years.

Q. You belonged to the same church as she did? A. I attended the church of which she was a member.

Q. And were you on visiting terms with her? A. Yes, sir.

Q. Did she come to see you? A. Yes, sir, very often.

Q. You were living how far away from her? A. About eight or ten blocks away.

Q. She used to come to see you? A. Yes, sir.

Q. And do you remember the time that your son's health broke down? A. Yes, sir.

Q. He had been working in New York? A. Yes, sir.

Q. Tell us the circumstances; tell us what happened when your son's health broke down, as to his relations with Mrs. Fonda? A. She called at the house and told me that she would like to have him go with her, and she said to me at the time, she called me "Mother"; she said, "Now, mother, I would like to take him with me; cannot I be a mother to him, too?" She said, "I consider him my son"; and I thought it over, and I said that I was satisfied, as I thought it was very kind of her.

Q. And he did go? A. Yes, sir.

Q. And he used to spend his summers with her? A. Yes, sir.

Q. And during the time she was in town, was he working for her right along? A. Yes, sir.

Q. How much of his time would he give to her? A. He would go down there generally, sometimes every day; if he did not go, she would telephone for him.

Q. In other words, he had to go whenever she wanted him? A. That is it, yes, sir.

Q. Now, that continued up to the time of your moving to 111 Shippen Street? A. Yes, sir.

Q. Do you remember whether or not you had a talk with Mrs. Fonda just before that, before you moved to Shippen Street? A. Yes, sir.

Q. Will you tell us about when that was, as nearly as you can fix it? A. Well, I think it was in March; I am pretty sure it was in March; she came to my house to lunch; she said to me then—she called me "Mother"; she said, "Mother, I have a surprise for you"; she said, "I will buy the house at 111 Shippen Street, if you will come down there to live"; and it took me so by surprise.

Q. What did she say about the house; what else did she say about the house? A. She said, "I want you to come"; she said, "If you come, I will buy the house for Richard"; but, she said, "If anything happens to Richard, it will be yours"; she said, "You will always have a home."

Q. And what did you say? A. It took me so by surprise, and I said, "You are very kind, but I shall have to talk it over with my husband."

Q. When did you next see her? A. Shortly after she came up to the house to see if I had agreed to come.

Q. Within a few days, do you mean? A. Yes, sir.

Q. Did she say anything then? A. She said she would like to have us come, that is all; it was decided then.

Q. What did you say then? A. I said, "Yes," that we would go.

Q. What was the next thing that you remember about that? A. That was all that was said; we got ready to move down there.

Q. And you did move in May? A. Yes, sir.

Q. And you are still living there? A. Yes, sir.

Q. And Mrs. Fonda lived downstairs until the time of her death? A. Yes, sir.

Q. Did you ever have any further talk with her about the ownership of the house? A. No, sir.

Q. Did you pay any rent for your part of the house? A. Yes, sir.

Q. Whom did you pay it to? A. To my son; I paid him $20.00 a month; we had the upper floor and the attic.

Q. How many rooms did you have in the attic? A. Four rooms in the attic.

Q. And did you pay your son in cash? A. Yes, sir.

Q. How often did you pay him? A. I paid him the first of every month.

Q. When did you begin to pay? A. As soon as we moved in there.

Q. So you paid him at the rate of $20.00 a month, for every month, beginning about May, 1912, and up to the time— A. Well, we moved in there in May; we started paying rent from the first of June.

Q. And you kept that up? A. Yes, sir, I have kept that up ever since.

Q. To-day do you pay him $20.00 a month? A. Yes, sir.

Q. What does your husband do? A. He is employed down at the piers at Hoboken—the Wilson Line.

Q. What is his work? A. What would you call it?

Q. What does he make a month? A. $18.00 a week.

Q. How much of a family have you? A. I have a son and a daughter besides this one.

Q. Do they work? A. Yes, sir, they work, and they pay me board every week, and I gave my son Richard $20.00 a month; I felt as though he ought to pay me board as well as the rest of them, his father not earning much money, and that is why I only paid him $20.00 a month rent.

