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Notice of Appeal.

(Filed July 3, 1926.)

IN CHANCERY OF NEW JERSEY.

57/585.

Between

AMATO RIZZI, GEORGE S. LEPORE and JOSEPH DESENA,
Complainants,

and

HOVAGIM POHAN and HAIGANOOSH POHAN, his wife,
Defendants.

On Bill, Etc.

Amended Notice of Appeal.

To:

JOHN W. OCKFORD, Solicitor of Complainants.

Dear Sir:

The defendants, Hovagim Pohan and Haiganoosh Pohan, his wife, hereby appeal from the final decree in favor of the complainant Amato Rizzi, advised by Hon. John Griffin, one of the Vice-Chancellors of this court, and every part thereof, made in this court in the above entitled cause on the 29th day of June, 1926, to the Court of Errors & Appeals, in the last resort in all causes.

Dated, July 2nd, 1926.

ROTHSTEIN & HURWITZ,
Solicitors for Defendants.

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

J. EMIL WALSCHEID,
of Counsel with the Defendants.

Petition of Appeal.

(Filed Aug. 14, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between AMATO RIZZI, et als., Complainants-Appellees, and HOVAGIM POHAN, et ux., Defendants-Appellants.	On Appeal from Court of Chancery. Petition.

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

The petition of appeal of Hovagim Pohan and Haiganoosh Pohan, appellants in this case, respectfully shows that:

1. Your petitioners, Hovagim Pohan and Haiganoosh Pohan, respectively find themselves aggrieved by a Final Decree made in the Court of Chancery, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 28th day of June, 1926, in a cause wherein Amato Rizzi, George S. Lepore and Joseph DeSena were complainants, and your petitioners, Hovagim Pohan and Haiganoosh Pohan, were defendants, in this respect, to wit: That the said decree ordered, adjudged and decreed that the complainant, Amato Rizzi, was entitled to and decreed to have a lien upon the premises described in the bill of complaint, in the sum of $500.00, with interest from February 16th, 1925, and that it ordered, adjudged and decreed that unless the defendants, or one of

them, pay, or cause to be paid, to said complaint, or his solicitor, the said sum of $500.00 with interest as aforesaid, within ten days from the date of said decree, that then the said premises should be sold to raise and satisfy the said sum of money due to the said complainant, that is to say, the sum of $500, together with lawful interest thereon to be computed from the 16th day of February, 1925, with costs to be taxed, and that a writ of fieri facias should issue for that purpose out of the said Court of Chancery, directed to the Sheriff of the County of Hudson, commanding him to make sale, according to law, of the said premises, and that out of the moneys arising from such sale, he pay to the said complainant, or to his solicitor, the said sum aforesaid, and that in case more money should be raised by the said sale than should be sufficient to make such payments, that the surplus be brought into the Court of Chancery to abide the further order of the Court of Chancery, and that the said Sheriff should make return, without delay, to the said Court of Chancery, of this proceeding by virtue of the said writ.

2. Your petitioners therefore humbly appeal from all of said decree of the said Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for the following reasons:

(a) There was no evidence adduced at the hearing of said cause in the Court of Chancery to justify the making of said decree.

(b) The evidence adduced upon the hearing of said cause in the Court of Chancery was not sufficient to establish an equitable estoppel against the defendant, Haiganoosh Pohan.

(c) The conduct of the defendant, Haiganoosh

Pohan, claimed to constitute an equitable estoppel, was not relied upon and did not constitute any inducement for any action taken by the complainant Rizzi.

(d) The separate estate of the defendant, Haiganoosh Pohan,—she being the wife of the defendant Hovagim Pohan,—should not be made to respond for the judgment recovered by complainant Rizzi against Hovagim Pohan, the husband, even though the facts alleged and proved as constituting an equitable estoppel against her, are true.

(e) Whatever rights complainant Rizzi had against the defendant, Haiganoosh Pohan, under the paper writing upon which his cause of action was founded, were merged into the judgment obtained by him against the husband Hovagim Pohan and were thereby waived as against the defendant, Haiganoosh Pohan.

(f) The rights of complainant Rizzi against the defendant, Haiganoosh Pohan, should not be judged by the principles of equitable estoppel.

(g) The complainant Rizzi, as against the defendant, Haiganoosh Pohan, was not entitled to a return of the moneys for which he obtained judgment against the defendant, Hovagim Pohan, without first obtaining judgment at law for the amount involved against the defendant, Haiganoosh Pohan.

(h) The lien granted to the complainant Rizzi against the lands of the defendant, Haiganoosh Pohan, for the amount of his judgment, cannot be sustained on the ground that the conveyance to Haiganoosh Pohan of the property, against which the lien was allowed, was in fraud of the complainant Rizzi or in fraud of any other creditors of the defendant, Hovagim Pohan.

Your petitioners therefore pray that the said decree of the said Chancellor may be in all things reversed, set aside and for nothing holden and that your petitioners may have such other relief in the premises as to this honorable court shall seem meet.

J. EMIL WALSCHEID,
Solicitor for and of Counsel
with Petitioners.

Answer to Petition of Appeal.

(Filed Aug. 20, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AMATO RIZZI, et als.,
Complainants-Appellees,

and

HOVAGIM POHAN, et ux,
Defendants-Appellants.

On Appeal from the Court of Chancery.

The answer of complainants-appellees, Amato Rizzi, George S. Lepore and Joseph DeSena, to the Petition of Appeal of the defendants-appellants.

These complainants-appellees admit that a final decree was made in the Court of Chancery as alleged in Paragraph 1 of the Petition of Appeal, but said decree included other provisions than set forth in said Petition of Appeal, and these appellees beg leave to refer to such decree when the same shall be produced, for the purpose of ascer-

taining and determining the substance and form thereof.

These appellees do not admit the truth of any or all of the matters in said Petition of Appeal contained, except as hereinabove expressly admitted.

These appellees are advised and believe that the said decree insofar as the same is appealed from by defendants-appellants, and as set forth in their Petition of Appeal, is agreeable to equity, and they pray that the same may be affirmed with costs in favor of these appellees.

JOHN W. OCKFORD,
Solicitor for and of Counsel
with Appellees, Amato Rizzi,
George S. Lepore and Joseph DeSena.

Bill of Complaint.

(Filed March 6, 1925.)

IN CHANCERY OF NEW JERSEY.

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

The Bill of Complaint of Amato Rizzi, of the Township of Weehawken, and of George S. Lepore and Joseph De Sena, of the Town of West Hoboken, County of Hudson and State of New Jersey, respectfully shows unto your Honor:

1. On or about October 11, 1923, the complainants, Lepore and De Sena, were employed by one, Hovagim Pohan, to act for him as real estate

brokers to procure a buyer for certain premises known as 13 Oak Street, Weehawken, N. J., upon certain terms and conditions, and the said Pohan then and there represented to the said Lepore and De Sena that he, the said Pohan, was the owner of said premises.

2. Thereafter the complainants, Lepore and De Sena, did procure a buyer for such property, who was the complainant, Amato Rizzi. That such employment was accompanied by a written agreement for commissions in which the said Pohan represented that he was the owner of said premises. That such representations and such agreement were made by the said Pohan in the presence of his wife, whose name is Haiganoosh Pohan, and were in nowise disputed by the said Haiganoosh Pohan.

3. Thereafter an action was commenced in the New Jersey Supreme Court, Hudson Circuit, by the complainants against the said Hovagim Pohan, wherein and whereby the complainant, Rizzi, sought to recover the return of a deposit made by him on account of the proposed purchase by him of such property, and by the complainants, Lepore and De Sena, to recover the sum of $958.00 for commissions earned by them in connection with such sale.

4. Thereafter the said action came on for trial and resulted in a verdict and judgment in favor of the complainants and against the said Hovagim Pohan, which judgment was and is for the sum of $1524.50 with costs amounting to $63.51, together with interest thereon from February 16, 1925. That the aforesaid judgment was duly re-

corded in the office of the Clerk of the New Jersey Supreme Court.

5. At the trial of the aforesaid action, the said Hovagim Pohan testified under oath, and in the presence of the said Haiganoosh Pohan, that he was the owner of the aforesaid premises.

6. Complainants aver the fact to be that the said Hovagim is the owner of such premises, but that the legal title thereto is in the name of the said Haiganoosh Pohan; and the complainants further allege that the said Hovagim Pohan and the said Haiganoosh Pohan are estopped from asserting otherwise as against these complainants by reason of the facts and circumstances above set forth.

7. The following is a more particular description of the said premises:

ALL that certain lot or tract of land, situate, lying and being in the Township of Weehawken, County of Hudson and State of New Jersey, more particularly described as follows:

BEGINNING at a point in the Southerly line of Oak Street distant eighty-six (86) feet Easterly from the corner formed by the intersection of the said Southerly line of Oak Street and the Easterly line of Gregory Avenue as said street and avenue are laid down on a certain map entitled "Amended Map of property of the Riverview Land Company situated at Weehawken, Hudson County, N. J., made by Sebastian Maulbeck C. E. Town Surveyor August 1909" and filed in the office of the Register of said County of Hudson on Sept. 8th, 1909, which said beginning point is opposite

the center line of a party wall standing partly on the premises herein-described and partly on the premises next adjoining thereto on the West, thence running Southerly to, thru and beyond the center of said party wall ninety-four and sixty-five one-hundredths (94.65) feet to a point; thence running Easterly thirty-eight (38) feet to a point opposite the center of another party wall standing partly on the premises herein-described and partly on the premises next adjoining thereto on the East; thence running Northerly to, thru and beyond the center line of said party wall ninety-four and thirty-six one hundredths (94.36) feet to a point in the said southerly side or line of Oak Street; thence running Westerly along the said southerly side or line of Oak Street thirty-eight (38) feet to the point or place of beginning.

BEING part of lot number Nine (9) and part of lot number Seven (7) as laid down on said map.

8. That such premises consist of the land above-described together with an apartment house erected thereon, and that the equity therein over and above encumbrances is sufficient to satisfy the aforesaid judgment.

9. That the said Hovagim Pohan has no real or personal property sufficient to satisfy such judgment, and which is subject to the ordinary process of execution.

Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That Hovagim Pohan and Haiganoosh Pohan, who are the defendants to this suit, may

answer this Bill of Complaint, and each statement therein.

2. That a decree be made impressing the lien of the aforesaid judgment upon the premises described in the Bill of Complaint, and that such premises be sold to satisfy such lien.

3. That the said defendants be decreed to pay to the complainants the amount due upon such judgment within a time to be fixed by the court; or

4. That the premises be sold to satisfy such decree as aforesaid.

5. That a writ of subpoena may issue, commanding said defendants to answer this Bill of Complaint and to abide by such decree as this court may make in the premises.

JOHN W. OCKFORD,
Solicitor for and of Counsel with Complainants.

Answer.

(Filed April 14, 1925.)

IN CHANCERY OF NEW JERSEY.

AMATO RIZZI, GEORGE S. LEPORE and JOSEPH DE SENA, Complainants, and HOVAGIM POHAN and HAIGANOOSH POHAN, Defendants.	On Bill, etc.

Defendants, residing in the Town of West Hoboken, in the County of Hudson and State of New Jersey, answering the complainants' Bill of Complaint, say that:

1. They deny the allegations contained in Paragraph 1 of the complainants' Bill of Complaint.

2. They deny the allegations contained in Paragraph 2 of the complainants' Bill of Complaint.

3. They neither deny nor admit the allegations contained in Paragraph 3 of the complainants' Bill of Complaint and therefore leave the complainants to their proof.

4. They have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the complainants' Bill of Complaint except that they admit that said action therein mentioned came on for trial and resulted in the judgment in favor of

the complainants and against the defendant, Hovagim Pohan.

5. They deny the allegations contained in Paragraph 5 of the complainants' Bill of Complaint; but if the defendant, Hovagim Pohan, did at all say, while he was on the witness stand at the trial of the action mentioned in the Bill of Complaint, that he was the owner of the premises therein mentioned, he, the said defendant answered without properly understanding the question and further because of the fact that he may have gotten into the habit of calling the property his property since it belonged to his wife, the defendant, Haiganoosh Pohan, and since he has been collecting the rents to the same and generally taking care of it.

6. They deny the allegations contained in Paragraph 6 of the complainants' Bill of Complaint and further say that the property described in the said Bill of Complaint, has always belonged to and still belongs to the defendant, Haiganoosh Pohan, that she is the only one who has owned and still owns said property and that whatever right, title, interest or equity there is in the said premises is in her, the said Haiganoosh Pohan, only and that the defendant, Hovagim Pohan, has no interest whatsoever in the said premises; that all the profits thereof have been received and retained by the said Haiganoosh Pohan, herself, for her own and personal use and estate.

7. They admit the allegations contained in Paragraph 7 of the complainants' Bill of Complaint.

8. They have no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 8 of the complainants' Bill of

Complaint, except that they admit "that such premises consist of the land above described together with an apartment house erected thereon."

9. They neither deny nor admit the allegations contained in Paragraph 9 of complainants' Bill of Complaint and therefore leave complainants to their proof.

Therefore, defendants pray to be dismissed with their lawful costs in this behalf most wrongfully sustained.

ROTHSTEIN & HURWITZ,
Solicitors of Defendants.

Order of Reference.

(Filed August 10, 1925.)

IN CHANCERY OF NEW JERSEY.

Between AMATO RIZZI, et als., Complainants, and HOVAGIM POHAN, et ux., Defendants.	On Bill, etc. Order of Reference on Consent. 57/585.

This cause being opened to the Court in the presence of John W. Ockford, of counsel with complainants, and Messrs. Rothstein & Hurwitz, of counsel with defendants, and all of the parties consenting,

It is, on this 10th day of August, 1925,

ORDERED that the above stated cause be and the same hereby is referred to the Honorable John Griffin, one of the Vice Chancellors of this Court, to hear the same for the Chancellor and report thereon to him and advise what order or decree should be made herein.

