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**Notice of Appeal.**

**SECOND DISTRICT COURT OF THE CITY OF  
JERSEY CITY.**

Filed October 13, 1917.

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HILL HABER,	}	On Contract.
<i>Plaintiff,</i>		
<i>vs.</i>		
HARRIS GOLDBERG,		
<i>Defendant.</i>		

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To

HILL HABER, Esq., Plaintiff, and  
ISIDOR HABER, Esq., Attorney of Plaintiff:

20

Sirs:

Take notice that the defendant, Harris Goldberg, hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of the City of Jersey City rendered in the above stated action on the nineteenth day of September, nineteen hundred and seventeen, and from each and every determination and direction of said District Court therein.

30

Dated September 27th, 1917.

WM. F. BURKE,  
Attorney of Defendant  
Harris Goldberg.

40

**Summons.****SECOND DISTRICT COURT OF THE CITY OF  
JERSEY CITY.**

STATE OF NEW JERSEY, }  
 Hudson County, } ss. :  
 City of Jersey City. }

**10**                   The State of New Jersey, To any  
                           Constable of the County of Hudson  
                           or to any Sergeant-at-Arms of the  
                           (Second) District Court of the  
                           City of Jersey City:

(Seal)  
 (A True Copy)

**SUMMON**

**20**                   **HARRIS GOLDBERG** to appear before the (Second)  
 District Court of Jersey City, **JOHN A. BLAIR**,  
 Judge, to be held at the Court Room, No. 662  
 Newark Avenue, in said City, on the ninth day of  
 August, one thousand nine hundred and seventeen,  
 at ten o'clock in the forenoon, to answer unto Hill  
 Haber, in an Action upon Contract. Damage five  
 hundred dollars.

**30**                   Witness, **JOHN A. BLAIR**, Esq., Judge of said  
 (Second) District Court at Jersey City aforesaid,  
 the 26th day of July, in the year one thousand  
 nine hundred and seventeen.

**RICHARD McAGHON**.  
 Clerk.

**ISADOR HABER**,  
 Plaintiff's Attorney,  
 358 Central Ave.,  
 Jersey City, N. J.

**State of Demand.**

**SECOND DISTRICT COURT OF THE CITY OF  
JERSEY CITY.**

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HILL HABER,	}
<i>Plaintiff,</i>	
<i>vs.</i>	
HARRIS GOLDBERG,	}
<i>Defendant.</i>	

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10

On Contract.

To the within named Defendant:

Take Notice, That the plaintiff will demand a trial of the within action on the return day and that you are requested to file your specification of defenses on or before the return day of the summons served herewith.

20

On Contract.

The plaintiff, who resides in the Town of West Hoboken, in the County of Hudson and State of New Jersey, complains of the defendant as follows:

1. Plaintiff is a real estate broker engaged in selling and exchanging real estate.

2. On or about June 21st, 1915, the defendant was the owner of the premises known as 4255 and 4257 Hudson Boulevard, in the Town of West Hoboken, Hudson County, N. J.

30

3. On or about said day, the defendant, in writing, agreed to pay the plaintiff a commission of \$300.00 for the sale of his property aforesaid, which commission was to be paid on the day set for the delivery of the deed.

40

4. Thereafter the plaintiff did procure a purchaser for the said premises who entered into a contract of purchase for the said premises with the said defendant.

5. The date set for the delivery of the deed has long since passed.

6. The plaintiff has requested payment from the defendant of the sum of \$300.00, but the defendant has refused to pay the same.

10 The plaintiff demands judgment in the sum of \$300.00, together with interest and costs of suit.

ISADOR HABER,  
Attorney of Plaintiff.

**Specification of Defenses.**

**SECOND DISTRICT COURT OF JERSEY CITY.**

Filed August 7, 1917.

20

HILL HABER,

*Plaintiff,*

*vs.*

HARRIS GOLDBERG,

*Defendant,*

On Contract.

To

30

ISADOR HABER, Attorney for Plaintiff:

The following is a specification of the defences intended to be made herein:

1. The plaintiff did not sell the property.
2. No contract was made for the purchase of said property.
3. The plaintiff has, in writing, released the defendant from any claim herein.
4. No deed was ever delivered for the plaintiff's

40

5. The plaintiff did not produce any buyer able and willing to buy.

6. The plaintiff and one Rufer entered into a contract for exchange of property which was never consummated because the title to Rufer's property was not marketable and because Rufer was enjoined from selling by proceedings pending in the Supreme Court of Orange County, New York, between Alton J. Vail as receiver plaintiff and Charles Hagen and others defendants.

10

WM. F. BURKE,  
Attorney of Defendant.

**Record.**

**SECOND DISTRICT COURT OF JERSEY CITY.**

Before

JOHN A. BLAIR, Esq.,

20

Judge.

STATE OF NEW JERSEY, }  
Hudson County, } ss.:  
City of Jersey City. }

30

40

## Record.

No. 47024

	HILL HABER,	}	In Contract.
	<i>Plaintiff,</i>		
	<i>vs.</i>		
10	HARRIS GOLDBERG,		
	<i>Defendant,</i>		

ISADOR HABER, Plaintiff's Attorney.

	Costs.	City.	Al.
	Summons and Copy,	\$1.50	
	Service and Return,		.60
	Mileage,		.30
	Trial Fee,	1.50	
			.90
20	Chg. 2.40		
		3.00	
		.90	
		3.90	
	Att'y fee	16.81	
		\$20.71	
	Appeal Chg.	1.00	

30 A summons was issued tested July 26th, A. D. 1917. Returnable August 9th, A. D. 1917, at ten o'clock in the forenoon.

The constable returned the summons as follows, viz.: I served the within summons July 28th, 1917, on Harris Goldberg, the defendant, by reading the same to him and delivering to him a copy thereof.

John G. Andes, Constable.

40 Plaintiff's demand was filed July 26th, A. D. 1917. Defendant's Specification of Defenses was

*Record.*

filed August 9th, 1917. August 9th, A. D. 1917, this cause was called for trial at 10 o'clock in the forenoon.

August 9th, A. D. 1917, the plaintiff appeared and the defendant appeared and the trial of the cause was proceeded with as follows:

On the part of the plaintiff Harry Sherman was sworn as stenographer. Hill Haber and Isadore Haber were sworn and testified. 10

On the part of the defendant Harris Goldberg was sworn and testified.

(Decision Reserved.)

Whereupon it is on this 19th day of September, A. D. 1917, by this Court considered and adjudged that said Hill Haber, plaintiff, recover against said Harris Goldberg, defendant, the sum of three hundred and thirty-six dollars and twenty-five cents damages, and twenty dollars and seventy-one cents costs of suit. 20

Oct. 3rd, 1917, Notice of Appeal and bond filed.

Oct. 18th, 1917, Copy of record mailed to Defendant's Attorney.

I do hereby certify that foregoing is a true copy of the record in the above stated case.

RICHARD McAGHON,  
Clerk.

(Seal)

30

**Testimony.****SECOND DISTRICT COURT OF JERSEY CITY.**


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HILL HABER,  
*Plaintiff,*

*vs.*

HARRIS GOLDBERG,  
*Defendant.*

---

} On Contract.

10

Jersey City, August 9, 1917.

Before

HON. JOHN A. BLAIR,

Judge.

ISADOR HABER, Esq., Attorney for Plaintiff;

WILLIAM F. BURKE, Esq., Attorney for Defendant.

20

MR. HABER: Mr. Burke admits that a certain contract has been executed. I will briefly state to your Honor what this case is based on.

30

My father, Hill Haber, is a real estate broker, and he was employed by the defendant, Harris Goldberg, to sell a certain piece of property owned by Harris Goldberg; that commission is signed in compliance with the statute of frauds, stating the party who shall act as broker, the property to be sold, and the amount of commission.

40

The plaintiff did procure a person in the name of Rufer, and a contract of exchange was entered into. Rufer had a certain piece of property in Middletown, and I drew the contract of exchange, a written contract, whereby Goldberg, the defendant, agreed to sell this piece of property to Rufer and take

*Colloquy.*

in payment part cash and part interest in another piece of property belonging to Rufer. Thereafter, it seems, that Goldberg had to sue Rufer for breach of contract and he did sue in the Union Hill District Court and recovered a judgment, and the judgment was paid. He then refused to pay the plaintiff broker his commission, and I claim that the broker is entitled to his commission. 10

MR. BURKE: The defence, your Honor, is this: We say that under the authority, the authority is only for selling, and there isn't any contract in existence providing for the payment of a commission for an exchange. The statute refers to either sale or exchange, that is, it differentiates a sale from an exchange, and we say that an exchange and a sale are very different things and that he is not entitled to recover. 20

Secondly, we say that we have a release in writing signed by Mr. Haber, which we will offer.

Thirdly, the exchange, or proposed exchange, consisted of exchanging property in Middletown, New York. The title to the property in Middletown, New York, could not be had, because of an injunction which was pending against the transfer of the property. The people who had the title to the property, and who were to give the property, were enjoined in New York State from selling the property, because of a bill that had been filed over there, alleging that the title they had was obtained by fraud, and in that proceeding in New York the plaintiff was successful, and it was decided and decreed that the conveyance to the plaintiff was fraudulent so that the title was not good. 30 40

*Colloquy.*

Under the case of *Leschziner against Bauman* it seems that the law in this State is this, that where the parties agree to make an exchange and the title to either property is not good, then, in that case, the agent is not entitled to his commission. Now, that seems different from the law with reference to sales. As I understand the ordinary rule in questions of sales, if the broker produces a buyer who is able, ready and willing to buy, then the broker's work is done and he is entitled to his money; but with reference to an exchange, it is just as I think you will find this *Leschziner* case, if the title is not good, then the broker is not entitled to his commission, because, in other words, while in an ordinary case of sale, the buyer must be one who is able to buy, in this case, where they made an exchange, if the title was not good he is not able to buy.

Then again, the contract provides that the money is to be paid on the date set for the delivery of the deed. Now, we say what we agreed was that no money was to be paid until the delivery of the deed, and that the words "the date set for the delivery of the deed" was put over on us, really. Nevertheless, we say that language, "the date set for the delivery of the deed" means on the turning over of the deed. The deed was never turned over, and for that reason also there never became any liability.

*Hill Haber—Direct.*

HILL HABER, SWORN.

DIRECT EXAMINATION BY MR. HABER:

Q. Mr. Haber, where do you live? A. 718 Angelique Street, West Hoboken.

Q. What is your business or occupation? A. Real estate.

Q. What do you mean by "real estate"? A. Selling real estate. 10

Q. Real estate broker? A. Yes, broker.

Q. How long have you been a real estate broker? A. About 17 or 18 years.

Q. Is that your only occupation? A. Yes.

Q. Do you know Harris Goldberg? A. Yes.

Q. How long have you been doing business with him? A. Oh, about six or eight years.

Q. Have you been selling various pieces of property from time to time for him? A. Yes, sir. 20

Q. I show you a piece of paper dated June 21, 1915, and ask you if you recognize that piece of paper? A. Yes, sir.

Q. It bears the signature Harris Goldberg; did you see Harris Goldberg sign that paper? A. Yes, sir.

MR. HABER: I wish to read into the record this paper:

"June 21, 1915. 30

"I hereby agree to pay Hill Haber the sum of three hundred dollars as commission for the sale of my property known as 4255 and 4257 Hudson Boulevard, North Bergen, N. J., to be paid on the date set for the delivery of the deed."

Q. Did you see Mr. Goldberg read over that paper before he signed it? A. Yes, sir.

Q. Where was that paper signed? A. In 40

*Hill Haber--Direct.*

Rufer's house in West New York, on 20th Street, corner of Broadway.

Q. This paper was signed in Mr. Rufer's house?  
A. Yes, sir.

Q. Did you bring a man to buy this particular property? A. Yes.

Q. Who was that man? A. Mr. Rufer and Mrs.  
**10** Rufer.

Q. Who was at Mr. and Mrs. Rufer's house?  
A. Mr. and Mrs. Rufer and Mr. Goldberg.

Q. They lived in West New York? A. In West New York.

Q. Do you know whether a contract was signed by Mr. Goldberg and Mr. Rufer and his wife?  
A. Yes, the same day.

Q. Where was that? A. On Mr. Rufer's property; in Mr. Rufer's house in West New York.

**20** Q. That was signed in Mr. Rufer's house? A. Yes, sir.

Q. Where was that paper signed? A. That paper was signed in Rufer's house; Goldberg was there; Mr. and Mrs. Rufer, the same day we made the contract.

Q. Was I there? A. Yes, sir.

Q. Who drew up the agreement? A. You drew up the agreement and Goldberg read it over.

**30** Q. Did he read it over? A. He read it over and he signed it.

Q. Did I draw up another agreement at the same time? A. At the same time you wrote another agreement.

Q. Have you got the other agreement? A. I got the other agreement for the other party.

Q. Was this agreement signed by the Rufers?  
A. At the same time.

Q. That was to sell their property? A. Yes, sir.

**40** Q. Both these properties were the properties

*Hill Haber—Direct.*

mentioned in the contract of exchange and were signed at the same time? A. The same day.

Q. How long before this paper was signed did Goldberg tell you about selling these parcels of property? A. Oh, he told me a couple of months before.

Q. Did you take him up to Middletown? A. I took him up to Middletown. 10

Q. The property which Mr. Rufer owned, was that in Middletown? A. Yes, in Middletown, sure.

Q. How often did you go up to Middletown with Mr. Goldberg to see the property in Middletown?

A. I was there twice.

Q. With Mr. Goldberg? A. With Goldberg and his son.

MR. HABER: I wish to offer this yellow slip in evidence, the written authority. 20

Without objection the paper was admitted and marked Exhibit P-1 in evidence.

MR. HABER: I wish to introduce notice to produce acknowledged by Mr. Burke August 3, 1917:

“Take notice that you are required to produce at the trial of the above-stated action a certain agreement for the sale and exchange of real estate between Harris Goldberg and Katie Goldberg, his wife, and John Rufer and Barbara Rufer, dated June 21, 1915, and in default thereof I shall introduce secondary evidence of the same. 30

“Dated August 3, 1917.”

Notice marked Exhibit P-2 in evidence.

MR. HABER: I ask that Mr. Burke produce the written contract under that notice.

MR. BURKE: We haven't it, but we have a copy.

MR. HABER: I now wish to introduce in evidence a certain agreement for exchange of real estate, signed by Harris Goldberg and his 40

*Hill Haber—Direct.*

wife, on the one hand, wherein he agrees to convey to John Rufer and Barbara Rufer the property mentioned in this written authority which he had given to the plaintiff, as parties of the first part, and John Rufer, and Barbara Rufer, as parties of the second part, dated June 21, 1915, and it is consented that this may be read into the record.

10

## "ARTICLES OF AGREEMENT.

"Articles of Agreement, made this 21st day of June, nineteen hundred and fifteen, between Harris Goldberg of the Town of West Hoboken, County of Hudson and State of New Jersey, and Katie, his wife, parties of the first part, and John Reufer and Barbara Reufer, husband and wife, of the Town of West New York, in the County of Hudson and State of New Jersey, parties of the second part:

20

Witnesseth, as follows: The parties of the first part, in consideration of one dollar, paid by the parties of the second part, the receipt of which by the parties of the first part is hereby acknowledged, and also in consideration of the conveyance by the parties of the second part of the real property hereinafter mentioned, hereby agrees to grant and convey to the parties of the second part, at a valuation for the purpose of this contract of twenty-seven thousand, seven hundred dollars.

30

"All those two certain lots or parcels of land and premises situate in the Township of North Bergen, Hudson County, N. J., and on a map entitled 'Map of property belonging to B. W. Rudiger made by Sebastian Maulbeck, Town Surveyor, 1911,' are known as parts of lots eight, all of lot seven and part of lot six, facing on the westerly side of Hudson Boulevard and being thirty-four and forty-two hundredths feet south of Ann Street and having each a frontage of thirty-two and forty hundredths feet wide in front and thirty-two feet wide in the rear as laid down on map

40

*Hill Haber—Direct.*

made by Sebastian Maulbeck June 12, 1914, for H. Goldberg.

“And the parties of the second part, in consideration of one dollar paid by the parties of the first part, the receipt of which by the parties of the second part is hereby acknowledged, and also in consideration of the conveyance by the parties of the first part of the real property hereinbefore mentioned, agrees to grant and convey to the parties of the first part, at a valuation for the purpose of this contract of ten thousand dollars, **10**

“All those certain lots, tracts or parcels of land and premises known as street numbers 21, 23 and 25 Railroad Ave., in the City of Middletown, County of Orange and State of New York, having a frontage of approximately one hundred and fifty feet on Railroad Avenue and being about 169 feet 6 inches wide in the rear and having a depth of approximately 114 feet 9 inches on Grove Street, being the same premises conveyed to Charles Hagen and John Rufer by Apec & Rush of New York City about April, 1905. Also all the right, title and interest of the parties of the second part in and to the railroad spur or switch or tracks running along Railroad Avenue and into the aforesaid premises. **20**

“Said premises which are to be conveyed by the parties of the first part are to be conveyed subject to the following incumbrances: a first mortgage of eight thousand dollars on the third house south of Ann Street and a mortgage of about eight thousand dollars on the other house, each for about five years, making a total of about sixteen thousand dollars more or less. **30**

“Said premises which are to be conveyed by the parties of the second part are to be conveyed subject to the following incumbrances: None.

“The difference between the values of the respective premises over and above incumbrances shall be deemed for the purposes of this contract to be one thousand seven hun- **40**

*Hill Haber—Direct.*

dred dollars more or less in favor of the parties of the first part, and the said parties of the second part agree to pay the same as follows:

10 "By giving the parties of the first part a second mortgage together with a bond on each of the two parcels conveyed to them by the parties of the first part in the sum of about eight hundred and fifty dollars or whatever is found to be the exact amount due, for a period of two years at six per cent., payable quarterly, they however to have the privilege of paying off the sum of fifty dollars or more on the whole sum, on any interest day.

20 "Each of the parties to these presents hereby agrees to convey the property above described, as sold by that party free from all encumbrances, except as above specified, and to execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the other party, or to the assigns of the other party (the deed to be drawn in each case at the cost of the vendor), a proper warranty deed containing full covenants, duly executed and acknowledged to convey and assure to the grantees an absolute fee of said premises.

"Said deeds shall be delivered and exchanged on or before the first day of August at 10 o'clock a. m. at the office of Isadore Haber, No. 358 Central Avenue, in the City of Jersey City, N. J.

30 "Each of the parties hereto assumes the risk of loss or damage by fire prior to the completion of this contract on the premises owned by them respectively. The rents of the said premises, insurance premiums and interest on mortgage, if any, shall be adjusted, apportioned and allowed up to the day of taking title.

40 "If there be water meters on the premises, the respective sellers shall furnish readings to date not more than thirty days prior to the time herein set for closing title and the unfixed meter charges for the intervening time shall be apportioned on the basis of such last readings.

*Hill Haber—Direct.*

“All personal property appurtenant to or used in the operation of said premises is represented to be owned by the respective sellers and is included in this exchange.

“This contract covers all right, title and interest of the respective sellers, of, in and to any lands lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the premises to be conveyed to the center line thereof, all right, title and interest of the respective sellers in and to any awards made or to be made in lieu thereof, and the sellers will execute and deliver to the purchasers, on closing of title or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of such awards. 10

“And it is understood, that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties. 20

“In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

“Witness:

“Isador Haber.

“HARRIS GOLDBERG (L. S.)

“KATIE GOLDBERG (L. S.)

“JOHN REUFER (L. S.)

“BARBARA REUFER (L. S.)

“Duly acknowledged before Isador Haber  
June 21, 1915.” 30

Q. This agreement was signed that same day that this written authority was signed? A. Yes.

Q. Who drew this agreement for the sale or exchange of the property? A. You did.

Q. And I read that over to them? A. Yes.

Agreement admitted in evidence, without objection, and marked Exhibit P-3.

Q. According to this agreement, title was to pass “Said deeds—” I am now reading from this agreement verbatim—“said deeds shall be deliv- 40

*Hill Haber—Direct.*

ered and exchanged on or before the first day of August, at 10 o'clock a. m. at the office of Isador Haber, No. 358 Central Avenue, in the City of Jersey City, New Jersey"; did you ask Mr. Goldberg for his commission after August 1, 1915?

A. I asked him for the commission; well, he said, he couldn't get a clear title and he got to sue the party, and if he gets from the party—when he gets from the party he will pay me my commission.

Q. He would have to sue what other party? A. Mr. Rufer.

Q. And if he got a judgment he would give you your money? A. Yes.

Q. Then he would pay you your commission? A. Yes.

MR. HABER: I might say now that I have subpoenaed the records of the Union Hill District Court in a suit wherein Harris Goldberg and his wife were plaintiffs and John Rufer and his wife were defendants, wherein Mr. Goldberg sued Rufer for breach of this very agreement, and the records there show that a judgment for \$500, the full amount of the jurisdiction of the Court, was obtained, and execution issued and was returned satisfied. I was informed by the Clerk that the records are in the Judge's room, which is locked, and they could not be produced. Is that correct, Mr. Burke?

MR. BURKE: It is conceded that the statement is correct.

Q. After Mr. Goldberg obtained his judgment and after Mr. Rufer paid it, did you ask Goldberg for this money? A. I asked Goldberg for my money; he says, "Now I got \$500 with the Court expenses, but I won't give you five cents"; and I

*Hill Haber—Cross.*

ask him again and he says, "Don't bother me, I won't pay you," and I ask him, "You promised me if you sue Rufer and you get the money you will pay me, and you don't pay me"; he says, "Well, I promised you, now I won't do it."

CROSS EXAMINATION BY MR. BURKE:

Q. Title to the property never passed, did it? 10

A. Well, Goldberg says he couldn't get a clear title.

Q. You know, don't you? A. I didn't search it; that is what he says.

Q. Don't you know that the title did not pass because the Rufers did not have a clear title?

A. That is what Goldberg says.

Q. You know that, too, don't you? A. I know it is not passed. 20

Q. Now, then, Mr. Haber, did Goldberg tell you that he would not pay you any commission unless the title passed? A. Goldberg told me that he could not—

MR. HABER: Just a minute; I object to that question on the ground that it is an attempt to vary a written instrument, which says the money is to be paid on the date set for passing the title. An attempt is made now to work around that written instrument and show another meaning which will change or alter that written instrument under this man's signature, after he had read it over, which says that this man shall pay a certain amount on the day set for passing title. The evidence is that he read it and then signed his name. 30

THE COURT: I think I will allow the question.

Exception noted as grounds for appeal. 40

A. No, he never said to me this.

*Hill Haber—Cross.*

Q. And at the time that you presented the agreement offered in evidence, didn't Mr. Goldberg say to you, "Now I am not liable for commission unless the title goes through"? A. No, he said to me he is going to sue the party and if he got a judgment then he gives me my commission.

Q. No, at the time that the agreement was made  
10 for the commission. A. No, he never said that.

Q. Didn't Mr. Goldberg say to you then that he would not pay any commission unless the title went through? A. He never said that to me.

Q. And didn't you then consult your son about that phase of the matter? A. He never said it to me.

Q. And didn't your son draw that agreement and put in the words "date set for passing of title" because you knew there was some question  
20 about Rufer's title?

MR. HABER: I object to that. My objection is to all this line of questions, which are the same as the first question. I don't want to make continuous objections; I suppose your Honor would rule the same way; so my objection runs to all this line with my exception.

THE COURT: Yes.

A. I didn't know nothing about it.

30 Q. If you know, why does your contract say that the commission is to be paid on the date set for passing title?

MR. HABER: I object to that as incompetent, irrelevant and immaterial, why a certain paper has certain language in it.

THE COURT: I think I will overrule that question.

40 Q. Is Mr. Rufer in Court?

MR. HABER: Mr. Rufer is dead.

*Isador Haber—Direct*

Q. Is Mrs. Rufer in court? A. Mrs. Rufer?

Q. Is she in court? A. She is not here; she is living in Brooklyn; she moved away.

MR. BURKE: I am waiting for the release, which I want to ask Mr. Haber about.

MR. HABER: I will object to that question as not being proper cross examination.

10

---

ISADOR HABER, Esq., SWORN.

## DIRECT EXAMINATION IN NARRATIVE:

I am a practicing attorney and counsellor at law of the State of New Jersey; I take care of my father's business; my father is the plaintiff in this suit; I was present at Mr. Rufer's house in West New York when the written authority marked Exhibit P-1 was drawn; it was drawn in Mr. Rufer's house in the presence of the plaintiff, Mr. Rufer, Mr. Rufer's wife, and was written out in longhand by myself; I at the same time drew another instrument on the same pad of paper of which this is half, which I have in my possession now, which contains identically the same words as this "to be paid on the date set for the passing of title or the delivery of the deeds." This was drawn by me as attorney to protect a real estate broker who rendered services up to the time of the execution of this instrument, with a knowledge of the law of New Jersey. I can safely say, from my business dealings with Mr. Goldberg, that he can read English and understands English, that I read this paper to him, that he took it and read it himself and signed it; that thereupon a written contract of exchange was entered into between Mr. Goldberg and his

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*Isador Haber—Cross.*

10 wife and Mr. Rufer and his wife, covering the premises in question. This instrument was also written out in longhand by myself one copy given to Mr. Goldberg and one to Mr. Rufer. This instrument was signed by all four—Mr. Goldberg and his wife and Mr. and Mrs. Rufer, and I was the subscribing witness.

## CROSS EXAMINATION BY MR. BURKE:

Q. Goldberg knew about the contract between your father and Rufer, didn't he? A. He saw it being executed.

Q. He knew about it, didn't he? A. Yes, sir.

20 Q. And he knew that your father was getting money from Rufer, too, didn't he? A. Yes; he saw them talking about it and he saw me writing out the instrument on the same yellow sheet of paper.

Q. What did Mr. Goldberg say when you read the contract to him providing for the payment to be made on the date set for the delivery of the deed? A. He said nothing; he knew that he was to pay \$300 as commission, because that had been agreed upon, and he read that instrument and signed it.

30 Q. Then that peculiar language is used without any reason at all? A. That is not peculiar language.

Q. That language was used without any reason at all? A. No talk at all; I had been drawing up the papers and Mr. Goldberg signed it.

## BY THE COURT:

40 Q. Was there any particular reason, Mr. Haber, for your using these words? A. The reason I used these words was this: In the cases I have had dealing on this question, I know that the Courts draw a distinction between contingencies

*Hill Haber—Cross—Re-Direct.*

and the contingencies which owners themselves put in these authorities, and realizing that a broker has rendered services and is entitled to his commission and need not guarantee the title, if he produces a purchaser whom the owner accepts by entering into a contract with him, and I made up this agreement and had one signed by Mr. Rufer and one signed by Mr. Goldberg at one and the same time. 10

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HILL HABER, recalled.

## CROSS EXAMINATION RESUMED BY MR. BURKE:

Q. I show you a paper dated September 5, 1916, and ask you if that is your signature? A. Yes, sir.

Q. I show you a check for \$375 made by Harris Goldberg, dated September 5, 1916, that same day, and ask you if that check is endorsed by you? A. Yes. 20

Q. Did you cash it? A. Yes, sir.

## RE-DIRECT EXAMINATION BY MR. HABER:

Q. This paper I show you reads, September 5, 1916, Received from Harris Goldberg a check for \$375 in full payment of the commission for selling my three houses on 19th Street, West New York; did you sell three houses for Mr. Goldberg on 19th Street just before September 5th, 1916? A. I exchanged them three houses for Dumont property; this is another sale; here is a sale of them houses on the Boulevard and 19th Street. 30

Q. Just answer my question; you did sell for Mr. Goldberg three houses in West New York just before September 5, 1916? A. Yes.