CROSS-EXAMINATION BY MR. HERR:

Q. Did you figure the amount that that house was worth to you? A. That is immaterial whether she figured it out or not.

Q. Who met Mrs. Fonda first, you or Richard? A. He did.

Q. But you, nevertheless, were very friendly with her? A. Yes, sir, she used to come around in her automobile, and she came before she got the automobile.

BOTH SIDES REST.

Abstract of Exhibits.

Exhibit C-1.

Albany, N. Y., June 6, 1912.

Mr. Geo. A. Berger,
Trust Co. of N. J.,
Hoboken, N. J.

Dear Sir:—

Will you kindly write me at 37 Ten Broeck St., Albany, N. Y., in regard to deed for property purchased for me. Would like same deeded to Richard C. Shelton, Jr., as soon as you can arrange to have same done * * *

Sincerely yours,
Signed—MELISSA A. FONDA.

Exhibit D-1.

Contract for sale of property, dated April 10, 1912, from Adelheid Rippe to George A. Berger, for the premises described in the bill of complaint, for the sum of $10,200. Deed to be given on May 1, 1912.

Exhibit D-2.

Full covenant and warranty deed, dated May 1, 1912, from Adelheid Rippe, widow, to George A. Berger, for the premises described in the bill of complaint. Duly acknowledged and recorded.

Exhibit D-3.

Full covenant and warranty deed, dated August 9, 1912, from George A. Berger and wife to Richard C. Shelton, Jr. Consideration $1.00. Premises are those described in the bill of complaint. Duly acknowledged on August 16, 1912, and recorded on September 4, 1912.

Exhibit D-4 1-2.

Box 291, Westport, N. Y., July 27-12.

Dear Mr. Berger:

Beg to acknowledge receipt of your letter of the 25th inst.

In regard to the will of Mr. James E. Weaver, would ask that Mr. Besson continue to look after my interest in the matter.

In reference to deed of house at #111 Shippen Str., beg to say that I would prefer same to go on record at once.

Wish to thank you for the kind interest you have taken in the matter and await your bill for services. * * *

Signed——MELISSA A. FONDA.

Exhibit D-5 1-2.

The Trust Company of New Jersey,
Hoboken, N. J., July 25, 1912.

My Dear Mrs. Fonda:—

* * * In regard to the deed to the property situated at #211 Shippen St., I desire to say that the same has been drawn and executed and is ready for delivery to you. Do you wish the same to go on record at once or await your return to the city? Your wishes in this matter will receive my prompt attention. * * *

Signed—GEO. A. BERGER.

Exhibit D-6 1-2.

The Trust Company of New Jersey,
Hoboken, N. J., August 19, 1912.

My Dear Mrs. Fonda:—

I enclose you herewith bill for the charge of the electric service lines at #111 Shippen St., Weehawken, N. J., which I have paid. At your convenience you can send me a check for the same. I am also enclosing you herewith a deed for the above mentioned property from myself to Richard C. Shelton, Jr.

Mr. Besson suggested that I mail you this deed before the same is put on record, but if you wish the same recorded before you return you should kindly mail it to Mr. Besson direct with the request that he place the same on record. * * *

Signed—GEO. A. BERGER.

Exhibit D-8.

Will of Melissa Fonda, dated May 10, 1910.

IN THE NAME OF GOD, AMEN: I, Melissa Augusta Fonda, of Weehawken Heights, in the County of Hudson and State of New Jersey, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this my last Will and Testament, in writing, in manner and form following, hereby revoking any and all other will or wills or codicil or codicils to wills, by me at any time heretofore made.

First. I hereby direct that all my just debts and funeral expenses be paid by my executor hereinafter named, out of my estate, as soon as the same may reasonably be paid after my decease.