E. R. WALKER,
C.

We hereby consent to the foregoing Order of Reference.

JOHN W. OCKFORD,
Solicitor of Complainants.

ROTHSTEIN & HURWITZ,
Solicitors of Defendants.

Minutes of Final Hearing.

IN CHANCERY OF NEW JERSEY.

Between AMATO RIZZI, et als., Complainants, and HOVAGIM POHAN, et ux., Defendants.	On Bill, etc. Minutes of Final Hearing.

APPEARANCES:

JOHN W. OCKFORD, Esq., for Complainants.
J. EMIL WALSCHEID, Esq., for Defendants.

Before—Hon. JOHN GRIFFIN, Vice Chancellor.

Chancery Chambers, Jersey City, N. J.,
March 1st, 1926.

THE CASE FOR THE COMPLAINANT.

The Vice Chancellor: As I understand this case, Rizzi and the other complainants made a contract with the husband of the defendant to purchase certain lands. The lands were owned by the wife; and you say that she stood by and saw her husband make representations that he was the owner, and therefore she is estopped from what—setting up that she was not the owner?

Mr. Ockford: Well, no; that is not exactly the situation.

The Vice Chancellor: I am dealing with the pleadings; you say nothing about the non-performance of the contract, you simply say she stood by and saw her husband represent that he was the owner, and he was not the owner, and that you sued in the Circuit Court—the plaintiffs being Rizzi, the vendee, who sought to recover back the moneys he paid as a deposit, and the other two complainants, as agents, sought to recover the commissions they earned—is not that it?

Mr. Ockford: That is correct.

The Vice Chancellor: There is nothing more here in your bill; and I presume that you claim that she, by standing by and not denying that her husband was the owner, is estopped now from defending this suit for a judgment for commissions and the deposit.

Mr. Ockford: Well, I think we go further; we go further and say that, in effect, it is the husband's property.

The Vice Chancellor: You are not seeking to establish an estoppel against the wife?

Mr. Walscheid: Yes, sir; that is all he is doing, I think; that is all I see in the bill.

Mr. Ockford: No, we are seeking to have the judgment impressed as a lien upon the property.

The Vice Chancellor: You say in your bill that the property is that of the husband.

Mr. Ockford: Yes, we say it is in the wife's name, but she holds it in trust for him.

The Vice Chancellor: Well, it presents a rather novel question.

Mr. Walscheid: We might just as well meet that proposition now. We say there is no such equity presented by this bill. I do not pretend to be surprised by anything that comes into this case, but we should be held to the bill; and I see nothing in this bill but a case of estoppel, because the woman stood by and was silent. The mere allegation that the husband owned the property, although it is in the wife's name, means nothing.

Mr. Ockford: Paragraph 6 of the bill is as follows: (Reading same.) That is a plain allegation that it is his property. It is a creditor's bill, to impress a lien upon this property, on the ground that he is the owner.

Mr. Walscheid: If it is a creditor's bill, it has not been properly pleaded; because, under that bill, whatever rights these parties acquired they acquired after the title was in the woman; and, under the cases, they must bring themselves within the case of Washington Bank v. Beatty; and under the rules, and the doctrine as laid down in Smith's Executors v. Wood, in 42 N. J. Eq., 563, I say this is not a creditor's bill—this is a bill purely on the theory of estoppel.

The Vice Chancellor: Well, I suppose that that clause (referring to Paragraph 6 of the bill) could be construed to mean that the wife owns this property in trust for her husband.

Mr. Walscheid: But that is not sufficient under the rules of pleading.

The Vice Chancellor: Oh, the pleading is not good, and a motion was made to strike it out, I understand, and that was denied.

Mr. Walscheid: Yes, that motion was made before I was in the case; and it was evidently denied on the theory that there was a bill sufficient on the theory of estoppel.

The Vice Chancellor: Well, I think I will try the case and see where it tends to.

GEORGE S. LEPORE, sworn.

Direct Examination by Mr. Ockford:

Q. Where do you live? A. No. 727A Dodd Street (now Twenty-fifth Street).

Q. What is your business? A. Real Estate Broker.

Q. A licensed broker in this State? A. Yes, sir.

Q. You are one of the parties to this action? A. Yes, sir.

Q. Now, in October, 1923, did you have occasion to talk with the defendant, Dr. Pohan, and the other defendant, his wife?

Mr. Walscheid: I object to the form of the question, as not within the pleadings.

The Vice Chancellor: Well, I think I will overrule the objection.

A. Yes.

Q. I show you a paper and ask you if you ever saw it before? A. Yes, sir.

Q. Where did you see it? A. At the home of Dr. Pohan.

Q. Did you see it written? A. I wrote it myself.

Q. Did you see anyone sign it? A. Dr. Pohan signed it, and I believe his wife signed it, too; I am not sure.

The Vice Chancellor: Well, what does the paper say?

Mr. Ockford: I offer it in evidence.

Mr. Walscheid: No objection to the paper.

(Admitted and marked Exhibit C, 1.)

Q. I show you another paper, Mr. Lepore—when did you first see that paper if you ever saw it before? A. On October 11th, at Dr. Pohan's house.

Q. Did you see anyone sign it? A. Yes, Dr. Pohan and his wife.

Q. Both signed it? A. Yes, sir.

Q. Whose handwriting is this? A. My handwriting. I wrote it out, and he signed it, and his wife signed it.

(The paper is offered in evidence by Mr. Ockford.)

Mr. Walscheid: I have no objection to the paper. I think I have a copy of it here (producing a paper). I have a typewritten copy of that, if your Honor wishes it.

(The paper is marked Exhibit C, 2.)

Mr. Ockford: There is one difference in it.

The Vice Chancellor: This is signed by them.

Mr. Walscheid: Well, we will make the copy agree with the original.

Mr. Ockford: This word here (indicating) is "Dr." as I read it. In the last line the word "Mr." should be "Dr." to make it

correspond; it says, "by both parties." The names are written in there, "Mr. Rizzi" and "Dr. Pohan".

The Vice Chancellor: Yes.

Mr. Ockford: We can go right on and correct that, and submit it to your Honor.

The Vice Chancellor: Yes. Well, never mind; it is not material.

(The copy was made to conform to the original.)

Q. I show you what purports to be a cancelled check, and ask you if that check was used in the transaction evidenced by Exhibit C, 2? A. Yes, this was the deposit check given to Dr. Pohan.

Q. To whom was that check? A. To Mr. Pohan.

Q. By whom? A. By myself.

Q. And is your name on it? A. Yes, on the back.

(The check offered in evidence, admitted without objection, and marked Exhibit C, 3.)

Q. Now, at the time the paper Exhibit C, 2, was signed, did you hear Dr. Pohan—

Mr. Walscheid: I object to the form of the question. I think the case is too important to have "Did you hear?"

The Vice Chancellor: Yes, do not lead the witness.

Q. At the time the paper, Exhibit C, 2 was written and signed, was anything said by Dr. Pohan and by Mrs. Pohan regarding the transaction—just answer yes, or no? A. Regarding the transaction of the sale?

Q. Yes? A. Well, the Doctor—

The Vice Chancellor: Oh, no,—"yes", or "no", the question was.

A. Yes.

Q. Now, please tell the court just what was said by Dr. Pohan and by Mrs. Pohan?

Mr. Walscheid: I object to the form of the question. There should be no suggestion. Let him tell the story without indicating who said things.

Q. Well, just tell us what happened at the time this paper, Exhibit C, 2, and the paper Exhibit C, 1 were signed? A. When I wrote the contract up, I asked the Doctor to sign it, and then, after he signed it, he said he was the owner, and I had to attend to the business through him; and I asked, "Now have your wife sign it"; he said, "Well, you don't need my wife's signature", he said, "everything in it is perfectly all right; I am the owner of the property." I said, "No, it is best to have your wife sign it because under the law, the wife has to sign a contract of sale"; so that is how his wife signed it.

Q. Now, who was present at the time that conversation took place? A. Mr. Rizzi was there, and my partner, Mr. De Sena.

Q. Who else? A. Doctor Pohan and his wife.

Q. Were the papers Exhibit C, 1, and Exhibit C, 2 signed at the same time, or on separate occasions, or how? A. Directly after I had the contract signed, I made up the commission cost, and they signed it there.

The Vice Chancellor: That commission agreement is signed by Dr. Pohan alone.

Mr. Ockford: Yes, your Honor.

Q. Just tell us what happened in connection with passing the check, as to what was said and done, and by whom? A. The agreement was made up, and the Doctor took the check as a deposit, and afterwards he wanted to charge the agreements, and Mr. Rizzi objected to changing the agreements.

Q. Never mind that. At the time the check was given just tell us how it happened and what was said and done, if anything, at the time the check was handed over—who did it, and how it was made out, and what was paid? A. The check was made out in DeSena & Lepore's name, and then my partner and I endorsed it, and I turned it over to Dr. Pohan as the deposit for the property. That is all that was said.

Q. Who was present at the time that happened? A. My partner and Dr. Pohan and his wife and Mr. Rizzi.

Q. In connection with this transaction, Mr. Rizzi, tell us how you came to be interested in the transaction at all?

Mr. Walscheid: Oh, I object to that.

Mr. Ockford: Well, you don't want me to lead him.

Q. How did you become the broker in this case—what were the circumstances?

Mr. Walscheid: When?

Q. When and how? A. Two days before we made the contract, Dr. Pohan walked in my office, and he gave me the price on that property, and said, "I want you to sell my property; see what you can do with it." Well, I showed Mr. Rizzi the property, and he liked it, and showed his wife the

property, and she liked it; and we went up and got the terms and closed the deal.

Q. When did you first meet the Doctor's wife? A. The night of the signing of that contract.

Cross Examination by Mr. Walscheid:

Q. Is it not a fact, Mr. Lepore, that you had this property for sale from Dr. Pohan in the month of September, 1923? A. I recall that it was just a few days before we closed the deal that he brought the property into my office.

Q. Well, how long before, have you any definite recollection, or are you just guessing? A. Well, I wouldn't say definitely, but I recall that it was just a few days before; it couldn't possibly be more than two days before that he came to my office and gave me the property.

Q. Well, you have testified twice in court about this matter, haven't you? A. I believe I have.

Q. And didn't you, on the first occasion, say that it was in the month of September that you had this property? A. That I don't remember, because it is so long ago.

Q. Well, you say that you did not? A. Well, I won't say; I don't know.

Q. You wouldn't would you? A. No.

Q. So that you really don't know, at this time, how long before these papers were signed, you had this property for sale—that is so, is it not? A. Well, I don't remember the exact day.

Q. That is what I understand. A. But I know it was just a short while before I sold the property for him that he came in and gave me the property for sale.

Q. Then, no matter when it was that you received the property, you started on your negotia-

tions for the sale of this property without having any paper writing for commissions? A. No, we didn't have no agreement about commissions until I signed the contract with him.

Q. Until after you signed the contract? A. Yes.

Q. You are sure of that, aren't you? A. Absolutely.

Q. And you got this purchaser, Rizzi, of course, prior to the 11th day of October, that day being the day on which the check was issued? A. Yes, sir.

Q. And how long prior to that did you have it? A. About two days before.

Q. About two days before? A. Yes, sir.

Q. And then, on the day in question, October 11th, you had this paper signed—you had first this paper signed, hadn't you (showing the witness Exhibit C, 2)? A. Yes, sir.

Q. Now, look at it? A. (After examining this paper) Yes.

Q. Now you say that Rizzi was present when that was signed? A. That I won't say positive, no.

Q. You do remember having testified that you went to see Dr. Pohan on the afternoon of October 11th, at about five o'clock for the purpose of having the paper signed? A. Yes, sir.

Q. You so testified in the other cases, did you not? A. Yes, sir.

Q. And you also testified in those other cases that the parties who were present were yourself and your partner, Mr. DeSena. A. In the afternoon?

Q. In the afternoon? A. Probably I did testify that way, yes.

Q. And it was so, was it not? A. Yes.

Q. And didn't you also then testify that you said to Mr. or Dr. Pohan that you would produce

the purchaser later? A. Well, I told him I would bring the purchaser back that evening.

Q. That evening, yes. And didn't you testify that you gave him this check at five o'clock in the afternoon? A. I wouldn't say positive that I did testify that way.

Q. Well, didn't you do that? A. I don't believe I gave it to him at five o'clock in the afternoon; it was later in the afternoon.

Q. Was the paper signed at five o'clock in the afternoon? A. No.

Q. Didn't you so testify? A. I don't recall doing that—of testifying that way.

Q. What? A. I do not recall of testifying that way; it has been so long ago that I testified, I don't know just what I testified at that time.

Q. I see; your recollection then was much fresher than it is now, wasn't it? A. Well, absolutely; it was only a short while after; I knew just what happened.

Q. Now, just to refresh your recollection, didn't you testify that you and De Sena went to Dr. Pohan's at five o'clock in the afternoon of October 11th; that you had the check? A. Yes.

Q. That you drew up this Exhibit C, 2—this paper that you have just identified? A. Yes, sir.

Q. That after it was drawn up, and after it was signed, you gave Dr. Pohan the check while Mr. Rizzi was not there? A. Yes, sir.

Q. That is so, is it not? A. I cannot remember that far back; but I recall going there and drawing up the agreement.

Q. Now, is it not the fact that when you drew up the agreement, and when Dr. Pohan signed the agreement, C, 2, Mr. Rizzi was not there, and, according to your best recollection, that was at five o'clock in the afternoon of October 11th, 1923? A. Yes.