Q. How much commission were you to receive from that? A. He cut off about \$75 from my com- 40

*Hill Haber—Re-Direct.*

mission; he took off \$75. He says, "Haber, maybe we can do some other time business," and he cut me down \$75.

Q. Was this check for \$375 in payment of your services for the sale of those three houses in West New York? A. Yes.

10 RE-CROSS EXAMINATION BY MR. BURKE:

Q. Now, Mr. Haber, will you kindly explain to the Court why you put in this paper and signed it, "and have no claim whatsoever"?

MR. HABER: I object to that question on the ground that it calls for a conclusion.

MR. BURKE: I will withdraw it.

20 Q. At the time you signed this paper acknowledging receipt of \$375 in full payment of the commission for selling the 19th Street houses and have no claim whatsoever, was there any talk between you and Goldberg? A. Nothing at all; I talk with him about my commission, he takes off \$75. He said, "Haber, I cut off \$75, maybe we can do some other business," and I signed it, I don't see it.

Q. You didn't see this paper? A. Well, I seen the paper; I don't read it over.

30 Q. You didn't see this paper? Didn't you see it in Judge McCauley's court two or three weeks ago? A. I don't read it over, Mr. Burke. Mr. Goldberg wrote that piece of paper and says, "Haber, sign it." I got my check and signed it, that is all; that is for the houses on 19th Street, not the other houses; this is not for the Middletown house; this was for the Dumont houses.

40 Q. At the last trial you didn't say that you didn't see what was on this paper, did you? A. At the last trial you only showed me this paper, if I signed it; you don't ask me no other ques-

*Motion for Non-Suit.*

tions. If you wanted to know, why didn't you ask me questions this time?

Q. This check and this paper were made about a year after the agreement for the Middletown exchange—June 21st and September 5th; Goldberg paid you that subsequently? A. For the other houses.

Q. This paper refers to the subsequent debt? A. **10**  
This paper was for the 19th Street houses and the Dumont property; in addition he takes me off \$75 off my commission.

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MR. HABER: The plaintiff rests.

MR. BURKE: Now, if your Honor please, I move for a non-suit. This contract, if your Honor please, provides for the payment of \$300 as commission for the sale of my property. Now, the evidence is that there was not any sale; that there was an exchange; and as Mr. Haber's commission depended upon making the sale and if there was not, then the commission is not due. These people made an agreement providing for the payment of \$300 if the sale was made. In the eyes of the law a sale and exchange are, of course, very different propositions. Even in the Act, I think your Honor will find that it provides for the sale and exchange, and whenever the cases speak of the sale and exchange they differentiate. Therefore, I think Mr. Haber had an agreement which would entitle him to a commission if he had sold the property, but nothing if there was an exchange. **20**  
**30**

The second ground is that this money did not become due anyway until the delivery of the deed. The mere fact that the astute counsel was able to insert in there "on the date set **40**

*Motion for Non-Suit.*

for the delivery of the deed," it seems to me, does not change the situation under the cases which I will refer to.

The third reason is, that the plaintiff has shown that the title to the property of Rufer referred to in the contract was not good; it was not a clear title.

10        Now, in the case of *Leschziner against Bau-*  
*man*, the contract between the people was very  
 similar to this contract, or something like  
 this contract—"I herewith agree to pay to S.  
 Leschziner & Company a commission of \$1,250  
 on the day of passing title, or July 15th, for  
 the sale of the Rudolph, Stella, Caroline and  
 Crescent apartment houses to the Home Cou-  
 pon Exchange Company," which I think is  
 stronger against the owner than our case, be-  
 20        cause it names a specific date. This is a  
 Court of Appeals case, decided in 1912.

In directing a verdict for the defendant at the close of the case, the learned trial court said:

"The question reduces itself to a simple matter of construction whether this agreement to pay a commission on the day of passing title, or July 15th, for the sale of this property is an agreement conditional on the passing of the title on that day.

30        "The difficulties surmounting the construc-  
 tion of the agreement arises from the fact that the property in question was not sold, but that on the day of the execution of the agreement another agreement for the exchange of properties was entered into between the defendant and the Home Coupon Exchange Company, which ultimately failed of fruition, because the company was unable to furnish a marketable title to the defendant of the premises which it had agreed to exchange."

40        So that it is really exactly like this case. The plaintiffs not having made sale of the

*Motion for Non-Suit.*

premises, and the proposed exchange having failed for valid reasons, the concrete inquiry thus presented is whether, under such circumstances, the plaintiffs are entitled to recover under their agreement.

“It will be observed that the agreement is based upon two assumptions as conditions precedent to its enforcement. The first is that title shall pass, and the second that there shall be a sale of the defendant’s apartment houses to the Home Coupon Exchange Company. The fact is conceded that title did not pass, and the record of this case presents no question for us to consider as to the bona fide character of the objections that were urged and resulted in its failure to pass. It is also conceded that there was no sale of the property in the ordinary mercantile sense in which that term is used in such agreements, and according to which we are bound to construe the language of the contract. These being the facts as presented by the record, it is difficult to perceive in what essential respect the case at bar can be differentiated so as to eliminate it from the rule laid down in *Hinds vs. Henry*, 36 N. J. Law, 328. In that case Mr. Justice Depue, speaking for the Supreme Court, and reviewing the authorities upon the subject, held the rule to be that ‘the broker may also, by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relates to the acts of his principal. A contract of that character is binding, and no action can be maintained until the contingency has arisen.’”

Now, then, the Court, however, held, that since it was within the power of the principal to fix the date of settlement, the rule of legal construction which has for its fundamental purpose the ascertainment of the intent of the parties could not be held to assist a wrong-

*Motion for Non-Suit.*

doer in escaping a just liability by reason of his own unreasonable act in refusing to fix a period of settlement which the very instrument sued upon contemplated would be fixed by him.

10 The condition in all such employments is that the broker shall obtain a sale. The broker's right to recover compensation in such cases is dependent upon his obtaining a sale. His right to commissions, by the terms of the present contract, is in express words dependent upon his obtaining a sale.

20 When it is recalled that the rule laid down in *Hinds vs. Henry* contains as one of its essential elements the fact of the ability of the purchaser to conclude the bargain upon the terms of the proposed contract, it becomes at once manifest that the commissions of a broker cannot be considered as earned where, by reason of the inability of the proposed purchaser to conclude the sale by taking title to the premises, the entire transaction fails, and no sale in fact takes place. Such was the posture of affairs in the case at bar; and if the controversy here be determinable upon that ground, resulting from the inability of the proposed purchaser to fulfill his contract, it is difficult to perceive upon what legal theory of liability the plaintiffs can sustain their case.

30 Upon the other hand, the language of the contract makes it manifest that until title shall have passed as the result of a sale to the proposed purchaser the contingency or condition upon which the legal right to claim for commissions is based has not arisen, and upon this aspect of the case *Hinds vs. Henry* is controlling, and presents the legal rule which justifies the direction of the circuit.

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*Offer of Exhibit.*

So that that case held, that the date set for passing title meant when title passed; secondly, it was a contract for sale and under an agreement for exchange he was not entitled to his commission because he did not bargain for that; thirdly, when the title was not good that the plaintiff was not entitled to recover.

THE COURT: I will hold this motion for nonsuit and will hear your side of the case, Mr. Burke. 10

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MR. BURKE: I would like, if your Honor please, to offer an exemplified copy of the case in the Supreme Court, Orange County, New York, wherein Alden J. Vail, as Receiver of Charles Hagan, judgment debtor in supplementary proceedings under a judgment recovered in the Supreme Court of New York, etc., is plaintiff, against Charles Hagan, Emily Hagan, his wife, and John Rufer and Babette Rufer, his wife, are defendants, with the summons dated and issued April 15, 1915; complaint filed and issued April 15, 1915; *lis pendens* recorded in Orange County wherein the property in question is located, on April 15, 1915; the record shows by the finding of fact and conclusion of law that the deed to the property in question, held by Rufers, was fraudulent, and on October 28, 1915, a decree was made declaring the title held by the Rufers, which they proposed to exchange with Goldberg, was fraudulent, and the deed was cancelled; so that these proceedings were pending at all times during the continuancy of the contract between Goldberg and Rufer and Goldberg could not get a good title. I have an index to the record. 20 30 40

Without objection the record was admitted and marked Exhibit D-1 in evidence.

*Harris Goldberg—Direct.*

MR. BURKE: Then I also offer in evidence an exemplified copy of the records of a proceeding pending in New York Supreme Court, Orange County, between Elmer H. Elman, plaintiff, against Charles Hagan and Emily Hagan, his wife, and John Rufer and Babette Rufer, his wife; the summons is dated and issued September 1, 1915; the complaint on the same day; *lis pendens* filed in Orange County, New York, the same day; the purpose of both actions being to set aside the deed held by Rufer to the property which he proposed to convey to Goldberg by the contract offered in evidence by the plaintiff in this case. On November 11, 1916, the records show that by stipulation the *lis pendens* was directed to be cancelled of record; and the action was pending until October 25, 1916.

Record marked Exhibit D-2 in evidence.

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HARRIS GOLDBERG, SWORN.

DIRECT EXAMINATION BY MR. BURKE:

Q. Mr. Goldberg, you are the defendant in this case? A. Yes, sir.

Q. I call your attention to the fact that the contract for commissions, dated June 21st, recited "to be paid on the date set for the delivery of the deed"; did you have any talk about that with Mr. Haber?

MR. HABER: I object to that. If this tends to vary or alter a written instrument, then I object to it; furthermore, I object to it on the ground that it is not part of the specification of defences interposed by the defendant and it is a complete surprise to me.

MR. BURKE: I will withdraw it.

*Harris Goldberg—Direct.*

Q. Mr. Goldberg, the title to this property under the contract for exchange never went through, did it? A. No, sir.

Q. Because of that injunction that was pending? A. Yes, sir.

Q. Now, did Mr. Haber know that the injunction was pending, did you find out?

MR. HABER: I object to that question. This man cannot state if the plaintiff knew about it. 10

MR. BURKE: If your Honor please, I want to show that when the parties put in "on the date set for passing title" that they had that in mind. Our purpose is to construe the contract and the meaning of the parties and that those words were put in there only because of conditions which the plaintiff knew existed at the time when that peculiar wording was written in that contract. 20

THE COURT: I think he may answer, if he knows.

A. He did.

Q. He did what?

MR. HABER: I object to that question before and to the following question on the ground that this man is not qualified to say whether the plaintiff knew whether there was an injunction pending; secondly, on the ground that it is immaterial, irrelevant and incompetent. 30

THE COURT: I will allow it.

Exception noted as grounds for appeal.

A. He knew.

Q. He knew what? A. He knew that this title cannot pass.

Q. What did he say to you and what did you say to him? 40

*Harris Goldberg—Direct.*

MR. HABER: I want to enter my objection and exception to this whole line of questions.

A. I only find out after that he knew; I didn't know it before; after when the suit was brought against Rufer he comes to me and he said, "You got \$500 out of Rufer, you should pay me out of that this \$300. It was only through me Rufer makes that agreement and he refused because he was afraid, because there was an injunction against him.

Q. Mr. Goldberg, on September 5th, 1916, Mr. Haber, the plaintiff in this case, signed this paper (indicating), did he not? A. He did.

Paper admitted in evidence, without objection, and marked Exhibit D-3.

Q. I call your attention to the fact that that paper recites that Mr. Haber has no claim against you whatsoever; will you tell the Court what you said and what Mr. Haber said at that time?

MR. HABER: I object to that question on the ground that it is an attempt to vary or alter a written instrument; the words speak for themselves.

THE COURT: I will overrule the objection and take that construction of it.

Q. I show you a check dated September 5, 1916, for \$375. Was that given at the time that paper was given? A. At the same time.

Check admitted, without objection, and marked Exhibit D-4 in evidence.

MR. BURKE: Now, I would like to offer, if your Honor please, Sections 1670 and 1671 of the Code of Civil Procedure of New York; Section 1675 of the Code of Civil Procedure of New York; the Real Property Law of the State of New York; the Consolidated Laws of

*Harris Goldberg—Cross.*

New York, 1909, Chapter 52; Consolidated Laws of New York, Birdseye, Cummings & Gilbert, Volume 4, Annotated, page 4919, and in particular Sections 262, 263, 264, 265 and 266 on Conveyances under the Real Property Law of New York; also Section 290; Section 1670 of the Code of Civil Procedure of New York; and Section 291 of the Code of Civil Procedure of New York. 10

## CROSS EXAMINATION BY MR. HABER:

Q. Now, Mr. Goldberg, this check which is marked in evidence was given by you to Mr. Haber for what purpose? A. For the two purposes: for the commission on the 19th Street houses and to settle up this claim.

Q. Do you mean to tell this Court that this check was given in payment of the commission for the 19th Street property? A. Yes, sir. 20

Q. And also in settlement of this suit? A. Also in settlement of this suit.

Q. Why wasn't the settlement of this suit put in writing in that paper; why was only the 19th Street property mentioned in that paper?

MR. BURKE: I object to that because it is in writing just as plain as it can be.

MR. HABER: I will let the Court inspect the paper and draw its own conclusion from it. 30

Q. How many houses did you have on 19th Street? A. Seven.

Q. How many houses did you authorize Mr. Haber to sell for you? A. Three.

Q. Did he find a buyer for the three? A. No, sir.

Q. He did not find a buyer? A. No; an exchange; not a buyer. 40

Q. He found an exchange for it? A. Yes.

*Harris Goldberg—Cross.*

Q. And he exchanged those three houses of yours on 19th Street for property in Dumont, didn't he? A. For one house in Dumont.

Q. For one house in Dumont? A. Yes.

Q. How much did you receive for each of those three houses in 19th Street? A. I didn't receive anything.

10 Q. What was your selling price? A. I don't remember; it was exchanged for a house in Dumont.

Q. Was I present when that transaction was closed? A. When the transaction was closed?

Q. Yes. A. I guess you were.

Q. Did I draw up the agreement of exchange? A. Yes, you did.

Q. Didn't you tell me that your price was \$5,500 for each house? A. I told Mr. Haber, your father,  
20 it was fifty, not fifty-five hundred.

Q. Didn't you tell me it was \$5,500 for each house? A. No, you put in fifty-five; I guess you put in fifty-five only to induce the other party that it was a high selling price; I gave my price for five thousand, the house to sell at five thousand; what you put in the contract I don't know.

Q. Did you read the contract? A. I did.

Q. You understand English, don't you? A. I asked why he put in 55 and he said, "Well, it  
30 doesn't make any difference to me, you get your exchange, that is all"; that is what you said.

Q. You understand English, don't you? A. A little bit.

Q. You can read English? A. Yes.

Q. You read that contract? A. Certainly.

Q. You took that property in Dumont at a certain figure, didn't you? A. No, sir; you said—

Q. Just a moment. A. —"We want to get more commission from the other party."

40 Q. I drew up that contract, didn't I? A. Yes, sir.

*Harris Goldberg—Cross.*

Q. It was in writing, wasn't it? A. In writing.

Q. That contract specified a certain figure for your property with certain mortgages on your property and a certain equity on your property? A. Yes, sir.

Q. And a certain figure for the other property you were buying, subject to certain mortgages, and a certain equity in that property; wasn't that so? A. I don't remember exactly; I guess it was; I don't remember. 10

Q. You guess it was? A. That is about three years ago.

Q. That being so, don't you know that the figures for your property were \$5,500 apiece? A. Fifty; not fifty-five.

Q. Were the figures in the contract? A. You put in fifty-five; I asked you why you put it in and you say that it does not make any difference, the exchange is the same to me, you wanted to induce the other party to think it was fifty-five. 20

Q. Don't you know, Mr. Goldberg, that you signed that contract— A. I only took \$5,000 for all my houses; I got another house for \$4,800, I will take.

MR. BURKE: Just a minute; I object to that.

MR. HABER: I am trying to bring out that release. It is the most ridiculous thing ever brought out by anybody in court. 30

Q. Now, Mr. Goldberg—

MR. BURKE: I still object to it.

THE COURT: I don't quite see how it is material.

MR. HABER: I am going to show just the selling price of that property and the commission which Mr. Haber ought to have had, and 40

*Harris Goldberg—Cross.*

I am going to show that this check was commission for that property.

MR. BURKE: We don't deny that.

MR. HABER: Yes, you do deny it; you say it was for commission and also a release of this claim. I am going to show that Mr. Haber was entitled to a bigger commission than that and then the Court can draw its own conclusion as to whether it also covered the release of this claim.

10 Q. Now, what commission was Mr. Haber to get for the sale of that property? A. He was to get two and a half per cent. by the sale and by exchange only one per cent.

20 Q. Was that agreement in writing? A. It was in writing; the writing was only for the sale of property; when I exchange I only give one per cent. only as a rule.

Q. How long are you in the real estate business, Mr. Goldberg? A. I guess I am long enough in it.

Q. Now, Mr. Goldberg, what price did you pay to Mr. Haber as commission for the exchange of your Boulevard property; one per cent.? A. Well, there was a conversation about this thing.

30 Q. Was it one per cent.? A. I told Mr. Haber he is not entitled to more than one per cent. on this exchange because it is not a sale; on an exchange, as a rule, he wants one per cent. I don't get anything from the first transaction; I had so much trouble and so much bother, I don't get anything, so I give him \$375 so we will settle the two cases. I only offer him one per cent. and he didn't want it; he asked me I shall give him two per cent., he don't have nothing on the other, so I say, "All right," and I give him the check.

40 Q. Now, Mr. Goldberg, how is it that you did

*Harris Goldberg—Cross.*

not give a paper writing for commission for exchange?

MR. BURKE: I object to that.

THE COURT: I don't think this is relevant.

Q. Now, Mr. Goldberg, you did not have any lawyer present when this 19th Street property was sold except myself, did you? A. Yes. 10

Q. I drew up the contract? A. Yes.

Q. And you signed it? A. Yes.

Q. And you paid my father \$375, didn't you? A. I paid it, yes; not only for this alone; I gave him this check, yes.

Q. And that was after this transaction on which this suit is based? A. Oh, long after. A year after.

Q. So that you did not have any other lawyer present when I was drawing up this agreement for the 19th Street property? A. No, nobody. 20

Q. You did sue Rufer, didn't you? A. Yes.

Q. On that contract, didn't you? A. Because I lost nine months I lost all chances to sell the property.

Q. You have been in Court; you know what it is to sue?

MR. BURKE: The records of the Court are the best evidence. We will concede that he sued and got \$500 damages. 30

Q. You did sue Rufer on that contract?

MR. BURKE: It is in the record, conceded.

Q. You were paid, too?

MR. BURKE: We concede that, too.

Q. Did you promise to pay Mr. Haber this commission? A. What commission?

Q. For the sale of this Boulevard property? A. Yes; if he sell, yes. 40

Q. If he sells? A. Yes, certainly.

*Hill Haber—Direct.*

Q. You were present when I drew up that little agreement? A. I was present.

Q. When I drew up that little agreement? A. I don't think so; I think Mr. Haber brought it to me.

MR. BURKE: That is the defendant's case.

10

HILL HABER, recalled.

DIRECT EXAMINATION BY MR. HABER:

Mr. Haber, were you the agent for Mr. Goldberg in the sale of the 19th Street property? A. Yes, sir.

Q. What purchaser did you bring him? A. I brought him a party in Dumont.

20 Q. Do you remember his name? A. Spencer.

Q. Was a contract made? A. A contract was made to take the Dumont property in exchange.

Q. Now, what price did Goldberg sell that property for? A. \$5,500 apiece.

MR. BURKE: I object to that; that was an exchange and not a sale.

Q. \$5,500 apiece?

MR. BURKE: My objection is still in.

30

MR. HABER: I will withdraw the question.

Q. Was there an exchange contract made? A. Yes, sir.

Q. At what price did Goldberg sell these three houses?

MR. BURKE: I object to that because it was an exchange and because the contract is the best evidence, and it is not material to any issue.

40

Q. What commission were you to receive from Goldberg for the sale of that property?

*Will Haber—Cross.*

MR. BURKE: May I ask if that agreement is in writing?

THE WITNESS: I got an agreement in writing.

MR. BURKE: Then I object unless the writing is produced.

Q. What did you do with that writing after you got your commission? A. I gave it back to Mr. Goldberg. 10

MR. HABER: I ask Mr. Goldberg to produce that paper writing which was given back when the plaintiff received his commission.

MR. BURKE: I want to save time; go ahead.

Q. What commission were you to get from Goldberg according to that written authority? A. On the 19th Street houses? 20

Q. On the 19th Street houses. A. Two and a half per cent. and he cut me off, he asked me to take \$375.

Q. He asked you to take \$375? A. He says, "Maybe we can do business again," and he gives me that and he cuts me off over fifty dollars.

Q. Did you ever agree to release this claim? A. Never.

CROSS EXAMINATION BY MR. BURKE: 30

Q. Mr. Haber, then after you made the 19th Street sale you had some dispute with Goldberg about how much you were to get for that sale; isn't that right? A. What sale?

Q. For 19th Street. A. He told me to come over there the next day and he would give me the commission, and I came over.

Q. You didn't get your entire commission, did you? A. And he talk with me, he says, "Haber, I won't pay you so much, I give you \$375." 40

*Hill Haber—Cross.*

Q. And \$375 was paid, he told you, because it was an exchange transaction and not a sale, didn't he? A. Well, for the exchange for the Dumont property.

Q. This was a year after the Rufer sale, wasn't it? A. Oh, it was after.

Q. You signed a paper in which you say you  
 10 have no claim whatsoever; do you mean to tell this Court it did not refer to the Rufer sale? A. I never see that paper, only he gave me that paper and says, "Haber, sign that," and I say, "Goldberg, what for I sign, I got the check?" He says, "Never mind, Haber, I want you to sign that so I have it." So I sign it for the \$375 because my commission was over \$400. On the three houses for \$5,500 it is over \$400. He says, "Haber, never  
 20 mind, I give you \$375 and you do more business," so he cuts that to \$375. I say, "What for is that paper?" "Never mind," he says. I want to do business with him now so I sign it.

Q. So you say you signed because you were going to do more business? A. I signed for the \$375.

Q. You signed because you were getting the money? A. Yes, and he was cutting me off to \$375.

Q. And he said that to you? A. Yes.

30 Q. So when you said to the Court a few minutes ago that you did not see what you signed, you did not mean that, did you? A. He says, "Sign that to take \$375—"

Q. Then you saw what you signed? A. I did not see what was inside.

Q. Which way was it, didn't you see what you signed— A. No, he says, "Haber, sign that paper."

40 Q. Didn't you see what you signed, or did you sign because you wanted to do more business with

*Hill Haber—Cross.*

him? A. He says to me, "Sign this receipt for \$375 for the 19th Street houses."

Q. You knew it contained a release, didn't you?

A. For the 19th Street houses.

Q. You knew it contained a release? A. For the 19th Street houses; no release; nothing at all.

Q. Didn't you say that you were entitled to more money than that? A. For \$16,500 it is more than \$375, but he says I shall take off \$50. 10

Q. What did you think the words meant, "Have no claim whatsoever"; what did you think that meant? A. He really don't say nothing to me; he says, "Sign that paper for \$375 for the 19th Street houses." So I sign that paper.

Q. Mr. Haber, how long have you been in business? A. Seventeen or eighteen years.

Q. And you got a lawyer in your office for several years? A. Yes. 20

Q. Still you did not know what you were signing and Goldberg made you sign it? A. Well, I am not acting always with a lawyer; I can't read much English, and when he says, "Sign that paper for \$375" when he asked me I signed it.

---

TESTIMONY CLOSED.

---

**Certificate of Stenographer.** 30

I, Harry Schirmer, a stenographer designated by the Court and sworn, do certify that the foregoing is a true and accurate transcript of the testimony and proceedings on the trial of the suit of Hill Haber, plaintiff, against Harris Goldberg, defendant, in the Second District Court of Jersey City.

HARRY SCHIRMER,  
Stenographer. 40

**Certificate of Judge.**

TO THE JUSTICES OF THE NEW JERSEY SUPREME  
COURT:

I hereby certify the foregoing transcript of the proceedings at the trial of the above entitled action and the testimony therein made by the stenographer designated by me, as the state of the case to be used on the hearing of the appeal herein.

10

Dated Oct. 2, 1917.

JOHN A. BLAIR,  
Judge of the Second District Court  
of the City of Jersey City.

---

**Exhibit P-1.**

June 21, 1915.

I hereby agree to pay Hill Haber the sum of  
20 Three Hundred (\$300) Dollars as commission for the sale of my property known as 4255 and 4257 Hudson Blvd., North Bergen, N. J., to be paid on the date set for the delivery of the deed.

(Signed) HARRIS GOLDBERG.

---

**Exhibit D-1.**

THE PEOPLE OF THE STATE OF NEW  
YORK,

30 BY THE GRACE OF GOD FREE AND INDEPENDENT.

To all to whom these presents shall come or may concern, Greeting:

Know Ye, That we, having examined the records and files in the Office of the Clerk of the County of Orange and Clerk of the Supreme Court of said State for said County, do find a certain action there remaining, in the words and figures following, to wit:

40

*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of  
 Charle Hagen, judgment debtor  
 in proceedings supplementary to  
 execution under a judgment re-  
 covered in the Supreme Court of  
 the State of New York in and  
 for the County of Suffolk by the  
 Suffolk County National Bank  
 against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
 GEN, his wife, and JOHN RUEFER  
 and BABETTA RUEFER, his wife,

*Defendants.*

10

20

To the above named defendants and each of them :

You are hereby summoned to answer the com-  
 plaint in this action and to serve a copy of your  
 answer on the plaintiff's attorneys within twenty  
 days after the service of this summons exclusive  
 of the day of service, and in case of your failure  
 to appear or answer, judgment will be taken  
 against you by default for the relief demanded in  
 the complaint.

30

Trial to be held in the County of Orange.

Dated April 15, 1915.

WATTS, OAKES & BRIGHT,

Attorneys for Plaintiff,

Office and Post Office Address,

4 East Main Street,

Middletown,

New York. 40

*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

10 ALTON J. VAIL, as Receiver of  
 Charle Hagen, judgment debtor  
 in proceedings supplementary to  
 execution under a judgment re-  
 covered in the Supreme Court of  
 the State of New York in and  
 for the County of Suffolk by the  
 Suffolk County National Bank  
 against the said Charles Hagen,

*Plaintiff,*

*against*

20 CHARLES HAGEN and EMILIA HA-  
 GEN, his wife, and JOHN RUEFER  
 and BABETTA RUEFER, his wife,

*Defendants.*

Plaintiff for his complaint against the above named defendants alleges.

1. Upon information and belief that heretofore in an action duly commenced in the Supreme Court of the State of New York, in and for the County of Suffolk by the Suffolk County National Bank against the above named defendant Charles Hagen, the said Suffolk County National Bank  
 30 duly recovered judgment against the said Charles Hagen on the 18th day of September, 1912, for the sum of \$1,025.82, and on that day the judgment roll in said action was duly filed and the judgment duly docketed in the office of the Clerk of the said County of Suffolk, and thereafter and on the 23rd day of September, 1912, a transcript of said judgment was duly and regularly filed and  
 40 said judgment docketed in the office of the Clerk of the County of Orange in the State of New

*Exhibit D-1.*

York, in which last mentioned county said judgment debtor then resided.

2. Upon information and belief that thereafter and on the 24th day of September, 1912, an execution upon said judgment in due form of law was duly and regularly issued against the property of the said Charles Hagen, judgment debtor and defendant herein, and duly delivered to the Sheriff of the County of Orange in which said County said judgment debtor then resided and still resides; and said execution was thereafter and prior to the commencement of this action duly returned by the said Sheriff wholly unsatisfied and said judgment still remains wholly unpaid and unsatisfied, and there is now due and owing thereon the sum of \$1,025.82, with interest thereon from the 18th day of September, 1912.