Second. I hereby direct that my executor here-

inafter named shall expend the sum of Two Thousand Dollars in the purchase of a head stone or monument to be erected over my grave, and to keep and maintain the said head stone or monument and grave in good order.

Third. I hereby give and bequeath unto my esteemed friend, Mrs. Augusta Callon, wife of George Callon, who now resides at No. 151 West 129th Street, in the City of New York, County and State of New York, the sum of Five Thousand Dollars.

Fourth. I hereby give and bequeath to Richard Clay Shelton who now resides at No. 382 Palisade Avenue, West Hoboken, N. J., the sum of Ten Thousand Dollars, and in addition thereto, all the household furniture owned by me, and now contained in and upon my present living apartments at No. 111 Shippen Street, Weehawken Heights, Hudson County, N. J., and any and all other articles of household furniture which I may hereafter own and which may be contained in and upon such premises or apartments as I may occupy at the time of my decease.

Fifth. I hereby give and bequeath unto my husband, Martin Fonda, the sum of One Dollar. This meagre bequest to my said husband is made by me, particularly because of the fact that he, my said husband, throughout the period of years that I lived with him, and particularly the latter years that I lived with him, he abused and ill treated me, and manifested no affectionate regard whatever towards me, and also for the reason that he lived separate and apart from me for and during a period of five years or more during the greater part of which time he lived with another woman, in the City of Hoboken, New Jersey; and also for the further reason that he has written

Exhibit D-8.

me letters threatening to do me bodily harm; and also for the reason that my said husband and myself have for several years last past, been living separate and apart, pursuant to an agreement in writing, executed by my said husband and myself, wherein and whereby we agreed to live separate and apart for the remainder of our natural lives. I hereby expressly emphasize my will in this respect, and I do hereby specially direct that my said husband shall receive no part or portion of my said estate, of which I may die seized or possessed, wheresoever the same may be situate, other than the aforesaid sum of One Dollar hereinabove given and bequeathed to him.

Sixth. I hereby give and bequeath to my daughter, Grace Lloyd Riesenberger, who now resides at No. 3 Eldorado Place, Highwood Park, Weehawken, New Jersey, the sum of One Dollar. This meagre bequest to my said daughter is made by me particularly because of the fact that for a number of years last past, I have expended much money in her behalf, and I have supported and provided for her and her children, prior to her marriage to her present husband, Edward Riesenberger, and also for the reason that at and after her marriage to her present husband, Edward Riesenberger, she has acted toward me in a mean and most contemptuous manner, and ordered me to leave the premises No. 3 Eldorado Place, Highwood Park, Weehawken, N. J., where I resided at the time of her said marriage, and which said premises were purchased by me and paid for by me and the title to said premises caused by me to be made in her name alone, and for the further reason that since her marriage to the aforesaid Edward Riesenberger, she has not manifested toward me the due regard which I consider that she, as my daughter, should have mani-

fested. I hereby specially emphasize this my will in this respect, and I do hereby specially direct and declare that my said daughter, Grace Lloyd Riesenberger, shall not receive any part or portion of my estate, of which I may die seized or possessed, other than the aforesaid sum of One Dollar hereinabove given, and bequeathed to her.

Seventh. I hereby give and bequeath to my grand-daughter, Augusta Catherine Trapp (daughter of my said daughter Grace Lloyd Riesenberger) and also to my grandson, James Lloyd Trapp, (son of my said daughter, Grace Lloyd Riesenberger) the sum of Ten Thousand Dollars each. I hereby expressly provide and direct however, that the said share and shares hereby given, and bequeathed to my said granddaughter, and to my said grandson, shall be retained and held in trust for them and each of them, by my executor hereinafter named, until they and each of them, shall attain the age of twenty-one years. I hereby direct that my said executor shall invest the aforesaid bequests to my said granddaughter and to my said grandson in such interest bearing securities, as he may deem most advisable and best for their interests, and the interest or proceeds of said investments to be paid over by my said executor quarterly that is, every three months, to such guardian as may be appointed for my said granddaughter and my said grandson, the same to be used by said guardian for and towards the support, maintenance and education of my said granddaughter, and my said grandson.