Q. And then you gave the check to Dr. Pohan? A. Absolutely.

Q. And then, at five o'clock in the afternoon, you told Mr. Pohan that you would bring Rizzi around? A. No.

Q. Didn't you so testify? A. No, I didn't tell him I would bring him around; we were there before we made all the arrangements—

Q. Wait a minute—you were there before to look at the property, but this is the time when the paper was signed—now, is it not a fact that at that time you told Mr. Pohan that you would thereafter bring Rizzi around to see him? A. No.

Q. And is it not a fact that you thereafter did bring Rizzi around? A. Rizzi was there before—

The Vice Chancellor: No, answer the question.

Q. (Question repeated.) A. Oh, several times, he went there.

Q. No, no, not several times before—after the paper C, 2 was signed, you only brought him down once, didn't you? A. Yes, I brought him around to see the Doctor a couple of days after.

Q. To see the Doctor? A. No, we met up at the lawyer's office; that is when Mr. Rizzi was there.

Q. No, at Dr. Pohan's house? A. I won't say positively, if I did go up the next day or a couple of days later.

Q. Didn't you testify that you brought him there at eight o'clock that evening? Let me ask it another way—let me have this paper, C, 2, a moment.

(The paper was handed to cross examining counsel.)

Q. Look at C, 2 (exhibiting the same to the

witness); Rizzi never signed that paper, did he? A. No.

Q. And at the time that the paper was signed by Mr. Pohan, or by Dr. Pohan, you drew up what was supposed to be a duplicate of that paper, didn't you? A. It was a duplicate, yes.

Q. And this is the paper you then drew up (showing the witness another paper); that is your writing, is it not? A. Yes.

Q. And that paper which I am now showing you is the paper which you drew up as the duplicate of Exhibit C, 2? A. Yes.

Mr. Walscheid (to Mr. Ockford): Is there any objection to my offering it in evidence now?

Mr. Ockford: Not at all.

(The paper is offered in evidence, admitted, and marked Exhibit D-1.)

Q. And, now, referring to Exhibit D-1, which is supposed to be the duplicate—Mr. Rizzi did not sign that, did he? A. No.

Q. And Mr. Pohan and Mrs. Pohan did not sign it? A. No.

Q. And that D-1 is the paper that you left with Dr. Pohan? A. Yes.

Q. Now, is it not the fact that when you got Dr. Pohan's signature at five o'clock in the afternoon of October 11th, 1923, you then took Exhibit C-2 away with you? A. Yes.

Q. You took that away with you? A. Yes.

Q. The one with the signatures on it? A. Yes.

Q. At five o'clock in the afternoon? A. I wouldn't say just what time it was.

Q. Well, about five o'clock? A. Yes, it was in the afternoon.

Q. And when you took it away, is it not the fact that you then told Dr. Pohan that you were taking that paper away to have Mr. Rizzi sign it? A. No.

Q. Didn't you so testify in the previous case? A. I do not recall that—what I testified to.

Q. Will you say that you did not? A. I may have testified that way.

Q. Will you say that you did not? A. I won't say that, no.

Q. And didn't you also testify that you then brought Mr. Rizzi back to Dr. Pohan's at eight o'clock in the evening? A. Mr. Rizzi was there before, with me.

Q. Answer my question—that is all I want you to do. Didn't you so testify? (Last question repeated.) A. I cannot answer that because I don't know just what I testified at that time; and my mind was more fresh on the proceedings that happened at the house a short while after; I don't know, I cannot remember all of them things.

Q. I notice, examining Exhibit C-1, that "one-half of the commission is to be paid on signing of the contract"—look at that? A. (The witness examined the paper.)

Q. You wrote that, didn't you? A. Yes, sir.

Q. And you wrote that after Exhibit C-2 had been written and signed? A. Yes, right after—the same night.

Q. Yes, the same night; and you then intended that that one-half of that commisson was to be paid when formal contracts for the sale of this property were to be signed, didn't you?

Mr. Ockford: I object to that as immaterial whether he did or not; the contract speaks for itself.

The Vice Chancellor: Well, of course, this case is not presented very clearly by the pleadings, but as I see it now, there is a compound suit here.

Mr. Walscheid: There are two suits here; yes, sir.

The Vice Chancellor: Well, they are included in one—one where the vendee seeks a return of his deposit; and the other, where the agent seeks the payment of his commission; they are both blended, and I don't know how much is due to the vendee for his deposit, and how much of the judgment went for commission.

Mr. Ockford: Well, there is a judgment which is res adjudicata, fixing the amounts.

The Vice Chancellor: I know, but suppose you may be able to recover for the deposit, but could not recover for the commissions, how would your bill stand?

Mr. Ockford: Well, I presume the Court could make a decree impressing the lien of the judgment to a certain extent upon the property, and not the full amount.

The Vice Chancellor: All right, go ahead.

Mr. Walscheid: There is another theory I wish to suggest, your Honor. He has in here a claim of estoppel. In order that the estoppel may become effective against this woman he must have been damaged by the estoppel. Now, that is necessarily a part of his case. If she merely sat by and made no remarks, he was not injured by that; that does not amount to an estoppel. Now, this goes to the proposition as to whether or not he was really injured by this alleged estoppel. Here is a contract for commissions,

signed after that paper writing C-2 had been written, and in it he inserts this clause; and the facts—well, I will clear it up in a moment; I will withdraw my question.

Q. After these two papers were signed you, together with Rizzi and your partner, went to a lawyer by the name of Saldarini, didn't you? A. Yes.

Q. And this lawyer, Otto Saldarini, drew formal contracts for the conveyance of this property to Rizzi, didn't he? A. Yes, he drew contracts—I don't know what kind of contracts they were.

Q. Well, a contract? A. Yes.

Mr. Walscheid (to Mr. Ockford): I ask you to produce the contract.

Q. And how long after this paper writing, Exhibit C-1, was it that you first went to Saldarini with Rizzi? A. The next day.

Q. Then, when you wrote, in this paper writing, Exhibit C-1, "one-half of the commission to be paid on signing of contract," you meant that one-half of this commission was to be paid on the signing of the contract, which was to be made by Mr. Saldarini, didn't you—yes or no?

Mr. Ockford: I object to the question. It is irrelevant, as to what he meant or what he intended; the contracts speak for themselves. He has recovered a judgment for his commission.

Mr. Walscheid: Not against Mrs. Pohan.

Mr. Ockford: True; but it is against the man who signed the agreement. There is no claim for commissions against Mrs. Pohan in the other case, or in this case, either.

The Vice Chancellor: Then your whole case must rest upon the theory that Mrs. Pohan stood by and saw her husband contract to sell this property as his own and signed a contract with you by means whereof you lost your commissions and the vendee lost his $500—that is your whole case.

Mr. Ockford: We go beyond that; we say that it was his property.

The Vice Chancellor: Well, all right.

Mr. Ockford: The only point of the present objection is that it doesn't make any difference what he intended or meant by the language he used; the language speaks for itself.

The Vice Chancellor: I think I will allow the evidence.

A. There was—

Q. Yes or no? (Question repeated.)

Mr. Ockford: You asked him what he meant—I think that will call for an explanation.

A. It meant that he was going to get an additional deposit and he was going to pay me one-half of the commission.

Q. When the formal contract was drawn by Mr. Saldarini, is not that so? A. What contract?

Q. The regular contract—what you brokers call "a regular contract"? A. He was going to send and get an additional deposit, and was going to pay me one-half of the commission.

Q. In other words, at the time when the contract which Saldarini was to draw was signed, Dr. Pohan was to receive an additional commission? A. Additional money.

Q. Additional money, I mean—how much? A. I believe it was $500 more.

Q. A thousand dollars, wasn't it? A. Or a thousand dollars, I don't know; and he was going to pay me one-half of my commission.

Q. And at that time he was to pay you one-half of the commission? A. That is right.

Q. I do not want to lead you astray on it, but that is as it was, is it not? A. He was supposed to pay me one-half the commission when he got the additional money.

Q. And when he signed the contract— A. I didn't say "sign," I say when he was going to get more money he was going to pay me one-half of my commission.

Q. And you expressed that in Exhibit C-1 by putting in "one-half of the commission to be paid on signing of contract," didn't you? A. Yes.

By the Vice Chancellor:

Q. As I understand you, the "contract" you refer to there is the contract drawn by Mr. Saldarini? A. Yes, sir.

Mr. Walscheid: Now, may I have those contracts, please.

(Mr. Ockford produces the same.)

Q. I show you a paper writing, and ask you whether that is not the contract which Mr. Saldarini drew as the result of your going there with Mr. Rizzi after Mr. Rizzi had paid the deposit of $500 through you to Dr. Pohan? A. Yes.

Mr. Walscheid: I, at this time, ask that it be marked for identification.

(The paper was marked J. E. W. 1 for identification.)

Q. Now, how many times were you to see Mr. Saldarini after October 11th, relative to this matter? A. Oh, I was there several times.

Q. With Mr. Rizzi? A. Yes, sir.

Q. And you went there the first time on the day following October 11th, 1923? A. Yes.

Q. Do you remember what day of the week that was? A. No, I do not.

Q. Saturday, wasn't it? A. I do not recall.

Q. And on that occasion, Mr. Saldarini drew the contract which you have identified? A. Yes.

Q. And Mr. Pohan was there at that time? A. Yes, sir; Dr. Pohan was there.

Q. And Mrs. Pohan was not there? A. No.

Q. And on that occasion, Mr. Pohan said that he wanted to take that contract and submit it to his lawyer? A. That is right.

Q. To see whether there were any changes to be made in it—is that so? A. I know he took the contract away.

Q. You were there? A. Yes; I don't know what for—he says he was going to take it to show to his lawyer, at that time.

Q. Haven't you testified so before? A. Yes.

Q. And you never knew who the lawyer was? A. Simsarian.

Q. And he said he wanted to show it to his lawyer, Simsarian, to see whether any changes would have to be made in it? A. Yes.

Q. And he took it away with him, didn't he? A. Yes.

Q. And how many days after that was that—one or two days? A. Oh, about two days later.

Q. And then Dr. Pohan came back with the contract and had some changes indicated in the contract? A. Yes.

Q. Do you know what those changes were—do you remember? A. No, I don't remember.

Q. Well, you know one of them was in relation to a tunnel? A. Yes.

Q. In other words, this property ran over the Pennsylvania Tunnel? A. Yes.

Q. And he wanted a clause put in it concerning the Pennsylvania Tunnel, didn't he? A. Yes, he wanted to make a change there.

Q. And then there were some other changes suggested, weren't there? A. By the Doctor; yes, sir.

Q. And then the parties did not agree—that is Rizzi and Dr. Pohan did not agree—is not that so?

Mr. Ockford: I object to that. That is immaterial as to whether or not they agreed to the change in the form of the contract, because the parties signed the contract, which is in evidence; and if Dr. Pohan sought to require the proposed buyer to sign a new kind of contract, under new terms and conditions, of course the buyer did not have to do it; and, as a matter of fact, he did not do it, and they do not claim that he did.

The Vice Chancellor: I think I will overrule the objection; the wife was not a party to the suit, and I do not know how far he is going with the question.

A. According to the terms of the original contract, he did not agree—

Q. Answer the question, yes, or no—they did not agree, did they?

The Vice Chancellor: Well of course—

Mr. Walscheid (interrupting): I will follow it up; I just want the fact on the record first.

Mr. Ockford: Well, that calls for the state of mind of the parties. He can say what they did, or said.

By the Vice Chancellor:

Q. Your party did not agree to accept the changes made by Dr. Pohan in the contract? A. No.

By Mr. Walscheid:

Q. You mean by that he did not agree? A. Did not agree.

Q. And he said he would not sign it—Rizzi's said he would not sign it? A. That he would not sign it under the conditions that he wanted it changed, because they had agreed to different conditions prior to that.

Q. All right—he said he would not sign the agreement as it was then presented? A. Yes.

Q. And is it not a fact that his lawyer, Mr. Otto Saldarini, in your presence, then and there advised him not to sign the contract? A. Yes, I think he did—not under the conditions he wanted them changed.

Q. And is it not the fact that Rizzi at that time refused to sign that contract (I am talking now of the contract drawn by Mr. Saldarini) because Rizzi wanted certain repairs to be made by Dr. Pohan in the building before he would sign?

Mr. Ockford: I object to that, upon the ground that it calls for a reason existing in the mind of Mr. Rizzi, and, unless he expressed the reason, it would not be binding upon anyone.

Mr. Walscheid: I withdraw the question.

Q. And did not Mr. Rizzi, at that time, also state that he did not intend to sign unless Dr. Pohan made certain repairs to the premises before he signed? A. It was not that, no.

Q. You did not hear that? A. I was there, I heard what he said, but he did not say that.

Q. Didn't you so testify at the first trial? A. I don't believe that I testified that he wanted repairs done to the building; I know I recall testifying that he did not sign it on account of Dr. Pohan changing the conditions of the contract or the agreement that they made out.

The Vice Chancellor : Well, confront the witness with what he testified.

Mr. Walscheid: I will, after a while, sir.

Q. Now, going back to Exhibit C, 3, the check, that was made out to you? A. DeSena & Lepore.

Q. And at that time, when you took this check from Mr. Rizzi, you took it from him as a deposit which was to be paid on account of the subsequent Pohan agreement, didn't you? A. I took it as a deposit—not on a subsequent agreement. You mean any other agreement, afterwards.

Q. You took it from Mr. Rizzi as a deposit to be used by you in tying up to the Pohan property? A. Yes.

Q. Yet you had the check made out to yourself? A. I made it out to myself that way.

Q. To DeSena & Lepore? A. Yes, and he signed it.

Q. You did not have it made out to Dr. Pohan, did you? A. No.

Q. Why not? A. Well, at that time he wanted to give me the deposit that way, and his conditions were that they were buying the property under his

conditions, and I said, "All right, we will make it in our name, and endorse it and give it to Dr. Pohan."