10

3. Upon information and belief that thereafter proceedings supplementary to execution upon said judgment were duly instituted and prosecuted by the said Suffolk County National Bank, the judgment creditor aforesaid, against the said defendant and judgment debtor Charles Hagen, and such proceedings were therein had that thereafter and on March 15, 1913, by an order duly made by this Court and thereafter duly filed in the office of the Clerk of the County of Orange, plaintiff was duly appointed the receiver of the property of said defendant and judgment debtor Charles Hagen and plaintiff thereupon qualified, ever since has been, and is now acting as such.

20

30

4. Prior to the commencement of this action, by an order of this Court duly made, permission to bring this action was duly given to the plaintiff.

5. Prior to the commencement of this action by an assignment, in writing, the said Suffolk County National Bank duly and regularly assigned the said judgment and the sums of money due and to

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*Exhibit D-1.*

grow due thereon to Elmer H. Lemon, of Middletown, New York, who is now the owner and holder of said judgment and who duly requested plaintiff to commence this action prior to the commencement hereof and prior to granting plaintiff such leave as hereinbefore recited.

10 6. Upon information and belief that prior to the recovery of the said judgment said defendant Charles Hagen was part owner in fee simple and possessed certain real property lying and being in the said City of Middletown, Orange County, New York, which said property was of the value of \$10,000 and upwards and was fully sufficient to satisfy said judgment and out of which the same might have been collected but for the collusive and fraudulent practices and contrivances herein-  
 20 after particularly described and which said property is described as follows:—

All the equal undivided one half of all that certain lot, piece or parcel of land situate, lying and being in the town of Wallkill, now called Middletown, County of Orange and State of New York, bounded and described as follows: Beginning at a stake eleven feet east of a brook running through the premises hereby conveyed and along and near the dwelling of William J. Conkling and at a  
 30 point seventy-three and one-half feet northeast of the center line of the New York and Erie Railroad Company, and running thence north twenty-four and one-fourth degrees east one chain and seventy-four and one-half links to a stake and stones on the east side of the brook aforesaid; thence north sixty-one and three-quarter degrees west two chains and forty-seven links to a stake, thence south twenty-eight and one-quarter degrees west two  
 40 chains and fifteen links to a stake on the north side of a street proposed to be opened between the premises hereby conveyed and the line of the lands

*Exhibit D-1.*

of the New York and Erie Railroad, thence along the north side of said street south sixty-one and three-quarter degrees east one chain and sixteen links to a point forty feet north of the line of the lands of said Company, thence further along said proposed street south seventy-seven and three-quarter degrees east one chain and forty-eight links to the place of beginning. Containing one-half of an acre of land, more or less. 10

Also all that other lot of land situate in the town of Wallkill aforesaid lying between the above described lot and the center line of Grove Street in said town, being a strip about twenty-six feet in width on the northerly end and about twenty feet on the southerly end on Railroad Avenue and about one chain and seventy-five and one-half links in length. It is hereby intended by the parties hereto to convey the strip between the Hat Factory lot and the center of Grove Street so that the northeasterly line of said Hat Factory lot will be extended to the center line of Grove Street and embrace all the land lying in a strip between said Hat Factory lot and the center of Grove Street. 20

And also all that certain other piece or parcel of land situate in the town of Wallkill above said bounded and described as follows, Beginning on the south corner of the lot on which the Hat Factory stands being at the corner of Grove Street and Railroad Avenue and running thence southwest in range with the southeast side of the Hat Factory Lot to the north line of lands of the Erie Railroad Company, thence along said line of said land northwest to a point where said line is intersected by the line of the southwest side of said Railroad Avenue, thence northwest along said line of said avenue to a point opposite to the west corner of the Hat Factory lot aforesaid, and in 30 40

*Exhibit D-1.*

range with the northwest side of said lot, thence northeast in range with the northwest side of said lot to west corner aforesaid, thence along southwest side of said lot to the place of beginning and being in that portion of ground used as a public highway and known as Railroad Avenue in front of said Hat Factory lot and extending

10 from south corner of lands of John H. Bell to intersection of northwest line of Grove Street with the northeast line of Railroad Avenue. Subject, however, to the right reserved by Horatio R. Wilcox to himself, his heirs and assigns if now subsisting to keep a drain from the cellar of said Wilcox's dwelling, through said strip of land above mentioned, and the right to repair and drain from time to time forever after when he or his heirs or assigns may deem it necessary so to do, as set

20 forth in the deed from Horatio R. Wilcox and wife to Joshua Draper dated September 8, 1862, and recorded in Orange County, New York Clerk's office in Liber 169 of deeds, page 94.

7. Upon information and belief that heretofore and prior to the rendition of said judgment said defendant Charles Hagen and Emilia Hagen, his wife, attempted to convey to the defendant John Ruefer by a certain deed in writing dated on June 1, 1912, and thereafter filed in the office of the

30 Clerk of the County of Orange, the lands and premises hereinbefore described.

8. Upon information and belief, that said deed was made without any consideration passing between the parties thereto and was made and executed by said defendants Charles Hagen and Emilia Hagen, his wife, and received and accepted by said defendant John Ruefer with intent to hinder, delay and defraud the just creditors of

40 the said Charles Hagen of their just claims against him and particularly to so hinder, delay and defraud the said Suffolk County National Bank.

*Exhibit D-1.*

judgment creditor aforesaid and its assignee hereinbefore described, and such conveyance was made and executed by the said defendants Charles Hagen and Emilia Hagen, his wife, and was accepted by the said defendant John Ruefer in trust for the use of the said Charles Hagen, that said conveyance was part of a collusive and fraudulent conspiracy to prevent the collection of the judgment hereinbefore set forth, that the said Charles Hagen had no other property than that attempted to be conveyed by said deed out of which the judgment hereinbefore set forth could be collected and was then and ever since has remained insolvent; and that unless such conveyance be set aside by a judgment of this Court and plaintiff be allowed to collect said judgment out of the above described real estate the same must remain wholly unpaid.

9. That the defendant Bebetta Ruefer, as your plaintiff is informed and believes, is a married woman, the wife of the defendant John Ruefer, and therefore if he obtained any title whatever to the said premises by reason of said conveyance collusively and fraudulently made as aforesaid she is seized of an inchoate right of dower therein.

Wherefore plaintiff demands judgment:

1. That said deed or conveyance above described made by said defendants Charles Hagen and Emilia Hagen, his wife, to the said defendant John Ruefer may be adjudged fraudulent and void as against the creditors of the said Charles Hagen and particularly as against this plaintiff and to have been made by the said Charles Hagen and Emilia Hagen, his wife, and accepted by the said John Ruefer for the purpose and with the intent to defraud, delay and hinder the creditors of said Charles Hagen and this plaintiff and that said deed may be adjudged void and of no effect and be cancelled of record.

*Exhibit D-1.*

2. That the defendants and each of them be adjudged to account for all moneys received by them or either of them under the deed or conveyance before described and for the proceeds, rents and profits of the real estate therein purporting to be conveyed and that they deliver said property, proceeds, rents and profits to plaintiff.

**10** 3. That said defendants and each of them be enjoined and restrained from selling, transferring, assigning or in any way interfering with said real property or any part thereof.

4. And for such other and further relief as to this Court may seem just and proper together with the costs and disbursements of this action.

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff.

**20** STATE OF NEW YORK, }  
County of Orange, } ss.:

ALTON J. VAIL, being duly sworn, says that he is the plaintiff in this action, that he has read the foregoing complaint, and knows the contents thereof, that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

**30** ALTON J. VAIL.

Sworn to before me this }  
15th day of April, 1915. }

E. Josephine Corwin, Notary Public.

Endorsed: Supreme Court, Alton J. Vail as Receiver, etc., vs. Charles Hagen et al. Summons and Complaint. Watts, Oakes & Bright, Attorneys for Plaintiff. Office and P. O. Address, 4 East Main Street, Middletown, N. Y.  
**40** Filed Apr. 15, 1915, 3H45M P. M.

*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court of  
the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
GEN, his wife, and JOHN RUEFER  
and BABETTA RUEFER, his wife,

*Defendants.*

10

20

Notice is hereby given that an action has been  
commenced and is now pending in this Court upon  
the complaint of the above named plaintiff against  
the above named defendants to set aside a certain  
conveyance heretofore made on the first day of  
June, 1912, by Charles Hagen and Emilia Hagen,  
his wife, to John Ruefer conveying the premises  
hereinafter described, which said deed was there-  
after recorded in the office of the Clerk of the  
County of Orange on July 1, 1912, in Book 534  
of Deeds, at page 89, upon the ground that the  
said deed was executed by the said defendants  
Charles Hagen and Emilia, his wife, and accepted  
by the defendant John Ruefer for the purpose of  
delaying, defrauding and hindering the creditors  
of the said Charles Hagen and particularly this  
plaintiff and the Suffolk County National Bank,  
one of the judgment creditors of said Hagen, as

30

40

*Exhibit D-1.*

more fully set forth in the verified complaint filed herewith; and that the object of said action is to set aside as fraudulent and collusive the said deed and to cancel the same of record; and that the premises in the City of Middletown, County of Orange and State of New York affected by this action are at the time of the commencement hereof and at the time of the filing of this notice situated in the said City of Middletown, County and State aforesaid, and are described in said deed as follows:

10 All the equal undivided one-half of all that certain lot, piece or parcel of land, situate, lying and being in the Town of Wallkill now called Middletown, County of Orange and State of New York, bounded and described as follows:

20 BEGINNING at a stake eleven feet east of a brook running through the premises hereby conveyed and along and near the dwelling of William J. Conkling, and at a point seventy-three and one-half feet northeast of the center line of the New York and Erie Railroad Company, and running thence north twenty-four and one-fourth degrees east one chain and seventy-four and one-half links to a stake and stones on the east side of the brook aforesaid, thence north sixty-one and three-quarter degrees west two chains and forty-seven links to a stake, 30 thence south twenty-eight and one-quarter degrees west two chains and fifteen links to a stake on the north side of a street proposed to be opened between the premises hereby conveyed and the line of the lands of the New York and Erie Railroad, thence along the north side of said street south sixty-one and three-quarter degrees east one chain and sixteen links to a point forty feet north of the line of the lands of said Company, thence 40 further along said proposed street south seventy and three-quarter degrees east one chain and forty-

*Exhibit D-1.*

eight links to the place of beginning. Containing one-half of an acre of land, more or less.

Also all that other lot of land situate in the Town of Wallkill aforesaid lying between the above described lot and the center line of Grove Street in said town, being a strip about twenty-six feet in width on the northerly end and about twenty feet on the southerly end on Railroad Avenue and about one chain and seventy-five and one-half links in length. It is hereby intended by the parties hereto to convey the strip between the Hat Factory lot and the center of Grove Street so that the northeasterly line of said Hat Factory lot will be extended to the center line of Grove Street and embrace all the land lying in a strip between said Hat Factory lot and the center of Grove Street.

And also all that certain other piece or parcel of land situate in the town of Wallkill above said bounded and described as follows:

BEGINNING on the south corner of the lot on which the Hat Factory stands, being at the corner of Grove Street and Railroad Avenue and running thence southwest in range with the southeast side of the Hat Factory lot to the north line of lands of the Erie Railroad Company, thence along said line of said land northwest to a point where said line is intersected by the line of the southwest side of said Railroad Avenue, thence northwest along said line of said avenue to a point opposite to the west corner of the Hat Factory lot aforesaid, and in range with the northwest side of said lot, thence northeast in range with the northwest side of said lot to west corner aforesaid, thence along southwest side of said lot to the place of beginning and being in that portion of ground used as a public highway and known as Railroad Avenue in front of said Hat

*Exhibit D-1.*

Factory lot, and extending from south corner of lands of John H. Bell to intersection of northwest line of Grove Street with the northeast line of Railroad Avenue.

10 Subject, however, to the right reserved by Horatio R. Wilcox to himself, his heirs and assigns if now subsisting to keep a drain from the cellar of said Wilcox's dwelling through said strip of land above mentioned and the right to repair and drain from time to time forever after when he or his heirs or assigns may deem it necessary so to do, as set forth in the deed from Horatio R. Wilcox and wife to Joshua Draper dated September 8, 1862, and recorded in Orange County, New York, Clerk's Office in Liber 169 of Deeds, page 94.

20 Dated April 15, 1915.

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff,  
Office and Post Office Address,  
4 East Main Street,  
Middletown,  
New York.

TO THE COUNTY CLERK OF THE COUNTY OF  
ORANGE:

30 You will please index the above notice to each of the above named defendants.

Dated April 15, 1915.

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff,  
Office and Post Office Address,  
4 East Main Street,  
Middletown,  
New York.

*Exhibit D-1.*

Endorsed: Supreme Court.

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ALTON J. VAIL, as Receiver of  
CHARLES HAGEN, etc.,

*vs.*

CHARLES HAGEN *et al.*

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10

LIS PENDENS.

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff,  
Office and Post Office Address,  
4 East Main Street,  
Middletown,  
New York.

ORANGE COUNTY CLERK'S OFFICE, SS.:

Recorded on the 15th day of April, 1915, at 20  
3:45 o'clock P. M., in Liber 24 of Lis Pendens at  
page 369 and examined.

J. D. MCGIFFERT,  
Clerk.

Filed Apr. 15, 1915, 3:45 P. M.

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At a Special Term of the Supreme  
Court of the State of New York,  
held at White Plains, N. Y., 30  
on the 15th day of April, 1915.

Present

HON. JOSEPH MORSCHAUSER,  
Justice.

40

*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of  
 Charles Hagen, judgment debtor  
 in proceedings supplementary to  
 execution under a judgment re-  
 covered in the Supreme Court of  
 the State of New York in and  
 for the County of Suffolk by the  
 Suffolk County National Bank  
 against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
 GEN, his wife, and JOHN RUEFER  
 and BABETTA RUEFER, his wife,

*Defendants.*

On reading and filing the petition of Alton J. Vail, Receiver of Charles Hagen, duly verified, asking for leave to bring an action against the above named defendants to set aside as in fraud of creditors a certain conveyance of real property in the city of Middletown, Orange County, New York, made by said Charles Hagen and wife on June 1, 1912, and recorded in the Orange County Clerk's Office, and the summons and verified complaint herein, and the Court being satisfied that the receiver ought to be authorized to bring such action.

Now, on motion of Watts, Oakes & Bright, attorneys for said receiver, it is

Ordered that said Alton J. Vail as such receiver is hereby authorized and directed to commence and prosecute an action in this Court against the

*Exhibit D-1.*

said Charles Hagen and Emilia Hagen, his wife,  
and John Ruefer and Babetta Ruefer, his wife,  
upon the cause of action hereinbefore stated.

Enter in Orange County.

JOSEPH MORSCHAUSER,  
Justice Supreme Court.

10

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SUPREME COURT—ORANGE COUNTY.

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ALTON J. VAIL, as Receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court of  
the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
GEN, his wife, and JOHN RUEFER  
and BABETTA RUEFER, his wife,

*Defendants.*

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TO THE SUPREME COURT OF THE STATE OF NEW  
YORK, IN AND FOR THE COUNTY OF ORANGE:

The petition of Alton J. Vail as receiver afore-  
said, respectfully shows:

1. On the 15th day of March, 1913, by an order  
of the Supreme Court duly thereafter filed and  
entered in the Office of the Clerk of the County of  
Orange and State of New York, in proceedings  
supplementary to execution upon the application

40

*Exhibit D-1.*

of Suffolk County National Bank as judgment creditor under a judgment recovered by it in an action brought in the Supreme Court of the State of New York, in and for the County of Suffolk against Charles Hagen, your petitioner was duly appointed receiver of the property of the said Charles Hagen and your petitioner thereupon duly  
10 qualified as such receiver and has ever since been and is now acting as such.

2. Your petitioner is advised and verily believes that as such receiver he has a good cause of action against the above named defendants to set aside a certain deed made by the said Charles Hagen and wife to John Ruefer conveying certain real property in the City of Middletown, Orange County, New York, which conveyance, as your petitioner is informed and verily believes, was made  
20 by the said Hagen and wife and accepted by said Ruefer without consideration and with the intent to defeat and defraud the creditors of the said Charles Hagen as is more fully set forth in the summons and verified complaint in this action which is hereby presented, referred to and made a part hereof. The sources of petitioner's information and grounds of his belief are the respective examinations of the said defendants, Charles Hagen and John Ruefer, in the supplementary proceedings hereinbefore mentioned.  
30

3. Your petitioner further alleges that the successful termination of such action will be of substantial advantage to the estate represented by your petitioner and to the creditors of the said Charles Hagen.

4. One Elmer H. Lemon, of Middletown, New York, who is the assignee of the judgment creditor above named, has presented to your petitioner the  
40 written request hereunto annexed that the action hereinbefore mentioned be brought.

*Exhibit D-1.*

5. No previous application for such relief has been made except that such an application was heretofore made to this Court but denied because of the alleged insufficiency of this petition which has since been amended.

Wherefore your petitioner asks leave to bring the action hereinbefore mentioned against the defendants above named.

10

ALTON J. VAIL, as Receiver aforesaid,  
Petitioner.

STATE OF NEW YORK, }  
County of Orange, } ss.:

ALTON J. VAIL, being duly sworn, says that he is the petitioner above named, that he has read the foregoing petition and knows the contents thereof, that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

20

ALTON J. VAIL.

Sworn to before me this }  
15th day of April, 1915. }

Peter D. Dusenberre,  
Notary Public.

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*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

10 ALTON J. VAIL, as Receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court of  
the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

20 CHARLES HAGEN and EMILIA HA-  
GEN, his wife, and JOHN RUEFER  
and BABETTA RUEFER, his wife,

*Defendants.*

TO ALTON J. VAIL as Receiver of Charles Hagen  
aforesaid:

30 I, the undersigned assignee of the judgment  
heretofore recovered by the Suffolk County Na-  
tional Bank against Charles Hagen above named  
in the Supreme Court of the State of New York,  
in and for the County of Suffolk, on the 18th day  
of September, 1912, for the sum of \$1,025.82, do  
hereby request that you commence in the Supreme  
Court of the State of New York, in and for the  
County of Orange, an action against the above  
named defendants to set aside as in fraud of the  
creditors of the above named Charles Hagen a  
certain deed made by said Hagen and wife to  
John Ruefer dated June 1, 1912, and recorded in  
40 the Clerk's Office of the County of Orange in  
Book 534, page 89, and which said deed purports

*Exhibit D-1.*

to convey certain real estate in the city of Middletown, Orange County, New York.

ELMER H. LEMON.

Dated April 14, 1915.

STATE OF NEW YORK, }  
County of Orange. } ss.:

10

On this 14th day of April in the year one thousand nine hundred and fifteen before me, the subscriber, personally appeared Elmer H. Lemon, to me known and known to me to be the same person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

PETER D. DUSINBERRE,  
Notary Public.

Endorsed: Supreme Court. Alton J. Vail as Receiver of Charles Hagen, etc., vs. Charles Hagen et al. Petition, Request and Order Granting Leave to Sue. Watts, Oakes & Bright, Attorneys for Plaintiff, Office and P. O. Address, 4 East Main Street, Middletown, N. Y. Filed Apr. 17, 1915. 8H A. M.

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30

40

*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of  
 Charles Hagen, judgment debtor  
 in proceedings supplementary to  
 execution under a judgment re-  
 covered in the Supreme Court of  
 the State of New York in and  
 for the County of Suffolk by the  
 Suffolk County National Bank  
 against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
 GEN, his wife, and JOHN RUEFER  
 and BABETTA RUEFER, his wife,

*Defendants.*

Plaintiff, for his amended complaint against the  
 above named defendants, alleges:

1. Upon information and belief, that heretofore  
 in an action duly commenced in the Supreme  
 Court of the State of New York, in and for the  
 County of Suffolk by the Suffolk County National  
 Bank against the above named defendant Charles  
 Hagen, the said Suffolk County National Bank  
 duly recovered judgment against the said Charles  
 Hagen on the 18th day of September, 1912, for  
 the sum of \$1,025.82; and on that day the  
 judgment roll in said action was duly filed and  
 the judgment duly docketed in the office of the  
 Clerk of the said County of Suffolk, and there-  
 after and on the 23rd day of September, 1912, a  
 transcript of said judgment was duly and regular-  
 ly filed and said judgment docketed in the office

*Exhibit D-1.*

of the Clerk of the County of Orange in the State of New York, in which said last mentioned county said judgment debtor then resided.

2. Upon information and belief that thereafter and on the 24th day of September, 1912, an execution upon said judgment in due form of law was duly and regularly issued against the property of the said Charles Hagen, judgment debtor and defendant herein and duly delivered to the Sheriff of the County of Orange in which said county judgment debtor then and at the commencement of this action resided; and said execution was thereafter and prior to the commencement of this action duly returned by the said Sheriff wholly unsatisfied and said judgment still remains wholly unpaid and unsatisfied and there is now due and owing thereon the sum of \$1,025.82 with interest thereon from the 18th day of September, 1912.

3. Upon information and belief that thereafter proceedings supplementary to execution upon said judgment were duly instituted and prosecuted by the said Suffolk County National Bank, the judgment creditor aforesaid, against the said defendant and judgment debtor Charles Hagen, and such proceedings were therein had that thereafter and on March 15, 1913, by an order duly made by this Court and thereafter duly filed in the office of the Clerk of the County of Orange, plaintiff was duly appointed the receiver of the property of said defendant and judgment debtor Charles Hagen and plaintiff thereupon qualified, ever since has been and is now acting as such.

4. Upon information and belief that heretofore in an action duly commenced in the Supreme Court of the State of New York, in and for the County of Suffolk by the Suffolk County National Bank against the above named defendant Charles Hagen the said Suffolk County National Bank

*Exhibit D-1.*

duly recovered judgment against the said Charles Hagen on the 3rd day of December, 1912, for the sum of \$1,039.37; and on that day the judgment roll in said action was duly filed and the judgment duly docketed in the office of the Clerk of the said County of Suffolk, and thereafter and on the 6th day of July, 1915, a transcript  
10 of said judgment was duly and regularly filed and said judgment docketed in the office of the Clerk of the County of Bronx in the State of New York, in which said last mentioned county said judgment debtor at that time resided.

5. Upon information and belief that thereafter and on the 7th day of July, 1915, and execution upon said judgment in due form of law was duly and regularly issued against the property of the said Charles Hagen judgment debtor and defend-  
20 ant herein and duly delivered to the Sheriff of the County of Bronx in which said county said judgment debtor at that time resided, and said execution was thereafter duly returned by the said Sheriff wholly unsatisfied and said judgment still remains wholly unpaid and unsatisfied, and there is now due and owing thereon the sum of \$1,039.37 with interest thereon from the 3rd day of December, 1912.

6. Upon information and belief that thereafter  
30 proceedings supplementary to execution upon said judgment were duly instituted and prosecuted by Elmer H. Lemon, the assignee of said Suffolk County National Bank as hereinafter set forth, against the said defendant, and judgment debtor, Charles Hagen, and such proceedings were therein had that thereafter and on August 20th, 1915, by an order duly made by this Court and thereafter  
40 duly filed in the office of the Clerk of the County of Suffolk, in which county the judgment roll in said action was filed, the receivership of the plain-

*Exhibit D-1.*

tiff herein was duly extended to the judgment obtained by said Suffolk County National Bank against the judgment debtor Charles Hagen on December 3, 1912, as set forth herein.

7. Upon information and belief on or about the 14th day of September, 1915, an order was duly made herein, by this Court, directing that the order appointing plaintiff as receiver made on the 15th day of March, 1913, together with the bond of plaintiff as such receiver, and such other papers as were filed therewith, be withdrawn from the files of the Orange County Clerk's office and filed *nunc pro tunc* as of the 15th day of March, 1913, in the office of the Clerk of the County of Suffolk, where the judgment rolls are filed in the actions against the defendant Charles Hagen, and further directing the amendment of the complaint herein. That pursuant to the terms of said order the order appointing plaintiff as receiver and the said receiver's bond, together with the other papers filed therewith were thereafter and on or about September 20, 1915, withdrawn from said Orange County Clerk's office and filed in the office of the Clerk of Suffolk County.

8. Prior to the commencement of this action by an order of this Court duly made permission to bring this action was duly given to the plaintiff.

9. Upon information and belief prior to the commencement of this action, by an assignment in writing the said Suffolk County National Bank duly and regularly assigned the said judgments and the sums of money due and to grow due thereon to Elmer H. Lemon, of Middletown, New York, who is now the owner and holder of said judgments, and who duly requested plaintiff to commence this action prior to the commencement hereof and prior to granting plaintiff such leave as hereinbefore recited.

*Exhibit D-1.*

10. Upon information and belief that prior to the recovery of the said judgment said defendant Charles Hagen was part owner in fee simple and possessed certain real property lying and being in the said city of Middletown, Orange County, New York, which said property was of the value of \$10,000 and upwards and was fully sufficient  
 10 to satisfy said judgment and out of which the same might have been collected but for the collusive and fraudulent practices and contrivances hereinafter particularly described, and which said property is described as follows:

All the equal undivided one-half of All that certain lot, piece or parcel of land situate, lying and being in the town of Wallkill now called Middletown, County of Orange and State of New York, bounded and described as follows: Begin-  
 20 ning at a stake eleven feet east of a brook running through the premises hereby conveyed and along and near the dwelling of William J. Conkling and at a point seventy-three and one-half feet northeast of the center line of the New York and Erie Railroad Company and running thence north twenty-four and one-fourth degrees east one chain and seventy-four and one-half links to a stake and stones on the east side of the brook aforesaid, thence north sixty-one and three-quarter  
 30 degrees west two chains and forty-seven links to a stake, thence south twenty-eight and one-quarter degrees west two chains and fifteen links to a stake on the north side of a street proposed to be opened between the premises hereby conveyed and the line of the lands of the New York and Erie Railroad, thence along the north side of said street south sixty-one and three-quarter degrees east one chain and sixteen links to a point forty  
 40 feet north of the line of the lands of said Company, thence further along said proposed street

*Exhibit D-1.*

south seventy-seven and three-quarter degrees east one chain and forty-eight links to the place of beginning. Containing one-half of an acre of land more or less.

Also all that other lot of land situate in the town of Wallkill aforesaid lying between the above described lot and the center line of Grove Street in said town, being a strip about twenty-six feet in width on the northerly end and about twenty feet on the southerly end on Railroad Avenue and about one chain and seventy-five and one-half links in length. It is hereby intended by the parties hereto to convey the strip between the Hat Factory lot and the center of Grove Street so that the northeasterly line of said Hat Factory lot will be extended to the center line of Grove Street and embrace all the land lying in a strip between said Hat Factory lot and the center of Grove Street.

And also all that certain other piece or parcel of land situate in the town of Wallkill above said bounded and described as follows: Beginning on the south corner of the lot on which the Hat Factory stands being at the corner of Grove Street and Railroad Avenue and running thence southwest in range with the southeast side of the Hat Factory lot to the north line of lands of the Erie Railroad Company, thence along said line of said land northwest to a point where said line is intersected by the line of the southwest side of said Railroad Avenue, thence northwest along said line of said avenue to a point opposite to the west corner of the Hat Factory lot aforesaid and in range with the northwest side of said lot, thence northeast in range with the northwest side of said lot to the west corner aforesaid, thence along southwest side of said lot to the place of beginning and being in that portion of ground used as a

*Exhibit D-1.*

public highway and known as Railroad Avenue in front of said Hat Factory lot, and extending from south corner of lands of John H. Bell to intersection of northwest line of Grove Street with the northeast line of Railroad Avenue. Subject, however, to the right reserved by Horatio R. Wilcox to himself, his heirs and assigns if now subsisting to keep a drain from the cellar of said Wilcox's dwelling through said strip of land above mentioned and the right to repair and drain from time to time forever after when he or his heirs or assigns may deem it necessary so to do as set forth in the deed from Horatio R. Wilcox and wife to Joshua Draper dated September 8, 1862, and recorded in Orange County, New York, Clerk's Office in Liber 169 of Deeds, page 94.