In the event of the death of my said granddaughter, Augusta Catherine Trapp, before she attains the age of twenty-one years, then and in that event, it is my will and I hereby direct, that the share or portion of my said estate herein

given and bequeathed to her shall be and the same is hereby given and bequeathed to my said grandson, James Lloyd Trapp.

In the event of the death of my said grandson, James Lloyd Trapp before he attains the age of twenty-one years, then and in that event, it is my will and I hereby direct that the share or portion of my said estate herein given and bequeathed to him shall be and the same is hereby given and bequeathed to my said granddaughter, Augusta Catherine Trapp.

All the rest, residue and remainder of my estate other than such as has been hereinabove specifically disposed of, be the same real, personal or mixed and wheresoever the same may be situate, I hereby give, bequeath and devise to my nieces, Margaret Lawrence Agar and Emma Frances McNary, both of whom now reside at Albany, New York.

It is my will and I hereby declare and direct that in case any direction or provision of this my last will and testatment shall be held illegal or void, or fail to take effect for any reason, no other part of this my will shall be thereby invalidated, impaired or affected, but that my last will and testament shall be construed and take effect as if the invalidated direction or provision had not been contained therein, and I do hereby further declare that it is my will should any of the legatees or beneficiaries named in this my last will and testament, in anywise contest or question the legality of this my last will, or in anywise undertake to have this my said will declared void or inoperative for any reason or reasons whatsoever, or to have any of the provisions of this my will declared void, illegal or inoperative, for any reason or reasons, whatsoever, then

and in that event, it is my will that such legatee or beneficiary shall not receive the bequest herein provided for such legatee or beneficiary, but shall be deprived thereof, and such bequest or provision as is herein provided for such legatee or beneficiary, shall then be paid over to my residuary legatees hereinbefore named.

I hereby nominate, substitute and appoint John J. Fallon, Counsellor-at-law, of the City of Hoboken, in the County of Hudson and State of New Jersey, executor of this my last will and testament, and Trustee of the several trusts hereinabove created, and it is my will that he be not required to give bonds.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Twelfth day of May, in the year of our Lord, One Thousand Nine Hundred and Ten.

MELISSA AUGUSTA FONDA, L. S.

Signed, sealed, published and declared, by the above named testatrix, Melissa Augusta Fonda, as and for her last will and testament, in the presence of us, who, at her request, in her presence and in the presence of each other (both being present at the same time) have hereunto subscribed our names as witnesses this twelfth day of May, in the year of our Lord, One Thousand Nine Hundred and Ten.

LOUIS F. BEACHNER,
272 Baldwin Avenue,
Jersey City, N. J.

OSCAR HAUGER,
1132 Bloomfield Street,
Hoboken, N. J.

Exhibit D-8 1-2.

Last Will and Testament of Melissa A. Fonda, dated April 22, 1914.

KNOW ALL MEN BY THESE PRESENTS, that I, Melissa A. Fonda, of the Township of Weehawken, in the County of Hudson and State of New Jersey, do make, publish and declare this my last will and testament as follows:

First. It is my will that all my just debts and funeral expenses be paid as soon as may be reasonable after my decease.

Second. I do give and bequeath to my daughter, Grace Lloyd Trapp Riesenberger, of No. 3 Eldorado Place, Weehawken, N. J., all my wearing apparel and the sum of Five Thousand Dollars ($5,000).

Third. I do give and bequeath to my granddaughter, Augusta Catherine Trapp, of No. 3 Eldorado Place, Weehawken, N. J., my gold watch and chain and my moonstone ring surrounded with diamonds.

Fourth. I do give and bequeath to John G Agar, of Albany, N. Y., the book-case and books contained therein, now at my home No. 111 Shippen Street, Weehawken, N. J.