By the Vice Chancellor:

Q. What do you mean by "his conditions"? A. The way the agreement was drawn up there. We had been there the day before—

By Mr. Walscheid:

Q. Wait a minute—I want to identify that agreement—the way the agreement, C, 2 was drawn up? A. Yes.

Q. Those were the conditions that he wanted? A. Prior to getting the deposit from Rizzi we had been to the Doctor, and made all those arrangements, then I got the deposit from him, and went back and gave the deposit, to the Doctor.

Q. Why did you have the check made out to DeSena & Leporte? A. Just because I wanted to be protected, as I was putting the deal through—that is why.

Q. Wouldn't the check made out otherwise protect you? A. Well, I just thought of it that way, that is all. All deals that I put through I have them give me the deposit in my name. That is how I do my business.

Q. Now, as a real estate agent, you knew, did you not, when you went out of Dr. Pohan's office with Exhibit C, 2, signed only by the Pohans, and when you left him Exhibit D, 1 without any signature, that Mr. Rizzi was in no way bound to buy that property? A. He was bound because he gave me the check with the conditions—to buy it under those conditions.

Q. Didn't you know, as a real estate agent, as

a matter of law, that Mr. Rizzi was not bound, since he had not signed any papers to buy.

Mr. Ockford: I object to that—whether he knew as a matter of law; that is calling for a great deal from a layman—whether he knew as matter of law, and what the law was in respect to this transaction; and he has already testified that he thought it was binding on him.

The Vice Chancellor: I think I will overrule the objection.

A. I didn't know, as matter of law; because he gave me the deposit, I thought that was binding enough for him; that is the reason I took the check that way.

Q. But you did go to Rizzi with this paper, C-2, and ask him to sign it, didn't you? A. Which paper.

Q. The one that was signed, and the one which you took away? A. No, sir.

Q. You never asked him to sign it? A. No, because we went to Soldarini's after that.

Q. I see—in other words you expected that Rizzi would sign the other contract which Soldarini was to draw? A. He had already agreed—

Q. Just answer the question? A. Under the terms, yes.

Q. Now, going back to your testimony on the 18th day of March, 1924—you testified then in the case of DeSena, et al., v. Pohan in the New Jersey Supreme Court, before Judge Willard M. Cutler, didn't you? A. Yes, sir.

Q. That is the first trial? A. Yes.

Q. Did you at that time say that Dr. Pohan gave you this property to list about the latter part of

September, and did you then use the following language "About the latter part of September, Dr. Pohan listed this property with my office, and gave me full particulars but would not give me the exclusive right"? A. Yes, sir.

Q. You testified to that?

Mr. Ockford: I object to that. That is not the whole answer.

Mr. Walscheid: That is all I am asking him; you can complete it.

Mr. Ockford: Oh, no; I object to his asking him to testify and giving him only part of his answer.

Mr. Walscheid: You have the right to complete it on the re-direct.

Mr. Ockford: I will object that where counsel apparently quotes from the testimony of the witness on a previous occasion, he cannot pick out part of the answer.

The Vice Chancellor: I think, if it is insisted upon, you should ask if he "was not asked this question, and did not answer this so."

Mr. Walscheid: But I do not have to go through the whole testimony. It is not in the shape of a question; it is in the shape of a statement. It makes no difference, at all, as far as I am concerned; I will read the whole thing, but I do not want to clutter up this record with matter that I think is not contradictory.

The Vice Chancellor: If counsel insists upon it, I suppose he has a right to have it all.

Mr. Ockford: I do not want the whole record; I want the complete answer to a single question.

Q. And didn't you, at that time, testify "About the latter part of September, Dr. Pohan listed this property with my office and gave me full particulars but would not give me the exclusive right; if I would sell, he told me he would give a commission, and around about the 2d or 3rd of October, I met Mr. Rizzi and interested him in the property of Mr. Pohan, or Dr. Pohan"—did you so testify? A. Yes.

Q. Then it was around the 2nd or 3rd of October that you already had Mr. Rizzi? A. Yes, but I couldn't remember the exact date. That was so long ago. I have to refresh my memory on it, that is all.

Q. And did you, on that occasion, also testify in reply to the following question: "Q. From Mr. Rizzi? A. From Mr. Rizzi, through me, and we signed an agreement, Dr. Rizzi signed an agreement together with his wife, that they would sell for the terms that were stated on the paper. All of the terms were written down, and he was well aware of what he was signing, and on a later date we were supposed to sign the contract. Everything was arranged; everything was agreed upon." Did you so testify? A. I believe I did testify that way.

Q. Yes, and it was the truth, wasn't it? A. If I testified that way, it was the truth.

Q. Certainly. Now, as matter of fact, that additional thousand dollars was never offered, was it. A. It was offered.

Q. It was offered? A. It was supposed to be paid when we was going to sign that other contract, that they wanted to sign.

Q. That was when it was supposed to be paid? A. Yes.

Q. But it was never tendered? A. It was tendered, but Dr. Pohan mixed up the agreement; he wanted to change the terms; so he never got the money.

Q. What did you explain to Pohan? A. Well, Mr. Rizzi was ready to pay the thousand dollars at Otto Saldarini's office?

Q. Did he count the thousand dollars out? A. He came down there with—

Q. (Interrupting) Did he count the thousand dollars out? A. I did not see him count anything; I say he was ready to pay it.

Q. You mean he had it in his possession? A. I didn't have anything; he had it.

Q. But he never made a tender of it? A. I don't know about making a tender; he was there to pay it.

By the Vice Chancellor:

Q. Did he take the money out of his pocket and hand it to Dr. Pohan? A. No, he did not take the money out of his pocket, but he was there ready to pay.

The Vice Chancellor: No, you have answered it.

By Mr. Walscheid:

Q. Of course, the additional thousand dollars was never paid, as far as you know? A. As far as I know, no.

Q. Now, I understood you to say that you understood that Mr. Rizzi was not to sign this contract, Exhibit D 1, or the contract, Exhibit C 2? A. He did not sign it, no.

Q. But you say that when you left Dr. Pohan's house, it was understood that Mr. Rizzi was not to sign that contract? A. No, he said "If I get the property under these conditions, I will buy it," and he gave me a check to buy it.

The Vice Chancellor: Repeat the question question repeated.

Mr. Ockford: I object to the question on the ground that the witness is not called upon to testify to the understanding by other parties.

The Vice Chancellor: He is not asking that—he says, "You said that."

Mr. Walscheid: He has so testified, right here, and I want to refresh his recollection.

(Question repeated.) A. It was understood. I did not offer it to him to sign it, because he had already agreed to buy it that way;

Q. You did not offer it to Rizzi to sign? A. No, because he was going to buy it that way.

Q. Did you testify, at your second trial "Q. Do you know what tie of the day that was signed"? (referring to Exhibit C, 2, before you), and then did you say, "A. About five o'clock in the evening"? A. I think I did, yes.

Q. And, at that time, did you testify, as follows: "Q. How long before the transaction you have just told us about" (that is, the signing of Exhibit C, 2) "was it that you obtained this check from Mr. Rizzi? A. In the afternoon, about three o'clock"? A. Yes, sir.

Q. That is true, too? A. Yes.

Q. Are you satisfied now that you were there at five o'clock to sign up Exhibit C, 2? A. I know it was in the afternoon—right in the afternoon, I couldn't say just positively five o'clock; it might have been after, and it might have been a little before.

Q. And were you then asked this question, and did you then reply as follows: "Q. At that time, Mr. Lepore, did Dr. Pohan, in your presence, sign this paper"? (showing you Exhibit C, 2) and did you say, "Yes, sir"? A. Yes, sir.

Q. And at that time were you asked this question by your counsel, "Q. And what, if anything, did you say to Dr. Pohan that you would do with respect to having him meet, the buyer, Mr. Rizzi"? (this was at five o'clock in the afternoon), and did you answer, "A. I told him I would bring the paper up immediately after I would get out of the house, and let him sign the agreement in the presence of him"? You said that, didn't you? A. I do not recall saying that; I don't know.

Q. Well, you say that you did not say it? A. No, I won't say I did not say it, no; I can't say.

Q. Now, is it not a fact that you did say it? A. Well, I don't know if I did, or not.

Q. Is it not now the fact, the absolute fact, that Mr. Rizzi was not present when Exhibit C, 2, was signed? A. No, he was not present.

Q. And it is not the fact that because he was not present, and because he had not signed these papers, you then said to Dr. Pohan as you testified before, "I told him, Dr. Pohan, I would bring the buyer up immediately after I would get out of the house, and let him sign the agreement in the presence of him"? A. I do not recall saying that; I don't know; I might have said it, and I might not; I don't know.

By the Vice Chancellor:

Q. Well, if you testified to that in the law court, is it true—if the record shows you testified that way in the law court, is it true or untrue? A. I don't know if I testified that way, or not?

By Mr. Walscheid:

Q. Now, will you answer the question of the Vice Chancellor—if you so testified, was it true? A. If I testified that way, yes, it was true.

The Vice Chancellor: Well, is it admitted that he did testify that way?

Mr. Ockford: That is my recollection of it. I haven't the minutes here.

Mr. Walscheid: Is there any doubt about this record?

Mr. Ockford: Not at all.

Mr. Walscheid: You admit that these records are all right—that they are true transcripts.

Mr. Ockford: I will consent to put the whole record in.

The Vice Chancellor: Oh, you don't want to make too much of a record.

Mr. Ockford: I say he may refer to any part that is material, but I want the record itself so marked that all of it that is pertinent may be considered.

Mr. Walscheid: It is conceded that the testimony as written up, of the trial held on the 18th day of March, 1924, before Judge Willard W. Cutler, in the case of DeSena, et al. v. Pohan, is correctly transcribed?

Mr. Ockford: Yes.

Mr. Walscheid: It is also conceded that the testimony of the trial held on February 4th and 5th, 1925, before Williard W. Cutler, in the case of Joseph DeSena and George S. Lepore and Amato Rizzi v. Hovagim Pohan is correctly transcribed?

Mr. Ockford: Yes.

Mr. Walscheid: Both of these cases being tried in the Hudson County Circuit of the New Jersey Supreme Court—is that right?

Mr. Ockford: That is correct. Now, haven't we that portion that has just been referred to make part of the record?

Mr. Walscheid: Why, it is in the record here.

The Vice Chancellor: Well, is it stipulated that the questions and answers to which the attention of the witness was called have been read into the record correctly in asking him the various questions.

Mr. Walscheid: I did that.

Re-direct Examination by Mr. Ockford:

Q. Just a question or two: Do you recall anything being said by Mr. Rizzi, or by his lawyer, Mr. Saldarini, to Dr. Pohan, at the conference in Mr. Saldarini's office as to whether or not Mr. Rizzi would sign Exhibit 2 (showing the witness the exhibit referred to)? A. These terms were all put in the other contract, and Mr. Rizzi agreed to sign it that way; and then Dr. Pohan took it away, and came back and wanted to change the terms, and the whole thing went wrong.

Q. Did Dr. Pohan, at the conferences in Mr. Saldarini's office, say anything as to whether he would go through with the contract as stated in Exhibit C, 2, without any of the corrections? A. Yes, sir.

Q. What did Dr. Pohan say about that?

Mr. Walscheid: I object to that as leading.

The Vice Chancellor: I think you had better give the whole conversation.

Q. Yes, now at the meeting in Mr. Saldarini's office, just tell us what, if anything, Dr. Pohan said?

Mr. Walscheid: Which meeting?

Q. Well, at the meeting when the parties failed

to sign the contract in its changed form—just tell us what, if anything, was said, that you recall, by Dr. Pohan, as to what he would do or would not do so far as carrying out the agreement, Exhibit C, 2? A. The night that Counsellor Saldarini wrote up the contract with the terms in, Dr. Pohan was there, and Rizzi was there, myself, and I believe my partner was there—I don't just recall just now whether he was there or not, but all of them terms were put in the contract, and both parties were satisfied.

Mr. Walscheid: I ask that that be stricken out, "both parties were satisfied."

The Vice Chancellor: I will strike that out. State what was said.

Q. What was said about the contract at that time, as to what the parties would do, or would not do? A. Well, after the contract was written up, Dr. Pohan says, "It is all right, the contract is all right, only I want to have my lawyer look it over," and then he went over the contract and came back making different changes in it, and the whole deal went off, because Mr. Rizzi would not stand for it.

Q. But, at this last conference which you just mentioned, when you say the deal was off, what, if anything, did Dr. Pohan say about going through with the deal on the original terms?

Mr. Walscheid: I object to that as leading.

The Vice Chancellor: I will sustain the objection.

Q. Well, do you remember anything that Dr. Pohan said at the time you say the deal was called

off—what, if anything else, was said by either him or Mr. Rizzi? A. When he came back with the contract with different things crossed out that his lawyer told him he should make different, Dr. Pohan says, "These things here have to be changed because my lawyer told me it should be done that way." Well, Rizzi says, "I can't go and take them terms the way you want them now"; he says, "we have already agreed on these terms; let us go through with it, the way it was," And he wouldn't do it, and they did not come to an agreement any more; it just went flat, the deal.

Q. Well, when Rizzi said that what did Dr. Pohan say? A. He says, "You take it this way, or you don't get the property at all."

Q. Take it which way? A. The way he wanted it, with the terms changed.

Re-cross Examination by Mr. Walscheid:

Q. Then there was a difference between the contract as drawn by Saldarini, and the contract which is J. E. W., 1, in evidence, and the contract as evidence by Exhibit C, 2, in evidence, being the paper that you drew, wasn't there? A. Wait a minute—I don't get that right—a difference, you mean, in terms?