11. Upon information and belief that heretofore and prior to the rendition of said judgment said defendant Charles Hagen and Emilia Hagen, his wife, attempted to convey to the defendant John Ruefer by a certain deed in writing dated on June 1, 1912, and thereafter filed in the office of the Clerk of the County of Orange the lands and premises hereinbefore described.

12. Upon information and belief that said deed was made without any consideration passing between the parties thereto and was made and executed by said defendants Charles Hagen and Emilia Hagen, his wife, and received and accepted by said defendant John Ruefer with intent to hinder, delay and defraud the just creditors of the said Charles Hagen of their just claims against him and particularly to so hinder, delay and defraud the said Suffolk County National Bank, judgment creditor aforesaid and its assignee hereinbefore described, and such conveyance was made and executed by the said defendants Charles Hagen and Emilia Hagen, his wife, and was ac-

*Exhibit D-1.*

cepted by the said defendant John Ruefer in trust for the use of the said Charles Hagen, that said conveyance was part of a collusive and fraudulent conspiracy to prevent the collection of the judgments hereinbefore set forth, that the said Charles Hagen had no other property than that attempted to be conveyed by said deed out of which the judgments hereinbefore set forth could be collected and was then and ever since has remained insolvent, and that unless such conveyance be set aside by a judgment of this Court and plaintiff be allowed to collect said judgments out of the above described real estate the same must remain wholly unpaid. 10

13. That the defendant Babetta Ruefer, as your plaintiff is informed and believes, is a married woman, the wife of the defendant John Ruefer, and therefore if he obtained any title whatever to the said premises by reason of said conveyance collusively and fraudulently made as aforesaid she is seized of an inchoate right of dower therein. 20

Wherefore, plaintiff demands judgment:

1. That said deed or conveyance above described made by said defendants Charles Hagen and Emilia Hagen, his wife, to the said defendant John Ruefer may be adjudged fraudulent and void as against the creditors of the said Charles Hagen and particularly as against this plaintiff, and to have been made by the said Charles Hagen and Emilia Hagen, his wife, and accepted by the said John Ruefer for the purpose and with the intent to defraud, delay and hinder the creditors of said Charles Hagen and this plaintiff, and that said deed may be adjudged void and of no effect and be cancelled of record. 30

2. That the defendants and each of them be adjudged to account for all moneys received by 40

*Exhibit D-1.*

them or either of them under the deed or conveyance before described and for the proceeds, rents and profits of the real estate therein purporting to be conveyed and that they deliver said property proceeds, rents and profits to plaintiff.

10 3. That said defendants and each of them be enjoined and restrained from selling, transferring, assigning or in any way interfering with said real property or any part thereof.

4. And for such other and further relief as to this Court may seem just and proper together with the costs and disbursements of this action.

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff.

20 STATE OF NEW YORK, }  
County of Orange, } ss.:

ALTON J. VAIL, being duly sworn, says that he is the plaintiff in this action, that he has read the foregoing complaint, and knows the contents thereof, that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

ALTON J. VAIL.

30 Sworn to before me this 14th }  
day of September, 1915. }

E. JOSEPHINE CORWIN,  
Notary Public.

Endorsed: Supreme Court, Alton J. Vail as Receiver, etc., vs. Charles Hagen et al. Amended Complaint. Watts, Oakes & Bright, Attorneys for Plaintiff, Office and P. O. Address, 4 East Main Street, Middletown, N. Y. Filed Sept. 20, 1915, 10H 30M A. M.

*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court of  
the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
GEN, his wife, JOHN REUFER and  
BABETTA REUFER, his wife,

*Defendants.*

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The defendants, Charles Hagen and Emilia Ha-  
gen, for their answer to the complaint of the  
plaintiff herein deny that they have knowledge or  
information sufficient to form a belief as to  
whether prior to the commencement of this action,  
or at any other time, the Suffolk County National  
Bank mentioned in the complaint, assigned the  
judgment therein mentioned or any sums of money  
due or to grow due thereon to Elmer H. Lemon,  
of Middletown, New York, or to any other per-  
son, they deny that they have any knowledge or  
information sufficient to form a belief as to  
whether said Elmer H. Lemon is now or ever  
has been the owner or holder of said judgment,  
they deny that they have any knowledge or in-  
formation sufficient to form a belief as to whether

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*Exhibit D-1.*

said Elmer H. Lemon at any time requested plaintiff to commence this action.

10 They admit that on June 1, 1912, the defendant Charles Hagen was part owner in fee simple and possessed of the real property lying and being in the city of Middletown, Orange County, New York, described in the complaint herein, they deny that any collusive or fraudulent practices or contrivances set forth in the complaint or any other entered into or were incident to the ownership of sale of the said property.

They admit that on June 1, 1912, by a certain deed in writing dated on that day and thereafter filed in the office of the Clerk of the County of Orange, these defendants sold and conveyed to the defendant John Reufer the said premises.

20 They deny that said deed was made without any consideration passing between the parties thereto, they deny that it was made or executed by these defendants with intent to hinder, delay or defraud the just creditors of the defendant Charles Hagen or to in any way hinder, delay or defraud the said Suffolk County National Bank, the judgment creditor mentioned in the complaint, or its assignee, they deny that the said deed was received or accepted by the defendant John Reufer with such  
30 intent or in any other manner except in good faith, they deny that the said conveyance was made and executed by these defendants in trust for the use of the defendant Charles Hagen, and deny that it was accepted by the said John Reufer in trust for the use of the said Charles Hagen, they deny that said conveyance was part of a collusive or fraudulent conspiracy to prevent the collection of the judgment hereinbefore set forth, and deny that said conveyance was executed for  
40 any such reason;

*Exhibit D-1.*

They deny that the defendant Charles Hagen had no other property at the time of said conveyance than that conveyed by said deed out of which the judgment set forth in the complaint could be collected, and deny that said Charles Hagen was then and has ever since remained insolvent, they deny that unless such conveyance be set aside by a judgment of this Court and that plaintiff be allowed to collect said judgment out of the above described real estate the same must remain wholly unpaid. 10

They allege that said conveyance from these defendants to said defendant John Reufer was made in good faith and valuable and adequate consideration and not made as a result of any conspiracy or with the intent to defraud the plaintiff herein or any judgment creditors of the said defendant Charles Hagen, whether specified in the complaint or otherwise. 20

They admit that the defendant Babetta Reufer is the wife of the defendant John Reufer and as such is seized of an inchoate right of dower in the premises described in the complaint.

Wherefore these defendants demand judgment that the complaint be dismissed with costs.

SERVIN & COX, 30  
Attorneys for Defendants  
Charles Hagen and Emilia Hagen.

STATE OF NEW YORK, )  
County of New York. ) ss.:

CHARLES HAGEN, being duly sworn, deposes and says that he is one of the defendants in this action, that he has read the foregoing answer and knows the contents thereof, that the same is true to the 40

*Exhibit D-1.*

knowledge of deponent except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

CHARLES HAGEN.

Sworn to before me this }  
 10 23rd day of July, 1915. }

THEODORE BLUM,  
 Commissioner of Deeds  
 of the City of New York.

Residing and certificate filed in New York County. N. Y. County Clerk's No. 157. Register No. 16036.

Endorsed: Supreme Court, Alton J. Vail, Receiver, *vs.* Charles Hagen & Others. Copy  
 20 Answer. Servin & Cox, Attorneys for Defts. Hagen, 44 North Street, Middletown, N. Y. Filed Sep. 20, 1915, 10H 30M A. M. Watts, Oakes & Bright, Esqs., attys. for plff.

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*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL receiver of Charles Hagen judgment debtor in proceedings supplementary to execution under a judgment recovered in the Supreme Court of the State of New York, in and for the County of Suffolk by the Suffolk County National Bank against the said Charles Hagen,

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*Plaintiff,**against*

CHARLES HAGEN AND EMILIA HAGEN his wife,  
JOHN REUFER AND BABETTA REUFER his wife,

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*Defendants.*

The defendants John Reufer and Babetta Reufer for their answer to the complaint of the plaintiff herein deny that they have knowledge or information sufficient to form a belief as to each and any of the allegations contained in the paragraphs of the complaint respectively numbered 1, 2, 3, and 4.

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Deny that they have knowledge or information sufficient to form a belief as to whether prior to the commencement of this action or at any other time the Suffolk County National Bank by an assignment in writing or otherwise, assigned the judgment specified in the complaint or the sums of money due and to grow due thereon to said Elmer H. Lemon and deny that they have knowl-

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*Exhibit D-1.*

edge or information sufficient to form a belief as to whether he is now the owner and holder of said judgment, and as to whether he ever requested the plaintiff to commence this action at any time.

10 Admit that the defendant Charles Hagen on and prior to June 1, 1912 was part owner in fee simple and in possession of certain real property in the city of Middletown described in the paragraph of the complaint herein numbered 6.

They deny that the judgment alleged in the complaint could have been collected out of said property subsequent to said date and deny that in the purchase of the said property by the defendant John Reufer or the conveyance of the same to him there were any collusive or fraudulent 20 practices or contrivances existing.

Admit that one June 1, 1912 the defendant Charles Hagen and Emilia Hagen granted, bargained, sold and conveyed the said premises to the defendant John Reufer by a deed in writing dated June 1, 1912 and thereafter filed in the office of the clerk of the County of Orange.

They deny that the said deed was made without any consideration passing between the parties thereto, they deny that it was made and executed 30 by the defendants Charles Hagen and Emilia Hagen his wife with intent to hinder, delay and defraud the just creditors of the said Charles Hagen out of their just claims against him and to so hinder delay and defraud the said Suffolk County National Bank or its assignee and deny that it was received or accepted by the defendant John Reufer with such intent, they deny that the said conveyance was made or 40 executed by the said defendants Charles Hagen and Emilia Hagen in trust for use of the said

*Exhibit D-1.*

Charles Hagen and deny that it was accepted by the defendant John Reufer in trust for the use of the said Charles Hagen, they deny that the said conveyance was part of a collusive and fraudulent conspiracy to prevent the collection of the judgment set forth in the complaint, and allege that the said conveyance was not in any respect collusive or fraudulent or made to hinder, delay or defraud the judgment creditor specified in the complaint or any other creditor of said Charles Hagen and Emilia Hagen or either of them, and allege that the said conveyance was made in good faith and for a good valuable and adequate consideration and that the defendants John Reufer and Babetta Reufer are now and have since June 12, 1912 been the owners in fee and entitled to the sole possession of the said property and each and every part thereof.

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Deny that they have knowledge or information sufficient to form a belief as to whether the said Charles Hagen had or had not any property at the time out of which the judgment set forth in the complaint could be collected and as to whether he was then or has remained insolvent and as to whether he has any property from which the judgment set forth in the complaint could or can be collected.

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The defendants allege that the defendant Babetta Reufer is the wife of the defendant John Reufer and as such is seized and entitled to an inchoate right of dower in the premises set forth in the complaint.

Wherefore the defendants demand judgment that the complaint herein be dismissed with costs.

SERVIN & COX, Attorneys for defendants, 40  
JOHN REUFER AND BARBETTA REUFER.

*Exhibit D-1.*

STATE OF NEW YORK. }  
 County of New York. } ss.:

John Reufer being duly sworn deposes and says that he is one of the defendants in this action, that he has read the foregoing Answer and knows the contents thereof, that the same  
 10 is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true. Sworn to before me this 23d day of July 1915.

JOHN REUFER.

Theodore Blum Commissioner of deeds City  
 of New York.

Residing and certificate filed in New York  
 County N. Y.

20 County Clerk's No. 157 Register's No. 16036.

Endorsed Supreme Court, Alton J. Vail, Receiver vs. Charles Hagen & others Copy Answer Servin & Cox Attorneys for defts. Reufer, 44 North Street Middletown, N. Y. Filed Sep. 20, 1915 10 H. 30 M. A. M. Watts, Oakes & Bright Pltfs. Attys. Esqs.

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*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as receiver of  
Charles Hagen judgment debtor  
in proceedings supplementary  
to execution under a judgment  
recovered in the Supreme Court  
of the State of New York in  
and for the County of Suffolk by  
the Suffolk County National  
Bank against the said Charles  
Hagen,

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*Plaintiff,**against*

CHARLES HAGEN AND EMILIA  
HAGEN his wife and  
JOHN REUFER AND BABETTA  
REUFER his wife.

20

*Defendants.*

Sirs:—

Please take notice that upon the summons and  
complaint and answers thereto the annexed affi-  
davits of Alton J. Vail and John Bright duly  
verified the proposed amended complaint herein  
and the exhibits annexed to said affidavits a  
motion will be made at a Special Term of this  
Court appointed to be held at the Court House  
in Goshen, New York, on the 13th day of Sep-  
tember 1915 at the opening of Court on that  
day or as soon thereafter as counsel can be heard  
for an order directing that the order appointing  
the plaintiff as receiver made on the 15th day  
of March 1913 and filed in the office of the Clerk

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*Exhibit D-1.*

of the County of Orange on the 22nd day of March, 1913 and bond of said plaintiff as such receiver filed in the said Clerk's office on the same day and the other papers filed with said order may be withdrawn from the files of the said Orange County Clerk and filed nunc pro tunc as of the 15th day of March 1913 in the office of the Clerk of the County of Suffolk and permitting the plaintiff to serve in this action an amended complaint in form as hereto attached and for such other and further relief or both as to this Court may seem just and proper. Dated September 4, 1915.

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff.

Office and Post Office Address 4 East Main St.,  
Middletown, New York.

To SERVIN & Cox,  
Attorneys for defendants.

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*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as receiver of  
Charles Hagen judgment debtor  
in proceedings supplementary  
to execution under a judgment  
recovered in the Supreme Court  
of the State of New York in and  
for the County of Suffolk by  
the Suffolk County National  
Bank against the said Charles  
Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN AND EMILIA  
HAGEN his wife and,  
JOHN REUFER AND BABETTA  
REUFER his wife,

*Defendants.*

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State of New York, }  
COUNTY OF ORANGE. } ss.:

John Bright being duly sworn says that he is  
one of the attorneys for the plaintiff in the above  
entitled action which is brought by the above  
named plaintiff receiver to set aside as in fraud  
of creditors a certain deed heretofore made  
by the above named defendants Hagen to the  
above named defendant John Ruefer dated June  
1, 1912 and thereafter filed in the office of the  
Clerk of the County of Orange Conveying certain  
real estate situated in the city of Middletown,  
Orange County, New York, the title to which  
prior to the making of the said deed was in the

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*Exhibit D-1.*

above named defendants Charles Hagen and John Reufer.

10 The summons and complaint together with the notice of pendency in this action were filed in the office of the Clerk of the County of Orange on April 15, 1915 and an order was duly made herein and thereafter entered in said Clerk's office permitting this action to be brought by the above named plaintiff.

On May 1, 1915 a copy of the said summons and complaint was personally served upon the defendant John Reufer and on the 20th day of May 1915 said John Reufer duly appeared in this action by Servin & Cox his attorneys, who served in his behalf a general notice of retainer.

20 Thereafter and on June 8, 1915 a copy of said summons and complaint was served upon the above named defendant Emilia Hagen and on June 19, 1915 the same was personally served upon the named defendant Charles Hagen. The said defendant Charles Hagen thereafter duly appeared in this action by said Servin & Cox and a general notice of retainer was served by them in his behalf on July 29, 1915.

30 The time of the defendants Charles Hagen and John Reufer was thereafter extended on various occasions at the request of said defendants' attorneys until July 26, 1915 on which date an answer was served by said attorneys for the defendants Hagen and a separate answer was served by them for the defendants Reufer.

40 Upon information and belief that heretofore an action was duly commenced in the Supreme Court in and for the County of Suffolk by the Suffolk County National Bank against the above named defendant Charles Hagen and in said action such proceedings were had that on the

*Exhibit D-1.*

18th day of September 1912 a judgment in favor of said bank for the sum of \$1025.82 was duly entered in the office of the Clerk of the County of Suffolk and on the 23rd day of September 1912 a transcript of said judgment was duly filed in the office of the Clerk of the County of Orange; thereafter an execution upon said judgment was duly issued to the Sheriff of the County of Orange, where the said Charles Hagen then resided, which said execution was duly returned wholly unsatisfied. The sources of deponent's information and the grounds of his belief are the papers and proceedings in said action on file therein and many of which are in the possession of deponent. 10

Therefore supplementary proceedings were duly instituted upon said judgment against said Charles Hagen under an order made by Mr. Justice Arthur S. Tompkins of this Court and dated November 27, 1912 a copy of which was thereafter duly served upon the said Charles Hagen at the city of Middletown, Orange County New York, and under which said Charles Hagen appeared before the Referee therein named and was examined. 20

Such proceedings were thereafter had under said order that an order was duly made therein on the 15th day of March 1913 by Mr. Justice Joseph Morschauer of this Court appointing Alton J. Vail the above named plaintiff, receiver of the property of the said Charles Hagen. Upon information and belief notice of the application for the appointment of said receiver was duly personally served upon the said Charles Hagen at Middletown aforesaid, and upon such application said Charles Hagen made an affidavit which was attached to the said notice to the effect 30 40

*Exhibit D-1.*

that the said supplementary proceedings was only one of its kind pending against him and that there was no judgment creditor's action pending against him. Said appointment of receiver was opposed by the said Charles Hagen through one Charles Taylor an attorney at law but was granted and a copy of said order appointing receiver is hereto annexed made a part hereof and marked "Exhibit A."

Said order appointing receiver and the receiver's bond provided for therein in due form of law and approved by the said Mr. Justice Joseph Morschauser were thereafter and on March 22, 1913 filed in the office of the Clerk of the County of Orange.

Upon the examination of the said defendant Charles Hagen in the said supplementary proceedings, it transpired that said judgment debtor had in his possession \$50 to which under the terms of said order appointing receiver the said receiver was entitled. Thereafter and on March 29, 1913 by an order duly made and signed by Mr. Justice Arthur S. Tompkins of this Court, the said Charles Hagen was directed to pay the said sum of \$50 to the above named plaintiff as receiver and in compliance with said order said judgment debtor duly paid to the said receiver the sum of money so directed.

Upon information and belief that heretofore a second action was commenced against the above named defendant Charles Hagen by the said Suffolk County National Bank in the Supreme Court of the State of New York, in and for the County of Suffolk in which action such proceedings were had that on December 3, 1912 judgment was entered therein in the office of the Clerk of the County of Suffolk against the said Charles

*Exhibit D-1.*

Hagen in the sum of \$1039.37. The sources of deponent's information and the grounds of his belief are the papers in said action in the possession of deponent.

Thereafter a transcript of said judgment was duly filed in the office of the Clerk of the County of Bronx and on the 7th day of July 1915 an execution thereunder was duly issued to the Sheriff of the County of Bronx, in which county as your deponent is informed and believes, the said Charles Hagen then resided which said execution was thereafter duly returned wholly unsatisfied. 10

On August 4, 1915 an affidavit and notice of motion in behalf of the above named defendant John Reufer was served upon deponent's firm, under the terms of which an order was sought by the said defendant Reufer allowing the payment into Court of the amount of the first judgment hereinbefore mentioned and costs or the giving of an undertaking as provided by the Code and that the notice of pendency herein be cancelled upon the approval of the same. This motion was made upon an affidavit signed by said John Reufer and came on for hearing at a Special Term of this Court held at White Plains on August 20, 1915. Reference is hereby made to the said affidavit and notice of motion and the same will be offered to the Court upon the argument of this motion. 20 30

On August 18, 1915 a notice of application for the extension of the receivership of the plaintiff as receiver of the property of the defendant Charles Hagen under the order appointing receiver hereinbefore mentioned was personally served upon the said Servin & Cox, attorneys for the defendants herein, which said motion was based upon the affidavits of Elbert N. Oakes, 40

*Exhibit D-1.*

Elmer H. Lemon and John Bright, and which said motion was returnable at a Special Term of this Court appointed to be held on August 20, 1915 as aforesaid.

10 Upon the return day of the motion to extend such receivership the said defendant Charles Hagen appeared by Abram F. Servin his attorney and one of the attorneys for the defendants in this action and opposed the granting thereof upon the sole ground that no notice of such application had been given to the said Charles Hagen. It appeared by the motion papers upon said motion that said Charles Hagen was a non-resident and personal notice of such application could not be served upon him within the State of New York and in the order made upon 20 said motion such service was dispensed with. The said motion was granted and an order was thereafter duly signed and filed in the office of the Clerk of the County of Suffolk on the 31st day of August 1915 extending the receivership of the above named plaintiff to the said second judgment of the Suffolk County National Bank hereinbefore mentioned. Reference is hereby made to the said affidavits and notice of motion and the same will be offered to the Court upon 30 the argument of this motion.

At the same time the motion to cancel the said notice of pendency filed herein upon the payment into Court or the giving of an undertaking, as therein requested, was argued by the said Abram F. Servin and no opposition was made to the granting thereof upon the part of of the plaintiff except that it was contended that any payment into Court or the giving of an 40 undertaking should be in an amount sufficient to cover both judgments and Mr. Justice Tomp-

*Exhibit D-1.*

kins, who was then presiding at said Special Term, granted the said motion upon the payment into Court of the amount of said two judgments interest and costs or the giving of an undertaking covering both of them.

At no time in this action has any question been made as to the regularity of the order appointing receiver or the filing thereof or as to the regularity of the filing of the receiver's bond. **10**

Deponent in preparing this action for trial, discovered that through inadvertence and mistake the order appointing the above named plaintiff as receiver provided for the filing thereof in the Orange County Clerk's office and also for the filing of the receiver's bond in the same office and that said bond an order had been so filed, instead of providing for the filing of both thereof in the County of Suffolk where the judgment roll recited in the complaint herein is filed as is required by Sec. 2467 of the Code of Civil Procedure. The place of such filing and the omission relating thereto was not discovered or known by deponent until your deponent's firm was about to file the order extending the receivership hereinbefore mentioned. This application is made in good faith and not for the purposes of delay and no previous application for the relief herein sought has been made. **20**

JOHN BRIGHT. **30**

Sworn to before me this }  
4th day of September 1915. }

E. JOSEPHINE CORWIN,  
Notary Public.

*Exhibit D-1.*

## SUPREME COURT—ORANGE COUNTY.

10 ALTON J. VAIL, as Receiver of  
CHARLES HAGEN, Judgment Debt-  
or, in proceedings supplementary  
to execution under a judgment  
recovered in the Supreme Court  
of the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

20 CHARLES HAGEN and EMILIA HA-  
GEN, his wife, and JOHN RUEFER  
and BABETTA RUEFER, his wife,

*Defendants.*

STATE OF NEW YORK, }  
County of Orange. } ss.:

ALTON J. VAIL, being duly sworn, says that he  
is the plaintiff in the above entitled action. That  
he has read the annexed affidavit of John Bright,  
and to the best of his knowledge, information and  
belief the facts therein stated are true.

30 Wherefore deponent respectfully requests an  
order directing that the order appointing depo-  
nent as Receiver, made on the 15th day of March,  
1913, and filed in the office of the Clerk of the  
County of Orange on the 22nd day of March, 1913,  
and the bond of your deponent as such receiver,  
approved by Mr. Justice Morschauser, filed in the  
said Clerk's office on the same day, and such other  
papers as were filed therewith be withdrawn from  
40 the files of the said Orange County Clerk's office

*Exhibit D-1.*

and filed nunc pro tunc as of the said 15th day of March, 1915, in the office of the Clerk of the County of Suffolk, where the judgment rolls in the actions against the above named defendant Charles Hagen, recited in the said affidavit of John Bright, are filed, and amending the complaint in this action so that the same will read as set forth in the proposed amended complaint hereto annexed, made a part hereof and marked "Exhibit B", and for such other and further relief or both as to this Court may seem just and proper. **10**

ALTON J. VAIL.

Sworn to before me this 2nd }  
day of September, 1915. {

E. Josephine Corwin,  
Notary Public.

**20**

**30**

**40**

**Exhibit "A."****SUPREME COURT—ORANGE COUNTY.**


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 IN THE MATTER

of

10 The Examination of CHARLES HA-  
 GEN, Judgment Debtor, in pro-  
 ceedings supplementary to execu-  
 tion upon the application of SUFFOLK COUNTY NATIONAL BANK,  
 Judgment Creditor, under a  
 Judgment recovered in an action  
 entitled, "Supreme Court, Coun-  
 ty of Suffolk, N. Y., Suffolk  
 County National Bank",

*Plaintiff,*

20

*against*

CHARLES HAGEN,

*Defendant.*


---

30 An Order having been heretofore duly made in  
 proceedings supplementary to execution in the  
 above entitled action by Hon. Arthur S. Tomp-  
 kins, requiring the above named judgment debtor,  
 Charles Hagen, to attend and be examined on oath  
 concerning his property before Alton J. Vail, Esq.,  
 a Referee, and said Referee having subscribed and  
 taken the oath required before entering upon said  
 examination, and said judgment debtor having  
 been examined under oath according to said order,  
 and the Referee having certified his return herein  
 containing all the evidence and other proceedings  
 taken before him.

And it appearing that no receiver of the prop-

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*Exhibit "A."*

erty of said judgment debtor had been appointed and said judgment debtor having personally received at least two days' notice of the application for this order, as shown by the annexed affidavit of Elmer H. Lemon, pursuant to the provisions of the Code of Civil Procedure.

And on reading and filing the affidavit and order for examination herein and the Referee's report thereon, with the evidence annexed thereto, together with the affidavits of Charles Hagen and Elmer H. Lemon. **10**

Now, on motion of Thomas Watt, Esq., attorney for Suffolk County National Bank, I do hereby order that Alton J. Vail of the City of Middletown, County of Orange, New York, be and he hereby is appointed Receiver of the property of said Charles Hagen, judgment debtor; that such Receiver before entering upon the execution of his trust execute and file with the Clerk of this Court, viz., the County Clerk of the County of Orange, New York, a Bond to the People, with at least two sufficient sureties to be approved by me in the penalty of Two hundred and fifty (\$250.00) Dollars, conditioned for the faithful discharge of his duties as such Receiver, and that upon filing such approved bond and filing and recording this order in the office of the Clerk of the County of Orange, New York, and other necessary counties, said Receiver be invested with all the rights, powers and duties of Receiver according to law. That said judgment debtor execute, acknowledge and deliver to said Receiver a proper assignment and conveyance of all his lands and real estate, wherever the same are situated. That the sum of thirty dollars be allowed to said judgment creditor for the costs of these proceedings and \$10.00 witnesses' fees and other disbursements herein as taxed, which sums are to be paid out of any **20**  
**30**  
**40**

*Exhibit "A."*

money which may come to the hands of said Receiver.

And the said judgment debtor is hereby restrained from making or suffering any transfer or other disposition of or interference with his property except in obedience to this order until further direction in the premises.

10 Dated at Newburgh, N. Y., this 15th day of March, 1913.

JOSEPH MORSCHAUSER,  
Justice Supreme Court Judge.