Fifth. All the rest of my jewelry and household furniture, I give and bequeath to my two nieces, Emma McNary and Margaret Agar, both of Albany, N. Y., the same to be divided as nearly equally as possible; said distribution to be determined by my executors hereinafter named.

Sixth. I give and bequeath to my friend, Gussie Callen of New York City, N. Y., the sum of Two Thousand Dollars ($2,000).

Seventh. I give and bequeath to my executors hereinafter named, in trust, the sum of Ten Thou-

sand Dollars ($10,000) to be invested by them in good security, and to apply the net income thereof towards the proper education, support and maintenance of my granddaughter, Augusta Catherine Trapp, until she arrives at the age of Twenty-one years, at which time the said principal sum of Ten Thousand Dollars ($10,000) is to be paid to her.

Eighth. I give and bequeath to my executors hereinafter named, in trust, the sum of Ten Thousand Dollars ($10,000) to be invested by them in good securities, and to apply the net income thereof towards the proper education, support and maintenance of my grandson, James Lloyd Trapp, until he arrives at the age of twenty-one years, at which time the said principal sum of Ten Thousand Dollars ($10,000) is to be paid to him.

Ninth. I give and bequeath to my friend, Richard C. Shelton, of the Township of Weehawken, N. J., the sum of Two Thousand Dollars ($2,000).

Tenth. I do give to my friend, George A. Berger, of the City of Hoboken, N. J., my pink pearl ring set with two diamonds, and also my locomobile, and my diamond pendant.

Eleventh. I hereby direct that I be buried in the Albany Rural Cemetery of Albany, New York, and that my executors hereinafter named shall spend the sum of One Thousand Dollars ($1,000) for the erection of a monument on my plot; and I do further direct that they shall open a special account with the Trust Company of New Jersey, in the sum of Two Thousand Dollars ($2,000) the revenue from which is to be devoted to the keeping in order and furnishing flowers to be placed on my burial plot.

Twelfth. All the rest, residue and remainder

of my estate, real, personal and mixed, I give, devise and bequeath to my daughter, Grace Lloyd Trapp Riesenberger, of Weehawken, N. J.

Thirteenth. I do hereby nominate and appoint George A. Berger and J. W. Rufus Besson, Executors and Trustees of this my last will and testament, and it is my will that they shall not be required to give bond for the faithful performance of their duties as such, and I do give to my executors the power to sell and dispose of any real estate of which I may die seized, at public or private sale, as they may deem best, and to give to the purchaser or purchasers thereof a good and sufficient deed or deeds therefor, and the purchaser or purchasers shall not be required to see to the application of the purchase money.

Lastly. I hereby revoke all former or other wills and testamentary dispositions by me at any time heretofore made.

IN WITNESS WHEREOF I have hereunto subscribed my name and attached my seal, this Twenty-second day of April, A. D., One Thousand Nine Hundred and Fourteen.

MELISSA A. FONDA, (L. S.)

Signed, sealed, published and declared by Melissa A. Fonda, the above named testatrix, as and for her last will and testament, in our presence, who at her request, in her presence, and in the presence of each other, have hereunto subscribed our names, as attesting witnesses.

Edwin H. S. Watford, No. 12 Hudson Place, Hoboken, N. J.

John H. Kamna, No. 12 Hudson Place, Hoboken, N. J.

Exhibit D-9.

Box 291, Westport, N. Y., July 19-12.

Mr. G. A. Berger,
Trust Co. of N. J.,
Hoboken, N. J.

Dear Sir:—

* * * Hope copy of Mr. James C. Weaver's will sent you about the 7th inst. has been received. If you have any news in regard to the same Mrs. Fonda will be pleased to hear of it. She would also be glad to know what has been done in regard to deed of house of which she wrote you on June 6. * * *

Signed—R. C. SHELTON, JR.