Q. Yes—in terms? A. No, the terms were alike—the same as it was in the contract there.

Q. Is there anything in that contract that you drew about a "warranty deed"?

Mr. Ockford: I object to that. The contract speaks for itself.

The Vice Chancellor: I know, but the witness has said something that is palpably untrue; he does not mean to, probably.

A. No, them terms there—

Q. Answer the question—is there anything in that paper, C, 2 about a "warranty deed"? A. No.

Q. Is there anything in that paper about "loss or damages to said premises by fire until the delivery of the deed"?

Mr. Ockford: I object to it; the two papers speak for themselves.

The Vice Chancellor: I know it, but the witness has said there was no difference in the two contracts.

The Witness: What I mean by "difference" is I mean the terms of sale, and the price.

Q. You mean the money terms of the sale? A. Yes, the price and the mortgages in them; that is what I mean by the "terms". That is what I meant.

ABRAHAM FINE, sworn.

Direct Examination by Mr. Ockford:

Q. Where do you live? A. No. 469 Palisade Avenue, West New York.

Q. What is your business or occupation? A. Insurance.

Q. Did you at any time own the premises 13 Oak Street, Weehawken Heights? A. I did.

Q. When did you cease to be the owner? A. I think it was June 1st, 1923, I am not sure—about that time.

By the Vice Chancellor:

Q. Did you say "June, 1923"? A. June 1st,

1923; I believe about that time. The title was in my wife's name.

Mr. Walscheid: Well, why do you testify like that?

The Witness: I signed the contract of sale.

Q. You signed the contract of sale of the property? A. I did.

Q. Have you the contract? A. No, I have not.

Q. Do you know where it is? A. No, I tried to find it, but I could not.

Mr. Ockford: I call on the other side to produce the contract between Mrs. Fine and Mrs. Pohan.

(The same is produced upon call.)

Q. I show you a paper produced by counsel for defendants and ask you if your signature is on that contract? A. Yes, that is mine.

Q. And is that your wife's signature? A. That is right.

Q. Do you know whose signature the third signature is? A. That was not signed in my presence that I remember—that is, the third.

Mr. Walscheid: It is an acknowledged paper, is it not?

Mr. Ockford: No, the subscribing witness is here.

Mr. Walscheid: Oh, I won't worry about that. I will admit that that is the contract under which Mrs. Pohan received her equitable title.

The Vice Chancellor: It is her signature to the contract?

Mr. Walscheid: Yes.

Mr. Ockford: I ask that it be marked in evidence at this time.

Mr. Walscheid: No objection.

(The paper is marked Exhibit C-4.)

Q. Do you know Dr. Pohan? A. I met him once or twice.

Q. Do you know his wife? A. No, I have seen her for a few minutes at the time title was passed but I would not recognize her.

Q. Where was this contract Exhibit C-4, signed by you?

Mr. Walscheid: Objected to as immaterial.

The Vice Chancellor: What difference does it make?

Mr. Ockford: Well, it may make some difference—it may make considerable difference; I don't know what his answer is going to be.

The Vice Chancellor: Go ahead. I don't know that it makes any difference what his answer is, but I do not know your case.

Q. Who was present when this contract was signed?

Mr. Walscheid: I object to that as immaterial.

Mr. Ockford: Well, if I ask the question in the first instance, the objection will be that it is leading.

The Vice Chancellor: Go ahead; answer the question.

A. My wife, Mr. Simsarian, and myself, at my house, at the time that I lived at 213 Third Street, Union Hill.

Q. At that time, had you ever met Mrs. Pohan?

Mr. Walscheid: I object to that as immaterial.

The Vice Chancellor: I will overrule the objection. I don't know where it is going to lead to.

A. No, sir.

Q. At that time, or prior thereto, had you met Dr. Pohan?

(Same objection; same ruling.)

A. No, sir.

Q. Did you meet Dr. Pohan in the transaction at any time?

The Vice Chancellor: What "transaction"?

Mr. Ockford: The transaction involving the contract, Exhibit C-4, dated May 2, 1923.

A. I did not meet Mr. Pohan until title was passed.

Q. Did you talk to Dr. Pohan when title was passed?

Mr. Walscheid: I object to that as immaterial, incompetent and irrelevant, and not binding on the defendant against whose property I suppose equitable estoppel is to work.

The Vice Chancellor: I will overrule the objection; I do not know where it is going to lead to.

A. I spoke to him at the time title was passed.

Q. Was Mrs. Pohan present? A. I believe she was in the outer office, not in the enclosure where

the title passed; but from what I understood, that was her.

Q. Did Dr. Pohan say anything to you about the property while his wife was present or within hearing?

Mr. Walscheid: I object to that; she was not in the room where the title was passed, and she could not have heard anything that might have been said.

Q. At any time while the transaction was going on did Dr. Pohan say anything to you about this property, in the hearing of his wife? What is the answer, please? Did he say anything about the property?

Mr. Walscheid: In the hearing of his wife.

A. No.

Q. Did you talk with Dr. and Mrs. Pohan in regard to the transaction at any time when they were together? A. No, sir.

Q. Was the transaction negotiated by an agent? A. Yes, sir.

Mr. Walscheid: I object to that, what difference does it make?

The Vice Chancellor: I do not see where it makes any difference; but I am not going to limit counsel.

Mr. Walscheid: Yes; but, if your Honor please, if these parties, at this time, are attempting to put in a creditor's bill, without having supplied the necessary foundation in their bill, I am surprised and injured, and not in a position to meet it.

The Vice Chancellor: Well, if you are so situated I will not hold you to your trial today.

Mr. Walscheid: I want to see this creditor's bill, and see what the charges are in it.

The Vice Chancellor: I do not think that this witness has said anything, up to the present, that would injure you.

Mr. Walscheid: I know he has not.

Q. Who was the agent?

Mr. Walscheid: I object to that.

The Vice Chancellor: I will overrule the objection.

A. Haig Simsarian.

Q. Is he in court, do you know? A. No, I do not see him.

Cross Examination by Mr. Walscheid:

Q. (Showing the witness a paper.) This is the deed you afterwards signed for the property, is it not? A. That is the deed.

(It is consented that the paper just identified by the witness shall go into evidence at this time as a defendant's exhibit; and the same is marked Exhibit D-2.)

The Vice-Chancellor: What is the date of it?

Mr. Walscheid: It is dated June 1st, 1923; acknowledged June 1st, 1923; and recorded on the 4th day of June, 1923, at 9:48 in the forenoon, for D. Simsarian, 148 Broadway, New York City.

MRS. HAGANOOSH POHAN, sworn.

Direct Examination by Mr. Ockford:

Q. You speak English, do you not? A. Yes, sir.

Q. You are the wife of Dr. Pohan? A. Yes, I am.

Q. You and he are defendants in this cause? A. Yes, we are.

Q. I show you a contract, Exhibit C-4, and ask you if that is your signature? A. It is my signature.

Q. Do you remember the transaction wherein this contract was signed? A. I beg your pardon—what transaction is it?

Q. This transaction—you have just identified your signature, I want to know if you recall the transaction; do you remember the facts in connection with the transaction? A. Yes, I do.

Q. Did you pay any sums of money in connection with that transaction?

Mr. Walscheid: I object; and I desire to be heard on this question, as it is now plainly going to a creditor's bill; and, under the cases, as I understand it—in fact, it has been squarely ruled in this State—that before a complainant can have relief on a creditor's bill he must plead the necessary facts, and the defendant must have an opportunity of meeting them. A suitor who seeks relief on the ground of fraud must do something more than make a general charge of fraud—he must state the facts that constitute the fraud, so that the person against whom relief is sought may be afforded a full opportunity not only to deny and explain

the facts charged, but to prove them; and he has the right to know in advance just what he will be required to meet (citing Smith v. Wood, 42 N. J. Eq., 563, at p. 566; affirmed on appeal 44 N. J. Eq., 603. Now, we have this further fact that in this case we now have the conveyance ante-dating these transactions; so not only must they bring themselves within the ordinary rule, but they must bring themselves within the further rule laid down in Washington National Bank v. Beatty, 77 N. J. Eq., 252, which is there stated as follows: "Where a conveyance is attacked by a subsequent creditor he must allege and prove fraud as a fact—that is, an actual intent to defraud some creditor, either existing at the time when the conveyance was made, or subsequent." Now, I am entitled to such a bill, if I am to meet that bill; and this woman is not supposed to go on the stand and submit herself to a fishing expedition as to matters as to which she is not at this moment prepared. I think, if they desired to come in on a creditor's bill, they undoubtedly had the right to do so. They had the right to amend; and they have the right to allege whatever fraud they think exists which they think they can prove. But I am entitled to know that in advance so that I may prepare my case; and I most strenuously urge that to allow this case now to proceed along these lines and beyond the scope of the present bill works a detriment to this defendant in that I am not prepared to meet it unless I first see the charges of fraud.

The Vice Chancellor: There is no charge of fraud in the bill?

Mr. Ockford: No, we do not say it is fraudulent. A man may have property in someone else's name, and we may show that he is the beneficial owner and impress a lien upon it. There may not be any fraud.

The Vice Chancellor: Then your point is that you want to prove by this lady that she is a trustee of her husband?

Mr. Ockford: Yes.

The Vice Chancellor: That would be within the scope of the bill.

Mr. Walscheid: It is not within the scope of the bill, sir. The mere statement that this man is the owner of the property is not a statement of fact, it is an assumption of law. The record now shows that he is not. And there is not a word about trust here (referring to the bill of complaint). If you will look at that Paragraph 6 in the bill, it says, "Complainants aver the fact to be that the said Hovagim is the owner of said premises"—all right, that is a conclusion of law; there is nothing to sustain that in the facts pleaded—"but that the legal title thereto is in the name of Haiganoosh Pohan. And the complainants further allege that the said Pohans are estopped from asserting otherwise, as against these complainants, by reason of the facts and circumstances above set forth." And what are they? Namely, that she stood by and saw this man sign a contract in which they say he claimed to be the owner. That is the only fact alleged. Now, how can I be asked to meet anything else than that? I am willing to meet this case if it is properly presented; but I am not willing to meet a case that is not within these pleadings.

Mr. Ockford: Well, we will pursue the oral inquiry first before we go into the documents.

Q. Now that you say that your husband made the payments for you, did you give him the money to make the payments? A. I always gave my money to my husband to hold and keep it for me.

Q. Well, in connection with this particular transaction whereby he purchased 13 Oak Street, did you give your husband any special sums of money for this particular transaction? A. I have given him money. He still owes me money, too.

Mr. Ockford: Well, that is not responsive. I will ask to have the question read again, and answered. It seems to me plain enough.

The Vice Chancellor: No, I will strike out the latter part of the answer.

Q. Now, in connection with this particular transaction, whereby he bought 13 Oak Street, did you give your husband any specific sums of money? A. Well, he came and told me there was a house that he wanted to make a present for me, that he wanted to buy it with my money; and he said, "Do you want a present like that?" He always gave me diamonds, or offered me presents before that, and I always wouldn't take it; and with my own money he said, "Do you want to buy the house?" I said, "Yes, I do," and then I gave him permission to use my money.

Q. Well, which was it, Mrs. Pohan, can you tell us—was it a gift, or was it your money?

Mr. Walscheid: I object to that, as calling for a conclusion.

The Vice Chancellor: She is telling what the conversation was with her husband; I am to determine whether it was a gift, or what it was.

Mr. Ockford: Well, she has testified both ways in the same answer.

The Vice Chancellor: She says that her husband owed her money; that she gave him moneys that he was saving for her; and her husband said, "I will make you a gift", and he bought the property with her money.

Q. Now, when had you given your husband any money prior to May 2d, 1923, Mrs. Pohan? A. I have given it to him right along. When I got married I began teaching and nursing, and I saved my money and gave it to him to hold and keep it for me.

Q. Well, when, prior to May 2d, 1923, did you give your husband any sum of money, that you recall? A. In 1919 I remember I gave him money to send it to the Mortgage Equity Company and keep it for me. There was a friend of mine came from Boston and told me that he was in that business, and I gave it to him to send it to him to keep it for me, to invest it for me. And then, before that, when I got married, I gave him $350; and when I was teaching I gave him all my money to keep it for me.

Q. Well, in the early part of 1923, just before you bought this Oak Street property, do you recall giving your husband any sums of money? A. Yes, I do; I gave him all my money. I was running a sanitarium at that time, and I was making good money, and I gave him all my money. I don't remember how much I gave him each time, but I gave him money.

Q. Do you remember the largest single sum of money that you ever gave your husband? A. I gave him $500 sometimes—$200, and $300, and $100, $85 and $90, and like that.

Q. Was this 13 Oak Street the first parcel of real estate that your husband bought for you?

Mr. Walscheid: Objected to as immaterial; we are only interested in 13 Oak Street.

Mr. Ockford: Well, in view of the witness's answers, we have got to be a little more specific.

The Vice Chancellor: I will overrule the objection.

A. No, there was another one, that he gave it to me because he had decided on going abroad to visit his friends in Erivan, Armenia; and so he gave it to me.

Q. How long before? A. Well, I don't exactly remember the date, but it was before that.

Q. What premises were those? A. 526 High Street.

Q. And was 526 High Street the first piece of real estate your husband bought for you? A. Yes.

Q. And 13 Oak Street was the second piece? A. Yes.

Q. Have you any record, Mrs. Pohan, or can you tell us the total amount of money that you gave your husband from the time you were married down until May 2d, 1923? A. I had with him about $10,000 until that time—$10,000.

Q. Have you any record of that? A. Yes, because he was sending it for me to the Mortgage and Equity Company. When he used it he would always ask me whether he could use it for anything

else. Sometimes when he couldn't pay his rent I would lend him it out of my money. When he wanted to buy a car, or anything like that, he would ask me and I would give it to him. If he had any bills to pay I would tell him to take it.