Endorsed. State of New York, Supreme Court, County of Orange. In the matter of Supplementary Proceedings, Suffolk County National Bank, Judgment Creditor, against Charles Hagen, Judgment Debtor. Order appointing Receiver. Thomas Watts, Attorney for Judgment Creditor. Middletown, N. Y.

20

Endorsed. Supreme Court. Alton J. Vail as Receiver, etc., vs. Charles Hagen, et al. Affidavits, etc., and Notice of Motion. Watts, Oakes & Bright, Attorneys for Plaintiff, Office and P. O. Address, 4 East Main Street, Middletown, N. Y. Filed Sept. 20, 1915, 10 H. 30 M. M.

At a Special Term of the Supreme Court held at the Court House in Goshen, New York, on the 14th day of September, 1915.

30

Present:

HON. ARTHUR S. TOMPKINS,  
Justice.

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of  
CHARLES HAGEN, Judgment Debt-  
or, in proceedings supplementary  
to execution under a judgment  
recovered in the Supreme Court  
of the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
GEN, his wife, and JOHN RUEFFER  
and BABETTA RUEFFER, his wife,

*Defendants.*

10

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A motion by the plaintiff for leave to withdraw from the files of the Orange County Clerk the order appointing him as receiver, dated March 15, 1913, and the bond filed by him as such and all other papers filed with said order and directing the filing of the same nunc pro tunc as of the said 15th day of March, 1913, in the office of the Clerk of the County of Suffolk and permitting him to serve an amended complaint in this action having come on to be heard at this time and place, and after reading and filing the pleadings herein, the notice of motion dated September 4, 1915, the affidavit of John Bright verified September 4, 1915, the affidavit of Alton J. Vail verified September 2, 1915, copy of the said order appointing Receiver and the said proposed amended complaint in support of said motion, and after hearing John

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40

*Exhibit "A."*

Bright of counsel for plaintiff, for the motion, and Abram F. Servin of counsel for defendants, appearing and consenting to the entry of this order, Now on motion of Watts, Oakes & Bright, attorneys for plaintiff, it is ordered that the said motion be and the same is hereby granted, that plaintiff be and he is hereby authorized and permitted to serve the amended complaint attached to the notice of motion aforesaid and that the same stand as and for the amended complaint of said plaintiff in this action, and it is

Further Ordered that the County Clerk of the County of Orange be and he is hereby directed to deliver to the plaintiff's attorneys upon production and filing of this order the order appointing the above named plaintiff as receiver of Charles Hagen, which said order is dated March 15, 1913, and was filed in the said Clerk's office on the 22nd day of March, 1913, and also the receiver's bond executed by the said Alton J. Vail with two sureties and thereafter approved by Mr. Justice Joseph Morschauser and filed on the same date as said order, together with all papers filed with said order and bond. And it is

Further Ordered that plaintiff be and he is hereby permitted to file the said order appointing receiver, receiver's bond and the other papers upon which said order appointing receiver was made in the office of the Clerk of the County of Suffolk in the State of New York nunc pro tunc as of March 15, 1913, and the said Clerk of the County of Suffolk is hereby ordered and directed to so file the same. And it is

Further Ordered that plaintiff be and he is hereby permitted to file in the said Orange County Clerk's office nunc pro tunc as of the said 15th day of March, 1913, a certified copy of the said order appointing receiver and of receiver's bond. And it is

*Exhibit "A."*

Further Ordered that this action proceed with the same force and effect as if the said order appointing receiver and bond a certified copy thereof had been originally filed as of the dates aforesaid and in the proper places as specified in the Code and without prejudice by reason of the filing thereof as herein ordered and directed.

Enter.

10

A. S. T.,

Justice Supreme Court.

Endorsed. Supreme Court. Alton J. Vail as Receiver, etc., v. Charles Hagen et al. Amended Complaint, affidavits, &c. Two Answers and Order. Watts, Oakes & Bright, attorneys for Plaintiff, Office and P. O. Address 4 East Main Street, Middletown, N. Y. Plff. Exhibit No. 12. Oct. 28, 1915. J. G. W. Filed Sept. 20, 1915, 10 H. 30 M. A. M. Received at Sept. 16, 1915, Supreme Court Chambers, Nyack, N. Y.

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*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of  
 CHARLES HAGEN, Judgment Debt-  
 or, in proceedings supplementary  
 to execution under a judgment  
 recovered in the Supreme Court  
 of the State of New York in and  
 for the County of Suffolk by the  
 Suffolk County National Bank  
 against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
 GEN, his wife, and JOHN RUEFER  
 and BABETTA RUEFER, his wife,

*Defendants.*

The defendants Charles Hagen and Emilia Hagen for their answer to the amended Complaint of the plaintiff herein deny that they have any knowledge or information sufficient to form a belief as to whether prior to the commencement of this action or at any other time the Suffolk County National Bank mentioned in the complaint herein assigned the judgment therein mentioned or either of them, or any sums of money due or to grow due thereon to Elmer H. Lemon of Middletown, New York, or to any other person, they deny that they have any knowledge or information sufficient to form a belief as to whether said Elmer H. Lemon is now or ever has been the owner or holder of said judgments or either of them, and deny that they have any knowledge or information to form a belief as to whether said Elmer H. Lemon at any time requested plaintiff to commence this action.

*Exhibit "A."*

They admit that on June 1, 1912, the said defendant Charles Hagen was part owner in fee simple and possessed of the real property lying and being in the City of Middletown, Orange County, New York, described in the complaint herein, and allege that said property was a part of the partnership assets of the firm of Hagen & Reufer, consisting of the defendant Charles Hagen and the defendant John Reufer. They deny that the said judgments or either of them could have been collected from or out of said property and deny that any collusive or fraudulent practices or contrivances set forth in the complaint or otherwise entered into or were incident to the ownership or sale of the said property. 10

They admit that on June 1, 1912, the defendants Charles Hagen and Emilia Hagen by a certain deed in writing dated on that day and thereafter filed in the office of the Clerk of the County of Orange sold and conveyed to the defendant John Reufer their interest in the said premises. 20

They deny that said deed was made without consideration passing between the parties thereto, they deny that it was made or executed by these defendants or either of them with intent to hinder, delay or defraud the just creditors of the defendant Charles Hagen or to in any way hinder, delay or defraud the said Suffolk County National Bank, judgment creditor mentioned in the complaint, or its assignee. 30

They deny that the said deed was received or accepted by the defendant John Reufer with such intent or in any other manner excepting in good faith, they deny that the said conveyance was made and executed by these defendants in trust for the use of the defendant Charles Hagen and deny that it was accepted by the defendant John Reufer in trust for the use of said defendant 40

*Exhibit "A."*

Hagen or of any of these defendants and deny that said conveyance was part of a collusive or fraudulent conspiracy to prevent the collection of the judgments set forth in the complaint or either of them and deny that said conveyance was executed for any such reasons.

10 They deny that the defendant Charles Hagen had no other property at the time of said conveyance than that conveyed by said deed out of which the judgments set forth in the complaint could be collected and deny that the said Charles Hagen was then and ever since has remained insolvent and deny that unless said conveyance be set aside by a judgment of this Court or that plaintiff be allowed to collect said judgments out of the real estate set forth in the complaint the same must remain wholly unpaid.

20 They allege that the conveyance of said property from these defendants to the defendant John Reufer was made in good faith and for a valuable and adequate consideration and was not made as a result of any conspiracy to defraud or with the intent to defraud the plaintiff herein or any judgment creditor of the said defendant Charles Hagen whether specified in the complaint or otherwise.

30 They admit that the defendant Babetta Reufer is the wife of the defendant John Reufer and as such is seized and entitled to an inchoate right of dower in the premises described in the complaint.

Wherefore these defendants demand judgment that the amended complaint be dismissed with costs.

SERVIN & COX,  
Attorneys for Defendants, Charles  
Hagen and Emilia Hagen.

40 STATE OF NEW YORK, }  
County of . } ss.:

*Exhibit "A."*

CHARLES HAGEN, being duly sworn, deposes and says that he is one of the defendants in this action, that he has read the foregoing Amended Answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

10

CHARLES HAGEN.

Sworn to before me, this 21st }  
 day of September, 1915. }

Theodore Blum,

Commissioner of Deeds,

City of New York,

Residing and Certificate filed in New  
 York County, N. Y.

County Clerk's No. 157;

20

Registers No. 16,036.

Endorsed. Supreme Court, Alton J. Vail as  
 Receiver vs. Charles Hagen and others. Copy  
 Answer to Amended Complaint. Servin & Cox,  
 Attorneys for Defendants Charles Hagen and  
 another, 44 North Street, Middletown, N. Y.

To Watts, Oakes & Bright, Esqs., Pltff.'s Attys.  
 Personally Sept. 24/15, by J. B.

30

40

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

10 ALTON J. VAIL, as Receiver of  
CHARLES HAGEN, Judgment Debt-  
or, in proceedings supplementary  
to execution under a judgment  
recovered in the Supreme Court  
of the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

20 CHARLES HAGEN and EMILIA HA-  
GEN, his wife, and JOHN RUEFER  
and BABETTA RUEFER, his wife,

*Defendants.*

The defendants John Reufer and Babetta Reufer for their answer to the amended complaint of the plaintiff herein deny that they have any knowledge or information sufficient to form a belief as to each and any of the allegations contained in the paragraphs of said amended complaint respectively numbered 1, 2, 3, 4, 5, 6 and 7.

30 They deny that they have any knowledge or information sufficient to form a belief as to whether prior to the commencement of this action or at any other time the Suffolk County National Bank, named in the complaint, by assignment in writing or otherwise, assigned the judgments specified therein or either of them or the sums of money due or to grow due thereon to the said Elmer H. Lemon and deny that they have knowledge or in-  
40 formation sufficient to form a belief as to whether

*Exhibit "A."*

he is now the owner and holder of the said judgments and as to whether he ever requested the plaintiff to commence this action at any time.

They admit that the defendant Charles Hagen on and prior to June 1, 1912, was part owner in fee simple and in possession of certain real property in the City of Middletown, N. Y., described in the paragraph of the amended complaint numbered 10. 10

They deny that the judgments alleged in the complaint or either of them could have been collected out of said property subsequent to said date and deny that in the purchase of the said property by the defendant John Reufer or the conveyance of the same to him there were any collusive or fraudulent practices or contrivances existing. 20

They admit that on June 1, 1912, the defendants Charles Hagen and Emilia Hagen granted, bargained, sold and conveyed the said premises to the plaintiff John Reufer by a deed in writing dated June 1, 1912, and thereafter filed in the office of the Clerk of the County of Orange. 20

They allege that prior to said time the said premises were owned by the defendants Charles Hagen and John Reufer as a part of the partnership property of the firm of Hagen & Reufer, consisting of those said defendants. 30

They deny that the said deed was made without any consideration passing between the parties thereto, they deny that it was made or executed by the defendants Charles Hagen and Emilia Hagen or either of them with intent to hinder, delay or defraud the just creditors of the said Charles Hagen out of their claims against him or to so hinder, delay or defraud the said Suffolk County National Bank, named in the complaint, or its assignee, they deny that said deed was re- 40

*Exhibit "A."*

ceived or accepted by the defendant John Reufer with such intent or with any intent to defraud; they deny that the said conveyance was made or executed by the defendant Charles Hagen and Emilia Hagen in trust for the use of said Charles Hagen and deny that it was accepted by the defendant John Reufer or the defendant Babetta Reufer in trust for the use of said Charles Hagen or anyone; they deny that the said conveyance was part of a fraudulent or collusive conspiracy to prevent the collection of the judgments set forth in the complaint and allege that the said conveyance was not in any respect collusive or fraudulent or made to hinder, delay or defraud the judgment creditor specified in the complaint or any other creditor of said Charles Hagen or Emilia Hagen or either of them or any assignee of any creditor thereof, they allege that said conveyance was made in good faith and for a good, valuable and adequate consideration and that the defendants John Reufer and Babetta Reufer are now and have since June 12, 1912, been the owners and seized in fee and entitled to the sole possession of the said property and each and every part thereof.

They deny that they have knowledge or information sufficient to form a belief as to whether the said defendant Charles Hagen had or had not any property at the time out of which the judgments set forth in the complaint or either of them could have been collected and as to whether he was then or has remained insolvent and as to whether he has or had any property from which the judgments set forth in the complaint could or can be collected.

They allege that the defendant Babetta Reufer is the wife of the defendant John Reufer and as such is seized and entitled to inchoate right of

*Exhibit "A."*

dower in the premises set forth and described in the complaint.

Wherefore the defendants demand judgment that the amended complaint be dismissed with costs.

SERVIN & COX,  
Attorneys for Defendants, John  
Reufer and Babetta Reufer. 10

STATE OF NEW YORK, }  
County of New York. }ss.:

JOHN RUEFER, being duly sworn, deposes and says that he is one of the defendants in this action, that he has read the foregoing amended answer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. 20

JOHN RUEFER.

Sworn to before me, this 21st }  
day of September, 1915. }

Theodore Blum,  
Commissioner of Deeds,  
City of New York,  
Residing and Certificate filed in New 30  
York County, N. Y.

Clerk's No. 157.

Register's No. 16,036.

Endorsed. Supreme Court, Alton J. Vail as Receiver vs. Charles Hagen and others. Copy Answer to Amended Complaint. Servin & Cox, Attorneys for Defendants John Reufer and another, 44 North Street, Middletown, N. Y.

To Watts, Oakes & Bright, Esqs., Pltff.'s Attys. 40  
Personally Sept. 24/15, by J. B.

*Exhibit "A."*

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Orange at the Court House in the Village of Goshen, New York, on the 28th day of October, 1915.

Present:

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HON. ARTHUR S. TOMPKINS,

Justice.

SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL, as Receiver of CHARLES HAGEN, Judgment Debtor, in proceedings supplementary to execution under a judgment recovered in the Supreme Court of the State of New York in and for the County of Suffolk by the Suffolk County National Bank against the said Charles Hagen,

20

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HAGEN, his wife, and JOHN RUEFER and BABETTA RUEFER, his wife,

30

*Defendants.*

This action being at issue having been duly noticed for trial at and placed upon the calendar for this present term of Court and having duly come on to be heard before this Court on the 28th day of October, 1915, and the proofs and allegations of the parties hereto and the arguments of respective counsel herein having been duly heard and considered and due deliberation having been had, this Court does hereby find and decide as follows:

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*Exhibit "A."*

## FINDINGS OF FACT.

1. On September 18, 1912, in an action duly commenced and prosecuted in this Court in and for the County of Suffolk, the Suffolk County National Bank as plaintiff duly recovered judgment against the defendant Charles Hagen for the sum of \$1025.82, which judgment on that day was duly filed and docketed in the office of the Clerk of said County and a transcript thereof was thereafter duly filed and said judgment docketed in the office of the Clerk of the County of Orange on the 23rd day of September, 1912, in which last mentioned County said judgment debtor Charles Hagen then resided. An execution upon said judgment was on September 24, 1912, duly and regularly issued against the property of the said defendant Charles Hagen to the Sheriff of the said County of Orange, in which said defendant Charles Hagen then and at the time of the commencement of this action resided, and said execution was thereafter and prior to the commencement of this action returned by said Sheriff wholly unsatisfied and said judgment still remains wholly unpaid. Said action was brought to recover upon a promissory note in writing dated April 11, 1912, made by said defendant Charles Hagen, whereby said Hagen, for value received, promised to pay to the order of G. E. Smith & Company \$1,000 at the First National Bank, Middletown, New York, four months after the date thereof, and which said note was thereafter and before maturity duly endorsed for value by the payee therein named and delivered to the said Suffolk County National Bank and at the time of the rendition of said judgment remained and now remains wholly unpaid.

2. Thereafter proceedings supplementary to execution upon said judgment of September 18,

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*Exhibit "A."*

1912, were duly and regularly instituted and prosecuted against the said defendant Charles Hagan and such proceedings were therein had that on March 15, 1913, by an order duly made by this Court and thereafter duly and regularly filed, plaintiff was duly appointed the receiver of the property of said defendant Charles Hagen; he  
**10** thereupon duly qualified and ever since has been and is now acting as such.

3. On December 3, 1912, in an action duly commenced and prosecuted in this Court in and for said County of Suffolk, said Suffolk County National Bank as plaintiff duly recovered judgment against the said defendant Charles Hagen for the sum of \$1039.37, which judgment on that day was duly filed and docketed in the office of the said Clerk of the County of Suffolk and a  
**20** transcript thereof was on July 6, 1915, duly filed and said judgment duly docketed in the office of the Clerk of the County of Bronx, in which last mentioned County said judgment debtor then resided, and thereafter and on the 7th day of July, 1915, an execution upon said judgment was duly and regularly issued to the Sheriff of the County of Bronx and said execution was thereafter duly returned by said Sheriff wholly unsatisfied and said judgment still remains wholly unpaid. Said  
**30** action was brought to recover upon a promissory note in writing dated April 11, 1912, made by said defendant Charles Hagen, whereby said Hagen, for value received, promised to pay to the order of said G. E. Smith & Company \$1,000 at the First National Bank, Middletown, New York, four months after the date thereof, and which said note was thereafter and before maturity duly endorsed for value by the payee therein named and delivered to the said Suffolk County  
**40** National Bank, and at the time of the rendition

*Exhibit "A."*

of such judgment remained and now remains wholly unpaid.

4. Thereafter proceedings supplementary to execution upon said judgment of December 3, 1912, were duly and regularly instituted and prosecuted and such proceedings were had therein that on August 20, 1915, by an order of this Court duly made and entered, the receivership of the plaintiff herein was duly extended thereto. 10

5. By an order of this Court permission to bring this action was duly given to the plaintiff herein prior to the commencement hereof.

6. Prior to June 1, 1912, the defendant Charles Hagen, subject to the inchoate right of dower therein of his wife, the defendant Emilia Hagen, was the owner in fee simple and in possession of an undivided one-half interest in certain real property situated in the City of Middletown, Orange County, New York, of which the following is a description: 20

All the equal undivided one-half of ALL that certain lot, piece or parcel of land situate lying and being in the Town of Wallkill, now called Middletown, County of Orange and State of New York, bounded and described as follows: Beginning at a stake eleven feet east of a brook running through the premises hereby conveyed and along and near the dwelling of William J. Conkling and at a point seventy-three and one-half feet northeast of the center line of the New York and Erie Railroad Company and running thence north twenty-four and one-fourth degrees east one chain and seventy-four and one-half links to a stake and stones on the east side of the brook aforesaid, thence north sixty-one and three-quarter degrees west two chains and forty-seven links to a stake, thence south twenty-eight and one-quarter degrees west two chains and fifteen links to a stake on 30 40

*Exhibit "A."*

the north side of a street proposed to be opened between the premises hereby conveyed and the line of the lands of the New York and Erie Railroad, thence along the north side of said street south sixty-one and three-quarters degrees east one chain and sixteen links to a point forty feet north of the line of the lands of said Company, thence

10 further along said proposed street south seventy-seven and three-quarters degrees east one chain and forty-eight links to the place of beginning. Containing one-half of an acre of land more or less.

Also all that other lot of land situate in the Town of Wallkill aforesaid lying between the above described lot and the center line of Grove Street in said town, being a strip about twenty-six feet in width on the northerly end and about

20 twenty feet on the southerly end on Railroad Avenue and about one chain and seventy-five and one-half links in length. It is hereby intended by the parties hereto to convey the strip between the Hat Factory lot and the center of Grove Street so that the northeasterly line of said Hat Factory lot will be extended to the center line of Grove Street and embrace all the land lying in a strip between said Hat Factory lot and the center of Grove Street.

30 And also all that certain other piece or parcel of land situate in the Town of Wallkill above said bounded and described as follows: Beginning on the south corner of the lot on which the Hat Factory stands, being at the corner of Grove Street and Railroad Avenue and running thence southwest in range with the southeast side of the Hat Factory lot to the north line of lands of the Erie Railroad Company, thence along said line of

40 said land northwest to a point where said line is intersected by the line of the southwest side of

*Exhibit "A."*

said Railroad Avenue, thence northwest along said line of said avenue to a point opposite to the west corner of the Hat Factory lot aforesaid, and in range with the northwest side of said lot, thence northeast in range with the northwest side of said lot to west corner aforesaid, thence along southwest side of said lot to the place of beginning, and being in that portion of ground used as a public highway and known as Railroad Avenue in front of said Hat Factory lot and extending from south corner of lands of John H. Bell to intersection of northwest line of Grove Street with the northeast line of Railroad Avenue. Subject, however, to the right reserved by Horatio R. Wilcox to himself, his heirs and assigns if now subsisting to keep a drain from the cellar of said Wilcox dwelling through said strip of land above mentioned and the right to repair and drain from time to time forever after when he or his heirs or assigns may deem it necessary so to do, as set forth in the deed from Horatio R. Wilcox and wife to Joshua Draper dated September 8, 1862, and recorded in Orange County New York Clerk's office in Liber 169 of Deeds, page 94.

7. The defendants Hagen by a deed dated June 1, 1912, and recorded in the office of the Clerk of the County of Orange on July 1, 1912, in Liber 534 of Deeds, at page 89, attempted to convey to the defendant John Ruefer their interest in and to the lands hereinbefore described.

8. Prior to the making of said deed said defendant Hagen had made and delivered to said G. E. Smith & Company three promissory notes in writing each for the sum of \$1,000 and each payable in four months from the date thereof at the First National Bank Middletown, New York, which said three notes became due on or about April 22, 1912. Prior to the due date thereof

*Exhibit "A."*

said G. E. Smith & Company sent to the said First National Bank two checks aggregating \$3003 for deposit to the credit of said defendant Charles Hagen and which were to be used, when collected in the payment of said notes. Said checks were received by said First National Bank and were forwarded for collection but were  
10 lost in the mails, of which loss said Hagen was informed by letter and orally on several occasions prior to the making of said deed. On June 4, 1912 and prior to the collection of said checks and the execution and delivery of the deed hereinbefore described said G. E. Smith & Company the maker of said checks, became bankrupt and said checks were never paid.

9. Both defendants Charles Hagen and John  
20 Ruefer prior to the making of the deed hereinbefore described knew that said E. G. Smith & Company had become bankrupt and that said defendant Hagen was liable and would probably be called upon to pay the notes upon which the two judgments hereinbefore described were entered and in addition thereto two other notes each made by the said defendant Charles Hagn in the same amount to the same payee and payable at the same time and place as said notes upon which judgment was thereafter so entered.

30 10. In addition to the indebtedness upon said four notes of \$1,000 each said defendant Charles Hagen, at the time of the execution and delivery of said deed was also indebted to other persons in excess of \$2450. was then insolvent, and was so known to be by the defendant John Ruefer, and said conveyance stripped said defendants Hagen of all their property and there was nothing  
40 left from which the creditors of said defendant Charles Hagen could in whole or in part satisfy their claims.

*Exhibit "A."*

11. Said deed and conveyance of the real property hereinbefore described was made executed and delivered by the defendants Hagen and received and accepted by the defendant Ruefer without any consideration passing between them and with the intent to hinder, delay and defraud the just creditors of the said defendant Charles Hagen of their just claims against him and particularly with the intent so to hinder, delay and defraud the said Suffolk County National Bank and for the purpose of protecting said defendant Hagen against any and all claims which might be made against him on his said notes aggregating \$4,000 payable to the order of said G. E. Smith & Company, and hereinbefore described, and said conveyance did actualy hinder, delay and defraud the creditors of said Charles Hagen under said notes and otherwise in the collection of their just claims against him.

12. On or about October 1, 1911 said defendants Charles Hagen and John Ruefer received in settlement for the loss by fire of their piano factory in the said City of Middletown and which was located upon the real property hereinbefore described the sum of \$13,732.28 which said moneys were apportioned between them and all partnership accounts between them were then balanced and settled and at the time of the execution and delivery of the deed hereinbefore described there was no balance due the said defendant John Ruefer from the said defendant Charles Hagen growing out of their said partnership transactions.

13. Subsequent to the execution and delivery of the deed hereinbefore described said defendant Charles Hagen on a number of occasions exercised acts of ownership and possession upon and over

*Exhibit "A."*

the real property hereinbefore described although he was not the agent therefor and was not authorized to do anything therewith, in the selling of bricks therefrom in the taking care of the property in the objections to municipal assessments thereon, in objections to the removal by the City of Middletown of a certain switch located on  
 10 said property and in an endeavor to cause the purchase thereof by the said City of Middletown.

## CONCLUSIONS OF LAW.

FIRST: That the said deed dated June 1, 1912, made by the defendants Charles Hagen and Emilia Hagen his wife to the defendant John Ruefer is fraudulent null and void and should be cancelled of record, that the same was executed and delivered by the defendants Hagen  
 20 and received and accepted by the defendant Ruefer with the intent to hinder, defraud and delay the creditors of said defendant Charles Hagen and the plaintiff herein in the due collection of their just claims against him; and that said deed did and does actually so hinder, defraud and delay said creditors and this plaintiff.

SECOND: That the defendants and each of them should account to the plaintiff for all moneys  
 30 received by them or either of them or by their or either of their agents, representatives employees or servants or any of them, subsequent to the delivery of the deed hereinbefore described and for the proceeds, rents and profits of the real property therein sought to be conveyed, and that said defendants pay to the plaintiff herein any and all sum or sums of money which may be found due to him upon such accounting.

40 THIRD: That the defendants and each of them and each of their agents, servants or represen-

*Exhibit "A."*

tatives, should be enjoined and restrained from selling, transferring assigning or in any way interfering with the title and possession of the plaintiff in the said property or any part thereof.

FOURTH: That the plaintiff have and recover of the defendants his costs and disbursements herein to be taxed.

And judgment is directed accordingly. **10**

Enter,

ARTHUR S. TOMPKINS,  
Justice Supreme Court.

Endorsed: Supreme Court, Alton J. Vail as Receiver, etc., vs. Charles Hagen et all, Decision. Watts, Oakes & Bright, attorneys for Plaintiff, office and P. O. Address, 4 East Main Street Middletown, N. Y.

Received at June 16, 1916, Supreme Court Chambers, Nyack, N. Y. **20**

At a Trial Term of the Supreme Court held in and for the County of Orange in the Ninth Judicial District of the State of New York at the Court House in the Village of Goshen this 28th day of October 1915.

Goshen, N. Y. Thursday Oct. 28, 1915, **30**  
10 o'clock A. M.

Court convened.

Present:

HON. ARTHUR S. TOMPKINS,  
Justice.  
J. D. McGiffert,  
Clerk.

Recess ordered until 1:30 o'clock P. M.  
1:30 o'clock P. M. **40**

*Exhibit "A."*

Court convened.

Recess ordered until 7 o'clock P. M.  
7 o'clock P. M.

Court convened.

Alton J. Vail as Received & act.

vs.

No. 11.

10 Charles Hagen & others.

Action before Court to set aside conveyance.

Appearances: Watts, Oakes & Bright for Plff.  
R. M. Cox for Deft.

Plaintiff witness sworn,

Dominic Oliva,

Walter H. Benedict. Plaintiff rest.

R. M. Cox atty. for defendant moved to dismiss  
on the ground plaintiff's case had not been proven.

20 Motion denied (exception).

Defendant witness sworn,

John Ruefer,

Chas. Hagen Both sides rest.

Decision reserved.

A true extract of the Minutes.

GEORGE F. GREGG,

Clerk. (L.S.)

At a Special Term of the Supreme  
Court of the State of New York  
held in and for the County of  
Orange at the Court House in the  
Village of Goshen, New York, on  
the 28th day of October 1915.

30

Present

HON. ARTHUR S. TOMPKINS,

Justice.