Q. Where was the Mortgage and Equity Company? A. In Boston.

Q. Did your husband ever give you, or show you any securities of that Company, made out in your name?

Mr. Walscheid: Objected to as immaterial.

The Vice Chancellor: What difference does it make? She says she gave him upwards of ten thousand dollars.

Mr. Ockford: Well, of course, if we are going to accept her statements without corroboration—

The Vice Chancellor: She is your witness.

Mr. Ockford: Yes; but she is also a defendant in this case.

The Vice Chancellor: I will overrule the objection.

A. Yes, he did show me.

Q. Have you those securities now? A. No, I have not disturbed them because this was some time ago we closed this transaction, because, when I closed the Hospital I didn't have any money with them at all, on account of using it for that building; and then he wanted to buy me a car and make a present for me, so I gave him the money to use for it, and I hadn't any more money with that Company any more; I closed the transaction with them.

Q. Where was the Hospital? A. At 526 High Street.

Q. When was that closed? A. The latter part of 1924. I still have the beds that I always kept patients in when I nursed.

Q. Yes; and do I understand that your money that you received at that time went into an automobile? A. No, I said when I wanted to draw all my money then I closed the deal with them—that is, I closed the account with them.

Q. And did you receive the money from that Company by check to your order, or how was the money sent? A. My husband was doing that business for me.

Q. Did any check to your order come to your hands in that transaction? A. No, it came to my husband, but he was using it for me.

Q. Did you pay any part of this money that you gave your husband during the time, by your check? A. No, I always gave it to him; I handed him the money; I never kept a check account until just lately, about a year, that I have been keeping it, because he said he would not handle my money any more since he had that unrighteous judgment against him.

Q. Well, it was after that that you first had a check account, is that right? A. That is correct; because he wouldn't handle my money no more for me.

Q. Did your husband ever give you any statement in writing of the money that he was holding for you?

Mr. Walscheid: I object to that as immaterial.

The Vice Chancellor: I will overrule the objection.

A. We always talked the matter over. I knew how much I had with him.

Q. Did he ever give you a statement in writing, is the question? A. No; he did not give me a statement in writing.

Q. Did any part of the money that you gave to your husband come from a savings bank account of yours? A. I did not put my money in bank. Whenever I had the money, the cash in my hands, I handed it to him to keep for me.

Q. Between the time of your marriage and the time you bought 13 Oak Street did you have a savings bank account in any bank? A. I did not have any savings account in any bank; I gave it to him to keep and hold it for me.

Q. And no check account? A. No, I did not, because I had no time; I was running that Hospital day and night, and I had no time to go out and deposit those moneys.

Q. Now, was this Hospital run in your name, Mrs. Pohan? A. Yes.

Q. You had some sort of a license for it, I suppose? A. What do you mean "license"? It was a physicians' and surgeons' hospital, but I was the Superintendent of the Hospital.

Q. Yes; well, was it a corporation? A. It was not a corporation. I was the owner of that hospital, but I had a name as The Physicians and Surgeons Hospital, because I wanted all the physicians to bring their cases in there.

Q. Do you know whether the name is registered anywhere? A. I had permission from the Town Hall to use, as a hospital, that place, because the house was mine.

Q. The West Hoboken Town Hall? A. Yes, the West Hoboken Town Hall.

Q. When was the hospital opened, Mrs. Pohan? A. 1921.

Q. Do you remember the month? A. November—the last part of November.

Q. And did you pay the expenses for running the Hospital? A. Yes, I did.

Q. Did you pay your rent? A. I did not have to pay any rent; that building was mine.

Q. Did you pay the taxes? A. The taxes and outside affairs I let my husband do those things for me.

Q. Well, did you pay the people who worked in the Hospital? A. I did.

Q. You paid those yourself? A. Yes, and the nurses.

Q. Did you keep any books of account to show it? A. Yes, I had some downstairs in the cellar where I couldn't find them. I had books. I kept a record of the patients, but I could not find it.

Q. Well, did you keep any records of the money that you took in and paid out? A. I know exactly what I made from the Hospital; I did not put down the details; I know what I made from the Hospital.

Q. How much did you make? A. Well, I have put down, at the request of my counsel, just how much I made while I was running the Hospital.

Q. That is what we want to know? A. (The witness now refers to a memorandum now produced by her.)

Q. Just call it off, please; I just want the total amount that you made, the net earnings for the time you were running the Hospital in 1921 to 1924? A. I made $1,050 in 1921; $2,859 in 1922; $1,717 in 1923. After that I closed the Hospital because I was expecting to have a baby and I couldn't continue it any more.

Q. And about how often during that period did you turn over money to your husband—weekly, or monthly, or how often? A. In 1923, January, I gave him $332; in February I gave him $288; in

March, $305; June, $195; August, $225; October, $190; December, $182. If you want me to give all the years previous to that I can do it, if you want me to.

Q. Let us take one thing at a time: At the time you commenced to operate this Hospital the money that you had previously given your husband was already invested, was it not? A. I beg your pardon—when I was running the Hospital?

Q. At the time you started the Hospital, the moneys that you had given your husband before then was invested, was it not? A. It was with the Mortgage Company to be invested, yes; and every month I was expected to pay so much—to put in more from month to month. I used to send so much in through my husband.

Q. How much a month was that? A. At first it was about one hundred dollars, or something; and then it was different prices; I don't remember exactly how much it was, but every month I used to send some.

Q. Well, what was about the largest amount that you can recall? A. Well, I don't believe I can remember.

Q. Well, do you recall any amount at any time? A. It was not exactly two hundred each month we used to send.

Q. And that was before you opened the Hospital. Where did you get that money from? A. I always kept patients in my house. I had a bed since I got married; I always had an extra bed for patients. I used to give ether for the doctors. I have been a nurse and whenever the patients wanted to go to a hospital sometimes I used to take care of them for eight or ten days right in my house.

Q. Do I understand that all the money you re-

ceived from that source you invested in this one company, the Mortgage and Equity Company of Boston—is that right? A. That is right.

Q. Did any of your money go into this High Street property? A. Well, I made some repairs while I was running the Hospital.

Q. No, but when you bought the High Street property? That was your property, wasn't it? A. No, the Doctor gave me that as a present.

Q. Did any of your money that you saved from the business of nursing and keeping a hospital go into the High Street property? A. Yes—well, I made repairs.

Q. I mean when you bought it? A. When I bought it, no. He gave it to me as a present. I said I did not buy that property.

Q. Are you still the owner? A. Yes, I am—or I exchanged it lately for another property.

Q. You say you made an exchange—how long ago was that? A. Last summer.

Q. And you received what property in exchange, Mrs. Pohan? A. I exchanged it for a cold water apartment, 806 Highpoint Avenue.

Q. Now, the money that you earned yourself from the time you were married until the time you opened the Hospital was all invested in this Equity Company in Boston? A. Yes.

Q. It did not go into the High Street property? A. Well, what I had left over I was going to make the repairs with. We did not send more than $200; the most I sent was only $200 to that Mortgage Company, and I told you sometimes I gave him $300. I gave him $400 sometimes.

The Vice Chancellor: That is not answering the question.

Q. All the money that you gave your husband

from the time you were married up until the time you opened the Hospital, was invested in this Mortgage and Equity Company of Boston, is that right? A. No, there was always some money left over, because I did not send all my money; because I was going to make—

Q. (Interrupting) What was the total amount of investment in that Company? A. Well, it ran to $3,000 once, and that is when I was going to buy this property. I had $10,500, something like that; and then I drew $8,500 for this Oak Street property; and then, while I was making repairs, I had some money with that Company; and for the repairs, sometimes when I needed it, I used to draw it. But I always kept on sending in the meantime.

Q. Now, you say that amount was in your husband's name? A. He was keeping it for me.

Q. Yes, but I say, the account between the Company and you was in your husband's name? A. It was sent in my name, in my name. Who said it was in the Doctor's name? He was keeping it for me.

Q. Yes, but what was it—did they have a book like a bank book, or certificates, or in what form was it? A. Well, they sent a certificate showing that you are going to keep an account with them.

Q. Were those certificates in your name? A. Yes, they were.

Q. And when you closed out that account you had to sign? A. Yes, I did.

Q. Did you use some of that money in connection with buying 13 Oak Street—is that right? A. Yes.

Q. $8,000? A. $8,500—something like that, yes.

Q. How was that money sent to you? A. Well, they sent a check.

Q. A check? A. Yes.

Q. Was the check made out to your order? A. At that time?

Q. Yes? A. I told you at the beginning he was using my money, and then, when he bought that property, of course they sent the check to him.

Q. No, but you told us that the account with this Boston company was in your name? A. That is all I know. I trusted him. You see, I trusted that that money was kept in my name.

Q. Well, but did you ever see anything in your name, in the way of a receipt or a book, or any certificate, or any evidence of that kind from the Boston Company that appeared in your name? A. In 1924, when he was talking, I saw the account in my name. I did not see it before, but I saw it in 1924.

Q. Well, pardon me—the $8,500 that came out of that account, did that pass through your hands, at all; did you ever see it; did you ever see the check? A. Well, he said he received the money for me. He said he paid this money, and I trusted him.

Q. Did you ever see any check or certificate, or did you sign anything to get that money, the $8,500? A. I don't remember.

Q. Well, did you turn over the $8,500 to anyone? A. Well, he said he was going to buy, with this money of mine, that property.

Q. I know what he told you, but did you ever give it to anyone? Did you ever have the $8,500 in cash, or check, or bank draft, or in any form, shape or manner? A. That was a check, then, I suppose, sent to him.

Q. Please do not tell us what you "suppose"; all we want to know is what the correct transaction is; we want to know the facts. Now, you say you "suppose" there was a check—why do you suppose

so; did you see it? A. Well, I know that they sent a check; they did not send all that money in a lump; they sent a check to him.

Q. Did you see a check, or checks, for that money? A. I don't remember; it is some time ago, that is all.

Q. Well, it was May, 1923—did you have many transactions involving $8,500? A. Well, I have been a poor woman, and I trusted him. I said, "Whatever money is necessary to buy that property you can ask them to send it."

Q. Well, you signed the contract, we know that? A. Yes.

Q. And you signed the mortgage in connection with it, did you not? A. Yes.

Q. And you were there when title passed to you, were you not? A. Yes, sir.

Q. Did you see any money pass? A. I suppose checks.

Q. Well, did you see any checks? A. He gave the check; I was too busy, and I signed my name and I went out, because I had to go to the Hospital in a hurry. But I knew the building was mine.

Q. All right; did you see a check in that transaction, for $8,500, or for any amount? A. I knew that they were going to buy that property; without money they could not buy it; and there was a check to be given, and that check was my money. I don't know whether it was made by Dr. Pohan, or by me; but I know there was money given to buy that property.

Q. Did you write your name on the back of any check in connection with that transaction? A. I don't remember.

Q. Had you ever endorsed a check for $500, or $8,000, in connection with this transaction? A. I don't remember.

Q. Or paid a deposit of $500? A. I told my husband to pay it for me.

Q. You made out no check? A. I told you I did not keep no check account in no bank.

Q. And the $8,000 you are sure came from the Company in Boston, are you not? A. I am positive about it, because that is the way I understood that my husband was going to use my money.

Q. Who asked you to sign your name? A. Well, it was up in the real estate office.

Q. Do you know who asked you to sign your name? A. Well, I was in the real estate office. Mr. Simsarian was there.

Q. Did he ask you to sign your name, or did your husband ask you to sign your name? A. Mr. Simsarian asked me "did I want to buy the property?" and I said "Yes."

Q. And did Mr. Simsarian say anything about the $500 that you were to pay under this contract? A. No. Of course, without money I couldn't buy the property, because he said I would have to pay money, and I had my husband to pay it for me.

Q. Well, did you see your husband make out a check for that amount, or did you see your husband count out five hundred dollars in money and give it to Mr. Fine? A. Well, as I told you, I don't remember that.

Q. And after that did your husband say anything at all to you as to the $8,000 to be paid on this contract? A. Well, he said "We have to pay $8,000 to buy the house."

Q. And what else did he say, as to where it was coming from? A. I knew that he was going to use my money; that is all I know.

Q. Yes, but after the contract was signed and before you took title, did your husband say anything to you? A. I don't remember.

Q. Wait a minute—you told us he said "We have

to pay $8,000"—did your husband say anything as to where the $8,000 was coming from? A. Well, that is the only place I had money—with the Mortgage and Equity Company.

Q. And at that time how much did you have there? A. Well, I had nearly $10,000, I said.

Q. Did you sign any papers to get the $8,000—did your husband ask you to sign any?

The Vice Chancellor: You have gone over that half a dozen times.

Mr. Ockford: Her answers are not consistent.

A. I said it was my money, and my husband was using it for me; and whenever it was necessary for any checking he did it for me.

Q. Cannot you say whether you signed any papers to get the $8,000? A. I don't remember.

The Vice Chancellor: That is about the tenth time she has said that, in reply to the same question.

Mr. Ockford: She also testified to some things that contradicted it, and I want to get at the fact, that is all.

Q. Now, Mrs. Pohan, after you bought 13 Oak Street who collected the rents?

Mr. Walscheid: I object to that as immaterial.

The Vice Chancellor: Go ahead. I will permit it.

A. My husband did that for.

Q. Did he give you the money? A. Yes, he always showed me the money, but I would always

give it back to him because, in our country, we let our husbands manage for us, we do not manage it ourselves.

Q. Well, after you got this property and your husband collected the rents, did he give the money to you? A. He did show it to me, and say, "Here is your money," and I would say, "All right, invest it for me."

Q. Do you know what he did with it—do you know whether he put it in bank, or did something with it? A. Well, I trusted him that he would use it for me; that whatever was mine would stay mine.

Q. Did you pay any taxes in connection with the property? A. I always let him manage the taxes and pay the bills.

Q. Do you recall the time your husband received the check which I show you, Exhibit C-3? A. Yes; he showed this check to me.

Q. Do you know when that was? A. That was in 1923, in October.

Q. Did you tell him what to do with the check, or the proceeds of the check? A. Well, I said to him that "was not enough of a deposit to sell that house," and he said "We are going to get some more when we sell the house; that was just the original contract that was made to bind both parties," he said.

Q. Then what did you say? A. Then he said to me "Do you want to sell that property?" and I said, "Yes, I do."

Q. Did that talk take place before the check was produced—did you talk about selling the property before the check was produced? A. Well, he had spoken with me about selling the property, and I said, "Yes, I want to sell it."

Q. You signed the contract of sale, did you not? A. Yes, I did.

Q. And in that transaction you relied on your husband to act for you, did you—you did not take any part in it, did you? A. Well, he came and asked me did I want to sell the house. I said "Yes".

Q. Did you tell him to go ahead and sell it? A. I said, "We will sell it; I will sell the property"; but, you see, I was busy, I told you, and I always let him do the things; but I did not give him permission to do it without asking me.

Q. Well, he did ask you, and you said, "All right, to sell it"? A. Yes.

Q. And then the contract was signed and the deposit check taken by your husband? A. Yes.

Q. What, if anything, did you tell your husband to do with this check?

Mr. Walscheid: I object to the form of the question. The question "Did you tell him to do anything" would be a proper question, but not basing it upon the assumption that she did tell him anything. She might not have told him anything.

The Vice Chancellor: Then she may say that she did not tell him anything. This, of course, is an adverse witness.

Mr. Walscheid: She seems to be a very willing witness.

The Vice Chancellor: Oh, she is perfectly willing.

Q. (Last question repeated.) A. I did not tell him anything. What should I tell him?

Q. How much is that check for? A. Five hundred dollars.

Q. You testified a moment ago that you told your husband, as I recall your testimony, that the deposit was not large enough—did you tell your hus-

band that? A. Well, no, I said that to him before he had gotten the deposit. He says to me, "Five hundred dollars they are offering," but I said "That is not enough." He said, "Well, they are going to bring some more." Then I said we will take it—"Take it," I said.

Q. At any time after that did he give you Five hundred dollars, representing this deposit?

Mr. Walscheid: I object to that, as not within the case, and as immaterial, incompetent and irrelevant.

The Vice Chancellor: I think I will overrule the objection.

A. No, he did not give it to me. You see, I trusted him that when—

The Vice Chancellor: Never mind that.

Mr. Walscheid: He did not give it to you—that is your answer.

Q. Did you give any instructions to your husband, after the time that your husband received this $500 check, as to what he should do about the sale of this property to Mr. Rizzi? A. I didn't give no instructions, no.

Q. Well, did he tell you anything about the transaction after you and he talked about the deposit check? A. I don't remember anything.

Q. Well, do you remember now whether you heard from any source, later, that the transaction did not go through? A. He only told me that when he called to Saldarini's office Mr. Rizzi did not come.

Q. And after that did he tell you anything more about Rizzi, or what he did or did not do? A. That is all I know—he said he didn't come.

Q. Did you say anything more to your husband about the $500 deposit? A. I told him to give it back to him.

Q. What did your husband say when you told him that? A. He said, "Don't you want us to ask any lawyer about this"? and so he went and asked his lawyer, and his counsel said not to give it back to them, that that was a deposit and he shouldn't give it back to them.

Q. After that, did your husband tell you whether he had or had not returned the deposit?

Mr. Walscheid: I object to that as immaterial.

The Vice Chancellor: What difference does it make? The lady said, very properly, that her husband wanted to return the deposit check to Rizzi.

Mr. Ockford: Well, I think we ought to get the final chapter of the check proceeding, as long as we have heard the testimony as to the instructions she gave—as to whether he carried them out, or not.

Q. Will you produce the pass-book of your account with the Commonwealth Trust Company that you were subpoenaed to produce?

Mr. Walscheid: She has no pass-book of the Commonwealth Trust Company. She has testified she had no bank book.

Q. You told us a short time ago that you had a bank account, a check account, that was opened there was some iniquitous judgment against your husband—have you that pass-book?

Mr. Walscheid: I object to that. How is that material, after this transaction was

completed, and after this judgment was taken? She said after this judgment was taken she opened a bank account.

The Vice Chancellor: I will sustain the objection.

Q. Have you any bank pass-book, either for a check account or for a savings bank account, or any account, that was in your name at any time prior to October, 1923?

Mr. Walscheid: She has distinctly testified that she had no such book.

The Vice Chancellor: I understand she had no bank account until after the judgment was taken—is that right?

The Witness: Yes, sir.

Q. Do you recall the date of the opening of that account? A. Well, I don't recall just the date, but I know it is about a year, or over a year—about a year; I don't recall just exactly the date, but when I look I can tell, of course.

Q. Well, you were subpoenaed to produce that bank book? A. When my husband refused to keep any more of my money—

Mr. Ockford: Just a moment: The date is important, and she is not sure, and I think we are entitled to look at the book. She was subpoenaed to produce it (addressing Mr. Walscheid).

Mr. Walscheid: But I object to it, as immaterial and irrelevant.

Mr. Ockford: She don't know the date.

Mr. Walscheid (to the witness): Have you the book?

The Witness: I have it home. I have a

baby, and I forgot it; and I can bring it, if you want it.

Mr. Ockford: She says it may be a year or a year and a half ago.

The Vice Chancellor: Well, she says, in any event, it was after this judgment was obtained.

The Witness: It is in the Hudson trust, and you can call them up and ask them. It is about a year.

Mr. Walscheid (to Mr. Ockford): You have the Hudson Trust Company here.

The Vice Chancellor: Well, she says she has forgotten it; she says she has a baby and she has forgotten it; that she is sure that it was after this judgment was obtained against them.

Q. Do you know when the judgment was obtained? A. It was in December, I think—December, or January, 1924.

Mr. Ockford: Well, I presume counsel will concede that it was in February. Your minutes of the trial of the case are there.

Mr. Walscheid: February 5th, 1925.

Cross Examination by Mr. Walscheid:

Q. You are an Armenian, are you? A. Yes, Mr. Walscheid.

Q. Born in Armenia? A. Yes.

Q. How old are you? A. I am thirty-four.

Q. Were you educated in Armenia? A. Yes, I was.

Q. You were married when? A. 1916—January 12th.

Q. And before you were married what did you do? A. I was teaching and nursing, both.

Q. Were you teaching school? A. Yes.

Q. And nursing? A. Nursing, too.

Q. And where had you taken your nursing course? A. Well, over on the other side I completed it—and a practical course in this country, too. I went to the Mountainside Hospital in Montclair.

Q. That is where you finished? A. Yes.

Q. Then before you were married you taught school and nursed? A. Yes.

Q. And had you earned any money in that way at the time of your marriage? A. Yes.

Q. And when you were married did you give your husband that money? A. Yes, I did.

Q. How much money was that? A. I gave him $350 in December before we were married; I loaned him some money.

Q. And after you were married did you continue to nurse? A. Yes, I did. For one year I taught in school, too.

Q. And also continued to teach? A. Continued teaching.

Q. And did you earn money in teaching? A. Yes, I did.

Q. And did you earn money by nursing? A. Yes, I did.

Q. And did you continue to teach and nurse until the time your sanitarium was opened? A. Yes, Mr. Walscheid.

Q. And how many beds did you have in the sanitarium? A. I had ten beds.

Q. And you ran the sanitarium, did you? A. I did.

Q. And your husband is a doctor, is he? A. Yes, he is.

Q. And did he have his office in the same building? A. Yes, he had.

Q. And it was in that sanitarium that you made these moneys? A. Yes.

Q. Now, did you ever intend, when this title was passed to you, to hold this property as the property of your husband; did you ever intend that this property which is here in question, 13 Oak Street, should be considered the property of your husband? A. No; that was mine.

Q. And, as I understand, the first property that you received he gave you, did he? A. Yes, he did.

Q. And where was that? A. 526 High Street.

Q. And how long before the Oak Street was bought was it that he gave you that? A. It was about a year, or a year and a half, about.

Q. A year and a half before? A. Yes.

Q. That was in 1921, didn't you say?

Mr. Ockford: No, 1923.

A. About a year.

Q. The Oak Street property you signed the contract for on May 2d, 1923? A. The Oak Street property—yes, I did.

Q. How long had you then had the other property? A. About a year.

Q. About a year? A. Yes, Mr. Walscheid.

Q. And he gave you the other property at a time when he intended to take a trip to Europe? A. Yes, sir.

The Vice Chancellor: Wasn't that first deed made in 1921—the deed of the other property?

Q. Was the first property the High Street property? A. Yes.

Q. Now, when was that deed made? A. I don't recall exactly the date, but I know about a year before the Oak Street property.

The Vice Chancellor: My recollection is that the evidence shows it was in 1921 that the High Street property was acquired—is not that right, Mr. Ockford?

Mr. Ockford: I understood it was prior to that. I thought she said—

The Vice Chancellor: Well, it doesn't make any difference.

Q. When did you open the Hospital? A. In 1922.

Q. In 1922, or '21? A. 1921, in November; and in 1922 actually I began it.

Q. And what happened in 1922? A. I began to run the Hospital.

Q. In November, 1921, you opened it? A. Yes.

Q. And at that time did you own this property that your husband gave you? A. Which one—526 High Street?

Q. Yes. A. 1921—just about a couple of months after, or before, I don't remember exactly.

Q. You don't remember exactly? A. No.

By the Vice Chancellor:

Q. This place where you ran the Hospital—wasn't that the place your husband gave you? A. Yes.

The Vice Chancellor: There were only two pieces of property?

Mr. Walscheid: Yes, that is right. I think that is all.

DIORAN SIMSARIAN, Esq., sworn.

Direct Examination by Mr. Ockford:

Q. Where do you live? A. 9 Oak Street, Weehawken, N. J.

Q. You know Dr. Pohan and his wife, do you not? A. Yes.

Q. Do you know Mr. Abraham Fine? A. Well, I have met him; I know who he is.

Q. Did you close the title whereby the deed, Exhibit D-2, was given? A. Yes.

Q. When was that? A. June 1st, 1923.

Q. Where? A. At my office, 467 Bergenline Avenue, West Hoboken, N. J.

Q. Who was present at the closing, Mr. Simsarian? A. Mr. Fine; Dr. and Mrs. Pohan; myself; and I do not recall now whether Mrs. Fine was there or not. It may be Mr. Fine's attorney was present also; I cannot just recall.

Q. I was just going to ask you were you the only attorney present? A. I cannot remember that.

Q. Do you know whose signature is in that deed? A. I presume that it is his attorney's signature—Mr. Huneke, is it not? I cannot tell whether he was there or not at the time.

Q. Well, whom did you represent? A. I represented Mrs. Pohan.

Q. Do you recall the circumstances of the cash payments in connection with the transfer of the title? A. I have a full copy of the closing statement, that I made at the time, if you wish me to look at that.

Q. Yes, and just tell us. What we are interested in is the cash consideration—how did it pass, in what form? A. The balance was $7,967.18. I have a notation here "$7,000 bank check; $1,000 bank check," making a total of $8,000, which left a surplus of $32.82.

Q. Have you any recollection, or does your record show what banks those two bank checks were drawn upon? A. I do not, but I have seen a letter this morning from a bank that might explain the situa-

tion. I did not have that information and knowledge when I came here.

Q. Is the information in court? A. Yes.

Q. Who has that letter? A. It is here somewhere; I saw it here this morning; I don't know who has it now.

Q. What was his name? A. Well, Dr. Pohan showed it to me. I don't know who has the letter now.

Q. Did that letter refresh your recollection? A. No, it did not refresh my recollection, because I do not remember of my own memory as to what the nature of those checks were, or just how that transaction was paid, excepting what my memorandum here shows.

Q. Well, you say you do not have any recollection—did that letter refresh your recollection? A. I can give you the substance of that letter, if that is what you want.

By the Vice Chancellor:

Q. Oh, no; after you read the letter did that recall to your mind the banks the checks were drawn on? A. No, your Honor.

The Vice Chancellor: That is the answer.

By Mr. Ockford:

Q. Well, tell us what happened at the closing with respect to the two bank checks—who produced them and who did anything with them, and what became of them, as far as you know? A. I cannot remember the exact transactions that took place, but I presume they were produced by either Dr. or Mrs. Pohan and turned over to Mr. Fine, as I do not recall each transaction as it took place.

Q. Well, were the checks given to you by anyone, do you recall, during the transaction? A. I don't remember exactly just how it occurred.

Q. Were Dr. and Mrs. Pohan there all the time during the closing, do you recall? A. I think Mrs. Pohan left earlier.

Q. Did she sign any papers, that you recall, in connection with the transaction? A. I think she endorsed the checks in question.

Q. Did she stay until the checks were passed? A. I don't remember how long it was when she did depart.

Q. Were the checks given to Mr. Fine, or to his attorney, do you recall? A. No, I do not.

Q. Were the checks drawn on the same bank, do you know? A. Well, I did not know until I read this information this morning.

Q. Did you have anything to do with the execution of the contract of May 2d, Exhibit C-4 (showing the witness the same)? A. No, not that I remember.

Q. Do you recall who made the appointment for the passing of title, so far as you were concerned? A. I don't remember that; it is about three years ago, and I have had, of course, numerous closings since this.