40

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as receiver of Charles Hagen, judgment debtor in proceedings supplementary to execution under a judgment recovered in the Supreme Court of the State of New York, in and for the County of Suffolk by the Suffolk County National Bank against the said Charles Hagen,

10

*Plaintiff**against*

CHARLES HAGEN and EMILIA HAGEN his wife and JOHN RUEFER and BABETTA RUEFER his wife,

20

*Defendants.*

This action being duly at issue having duly come on to be heard before this Court at a Special Term hereof called and held and having been duly tried on the 28th day of October 1915 and the Court having duly made and filed its decision in writing herein directing the entry of judgment as hereinafter specified and the costs and disbursements of the plaintiff having been taxed at the sum of \$183.02;

30

Now on motion of Watts, Oakes & Bright attorneys for the plaintiff, it is

Ordered and Adjudged

1. That the deed made by the defendants Charles Hagen and Emilia Hagen his wife to the defendant John Ruefer dated June 1, 1912 and recorded in the office of the Clerk of the County of Orange on the 1st day of July 1912 in Liber

40

*Exhibit "A."*

534 of deeds at page 89 attempting and purporting to convey the real property described in the complaint amended complaint and decision filed herein, be and the same is hereby declared fraudulent, null and void upon the ground that the same was executed and delivered by the said defendants Hagen and received and accepted by  
10 the defendant Ruefer with the intent to hinder, delay and defraud the creditors of the said defendant Charles Hagen in the collection of their just claims against him, and did actually so impede, hinder, delay and defraud this plaintiff and said creditors in such collection, and the same is hereby cancelled of record, and the Clerk of the County of Orange is hereby directed to endorse opposite the record of said deed the entry of this judgment and the cancellation thereof  
20 of herein ordered.

2. That the defendants and each of them account to the plaintiff for all moneys received by them or either of them their agents, representatives employees or servants or any of them subsequent to the delivery of the deed hereinbefore mentioned, and for the proceeds, rents and profits of the real property above mentioned; and that said defendants pay to the plaintiff herein any  
30 and all sum or sums of money which may be found due to him upon such accounting and for the purposes thereof said plaintiff is hereby given permission to apply at the foot of this judgment for the appointment of a referee or for a hearing before this Court for the purpose of taking and stating the said account of the defendants as herein directed.

3. That the said defendants and each of them, and each of their agents, servants or representatives, be and hereby are in all respects enjoined  
40 and restrained from selling, transferring, assign-

*Exhibit "A."*

ing or in any way interfering with the title and possession of the plaintiff in the said property or any part thereof.

4. That the plaintiff have and recover judgment against the said defendants for the sum of One hundred and eighty three 02/100 dollars (\$183.02) his costs and disbursements and have execution therefor. 10

Enter in Orange County.

A. S. T.,

Justice Supreme Court.

George F. Gregg,

Clerk.

**SUPREME COURT—ORANGE COUNTY.**

---

ALTON J. VAIL as Receiver of  
Charles Hagen Judgment debtor,  
&c.

*Plaintiff,*

*against*

CHARLES HAGEN and AMELIA HA-  
GEN his wife JOHN RUEFER and  
BABETTA RUEFER his wife,

*Defendants.*

---

20

Please take notice that the defendants Charles Hagen, Amelia Hagen, John Ruefer and Babetta Ruefer hereby except to the decision of the Court herein filed in the office of the Clerk of the County of Orange on June 21, 1916, in the following particulars:

30

1. They except to so much of the finding of fact numbered 9 as finds that the defendant John Ruefer prior to the making of the deed referred to knew that G. E. Smith & Company had become 40

*Exhibit "A."*

bankrupt and that the defendant Hagen would probably be called upon to pay any of the notes therein specified.

2. To so much of the finding of fact numbered 10 as finds that at the time of the execution and delivery of the deed the defendant Hagen was known by the defendant Ruefer to be insolvent.

10 3. To the finding of fact numbered 11 and each and every part thereof.

4. To so much of the finding of fact numbered 12 as finds that the partnership accounts were balanced and settled at the time of the execution and delivery of the deed, and that there was no balance due said defendant Ruefer from the defendant Hagen growing out of said account.

20 5. To the finding of fact numbered 13 and each and every part thereof.

6. To the conclusion of law numbered First and each and every part thereof.

7. To the conclusion of law numbered Second and each and every part thereof.

8. To the Conclusion of law numbered Third and each and every part thereof.

9. To the Conclusion of law numbered Fourth and each and every part thereof.

Yours etc.,

30

SERVIN & Cox,  
Attorneys for Defendants.

To:

George F. Gregg, Esq.,  
County Clerk.

WATTS, OAKES & BRIGHT, ESQRS.,  
Attorneys for Plaintiff.

(Endorsed).

40

*Exhibit "A."*

## SUPREME COURT.

ALTON J. VAIL as Receiver of Charles Hagen etc.

VS.

CHARLES HAGEN and others.

## EXCEPTIONS.

SERVIN &amp; COX, attorneys for defendants

44 North Street,

Middletown, N. Y.

10

Filed July 5, 1916,

8 A. M.

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as Receiver,

*Plaintiff,**against*

HAGEN and REUFER,

*Defendants.*

20

TOMPKINS, J.

The greater weight of testimony shows that the conveyance by Hagen to Reufer was made after Hagen had been notified that the check sent by Smith and Company to take up promissory notes which Hagen had signed for the accommodation of Smith and Company, and upon which he was liable, had been lost in the mail, and after both Hagen and Reufer knew that Smith and Company were in financial trouble, and that Hagen would probably be called upon to pay said notes aggregating about \$4,000.

30

The real estate conveyed by Hagen to Reufer, and the validity of which conveyance is now attacked by the plaintiff was all the defendant

40

*Exhibit "A."*

Hagen owned or had any interest in, and it seems to me that the conveyance was without valuable consideration, and was made for the purpose of protecting Hagen against claims that might be made against him on the Smith and Company notes.

10 The only consideration claimed for the conveyance by the defendant was an alleged balance due Ruefer to Hagen growing out of their partnership transactions of several years before.

The preponderance of evidence seems to be that these accounts were balanced, and settled between the partners, when they received and apportioned the fire insurance moneys in October, 1911.

Judgment for the plaintiff, with costs.

20 (Endorsed).

SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as Receiver etc.,  
against

CHARLES HAGEN et al.

MEMORANDUM.

Filed Sep. 13, 1916,

11:40 A. M.

30 At a Special Term of the Supreme Court of the State of New York, held at the Court House at Poughkeepsie, New York on the 15th day of November, 1916.

Present:

HON. ARTHUR S. TOMPKINS,

Justice.

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as Receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court of  
the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
GEN his wife, and JOHN RUEFFER  
and BABETTA RUEFFER, his wife,

*Defendants.*

10

20

Upon the annexed stipulation of Servin & Cox,  
attorneys for the defendants, it is hereby

ORDERED that the lis pendens heretofore filed  
in this action on April 15, 1915 in the office of the  
Clerk of Orange County and recorded in Book  
24 page 369 be cancelled and the Clerk of the  
County of Orange is hereby ordered and directed  
to cancel the same of the records in his office.

30

A. S. T.,

Justice Supreme Court.

40

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

10 ALTON J. VAIL as receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court  
of the State of New York, in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff**against*

20 CHARLES HAGEN and EMILIA HA-  
GEN his wife and JOHN RUEFER  
and BABETTA RUEFER his wife,

*Defendants.*

30 The above entitled action having been settled,  
adjusted, and discontinued, it is hereby stipulated  
that the lis pendens heretofore filed in this action  
on April 15, 1915, in the office of the Clerk of  
Orange County and recorded in Book 24 page  
369 be cancelled, and that an order cancelling  
the same may be obtained and entered by either  
party without notice.

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff.

SERVIN & COX,  
Attorneys for Defendants.

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as Receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court of  
the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
GEN his wife, and JOHN RUEFER  
and BABETTA RUEFER, his wife,

*Defendants.*

10

20

STATE OF NEW YORK, }  
County of Orange, } ss.:

ROSSLYN M. Cox, being duly sworn, says that  
he is one of the firm of Servin & Cox the attorneys  
for the defendants in the above entitled action,  
that the plaintiff appeared in said action by the  
firm of Watts, Oakes & Bright and that all of the  
defendants in said action appeared by Servin &  
Cox, that there has been no substitution or  
change of attorneys in said action, and no other  
attorneys have appeared for any of the parties  
to said action except as above stated.

30

ROSSLYN M. Cox.

Sworn to before me this }  
14th day of November, 1916. }

Bertha Helterline,

Notary Public.

(Endorsed).

40

*Exhibit "A."*

SUPREME COURT.

ALTON J. VAIL, as Receiver of Charles Hagen,  
vs.

CHARLES HAGEN, and others.

STIPULATION AND ORDER CANCELLING LIS PENDENS.

SERVIN & COX, Attorneys for Defendants,

10 44 North Street,  
Middletown, N. Y.

Filed Nov. 16, 1916.

B. 61 p. 17.

12:10 P. M.

At a Special Term of the Supreme  
Court of the State of New York,  
held at the Court House at Pough-  
keepsie, New York on the 15th  
day of November, 1916.

20 Present:

HON. ARTHUR S. TOMPKINS,

Justice.

30

40

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as Receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court of  
the State of New York in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,

*Plaintiff,*

*against*

CHARLES HAGEN and EMILIA HA-  
GEN his wife, and JOHN RUEFER  
and BABETTA RUEFER, his wife,

*Defendants.*

10

20

Upon the annexed stipulation dated November 14, 1916, made by and between Watts, Oakes & Bright, attorneys for plaintiff, and Servin & Cox attorneys for defendants, and upon the affidavit of Rosslyn M. Cox verified November 14, 1916,

On motion of Servin & Cox, attorneys for defendants, it is hereby

30

ORDERED that the above entitled action be and the same hereby is discontinued without costs to either party, and that the judgment in the above entitled action which was made and rendered at a Special Term of the Supreme Court held at Goshen, New York, on the 28th day of October 1915, and filed in the office of the Orange County Clerk on the 21st day of June, 1916, and each and every part thereof, be and the same hereby is set aside, cancelled and annulled; and it is further

40

*Exhibit "A."*

ORDERED that the deed made by Charles Hagen and wife to John Ruefer, dated June 1, 1912, and recorded in the office of the Clerk of the County of Orange on July 1, 1912, in Liber 534 of deeds at page 89 shall remain in full force and effect as though said judgment had not been rendered, and the Clerk of the County of Orange is hereby  
 10 ordered and directed to endorse opposite the record of said deed the entry of this order.

A. S. T.,  
 Justice Supreme Court.

SUPREME COURT—ORANGE COUNTY.

ALTON J. VAIL as receiver of  
 Charles Hagen, judgment debtor  
 20 in proceedings supplementary to  
 execution under a judgment re-  
 covered in the Supreme Court  
 of the State of New York, in and  
 for the County of Suffolk by the  
 Suffolk County National Bank  
 against the said Charles Hagen,

*Plaintiff*

*against*

30 CHARLES HAGEN and EMILIA HA-  
 GEN his wife and JOHN RUEFER  
 and BABETTA RUEFER his wife,

*Defendants.*

The judgments against the above named judg-  
 ment debtor, Charles Hagen, having been settled  
 in full and having been satisfied, and the above  
 named Receiver, Alton J. Vail, the plaintiff  
 having filed his report and having been duly  
 40 discharged and his bond cancelled,

*Exhibit "A."*

IT IS HEREBY STIPULATED AND CONSENTED that the above entitled action be and the same hereby is discontinued without costs to either party, and that the judgment herein which was made and rendered at the Special Term of the Supreme Court held at Goshen, New York on the 28th day of October, 1915, and filed in the Orange County Clerk's office on the 21st day of June, 1916, and each and every provision thereof, be set aside, cancelled and annulled, and that the deed made by Charles Hagen and wife to John Ruefer dated June 1, 1912 and recorded in the office of the Clerk of the County of Orange on July 1, 1912 in Liber 534 of Deeds at page 89 be and remain in full force and effect as though the aforesaid judgment had not been rendered, and that the Clerk of the County of Orange be directed to endorse opposite the record of said deed, the entry of the order made hereon, and that an order to carry this stipulation into effect may be obtained by either party without notice and without costs.

Dated November 14, 1916.

WATTS OAKES & BRIGHT,  
Attorneys for Plaintiff.

SERVIN & COX,  
Attorneys for Defendants.

10

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30

40

*Exhibit "A."*

## SUPREME COURT—ORANGE COUNTY.

10 ALTON J. VAIL as receiver of  
Charles Hagen, judgment debtor  
in proceedings supplementary to  
execution under a judgment re-  
covered in the Supreme Court  
of the State of New York, in and  
for the County of Suffolk by the  
Suffolk County National Bank  
against the said Charles Hagen,  
*Plaintiff*

*against*

20 CHARLES HAGEN and EMILIA HA-  
GEN his wife and JOHN RUEFER  
and BABETTA RUEFER his wife,  
*Defendants.*

STATE OF NEW YORK, }  
County of Orange, } ss.:

ROSSLYN M. COX being duly sworn, says that he is one of the firm of Servin & Cox, the attorneys for all of the defendants in the above entitled action.

30 That the plaintiff appeared herein by Watts, Oakes & Bright, his attorneys, and all of the defendants appeared herein by Servin & Cox, their attorneys and that there have been no substitutions of parties or attorneys herein, and that no other attorneys have appeared herein for any of the parties hereto.

40 That all of the judgments against the judgment debtor, Charles Hagen, upon which the Receiver herein was appointed or the receivership extended and upon which this action was based have been

*Exhibit "A."*

fully paid and satisfied of record and there has been no action taken in reference to the title of the real property described in the complaint herein since the entry of the judgment of October 28, 1915, which was entered in the Orange County Clerk's office on June 21, 1916.

That Alton J. Vail, the Receiver herein and the plaintiff in this action has made his report petitioning for his discharge and the cancellation of his bond and an order has been made cancelling said receivership and discharging the bondsmen of said receiver. 10

That the cancellation of the judgment herein is necessary in order that the title to the property described in the complaint herein may be cleared and a good and marketable title given for said property free and clear from the effect of the judgment entered herein. 20

ROSSLYN M. COX.

Sworn to before me this }  
14th day of November, 1916. }

Bertha Helterline,

Notary Public.

(Endorsed).

### SUPREME COURT.

ALTON J. VAIL, as Receiver of Charles Hagen, 30

vs.

CHARLES HAGEN, and others.

STIPULATION AND ORDER CANCELLING JUDGMENT.

SERVIN & COX, Attorneys for Defendants,

44 North Street,

Middletown, N. Y.

Filed Nov. 16, 1916.

B. 61, p. 16. 40

12:10 P. M.

*Exhibit "A."*

All which we have caused by these presents to be exemplified, and the Seal of our said Supreme Court to be hereunto affixed.

10 Witness, Hon. Michael H. Hirschberg, one of the Justices of our said Supreme Court, at the City of Newburgh, the 24th day of July in the year of our Lord, one thousand, nine hundred and seventeen and of our independence the one hundred and forty second.

George F. Gregg,  
Clerk.

20 I, Michael H. Hirschberg, one of the Justices of the Supreme Court of the State of New York, for the County of Orange, do hereby certify that George F. Gregg, whose name is subscribed to the preceding exemplification, is the Clerk of the said County of Orange, and Clerk of said Supreme Court for said County, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the Seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated Newburgh, N. Y.,

this 24 day of July, 1917.

30 MICHAEL H. HIRSCHBERG,  
Justice of the Supreme Court.

STATE OF NEW YORK, }  
County of Orange, } ss.:

40 I, George F. Gregg, Clerk of the Supreme Court of said State, in and for the County of Orange, do hereby certify that Michael H. Hirschberg, whose name is subscribed to the preceding Certificate, is one of the Justices of the Supreme Court of said State in and for the Ninth Judicial District (within which the County of Orange is

*Exhibit D-2.*

situated), duly elected and sworn, and that the signature of said Justice to said Certificate is genuine.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of the said Court, this 24th day of July 1917.

GEORGE F. GREGG,  
Clerk. 10

**Exhibit D-2.**

THE PEOPLE OF THE STATE OF NEW YORK.

By the Grace of God, free and independent.  
To all to whom these presents shall come or may concern, Greeting,

KNOW YE, that we, having examined the records and files in the Office of the Clerk of the County of Orange and Clerk of the Supreme Court of said State for said County, do find a certain action there remaining, in the words and figures following to wit: 20

30

40

*Exhibit D-2.*

## NEW YORK SUPREME COURT.

ORANGE COUNTY.

ELMER H. LEMON,

*Plaintiff,**against*

10

CHARLES HAGEN AND EMILIA

HAGEN, his wife,

JOHN REUFER AND BABETTA

REUFER, his wife,

*Defendants.*

To the above named defendants and each of them:

20

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Orange.

Dated September 1, 1915.

30

WATTS, OAKES & BRIGHT,  
Attorneys for Plaintiff,  
Office and Post Office Address,  
4 East Main Street,  
Middletown, N. Y.

40

*Exhibit D-2.*

NEW YORK SUPREME COURT.  
ORANGE COUNTY.

ELMER H. LEMON,

*Plaintiff,*

*against*

CHARLES HAGEN AND EMILIA  
HAGEN, his wife,

JOHN REUFER AND BABETTA  
REUFER, his wife,

*Defendants.*

10

Plaintiff for his complaint against the above name defendants, alleges;

1. Upon information and belief, that heretofore in an action duly commenced in the Supreme Court of the State of New York, in and for the County of Suffolk by the Suffolk County National Bank against the above named defendant Charles Hagen, the said Suffolk County National Bank duly recovered judgment against the said Charles Hagen on the 18th day of September, 1912, for the sum of \$1025.82; and on that day the judgment roll in said action was duly filed and the judgment duly docketed in the office of the Clerk of the said County of Suffolk. Upon information and belief, that heretofore, and in a second action duly commenced in the Supreme Court of the State of New York, in and for the County of Suffolk by the said Suffolk County National Bank against the above named defendant Charles Hagen, the said Suffolk County National Bank duly recovered judgment against the said Charles Hagen on the 3rd day of December, 1912, for the sum of \$1039.37; and on that day the judgment

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*Exhibit D-2.*

roll in said action was duly filed and the judgment duly docketed in the office of the Clerk of the said County of Suffolk. That thereafter, and on or about the 24th day of February, 1915, both of said judgments filed by said Suffolk County National Bank against the defendant Charles Hagen as aforesaid were duly  
10 and regularly assigned, together with the sums of money due and to grow due thereon by said Suffolk County National Bank to Elmer H. Lemon, the plaintiff herein, who is now the owner and holder thereof.

2. Upon information and belief, transcripts of said judgments were duly and regularly filed and said judgments duly docketed in the office of the Clerk in the County of Orange, in the  
20 State of New York, in which last mentioned County the real property hereinafter described is situated.

3. Upon information and belief, that on or about the 27th day of August, 1915, an execution upon the judgment obtained by said Suffolk County National Bank in due form of law was duly and regularly issued against the property of the said Charles Hagen judgment debtor and defendant herein, and duly delivered to the Sheriff  
30 of the County of Suffolk, in which County the judgment rolls in said actions are filed as aforesaid; and said execution was thereafter and prior to the commencement of this action duly returned by the said Sheriff wholly unsatisfied and said judgments still remain wholly unpaid and unsatisfied, and there is now due and owing thereon the sum of \$2081.60 with interest thereon from the 3rd day of December, 1912. Upon information  
40 and belief, that the defendant Charles Hagen, the judgment debtor as aforesaid, at the time of

*Exhibit D-2.*

the commencement of the action herein was and now is a non resident of the State of New York, and that he has no office for the regular transaction of business in person within this state.

4. Upon information and belief, that prior to the recovery of the said judgments, said defendant Charles Hagen was part owner in fee simple possessed of certain real property lying and being in the city of Middletown, Orange County, New York, which said property was of the value of \$10,000.00 and upwards and was fully sufficient to satisfy said judgments and out of which the same might have been collected but for the collusive and fraudulent practices and contrivances hereinafter particularly described, and which said property is described as follows:

All the equal undivided one half of All that certain lot, piece of parcel of land situate, lying and being in the Town of Wallkill now called Middletown, County of Orange and State of New York, bounded and described as follows:

BEGINNING at a stake eleven feet east of a brook running through the premises hereby conveyed and along and near the dwelling of William J. Conkling, at a point Seventy three and one half feet northeast of the center line of the New York and Erie Railroad Company, and running thence north twenty four and one fourth degrees east one chain and seventy four and one half links to a stake and stones on the east side of the brook aforesaid, thence north sixty one and three quarter degrees west two chains and forty seven links to a stake, thence south twenty eight and one quarter degrees west two chains and fifteen links to a stake on the north side of a street proposed to be opened between the premises here-

*Exhibit D-2.*

by conveyed and the line of the lands of the New York and Erie Railroad, thence along the north side of said street south sixty one and three quarter degrees east one chain and sixteen links to a point forty feet north of the line of the lands of said Company, thence further along said proposed street south seventy-seven and three quarter  
 10 degrees east one chain and forty eight links to the place of beginning. Containing one half of an acre of land more or less.

Also all that other lot of land situate in the Town of Wallkill aforesaid lying between the above described lot and the center line of Grove Street in said town, being a strip about twenty six feet in width on the northerly end and about  
 20 twenty feet on the southerly end on Railroad Avenue and about one chain and seventy five and one half links in length. It is hereby intended by the parties hereto to convey the strip between the Hat Factory lot and the center of Grove Street so that the northeasterly line of said Hat Factory lot will be extended to the center line of Grove Street and embrace all the land lying in a strip between said Hat Factory lot and the center of Grove Street.

And also all that certain other piece or parcel  
 30 of land situate in the Town of Wallkill aforesaid bounded and described as follows:

BEGINNING on the south corner of the lot on which the Hat Factory stands being at the corner of Grove Street and Railroad Avenue and running thence southwest in range with the southeast side of the Hat Factory lot to the north line of lands of the Erie Railroad Company, thence along said line of said Land northwest to a point  
 40 where said Line is intersected by the line of the southwest side of said Railroad avenue to a point the west corner of the Hat Factory lot aforesaid,

*Exhibit D-2.*

and in range with the northwest side of said lot, thence northeast in range with the northwest side of said lot to west corner aforesaid, thence along southwest side of said lot to the place of beginning and being in that portion of ground used as a public highway, and known as Railroad Avenue in front of said Hat Factory lot, and extended from south corner of lands of John H. Bell to intersection of northwest line of Grove Street with the northeast line of Railroad Avenue. Subject however to the right reserved by Horatio R. Wilcox to himself, his heirs and assigns if now subsisting to keep a drain from the cellar of said Wilcox's dwelling through said strip of land above mentioned and the right to repair the drain from time to time forever after when he or his heirs or assigns may deem it necessary to do, as set forth in the deed from Horatio R. Wilcox and wife to Joshua Draper dated September 8, 1862 and recorded in Orange County New York Clerk's Office in Liber 169 of deeds page 94.

5. Upon information and belief, that heretofore and prior to the rendition of said judgments said defendant Charles Hagen and Emilia Hagen his wife attempted to convey to the defendant John Reufer by a certain deed in writing dated on June 1, 1912, and thereafter filed in the office of the Clerk of the County of Orange, the lands and premises hereinbefore described.

6. Upon information and belief, that said deed was made without any consideration passing between the parties thereto and was made and executed by said defendants Charles Hagen and Emilia Hagen, his wife, and received and accepted by said defendant John Reufer with intent to hinder, delay and defraud the just creditors of the said Charles Hagen of their just claims against

*Exhibit D-2.*

him and particularly to so hinder, delay and defraud the said Suffolk County National Bank, judgment creditor aforesaid and its assignee hereinbefore described; and such conveyance was made and executed by the said defendants Charles Hagen and Emilia his wife, and was accepted by the said defendant John Reufer in trust for the use of the said Charles Hagen; that said conveyance was part of a collusive and fraudulent conspiracy to prevent the collection of the judgments hereinbefore set forth; that the said Charles Hagen had no other property than that attempted to be conveyed by said deed out of which the judgments hereinbefore set forth could be collected and was then and ever since has remained insolvent, and that, unless such conveyance be set aside by a judgment of this court and plaintiff be allowed to collect said judgments out of the above described real estate, the same must remain wholly unpaid.

7. That the defendant Babetta Reufer, as your plaintiff is informed and believes is a married woman, the wife of the defendant John Reufer, and, therefore, if he obtained any title whatever to the said premises by reason of said conveyance collusively and fraudulently made as aforesaid, she is seized of an inchoate right of dower therein.

WHEREFORE, plaintiff demands judgment:

1. That said deed or conveyance above described made by said defendants Charles Hagen and Emilia Hagen his wife, to the said defendant John Reufer may be adjudged fraudulent and void as against the creditors of the said Charles Hagen and particularly as against this plaintiff and to have been made by the said Charles Hagen and Emilia Hagen his wife, and accepted by the said John Reufer for the purpose and with the

*Exhibit D-2.*

intent to defraud, delay and hinder the creditors of said Charles Hagen and this plaintiff and that said deed may be adjudged void and of no effect and be cancelled of record.

2. That the defendants and each of them be adjudged to account for all moneys received by them or either of them under the deed or conveyance before described and for the proceeds, rents and profits of the real estate therein purporting to be conveyed and that they deliver said property, proceeds, rents and profits to plaintiff. 10

3. That said defendants and each of them be enjoined and restrained from selling, transferring, assigning or in any way interfering with said real property or any part thereof.

4. And for such other and further relief as to this Court may seem just and proper together with the costs and disbursements of this action. 20

WATTS, OAKES & BRIGHT,  
Attorneys for plaintiff.

STATE OF NEW YORK, }  
County of Orange. } ss.:

Elmer H. Lemon, being duly sworn, says that he is the plaintiff in this action; that he has read the foregoing complaint, and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein state to be alleged on information and belief, and as to those matters he believes it to be true. 30

ELMER H. LEMON.

Sworn to before me this }  
1 day of September, 1915. }

PETER D. DUSINBERRE,  
Notary Public. 40  
(Endorsed)

*Exhibit D-2.*

## SUPREME COURT.

---

 ELMER H. LEMON, plaintiff,

v.

CHARLES HAGEN et al.

**10** SUMMONS AND COMPLAINT.WATTS, OAKES & BRIGHT,  
Attorneys for plaintiff.Office and P. O. Address,  
4 East Main Street,  
Middletown, N. Y.

Filed Sep. 1, 1915.

2-40 P. M.

**20** SUPREME COURT.

ORANGE COUNTY.

ELMER H. LEMON,

*Plaintiff,**against*CHARLES HAGEN AND EMILIA  
HAGEN, his wife,**30** JOHN REUFER AND BABETTA  
REUFER, his wife,*Defendants.*


---

**40** NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this Court upon the complaint of the above named plaintiff against the above named defendants to set aside a certain conveyance heretofore made on the first day of June, 1912, by Charles Hagen and Emilia Hagen his wife to John Reufer,

*Exhibit D-2.*

conveying the premises hereinafter described, which said deed was thereafter recorded in the office of the Clerk of the County of Orange on July 1, 1912, in Book 534 of deeds at page 89, upon the ground that the said deed was executed by the said defendants Charles Hagen and Emilia Hagen his wife, and accepted by the defendant John Reufer for the purpose of delaying, defrauding and hindering the creditors of the said Charles Hagen and particularly this plaintiff as more fully set forth in the verified complaint filed herewith; and that the object of said action is to set aside as fraudulent and collusive the said deed and to cancel the same of record; and that the premises in the City of Middletown, County of Orange and State of New York affected by this action are at the time of the commencement hereof and at the time of the filing of this notice situated in the said City of Middletown, County and State aforesaid, and are described in said deed as follows:

All the equal undivided one half of all that certain lot, piece or parcel land situate, lying and being in the Town of Wallkill now called Middletown, County of Orange and State of New York, bounded and described as follows:

BEGINNING at a stake eleven feet east of a brook running through the premises hereby conveyed and along and near the dwelling of William J. Conkling, and at a point seventy three and one half feet northeast of the center line of the New York and Erie Railroad Company, and running thence north twenty four and one fourth degrees east one chain and seventy four and one half links to a stake and stones on the east side of the brook aforesaid, thence north sixty one and three-quarter degrees west two chains and forty

*Exhibit D-2.*

seven links to a stake, thence south twenty eight and one quarter degrees west two chains and fifteen links to a stake on the north side of a street proposed to be opened between the premises hereby conveyed and the line of the lands of the New York and Erie Railroad, thence along the north side of said street south sixty one and  
 10 three quarter degrees east one chain and sixteen links to a point forty feet north of the line of the lands of said Company, thence further along said proposed Street south seventy seven and three quarter degrees east one chain and forty eight links to the place of beginning. Con-  
 ing one half of an acre of land more or less.

Also all that other lot of land situate in the Town of Wallkill aforesaid lying between the  
 20 above described lot and the center line of Grove Street in said town, being a strip about twenty six feet in width on the northerly end and about twenty feet on the southerly end on Railroad Avenue and about one chain and seventy five and one half links in length. It is hereby intended by the parties hereto to convey the strip between the Hat Factory lot and the center of Grove Street so that the northeasterly line of said  
 30 Hat Factory lot will be extended to the center line of Grove Street and embrace all the land lying in a strip between said Hat Factory lot and the center of Grove Street.

And also all that certain other piece or parcel of land situate in the town of Wallkill above said bounded and described as follows:

BEGINNING on the south corner of the lot on which the Hat Factory stands being at the corner of Grove Street and Railroad Avenue  
 40 and running thence southwest in range with the southeast side of the Hat Factory lot to

*Exhibit D-2.*

the north line of lands of the Erie Railroad Company, thence along said line of said land northwest to appoint where said line is intersected by the line of the southwest side of said Railroad Avenue, thence northwest along said line of said Avenue to a point opposite to the west corner of the Hat Factory aforesaid, and in range with the northwest side of said lot to west corner of the Hat Factory lot aforesaid, and in range with the northwest side of said lot thence to northeast in range with the northwest side of said lot to west corner aforesaid thence along southwest side of said lot to the place of beginning and being in that portion of ground used as a public highway and known as Railroad Avenue in front of said Hat Factory lot, and extending from south corner of lands of John H. Bell to intersection of northwest line of Grove Street with the northeast line of Railroad Avenue.

Subject however to the right reserved by Horatio R. Wilcox to himself, his heirs and assigns if now subsisting to keep a drain from the cellar of said Wilcox's dwelling through said strip of land above mentioned and the right to repair and drain from time to time forever after when he or his heirs or assigns may deem it necessary to do, as set forth in the deed from Horatio R. Wilcox and wife to Joshua Draper dated September 8, 1862 and recorded in Orange New York Clerk's Office in Liber 169 of Deeds page 94.

Dated September 1, 1915.

WATTS, OAKES & BRIGHT,  
Attorneys for plaintiff,  
Office and Post Office Address,  
4 East Main Street, 40  
Middletown, New York.



*Exhibit D-2.*

At a Special Term of the Supreme Court of the State of New York, held at Nyack, Rockland County, New York on the 11th day of November, 1916.

Present:

HON. ARTHUR S. TOMPKINS, 10  
Justice.

SUPREME COURT—ORANGE COUNTY.

---

ELMER H. LEMON,

*Plaintiff,*

*against*

CHARLES HAGEN AND EMILIA

HAGEN, his wife,

JOHN REUFER AND BABETTA

REUFER, his wife,

*Defendants.*

---

20

Upon the annexed stipulation, on motion of Servin & Cox attorneys for the defendants, it is hereby

ORDERED that the above entitled action be and the same is hereby discontinued without costs to either party as against the other; and it is further 30

ORDERED that the lis pendens heretofore filed in this action on September 1, 1915, in the office of the Clerk of Orange County and recorded in Book 24, page 435 be cancelled and the Clerk of the County of Orange is hereby ordered and directed to cancel the same on the records in his office.

A. S. T. 40

Justice Supreme Court.

*Exhibit D-2.*

## SUPREME COURT.

ORANGE COUNTY.

---

ELMER H. LEMON,  
*Plaintiff,*

*against*

10 CHARLES HAGEN AND EMILIA  
HAGEN, his wife,  
JOHN REUFER AND BABETTA  
REUFER, his wife,

*Defendants.*


---

The above entitled action having been amicably settled and adjusted by and between the parties thereto, it is hereby,

20 STIPULATED that the said action be and the same hereby is discontinued without costs to either party as against the other, and that an order so discontinuing the same and cancelling the lis pendens heretofore filed in this action on September 1, 1915, in the office of the Clerk of Orange County and recorded in Book No. 24 at page 435 may be obtained and entered by either party without notice.

30 Dated October 25, 1916.

WATTS, OAKES & BRIGHT.

Attorneys for plaintiff.

SERVIN & COX,

Attorneys for defendants.

*Exhibit D-2.*

## SUPREME COURT.

ORANGE COUNTY.

ELMER H. LEMON,

*Plaintiff,**against*

CHARLES HAGEN AND EMILIA

HAGEN, his wife,

JOHN REUFER AND BABETTA

REUFER, his wife,

*Defendants.*

10

STATE OF NEW YORK, }  
County of Orange. } ss.:

Roslyn M. Cox being duly sworn says that he is one of the firm of Servin & Cox attorneys for the defendants in the above entitled action.

That the plaintiff appeared in said action by the firm of Watts, Oakes & Bright, and that all of the defendants in said action appeared by Servin & Cox; that there has been no substitution or change of attorneys in said action, and no other attorneys have appeared for any of the parties to said action except as above stated.

ROSSLYN M. COX.

Sworn to before me this }  
25th day of October, 1916. }

BERTHA HELTERINE,

Notary Public.

(Endorsed)

30

40

*Exhibit D-2.*

## SUPREME COURT.

ELMER H. LEMON,

*vs.*

CHARLES HAGEN &amp; others.

**10** STIPULATION AND ORDER DISCONTINUING ACTION  
AND CANCELLING LIS PENDENS.

SERVIN &amp; COX,

Attorneys for defendants.

44 North Street,

Middletown, N. Y.

B. 61 P. 17.

Filed Nov. 16, 1916.

12-10 P. M.

**20** All which we have caused by these presents  
to be exemplified, and the Seal of our said  
Supreme Court to be hereunto affixed.Witness, Hon. Michael H. Hirschberg, one of  
the Justices of our said Supreme Court, at the  
City of Newburgh, the 24th day of July, in the  
year of our Lord, one thousand, nine hundred  
and seventeen and of our independence the one  
hundred and forty second.

GEORGE F. GREGG,

Clerk.

**30**I, Michael H. Hirschberg, one of the Justices  
of the Supreme Court of the State of New York,  
for the County of Orange, do hereby certify  
that George F. Gregg, whose name is subscribed  
to the preceding exemplification is the clerk of  
the said County of Orange, an dClerk of said  
Supreme Court for said County, duly elected and  
sworn, and that full faith and credit are due**40**

to his official acts. I further certify, that the Seal affixed to the exemplification is the Seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated Newburgh, N. Y., this 24th day of July, 1917.

MICHAEL H. HIRSCHBERG,  
Justice of the Supreme Court.

STATE OF NEW YORK, }  
County of Orange. } ss.:

10

I, George F. Gregg, Clerk of the Supreme Court of said State, in and for the County of Orange, do hereby certify that Michael H. Hirschberg, whose name is subscribed to the preceding Certificate, is one of the Justices of the Supreme Court of said State in and for the Ninth Judicial District (within which the County of Orange is situated), duly elected and sworn, and that the signature of said Justice to said Certificate is genuine.

20

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of the said Court, this 24th day of July, 1917.

GEORGE F. GREGG,  
*Clerk.*

**Exhibit D-3.**

30

Sept. 5 0/16

Received from Mr. Goldberg check for 375 in full payment of the Commission for selling my 3 Houses on 19th st West New York and have no claim whatsoever—

H HABER

40

**Exhibit D-4.**

55-152

## COMMONWEALTH TRUST COMPANY

West Hoboken, N. J., Sept. 5, 1916. No. ..

Pay to the order of Hill Haber \$375 00/00  
Three hundred Seventy-five Dollars

HARRIS GOLDBERG

**10** Safe Deposit Vaults

Endorsed:

H. HABER

9 5 16 Paid

---

**Exhibit —****Consolidated Laws of the State of New York,  
Laws of 1909.****20** Chapter 52 of the Laws of 1909, entitled "An Act relating to real property, constituting chapter fifty of the consolidated laws."

## ARTICLE VIII.

**30** SECTION 262. *Conveyances with intent to defraud purchasers and incumbrancers void.*—A conveyance of an estate or interest in real property, or the rents and profits thereof, and every charge thereon, made or created with intent to defraud prior or subsequent purchasers or incumbrancers, for a valuable consideration, of the same real property, rents or profits, is void as against such purchasers and incumbrancers. Such a conveyance or charge shall not be deemed fraudulent in favor of a subsequent purchaser or incumbrancer, who, at the time of his purchase or incumbrance, has actual or legal notice thereof, unless it appears that the grantee in the conveyance, or the person to be benefited by the charge, was privy to the

**40** fraud intended.

*Exhibit.*

SECTION 263. *Conveyance with intent to defraud creditors void.*—A conveyance or assignment in writing or otherwise, of an estate, interest or existing trust in real property, or the rents or profits issuing therefrom, or a charge on real property, or on the rents or profits thereof, made with the intent to hinder, delay or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, or a bond or other evidence of debt given, suit commenced or decree or judgment suffered, with the like intent, is void as against every person so hindered, delayed or defrauded. 10

SECTION 264. *Conveyances void as to creditors, purchasers or incumbrancers, void as to heirs and assigns.*—A conveyance, charge, instrument or proceeding, declared by this article to be void as against creditors, purchasers or incumbrancers, is equally void as against heirs, successors, personal representatives or assigns. 20

SECTION 265. *Fraudulent intent, question of fact.*—The question of fraudulent intent in a case arising under this article, shall be deemed a question of fact and not of law; and a conveyance or charge shall not be adjudged fraudulent as against creditors, purchasers or incumbrancers, solely on the ground that it was not founded on a valuable consideration. 30

SECTION 266. *Rights of purchaser or incumbrancer for valuable consideration protected.*—This article does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

SECTION 290. *Definitions; effect of article.*—The term "conveyance" includes every written instru- 40

*Exhibit.*

ment by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease  
 10 for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

SECTION 291. *Recording of conveyances.*—A conveyance of real property, within the State, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified  
 20 when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose con-  
 30 veyance is first duly recorded.

**The New York Code of Civil Procedure.**

SECTION 1670. (Am'd. 1904.) *Notice of pendency of action by plaintiff.*

In an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of real property, if the complaint is verified the plaintiff may, when he filed his complaint, or at any time afterwards before final judgment, file, in the clerk's office of each county where  
 40 the property is situated, a notice of the pendency

*Exhibit.*

of the action, stating the names of the parties and the object of the action, and containing a brief description of the property in that county, affected thereby. Such a notice may be filed with the complaint, before the service of the summons; but, in that case, personal service of the summons must be made upon a defendant, within sixty days after the filing, or else, before the expiration of the same time, publication of the summons must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor, as prescribed in chapter fifth of this Act. 10

SECTION 1671. (Am'd. 1905.) *Effect of notice.*

Where a notice of the pendency of an action may be filed, as prescribed in the last section, the pendency of the action is constructive notice, from the time of so filing the notice only, to a purchaser or incumbrancer of the property affected thereby, from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in the next section. A person, whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action. In any action, other than an action to foreclose a mortgage or for the partition of real property or for dower, in which a notice of the pendency thereof has been filed, and in which it shall appear to the Court upon a motion made as hereinafter provided, that adequate relief can be secured to the plaintiff by a deposit of money, or in the discretion of the Court by the giving of an undertaking, as hereinafter provided, where the cancellation of such notice is not otherwise expressly provided for or regulated, any defendant or any other person having an interest in the property affected by the 20 30 40

*Exhibit.*

action, may apply for the cancellation of such notice. Such application shall be by motion made in the action upon notice, to be directed and approved by the Court, to all the parties to the action and to such other persons as the court may direct. If the court on the hearing of the motion shall decide that adequate relief can be

**10** secured to the plaintiff and that the case is one in which the judgment sought to be enforced against the real property mentioned in said notice of pendency of action may be secured by the deposit of the amount claimed or by the giving of an undertaking, the court may make an order directing that the applicant make a deposit in court of a sum of money, or in the discretion of the court, give an undertaking with at least two

**20** sufficient sureties for the payment of any amount which the party filing such notice of pendency of action, or any other party to the action claiming an interest or lien upon such real property may recover in this action, and will pay the judgment sought to be enforced against said real property, in the event that a final judgment shall be recovered therein and conditioned for the performance of such other terms as the court may direct, and that thereupon, and upon such other terms, if any, as the court shall deem equitable, an order be

**30** made cancelling such notice of record. The sum required to be paid into court or the amount of the undertaking, shall be at least the amount claimed by the plaintiff or the value of the property affected by the action or the interest of the party filing such notice therein, with interest and costs, and if the court allow an undertaking to be given, a copy thereof with notice of filing of the same, shall be served upon the attorney for the plaintiff and upon such other parties as the court

**40** may direct and notice of not less than two days of the justification of the sureties. Upon the

*Exhibit.*

deposit of the sum required into court, or if an undertaking is given, upon the approval of such undertaking by the court or a judge thereof and the compliance with such other terms as may have been imposed, the court may direct that the notice of pendency of action be cancelled of record by a particular clerk or by all the clerks with whom it is filed and recorded, which cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is cancelled. After a notice of pendency of action has been cancelled as herein provided, neither the proceedings in the action, nor any judgment which may be rendered therein, shall affect the real property described in any notice of pendency which has been cancelled pursuant to the provisions of this section.

10

20

SECTION 1675. *When and how court may compel delivery of possession of real property to purchaser.*

Where a judgment in an action specified in this title, allots to any persons a distinct parcel of real property, or contains a direction for the sale of real property, or confirms such an allotment or sale, it may also, except in a case where it is expressly prescribed in this Act that the judgment may be enforced by execution, direct the delivery of the possession of the property to the person entitled thereto. If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, besides punishing the disobedience as a contempt, may, in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed, as if it was an execution for the delivery of the possession of the property.

30

40

**Specification of Objections.**

**NEW JERSEY SUPREME COURT.**

10	<p style="text-align: center;">HILL HABER, <i>Plaintiff-Appellee,</i> <i>vs.</i> HARRIS GOLDBERG, <i>Defendant-Appellant.</i></p>	<p style="font-size: 3em;">}</p> <p style="text-align: center;">On Appeal from Dis- trict Court.</p>
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The defendant-appellant in the above entitled cause, specifies the following determinations or directions of the District Court with respect to which he is dissatisfied in point of law, and the reasons on the appeal in the above entitled cause:

- 20 1. The Court erred in refusing to grant a non-suit at the close of the plaintiff's case for the reasons then stated.
2. The Court erred in finding that the plaintiff procured a purchaser ready and willing to take title and to complete the contract entered into between them.
3. The Court erred in finding that a day was set for the delivery of the deed.
- 30 4. The Court erred in finding that the moneys became due to the plaintiff, no date having been set for the delivery of the deed.
5. The Court erred in refusing to find that the paper writing Exhibit D-3 operated as a release releasing the defendant from the debt in suit.
6. The Court erred in rendering judgment for the plaintiff.
7. The Court erred in refusing to render judgment for the defendant for the following reasons:

*Specification of Objections.*

a. The plaintiff did not procure a purchaser able and willing to conclude the bargain on the terms of which the broker was authorized to sell.

b. The plaintiff did not procure a purchaser able and willing to take title.

c. The title of the purchaser procured by the plaintiff (the other party to the exchange) in the property to be exchanged for the property of the defendant was defective and he was not a purchaser able and willing to take title or to conclude the bargain. **10**

d. The purchaser procured by the plaintiff, the other party to the exchange, was not able to take title or to conclude the bargain on the terms authorized and agreed to between him and the plaintiff.

e. The authority of the plaintiff to exchange said lands was not in writing. **20**

f. The authority of the plaintiff to make the exchange was not recognized in writing or memorandum signed by the owner or his authorized agent, either before or after such exchange had been effected.

g. The authority in writing signed by the defendant for the sale and not an exchange.

h. The commissions for the procuring of the purchaser were agreed to be paid on the date set for the delivery of the deed; no date was set for the delivery of the deed and the defendant never became liable to pay any such commissions. **30**

i. The plaintiff had before the commencement of the action, in writing, released the defendant of and from the debt in suit.

WM. F. BURKE,  
Attorney of Defendant-Appellant.

Disposition of Debts

Section 1081, Internal Revenue Code

a. The liability of the transferee of a debt is not affected by the fact that the transferor was insolvent at the time of the transfer.

b. The liability of the transferee of a debt is not affected by the fact that the transferor was insolvent at the time of the transfer.

The liability of the transferee of a debt is not affected by the fact that the transferor was insolvent at the time of the transfer.

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**Notice of Appeal.**

(Filed April 24, 1918.)

**NEW JERSEY SUPREME COURT.**

HILL HABER,

*Plaintiff-Appellee,**vs.*

HARRIS GOLDBERG,

*Defendant-Appellant.*On Appeal  
from  
Supreme  
Court.**10**To ISADOR HABER, ESQ.,  
Attorney of Plaintiff.

Take notice that the defendant appeals to the Court of Errors and Appeals from the judgment of the New Jersey Supreme Court, on appeal in this cause, affirming the judgment of the Second District Court of Jersey City.

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Dated, April 23, 1918.

WM. F. BURKE,  
Attorney of Defendant-Appellant.**30****40**

**Grounds of Appeal.**

(Filed May , 1918.)

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

10	<p style="text-align: center;">HILL HABER, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">HARRIS GOLDBERG, <i>Defendant-Appellant.</i></p>	} On Appeal.
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The appellant states the following grounds of appeal:

1. The Appellate Court erred in holding that "the plaintiff had done the work by producing a customer for the defendant. Such was the agreement, and it was defendant's fault if he chose to make an agreement without ascertaining in advance whether Reufer had title to the Middletown property".

2. The Appellate Court erred in holding that the plaintiff had procured a purchaser ready and able to take title and to complete the contract entered into.

3. The Appellate Court erred in holding that the written acknowledgment, Exhibit P-1, was a sufficient recognition to support the plaintiff's claims for commissions.

4. The Appellate Court erred in holding that the paper writing claimed to be a release was a mere receipt and that "the form of the receipt is such that it cannot be regarded as possessing either the essentials or the comprehensiveness of a release, even if the parties meant it to extend its operation to the property in question."

5. The Appellate Court erred in not holding that the paper writing Exhibit D-3 was a release of the plaintiff's claim to the commissions in suit.

6. The Appellate Court erred in not reversing the judgment of the District Court for the reasons set forth in the specifications of objections.

Dated, May , 1918.

WM. F. BURKE,  
Attorney of Plaintiff-Appellant.

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### **Opinion of Supreme Court.**

(Filed February 7, 1918.)

### **NEW JERSEY SUPREME COURT.**

NOVEMBER TERM, 1917.

HILL HABER

vs.

HARRIS GOLDBERG.

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Appeal from Second District Court of Jersey City.

Argued November Term, 1917. Decided February Term, 1918.

ISADOR HABER, for Plaintiff.

WM. F. BURKE, for Defendant.

Argued before Justices Swayze, Trenchard and Minturn. 30

Per Curiam:

The suit was for commissions on an exchange of real estate. A written agreement was made on June 21, 1915, between Goldberg and one Reufer, by which Goldberg was to convey his property in North Bergen and Reufer was to convey his property in Middletown, New York.

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On the same day that the agreement was made, Goldberg signed a written recognition, agreeing to pay Haber \$300 "as commission for the sale of my property, to be paid on the date set for the delivery of the deed." The deed never was delivered and the exchange failed, because the title of Reufer to the Middletown property was not good.

10 It is insisted that the written acknowledgment applies only to a sale, and that this was an exchange, and that the statute makes a distinction between sale and exchange.

20 We think that it does, but in this case the acknowledgment was made at the time the agreement was made, and after the work had been done to bring the parties together. It was made, therefore, in contemplation of what had taken place, or was to take place immediately. The parties therefore regarded such an exchange as the equivalent of a sale.

It is argued that there was a release, but it appears that the so-called release was a mere receipt for commissions on other property sold.

30 It contains the words "and all claims whatsoever", which might relate to the additional sum claimed, on the other property, or might possibly relate to any other claim, but in any event the form of the receipt is such that it cannot be regarded as possessing either the essentials or the comprehensiveness of a release, even if the parties meant it to extend its operation to the property in question.

The other defense is based upon the doctrine of *Leschziner vs. Bowmann*, 83 L., 743. The distinction, however, is made clear by the language of the agreement. The *Leschziner* case turned upon the fact that the commission was to be paid

upon the passing of the title, and the title never passed. In this case, the provision is that it shall be paid on the date set for the delivery of the deed, and of course that date having been fixed, it made no difference whether the title actually passed on the date set or not.

The plaintiff had done the work by producing a customer for the defendant. Such was the agreement, and it was defendant's fault if he chose to make an agreement without ascertaining in advance whether Reufer had title to the Middletown property.

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The judgment for the plaintiff must be affirmed with costs.

**Rule of Affirmance.**

(Filed February 19, 1918.)

**NEW JERSEY SUPREME COURT.**

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HILL HABER,

*Plaintiff-Appellee,*

*vs.*

HARRIS GOLDBERG,

*Defendant-Appellant.*

On Appeal.

This cause having been duly argued at the November, 1917, term, of this Court by Isador Haber of counsel with the plaintiff-appellee, and William F. Burke, attorney of, and John H. Sheridan of counsel with defendant-appellant, and the Court having considered the same, and finding no error in the record or proceeding in the District Court,

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It is thereupon ordered and adjudged that the

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judgment heretofore rendered in the District Court and removed by appeal to this Court, be affirmed with costs, and that the record thereof be remitted to the Second District Court of the City of Jersey City, to be proceeded with in accordance with this judgment and the practice of said Court.

Entered February 9, 1918.

On motion of

ISADOR HABER.

10 A true copy.

ENOCH L. JOHNSON,  
Clerk.

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## New Jersey Court of Errors and Appeals

HILL HABER,  
Plaintiff-Appellee,

vs.

HARRIS GOLDBERG,  
Defendant-Appellant.

On Appeal  
From Supreme  
Court.

### **BRIEF OF PLAINTIFF-APPELLEE.**

This is an appeal from a judgment rendered in the Supreme Court affirming a judgment rendered in the Second District Court of Jersey City in favor of the plaintiff.

The plaintiff is a real estate broker. In June, 1915, the defendant, who was the owner of premises on the Hudson Boulevard, North Bergen, N. J., which we will call the "Boulevard Property," authorized the plaintiff to find him a purchaser for the said property and agreed to pay him a commission therefor. The authority was in writing under the signature of the defendant and read as follows:

"June 21, 1915. I hereby agree to pay Hill Haber the sum of Three Hundred (\$300.00) Dollars as commission for the sale of my property known as 4255 and 4257

Hudson Boulevard, North Bergen, N. J., to be paid on the date set for the delivery of the deed, Harris Goldberg" (Ex. P-1, p. 42).

The plaintiff procured John Ruefer to purchase the said property. Mr. Ruefer, who owned property in Middletown, New York, entered into a contract of exchange with the defendant, Harris Goldberg, covering his Middletown property and the defendant's Boulevard property.

Thereafter it seems that Mr. Ruefer could not give clear title to his Middletown property and the defendant Goldberg sued Ruefer in the Union Hill District Court for \$500 damages for breach of contract of exchange and obtained a judgment. The judgment was paid in full.

The defendant then refused to pay the plaintiff any commission, and thereupon the above-entitled action was commenced.

### POINT I.

**The point raised by the appellant in his brief that the plaintiff, when he produced Ruefer as his purchaser, knew that Ruefer could not convey his property free from encumbrances, should not be entertained by this Court, inasmuch as no mention is made thereof in any of the grounds of appeal.**

"Counsel for appellant makes the point in their brief that there was no proof in the case that Gibbs & Hill were doing work for the appellant company, and therefore the deceased, the employee of Gibbs & Hill, was un-

lawfully crossing the railroad tracks, and a trespasser. This point is not presented by any of the grounds of appeal relied on by the appellant and is not entitled to be considered." (*Fithian v. Pennsylvania R. Co.*, 103 *Atl.*, p. 193, Court of E. & A.)

Furthermore, the evidence shows (pp. 31 and 32) that this contention of the appellant is based upon his own answer in response to his attorney's question as to whether or not the plaintiff knew that the injunction was pending. The question and answer were objected to by counsel, but allowed in evidence over counsel's objection. The Court can readily see that this testimony of the appellant, although admitted by the Court below, purely called for a conclusion on behalf of the witness.

Appellant admits in his brief that were it not for the fact that plaintiff knew that Ruefer's title was defective, the plaintiff would be entitled to his commission; hence if the Court cannot consider this contention of appellant, then the plaintiff is entitled to his commission by the appellant's own admission.

## POINT II.

**The plaintiff was entitled to his commission as soon as a binding contract of exchange was entered into.**

The contention of the appellant is that inasmuch as the exchange was never completed, plaintiff was not entitled to his commission; that the purchaser must be able to buy or able to give clear title, and cites *Leschziner et al. v. Bauman*, 85 *Atl.*, 205.

In this case Judge Minturn construes the wording of the agreement for commission as a condition precedent or a contingency which must happen before the broker is entitled to his commission; the words are:

"I herewith agree to pay to S. Leschziner & Company a commission of \$1250 on the day of passing title or July 15th, for the sale of the Rudolph, Stella, Caroline and Crescent apartment houses to the Home Coupon Exchange Company. H. B. Bauman."

The Court in this case decided that these words make the passing of title contingent to the payment of commission to the broker. The words are "on the day of passing title or July 15th," that is, July 15th was fixed for the passing of title and the two phrases or groups of words are used together as fixing the passing of title, as the time when the broker would be entitled to his commission. Such being the case, of course, this constitutes a contingency.

The Court further says:

"The question reduces itself to a simple matter of construction, whether this agreement to pay a commission on the day of passing title, or July 15th, for the sale of this property is an agreement conditional on the passing of title on that day."

The case would be decided in exactly the same way if the words "or July 15th" were not in the agreement at all. In fact, the Court construes these words "or July 15th" as meaning the same as "the day of passing title." Such being the case, of

course, a contingency existed. - So, where the contract with the agent contained a provision fixing the payment of commission to the broker at the time "of the consummation" of the sale, it is plain also that this would be a contingency.

*Morse v. Conley*, 85 *Atl.*, 196.

The *Leschziner* case cites *Courter v. Lydecker*, 58 *Atl.*, 1093. This case strengthens the case before the Court, for in the *Courter* case, the authority given the broker reads as follows:

"I hereby authorize Lydecker Bros., of Paterson, New Jersey, to sell my property herein described at a commission of five per cent., no charge to be made by them unless they obtain for me a sale."

The facts were that a purchaser was produced who entered into an oral agreement of purchase, paid \$500 and entered into possession. After holding possession a short time, he abandoned it and failed to carry out the further provisions of the agreement with the seller and never received a deed. The defendant in that case retained the \$500 paid him. The Court below held:

"Upon these facts the Court held that a valid and binding agreement for the sale of the farm had been reached between Kenworthy and the defendant, due to the efforts of the plaintiffs; that such an agreement, having been partly performed, constitutes a sale within the meaning of the terms of the agreement between the defendant and the plaintiff—and gave judgment for the plaintiff for the sum of \$165, the full

amount claimed by the plaintiff from the defendant, and the costs of suit."

The Supreme Court, when this case came before it on appeal, held:

"The condition upon which the plaintiff was to become entitled to his commission was that he should obtain a sale for the defendant."

The Court affirmed the judgment for the broker in the lower court in these words:

"The broker's right to recover commissions in such cases is dependent upon his obtaining a sale. His right to commissions by the terms of the present contract is, in express words, dependent upon his obtaining a sale. The standard by which the performance of this duty is to be ascertained must therefore be exactly the same under this contract as under a general employment. *In the present case, the broker obtained a purchaser willing to conclude a bargain upon the terms upon which the broker was authorized to sell, who was acceptable to—for he was accepted by—the vendor.* But it is insisted that there was no writing, and so the parol agreement between the vendor and purchaser was not a sale. The broker, under the terms of his employment, had no authority to enter into a written contract which would bind the vendor. *Hedden v. Shepherd*, 29 N. J. Law, 334; *Morris v. Ruddy*, 20 N. J. Eq., 236; *Milne v. Kleb*, 44 N. J. Eq., 378; 14 Atl., 646. *The vendor was content to rely upon a parol agreement accompanied by the payment of a part of the consideration.* It does

not appear that he ever asked for a writing and so it does not appear that the purchaser refused to execute one. The broker had performed his duty in obtaining a willing and acceptable purchaser upon the terms named, and he earned his commission. *It is to be observed that, the purchaser having gone into possession, the oral contract was, in equity, enforceable by the vendor. Wharton v. Stoutenburgh, 35 N. J. Eq., 277. It was upon this ground the case was decided below. But whether this verbal contract was or was not enforceable by the vendor, he, having accepted it as a sale, cannot deny to the broker his commissions for obtaining the sale."*

The Court therefore held that the broker is entitled to his commission when the owner accepts the buyer, which, in the case before us, is patent by the owner entering into a contract with the buyer. Furthermore, the Court held that inasmuch as a contract enforceable by the vendor had been entered into, the broker was entitled to his commission. In the case before us, such a binding contract had been entered into and the defendant had sued for the breach of it, had secured a judgment, and had been paid. Thirdly, the Court held that whether or not the contract was enforceable by the vendor, he having accepted it as a sale, cannot deny the broker his commission.

**POINT III.**

**The case of *Hinds v. Henry* does not preclude the plaintiff from obtaining a judgment.**

It is true that the case of *Hinds v. Henry*, 36 *N. J. Law*, 328, is a leading case on the question before us and has been followed, as the Court in the *Leschziner* case says, for forty years. The general rule as laid down in that case is

“The right of the broker to commissions is complete when he has procured a purchaser able and willing to conclude a bargain on the terms on which the broker was authorized to sell.”

The Court means that where a broker procures a buyer on the terms on which he was authorized to sell and the owner refuses to sell or refuses to enter into a contract with such purchaser, that then in order for the broker to be entitled to his commission, he must prove that he procured such purchaser, that he procured him on the terms upon which he was authorized to sell; that the purchaser was ready and willing to buy and that he was able to buy, otherwise a broker could procure any irresponsible person and claim his commission.

The said rule does not hold where the owner enters into a written, binding contract with such purchaser. By entering into such binding contract, he accepts such purchaser as able; he might protect himself by demanding a large deposit, but the fact that he enters into a binding contract with him signifies that he has accepted such purchaser as being able.

That this is the law in this State is shown in the latest decision on the opinion rendered by Justice Swayze in *Freeman v. Van Wagemen et al.*, decided on June 6, 1917. Justice Swayze says:

“A clear distinction is made in our cases between a sale and a conveyance of land. We agree with what was said in *Lindley et al. v. Keim et al.*, 54 N. J. Eq., 418, at page 423, quoting the opinion of Vice-Chancellor Pitney, to be found in 34 Atl., 1073, that the words ‘sale’ and ‘sell’ in agreements between the owners of land and real estate brokers mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms. This the plaintiff did, the defendants actually accepted Scherer as satisfactory, and the only question, so far as the Scherer transaction is concerned, was that put by the judge to the jury, whether the written authority had been abandoned by the plaintiff as the defendants claimed.”

101 Atl., 55, Advance Sheet July 19, 1917.

Furthermore, a sale as used in the authority given to the broker to sell for an owner and to entitle him to a commission does not mean a conveyance, but a bringing together of the parties so that their minds might meet, the one to sell and the other to buy. This also is laid down as the law in the *Freeman* case, in which Justice Swayze says:

“As to this, the defendants claim that, although the plaintiff had produced a ready and willing purchaser in the person of Scherer, he had not produced one able to perform the contract. The judge charged that all the plaintiff was bound to do was

*to bring the parties together and get them to make a binding agreement. \* \* \* This was a correct statement of the law. It is a mistake to think that we decided in Hinds v. Henry, 36 N. J. Law, 328, that the broker could never recover unless he procured an able and willing purchaser. We said that the general rule was that when he had done that, his right to commission was complete. We did not deny that other facts also might make his right complete."*

A broker cannot and is not expected to guarantee the validity of the title of his principal; his services are completed when he has procured a purchaser upon the terms upon which he was authorized to sell.

#### POINT IV.

**The plaintiff was entitled to his commission, although an exchange was entered into and not an outright sale.**

The defendant attempts to evade payment to the plaintiff, on the ground that the authority which he had given the plaintiff to sell did not also include an exchange. I believe I need not argue this matter other than to quote from the case of *S. E. Crowley Co. v. Meyers*, decided by the Court of Errors and Appeals, Chancellor Magie writing the opinion, 55 *Atl.*, at page 305. In that case, the Court says as follows:

"The first question raised by defendant is presented by the assignment in error based on the refusals of the trial judge to nonsuit plaintiff, or to direct a verdict for

defendant, which may be considered together. The contract upon which the declaration was founded was one which fell within the provisions of section 10 of the 'Act for the prevention of frauds and perjuries' (Revision approved March 27, 1874; 2 *Gen. St.*, p. 1604). By those provisions, such a contract to be enforceable, must be in writing, signed by the owner of the real estate. It must give authority to the broker or real estate agent to sell, and fix the commissions on the dollar for the services in selling. As the liability is limited to an instrument in writing, the rule that evidence intended to vary or alter the writing relied upon for authority is inadmissible was applicable. The ground on which the motions to nonsuit and direct a verdict were rested was that the written agreement, properly construed, limited the liability of defendant to pay commissions to a sale procured by the broker or real estate agent for cash only. The trial judge charged the jury that such was the true construction of the contract. He left it to the jury whether the provision for a sale for cash had not been waived by the seller by his acceptance of a purchaser who paid in part in cash and in part by a conveyance to the seller of other real estate, accepted by the seller as equivalent to make up \$30,000 of the sale price of \$70,000. The contract of a real estate agent is a contract with the owner to procure a purchaser for the property upon the terms fixed by the owner. If he procured a satisfactory purchaser upon such terms, he earns his commissions. *Hedden v. Shepherd*, 29 *N. J.*

*Law, 334; Vreeland v. Veterlein, 33 N. J. Law, 247; Hinds v. Henry, 36 N. J. Law, 328; Runyon v. Wilkinson, 57 N. J. Law, 420; 31 Atl., 390. When the consideration is fixed by the owner, in the authority given to the agent, at a certain price in dollars, the owner may reject a purchaser procured by the agent who offers to pay the price, not in dollars, but in other property. But if the owner, having the option to reject such an offer, accepts it, and takes other property as equivalent for so much of the selling price fixed by his authority, I have no doubt that the agent becomes thereby entitled to his commissions."*

This decision, I believe, sets at rest all doubt on this question. The defendant had the option to reject Mr. Ruefer, whom the broker had procured, on the ground that Mr. Ruefer could not pay all cash, but the defendant chose to accept him, and in fact did so by entering into a valid, binding contract of exchange. The defendant may have entered into a new contract with the broker upon finding that the purchaser intended to pay partly by a conveyance of another piece of property upon hearing that an exchange would be agreeable to him, but he did not do so. The case of *S. E. Crowley Co. v. Meyers* is therefore exactly in point.

It might further be stated that inasmuch as the agreement, Exhibit P-1, and the agreement for the exchange of property were executed at one and the same time and after the services were rendered by the plaintiff to the defendant, that the defendant regarded the exchange as a sale or the equivalent of a sale, and such was in contemplation of the parties when the word "sale" was inserted in this

agreement, and the Supreme Court on appeal so found.

#### POINT V.

**The alleged release did not operate as a release of the claim upon which this action is based.**

The evidence shows that subsequent to the transaction involving the Boulevard property upon which this action is brought, the plaintiff sold for the defendant three houses on 19th Street, West New York. The evidence of the plaintiff and Mr. Haber, the attorney who drew the contract of exchange in that case, is that the three houses were sold for \$16,500. The evidence also shows that the defendant had agreed in writing to pay the plaintiff 2½ per cent., which would entitle the plaintiff to \$412.50 (p. 36, lines 12 to 20). However, the defendant would not pay the plaintiff the entire amount due him and give him a check for \$375, and had the plaintiff sign a receipt that he had received this \$375,

“as commission for the sale of the 19th Street property and all claims whatsoever”  
(Ex. D).

This instrument was written on a small piece of paper in the form of a receipt, was not sealed or witnessed. It was merely a receipt for money paid. The defendant endeavored to make the Court below believe that the plaintiff agreed to take \$375, which was much less than he was entitled to, for the sale of the 19th Street property, not only in full payment of commission for the 19th Street property,

but also in full payment and release of his claim for commission on the Boulevard property.

In order to support his contention that the release signed by the plaintiff operated to release the claim upon which this suit was brought, the appellant must lay a clever foundation. He states in his brief that the plaintiff had no written authority or memorandum to sell the 19th Street property, and hence, though he did sell the same, appellant was under no legal duty to pay him inasmuch as the statute requiring a written authority had not been complied with.

Appellant then contends that the payment of \$375 as commission when he was under no legal liability therefor and after the dispute over the amount, is a sufficient consideration for this release. But it might be asked, did the defendant then give the plaintiff \$375 to release the present claim, which amounted to only \$300? This must be so if he was under no legal liability to pay the plaintiff for the sale of the 19th Street property. In fact, this entire contention of the defendant may be dismissed, because it is founded upon an unwarranted statement of fact, viz., that there was no written authority or memorandum signed by the defendant for the sale of the 19th Street property. The defendant himself admitted upon cross-examination that the plaintiff had a written agreement from him (p. 36, lines 12-20). Even assuming that the instrument was a release, it was an open question of fact for the Court to determine whether it operated to release the claim in question or whether it operated to release all claims relative to the 19th Street property which was mentioned in the body of the instrument.

If Goldberg wanted a release of any claim on the Boulevard property, why didn't he insert words to

that effect? Why didn't he insert "in payment of commission for the 19th Street property and the Boulevard property"? The words "and all claims whatsoever" must be read in conjunction with the rest of this receipt, *viz.*: that it covers all claims for anything due relative to the 19th Street property only. The Court below evidently so treated it, for after all it is a question of fact and the Court found in favor of the plaintiff.

The plaintiff having accepted less than what was due him as commission for the sale of the 19th Street property, there surely could be no consideration for a release of any claim against Goldberg for the sale of the Boulevard property. Not enough that the plaintiff had agreed to accept less than what was due him for the commission on the 19th Street property, the defendant tried hard to have the Court below believe that this was also in payment of the claim upon which this suit is based, and his endeavor was very ingenious. He claimed that inasmuch as the 19th Street transaction was an exchange, that therefore the written authority which he had given the plaintiff to sell that particular property, wherein he agreed to pay 2½ per cent., was of no effect, that he intended only to pay him 1 per cent. because it was an exchange, and that the balance between this 1 per cent. and the amount of the check was in payment of the release of this claim.

This takes us back to the proposition herein argued, *viz.*: does the written authority, given a broker to sell, cover an exchange, where the owner accepts the buyer by entering into a contract with him? If that is so, then the plaintiff was entitled to \$412.50 as commission for the sale of the 19th Street property, and hence by accepting less than

that sum, he received nothing as a consideration to release his claim on the Boulevard property should we even give Goldberg the benefit of the doubt.

The receipt not being under seal, the question of its consideration was an open one of fact for the Court and the Court found in favor of the plaintiff on that fact.

### POINT VI.

**The plaintiff in this case was entitled to his commission "on the date set for the delivery of the deed."**

The words in the plaintiff's agreement entitling him to commission read that the commission shall be paid "on the date set for the delivery of the deed." That date had long passed prior to the commencement of this action, hence the plaintiff was entitled to his commission. The defendant endeavored to make the Court below believe that he did not understand these words "on the date set for the delivery of the deed" or that they had been written into the instrument without his knowledge or authority. However, the testimony clearly shows that the instrument was read to him; that he thereupon took it and read it himself, and put his signature thereto. The evidence is that Mr. Haber, the attorney who drew this written authority, read it to the defendant and the defendant signed it. The defendant testified that he understands and can read English.

These words speak for themselves and cannot, in any shape, manner or form, be altered or varied, by any oral evidence as was attempted by the defendant. The rule of law is clear that a written

instrument cannot be altered or varied by oral evidence. In the case of *Crowley Co. v. Meyers*, 55 *Atl.*, at page 306, Chancellor Magie, in speaking of the contents of a written authority in order to entitle a broker to a commission, says:

“It must give authority to the broker or real estate agent to sell and fix the commission on the dollar for the services in selling. *As the liability is limited to an instrument in writing, the rule that evidence intended to vary or alter the writing relied upon as authority is inadmissible was applicable.*”

Such being the law, the Court must necessarily give effect to the words used in this written authority, *viz.*: that the broker was entitled to his commission at a certain time, *viz.*: the date set for the delivery of the deed in the written contract of exchange, which date has long since passed.

#### POINT VII.

**The defendant having sued the purchaser for breach of contract of exchange, having procured a judgment, and having been paid in full, must pay the plaintiff his commission.**

It is in evidence in this case that Goldberg had sued Ruefer for breach of contract of exchange in the Union Hill District Court, wherein he alleged that he was damaged by Ruefer's failure to carry out the exchange in the sum of \$500. The evidence further shows that a judgment was obtained by him in the full sum of \$500 and costs, and that this

judgment and costs were paid. This being so, is not Goldberg in the same position as if the exchange had been consummated, and titles passed? Goldberg, in his complaint for breach of contract, in fact says this: Reufer has agreed to buy my property and pay me in part by giving me title to his property. He has failed to give me title to his property. My property is worth so much and his property is worth to me so much and if an exchange had been completed, I would have profited thereby \$500. This I have lost by Ruefer's breach of contract. I have suffered \$500 damages and I must sue him for \$500.

Goldberg received payment for the damages he claimed, and therefore he has been made whole and is in the same position as if title had passed. He has the entire benefit of the transaction, and therefore must pay the plaintiff his commission.

*Qui Sentit Commodum sentire debet et onus.*

He who derives the advantage ought to bear the burden.

It is respectfully submitted that the judgment of the Court below in favor of the plaintiff be affirmed.

ISADOR HABER,  
Attorney and of Counsel  
with Plaintiff-Appellee.

[14391]

New Jersey Court of Errors and Appeals

HILL HABER,

*Plaintiff-Appellee,*

*vs.*

HARRIS GOLDBERG,

*Defendant-Appellant.*

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On Appeal  
from  
Supreme  
Court.

**BRIEF FOR DEFENDANT - APPELLANT.**

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This is an appeal from a judgment of the Second District Court of Jersey City.

The action was brought by the plaintiff-appellee against the defendant-appellant, to recover the sum of \$300 as commission for bringing about the exchange of certain real estate between the defendant-appellant and John Ruefer and Barbara Ruefer his wife.

Defendant-Appellant was the owner of lands situate on the west side of the Hudson Boulevard, Township of North Bergen, Hudson County, New Jersey, and John and Barbara Ruefer were or claimed to be the owners of lands on Railroad Avenue, City of Middletown, Orange County, New York.

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On June 21, 1915, defendant-appellant and John and Barbara Ruefer entered into an agreement to exchange their respective properties (a copy of

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the agreement was read into the record on pages 14 to 17); it was therein agreed that title should be closed on or before August 1st, at 10 o'clock A. M. at the office of Isadore Haber.

10 The lands in Middletown owned by the Ruefers, and which they had by said agreement agreed to convey to the defendant-appellant, were conveyed to them by Charles Hagen and wife, and on April 15, 1915, prior to the making of the exchange agreement, a suit had been commenced in the Supreme Court of New York, Orange County, by one Alton J. Vail, as Receiver of Charles Hagen, judgment debtor, against John and Barbara Ruefer and others to set aside and annul the said conveyance by Charles Hagen and wife to them of said lands as being in fraud of the creditors of said Charles Hagen, and there was filed in the office of the Clerk of Orange County a notice of the pendency of suit. After a trial of said action a decree was entered therein adjudging fraudulent the said conveyance to said Ruefer and directing that the same be cancelled. The plaintiff had knowledge, at the time of the making of the agreement for exchange, that the Ruefers could not convey a clear title (case pp. 31-32).

20 On November 16, 1918, fifteen months after the time fixed for the passing of title, the New York suit against Ruefer was settled by the payment of the judgment and the lis pendens cancelled.

30 The so called authority or memorandum (Exhibit P-1) was executed at the same time with the agreement for exchange and there was no such authority before the rendition of the services.

Judgment was rendered for the plaintiff for the full amount claimed with costs. Appeal was taken to the Supreme Court which affirmed the judgment of the District Court with costs.

**POINT I.**

The title of John and Barbara Ruefer to the property to be conveyed by them being defective, and the exchange never having been completed, plaintiff is not entitled to any commissions.

The general rule is that the right of a broker to commissions is complete when he has procured a purchaser able and willing to conclude a bargain on the terms on which he was authorized to sell. 10

*Hinds vs. Henry*, 7 Vr. 328-332.

*Ryer vs. Turkel*, 46 Vr. 677-687.

The plaintiff's claim to commissions is based on his bringing about an exchange of property between John and Barbara Ruefer and the defendant; his right to commissions must be based on this, that John and Barbara Ruefer were the purchasers procured by him and they must have been able and willing to conclude the bargain entered into. 20

The contract for exchange provided for the conveyance of the Middletown property by Ruefer to Goldberg, free from all encumbrances except those set forth in the contract; this Ruefer could not do. There was an additional encumbrance, namely, the suit in the New York Supreme Court, and the *lis pendens* thereof, which rendered a purchaser subject to be divested of title if the plaintiff in that suit did succeed in his suit, as he actually did. 30

It might be a sufficient answer in an ordinary case to say that Goldberg should have searched the title of Ruefer's property before entering into the exchange contract if the broker had no knowledge of the inability of the proposed purchaser to carry out the terms of the agreement, and was acting in good faith, but plaintiff, when he produced Ruefer as his purchaser, knew of these facts 40

and knew that Ruefer could not convey free of this encumbrance (case, pp. 31-32). He knew then that his purchaser was not able to complete the bargain on the terms proposed and Goldberg did not. Why should the plaintiff be permitted to take advantage of his own wrong?

10 In *Courter vs. Lydecker*, 71 N. J. Law p. 511, the Supreme Court, Justice Reed, says: "The condition in all such employments is that the broker shall obtain a sale. The broker's right to recover compensation in such cases is dependent upon his obtaining a sale." It would seem that where the broker knows no sale can be consummated because of his purchaser's inability to complete, he has not obtained a sale and since his right to commissions is *dependent upon his obtaining a sale* it follows he should not be entitled to commissions.

20 The case at bar is almost identical with the case of *Leschziner vs. Bauman*, decided by this Court, reported in 75 Atl. p. 205. There the broker's agreement provided for the payment of "a commission of \$1250 on the day of passing title or July 15th, for the sale of the Rudolph, Stella, Caroline and Crescent apartment house to the Home Coupon Exchange Company." No agreement for sale was executed but instead an agreement for exchange was entered into between defendant and

30 the Home Company which failed of fruition because that company could not furnish a marketable title to the property it had agreed to exchange. In the present case the broker's agreement provides for the payment of the sum of \$300. "as commission for the sale of my property known as 4255 and 4257 Hudson Boulevard, North Bergen, N. J., to be paid on the date set for the delivery of the deed" which was fixed by the exchange agreement as "on or before the

40 first day of August." At the same time and as

part of the transaction the agreement between Goldberg and Ruefer for exchange was executed, which failed of fruition because Ruefer was unable to furnish a marketable title to the property he had agreed to exchange.

The only difference in the agreement in the two cases is: In the Leschziner case the commissions were to be paid "on the passing of title or July 15th" and in the present case "on the day set for the delivery of the deed." 10

In the Leschziner case, the Court says: "It will be observed that the agreement is based upon two assumptions as conditions precedent to its enforcement. The first is that title shall pass, and the second that there shall be a sale of the defendant's apartment houses to the Home Coupon Exchange Company."

In the present case the broker's agreement was executed at the same time as the exchange agreement with Ruefer and assuming (as we must assume if plaintiff can recover at all) that the word "sale" in the agreement means "exchange" and in view of the fact that both instruments are part of the same transaction, then the right of the broker to commissions is likewise based upon two assumptions as conditions precedent; first, that the day set for the delivery of the deeds shall arrive and the second, that there shall be an exchange of the properties between the parties to the exchange agreement. The first condition has been fulfilled but as to the second, no exchange was in fact made without fault on the part of Goldberg, and plaintiff should therefore not be entitled to commissions. 20  
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In the Leschziner case the Court proceeds to discuss the effect of the two conditions precedent and says at page 205:

"When it is recalled that the rule laid down in *Hinds v. Henry*, contains as one of its es- 40

10 sential elements the fact of the ability of the purchaser to conclude the bargain upon the terms of the proposed contract, it becomes at once manifest that the commissions of a broker *cannot be considered as earned* where, by reason of the inability of the proposed purchaser to conclude the sale by taking title to the premises, the entire transaction fails *and no sale in fact takes place*. Such was the posture of affairs in the case at bar; and *if the controversy here be determinable upon that ground*, resulting from the inability of the proposed purchaser to fulfill his contract, it is difficult to perceive upon what legal theory of liability the plaintiffs can sustain their case.

20 "Upon the other hand, the language of the contract makes it manifest that until title shall have been passed as the result of a sale to the proposed purchaser the contingency or condition upon which the legal right to a claim for commissions is based has not arisen, *and upon this aspect of the case Hinds v. Henry* is controlling, and presents the legal rule which justifies the direction at the circuit."

30 The contention of counsel for appellee and the opinion of the Court below in the present case is based on the assumption that the Leschziner case was decided only on the failure of the one condition precedent, viz: that title had not passed. But, the two paragraphs quoted above show that this cannot be so; this Court decided that case on two points of law, one that no sale had taken place because the purchaser was unable to make good title and, two, that the title had not passed. To say otherwise would be to disregard entirely the first paragraph quoted. It cannot be contended the Court in that paragraph intended merely to discuss the question of whether or not the defendant had properly refused to pass title (under the case of *Rauchwanger v. Katzin*, 82 Atl. 510); because that is not the language used and that question was already settled by the opinion, the

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Court at page 205 saying: "The fact is conceded that title did not pass and the record of the case presents no question for us to consider as to the bona fide character of the objections that were urged and resulted in its failure to pass."

The language quoted must mean something and it can only mean what it says.

## POINT II.

### **The plaintiff released the defendant from liability for the claim in suit.**

After the plaintiff had rendered whatever services he had performed and before suit was started, plaintiff had brought about an exchange of other property of the defendant between the latter and another. There is no evidence of any written authority or memorandum signed by him either before or after such exchange had been effected. There was some dispute as to the amount of commissions to be paid to plaintiff on that exchange. The defendant then paid to plaintiff \$375 and took a receipt containing these words:

(Exhibit D-3).

"Received \* \* \$375 in full payment of the commissions for selling my 3 houses on 19th St., West New York and *have no claim whatsoever.*"

No particular form or set of words is essential to a release provided the intention to release is manifest.

34 Cyc. 1045.

It is contended that the words quoted above, manifest an intention to release all claims of the plaintiff against the defendant.

While the release is not under seal, there is sufficient consideration to support it. The pay-

ment of \$375 as commissions when defendant was under no legal liability therefor, and after the dispute over the amount, is sufficient consideration for the release.

The defendant cannot escape the legal effect of Exhibit D-3 by saying he did not read it; this is no excuse and he is bound by what he so signs in the absence of fraud and no fraud has been shown.

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*Van Deventer vs. Van Deventer*, 17 Vr. 460.

*Alexander vs. Ferguson*, 63 Atl. 998.

### POINT III.

**The authority of the plaintiff to exchange not being in writing signed by the defendant, he is not entitled to recover his commissions.**

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Unless the authority of the broker to sell or exchange be in writing, he is not entitled to any commissions. The act governing this case reads as follows:

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"10. No broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized in a writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected, and the rate of commission on the dollar shall have been stated therein."

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*Phamp. L.* 1911 p. 703.

Prior to the amendment of 1911, there could

be no question but that the plaintiff could not recover his commissions.

The services alleged to have been performed by the plaintiff were completed before the execution of any written authority of any kind; the parties had been brought together; the terms agreed upon and they had met for the purpose of executing the exchange agreement and Exhibit P-1, relied upon by the plaintiff as his written authority under the act, was then signed by the defendant. **10**

Since no service were performed after Exhibit P-1 was executed, plaintiff would not have been entitled to commissions

*Shields v. Sterrat*, 71 Atl., p. 1129.

and since no consideration was shown for the execution of Exhibit P-1 plaintiff could not have been entitled to commissions. **20**

*Stout v. Humphrey*, 40 Vr. 436.

The change made by the act was to provide that the authority of the broker to make a *sale* or *exchange* might be recognized in writing before or after the sale or the exchange had been effected.

It would seem logical that the written recognition must recognize the authority of the broker to effect that thing, either a sale or an exchange, which he has in fact effected. If he effects a sale then the writing should recognize his authority to effect *a sale* and if he effects an exchange then the writing should recognize his authority to effect *an exchange*. **30**

The act declares that no broker shall be entitled to commissions unless his authority to sell or exchange be recognized in writing; unless the plaintiff can show that his authority effect *an exchange* has been recognized by the defendant in writing, he cannot recover. The distinction **40**

between a *sale* and an *exchange* is recognized in the Leschziner case (*supra*) where the Court at page 205 says:

"It is also conceded that there was no sale of the property in the ordinary mercantile sense in which that term is used in such agreements, and according to which we are bound to construe the language of the contract."

10 We contend that Exhibit P-1 does not recognize his authority to effect an *exchange*.

It might be noted in passing, that Exhibit P-1 was drawn by the plaintiff's son, his attorney in this action, and in his behalf, the defendant had nothing to do with the drawing of it, so that the language must be construed as against the plaintiff.

20 Furthermore, the act presupposes a preexisting authority not in writing to do the act for which commissions are claimed; in other words the broker must have been authorized orally to act as broker before the sale or exchange is effected; he must not be a mere volunteer.

There is no proof of any previous oral authority; nothing to show that the plaintiff was not a mere volunteer.

#### POINT IV.

30 **It is respectfully submitted that the judgment of the District Court should be reversed and judgment should have been for defendant.**

Respectfully submitted,

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JOHN H. SHERIDAN,

Of Counsel.