Q. Who was Haig Simsarian? A. That is my brother.

Q. Is he an attorney? A. No, he is in the real estate business.

By Mr. Walscheid:

Q. Wasn't that your father? A. No, he is my brother.

By Mr. Ockford:

Q. Have you any knowledge of the payment of

the $500 deposit referred to in that contract? A. No, I have not.

Q. Was any receipt exhibited for that at the closing, do you know? A. No, I do not recollect.

Q. Was there a purchase money mortgage given, Mr. Simsarian? A. (Referring to the notes of closing.) No.

Q. Was any cash used in the transaction of closing? A. I presume this $32.82 was refunded to the purchaser.

Q. Do you recall how that was done—in cash, or check, or whose check? A. No, I do not recall now how it was done.

Cross Examination by Mr. Walscheid:

Q. You now know that there were two checks, don't you? A. Yes, sir.

Q. And you know that both of those checks were drawn to the order of Mrs. Pohan? A. Yes.

Q. And that she endorsed those two checks? A. She did.

By Mr. Ockford:

Q. Just a minute—how do you know that? A. Why, on this memorandum I saw it, and from my recollection I know she endorsed the checks before she departed.

Q. How do you know what bank they were drawn on, and who drew them? A. I have not said the name of the bank. I know now on what bank they were, from this information that I read today; but I did not recollect before I came here on which banks those checks were.

Q. Well, your testimony in answer to Mr. Walscheid's questions is given in the light of the letter that was shown to you here this morning by Dr. Pohan—is that right? A. No, only so far as the name of the Bank is concerned.

Q. Well, how about as to the name of the payee? A. Well, Mrs. Pohan endorsed the checks in my presence.

Q. You recall that? A. Yes, I do.

Q. Well, on direct examination you testified that you did not know.

Mr. Walscheid: No, on direct examination he testified that she had endorsed them; it was almost the last thing he said.

Mr. Ockford: Well, I ask to have the letter produced, seeing that the witness has been allowed to testify in respect to the matter, and it is in the possession of the defendants, and their questions brought it out; otherwise I move to strike out this testimony on cross examination.

The Vice Chancellor: The testimony on cross-examination? No; you can ask to have stricken out all reference made to this letter.

Mr. Ockford: No, I would rather have them produce the letter.

The Vice Chancellor: Do you call upon the other side to produce the letter?

Mr. Ockford: Yes, sir—referred to in his testimony on cross examination.

Mr. Walscheid: Then it goes into evidence?

Mr. Ockford: Yes.

The Vice Chancellor: Yes.

(Letter produced in response to the call, and handed to examining counsel.)

Q. I show you a letter produced by Mr. Wal-

scheid—is that the letter that was shown to you in the court room this morning? A. Yes, sir.

(The letter is offered in evidence by Mr. Ockford, admitted, and marked Exhibit C-5.)

Q. Now, just one question—are you sure now that Mrs. Pohan endorsed those two bank checks in your presence? A. Yes.

Q. Did you see her do it? A. Yes, to the best of my recollection, that is what she did, in my presence.

The Vice Chancellor: Well, could they get the money in any other way, unless she endorsed them? The checks were to her order.

Mr. Ockford: Well, of course, we ought to have the checks themselves, to see.

The Vice Chancellor: Well, he has sworn to it.

Recess until two o'clock p. m.

Afternoon Session.

Hearing of the cause resumed at two o'clock p. m., pursuant to adjournment.

FRANK GEORGE LISH, sworn.

Direct Examination by Mr. Ockford:

Q. You are connected with the Commonwealth Trust Company of Union City, formerly West Hoboken? A. I am.

Q. Are you here in response to a subpoena served on the Trust Company? A. I am.

Q. Will you tell us, if you can, in reference to two checks referred to in this letter, Exhibit C-5, signed by your Treasurer? A. Here they are, right here (referring to a bank check book produced by the witness).

Q. Well, let us take the first check—now call off the check? A. "Check for $7,000, Haiganoosh Pohan."

Q. Give us the number, date and endorsements, please? A. 15043 is the check number. The date is May 31, 1923, and the amount is $7,000.

Q. Just give the endorsements on that check? A. "Pay to the order of Pauline Fine," and it is endorsed "Haiganoosh Pohan." Then Pauline Fine endorsed the check for deposit. That is all on that check. Then there is another check to Haiganoosh Pohan for $1,000, numbered 15044, dated May 31, 1923. That was paid to the order of Pauline Fine by Haiganoosh Pohan, and endorsed by Pauline Fine. That was deposited in the Commonwealth Trust Company by Haig Simsarian.

Q. The checks are checks of the Commonwealth Trust Company, signed by its treasurer? A. Yes.

Q. Now, the $1,000 check is credited to another account in the same bank? A. In the same institution.

The Vice Chancellor: They are both on Account No. 6998.

Q. And to what account are those checks charged? A. Those are what you might say "treasurer's checks." It is a certification of the Bank. Those checks act as certified checks. It is a treasurer's check, which is really a check of the institution itself.

Q. But to whose account were those checks charged—what customer's account? A. Why, it is not charged to any customer's account. The money is brought to the Bank, and, upon request of the customer, they are given a treasurer's check—in other words, they can bring their own certified check, or bring cash.

Q. Or charge it to an account, if they are a customer of the Bank, can they not? A. Well, their own check would cover that.

Q. Well, have you the records here which show who procured these checks, and by what means? A. Well, now, as far as these records show, it looks as though they had been charged to Savings Account 6998. Now, I could not verify that, for the simple fact that I have not those credits and haven't been told to bring them along.

Q. Is that true as to each of the two checks? A. That is, as far as these records show right here. That must be a savings account.

Q. In your own bank? A. In my own bank.

Q. And you haven't those accounts here? A. No, sir, I have not.

Q. The subpoena was issued to cover that very item? A. Well, I didn't hear anything about that; that would be, naturally, up to one of the officers.

Q. And you do not know in whose name that account is? A. No.

Q. And do you produce any checks of Hovagim Pohan or Haiganoosh Pohan? A. No, sir, I did not; I have no checking account for those parties.

Q. You say you have no checking account of either of those parties? A. No, sir, for either of those parties.

Q. What do you know about a savings account of either of those two parties? A. Of that I could not tell you. As far as these records show here,

I believe this savings account must have been charged with these two checks (referring to Savings Account No. 6998).

Mr. Walscheid: I object to what you believe.

The Vice Chancellor: I will sustain the objection.

Mr. Ockford: That is all we have with this witness. I want to show to the Court that the savings account is in the name of the defendants, and we, of course, cannot close our case until they are here. We have subpoenaed the Cashier to produce them, and he has not produced them.

The Vice Chancellor: Where is the subpoena?

(Subpoena produced and handed to the Court by the witness.)

The Witness: I believe we can produce them, if we have them up there.

The Vice Chancellor: Well, I do not know that that subpoena would, strictly, apprise the bank that you wanted the savings accounts. Still, I suppose there is no objection to producing them.

Mr. Ockford: Well, maybe when we call the other defendant he may be able to produce them. He was subpoenaed to produce his pass-book, and we may not need this.

No cross examination.

GUSTAV HELFF, sworn.

Direct Examination by Mr. Ockford:

Q. What is your position in the Hudson Trust Company? A. Individual bookkeeper.

Q. And you are here in response to a subpoena served on the Cashier of that Bank? A. I am.

Q. Has the Hudson Trust Company any account in the name of Hovagim or Haiganoosh Pohan? A. We have just one account, in the husband's name.

Q. And what kind of an account? A. A checking account.

Q. Is it still open? A. You ask for data of three months there (referring to the subpoena); now, April, May and June is all I have got the data for.

Q. Of 1923? A. Yes.

Q. That account was open at that time? A. Yes.

By Mr. Walscheid:

Q. That is all you brought? A. That is all I brought—only what the subpoena calls for.

By Mr. Ockford:

Q. I show you what purports to be a check deposited in your Bank to the credit of Dr. H. Pohan—does that item appear in your transcript? A. That check is not drawn on us.

Q. No, but was that deposited with you? A. It was not deposited in our Bank.

Q. Not deposited in your Bank? A. It was the Commonwealth Trust Bank.

Q. You have a transcript of payments made in the month of May, 1923? A. I have.

Q. What are they? A. May 1, $15.00; May 3, $500.00; May 4, $123.00; May 5, $5.51; May 5, $7.80; May 14, $6.00; May 23, $10.00; that is all in May.

Q. Is this your original, or can you leave this copy with us? A. This is a copy.

Mr. Ockford: I ask to have it marked.

Mr. Walscheid: I object to that paper, as immaterial, incompetent and irrelevant.

The Vice Chancellor: I will sustain the objection.

Mr. Ockford: May I express on the record that the first reason is to show that apparently no part of the consideration of the purchase of this property came from this account. I do not want to be charged afterwards with not having endeavored, by excluding certain matters—

The Vice Chancellor: Well, he has testified to what the account shows, and I will sustain the objection as to the offer of this paper.

No cross examination.

HOVAGIM POHAN, M. D., sworn.

Direct Examination by Mr. Ockford:

Q. You were subpoenaed, Doctor, to produce a savings-bank passbook of the Commonwealth Trust Company, in your name—have you it here? A. Yes, sir.

Q. Will you produce it, please? A. Yes, sir (producing a book and handing the same to examining counsel).

Mr. Walscheid: I desire to object to this, on the ground that it is not within the issues raised by these pleadings—this examination. I just do that to protect my rights.

Mr. Ockford: Well, we are just tracing the transactions as to the moneys used to buy this property.

The Vice Chancellor: You are trying to show that this property was the property of the husband?

Mr. Ockford: Yes.

The Vice Chancellor: I will overrule the objection.

Q. I show you this book that you produced, "Commonwealth Trust Company, Account 6998," and ask you is that the only savings bank account that you had with the Commonwealth Trust Company? A. No, I have another book.

Q. Well, the same account, or a separate account? A. Why, it was in my name, too.

Q. But is this book that you produce a continuation of the same account? A. No, sir.

Q. A separate account? A. Separate.

Q. Well, let us take this account first—when was this account opened that you now produce the pass-book of? A. I will have to look.

Mr. Walscheid: Doesn't the book show?

Mr. Ockford: I don't think it does.

A. According to this, it was in September, 1915.

Q. And this account is still in existence? A. Yes, sir.

Q. Did you, in the month of May, 1923, make any withdrawals of money from this account to purchase cashier's or treasurer's checks? A. I deposited some checks, and I drew it back, for $8,000.

Q. Will you show us in the pass book the entries of the withdrawals of the $8,000 in May, 1923? A. "$8,000" (designating an entry in the book which reads, "May 31, 1923, $8,000, withdrawal").

Q. And the withdrawal of $8,000 of that date from this account was made by you, was it not?

A. Yes, the check was withdrawn by me from the bank; I asked the bank to give it to me.

The Vice Chancellor: Of course; no one else could draw it.

The Witness: Yes.

By Mr. Walscheid:

Q. I suppose you drew a check to the Bank, is that what you did? A. Previously, if you want me to—

The Vice Chancellor: Why waste time about it?

Mr. Ockford: I want to connect this with these cashier's checks.

The Vice Chancellor: That is all right; but he drew $8,000 out of that Bank, as the account stood in his name, and no one else could draw it.

By Mr. Ockford:

Q. And with that $8,000 you procured the two cashier's checks? A. Two bank checks.

Q. Two bank checks, which were used in connection with purchasing the Oak Street property? A. Yes.

Q. About the $500 deposit in that transaction—did that come from this account, Doctor? A. I cannot tell you that, because I gave a $500 check with my check.

Mr. Ockford: I offer in evidence the entry in the passbook which has just been referred to, dated May 31, 1923, "Withdrawal $8,000 from Account No. 6998," in the name of H. Pohan, M. D., on the Commonwealth Trust Company of West Hoboken.

(Admitted, subject to the same objection, and marked Exhibit C-6.)

Q. I ask you whether the deposit under date of May 26, amounting to $7,614.70, was made in cash or by check? A. That was sent to me—

Q. (Indicating in the account) This item? A. I don't remember in what way it was; it was not cash.

Q. Well, how was it? A. It was not in cash; I don't know in what form—a check or money order—I don't remember.

Q. Where did you get it from? A. From Boston.

Q. Who, in Boston, or what, in Boston. A. Mortgage Equity Company.

Q. And what did that check represent that you received from Boston? A. That was the money that my wife used to invest—gave me; she gave me the money to keep and invest for her; and I sent it to this Company because they were giving us six and a half per cent. interest on it.

Q. Well, in what form was the account with this Boston Company? In the first place, in whose name was the account? A. In the beginning it was in my name, when I started the account. Then, when I drew some of my money out I did not have no more money left there, and my wife had continued the account in her name.

Q. Well, when was that change made? A. That was around 1920.

Q. And did you have mortgage certificates from that Company, or in what form were the evidences of investment? A. They gave us certificates showing how much money we had with them.

Q. Separate certificates? A. I don't remember whether it was one certificate or two certificates. I know they changed the certificate every six

months or so. We had to send the old certificate and they used to send us a new certificate showing how much money there was standing there.

Q. And when was that account closed—before or after the date of May 26th, 1923? A. That account was closed, I think it was in the late part of 1924, as far as I can remember.

Q. The account was still open when you withdrew this amount of money, $7,614.30? A. Yes.

Q. What, if any certificates, did you surrender on drawing that money? A. The certificate that we had.

Q. Did you send that to the Boston Company? A. Yes; my wife had to sign it and send it back.

Q. It was in her name? A. Yes.

Q. And the checks that came from Boston were made out to her order, were they? A. When we had the joint account it was—

Q. (Interrupting) No, in this transaction?

The Vice Chancellor: The $7,600.

Q. To whose order was that drawn? A. I think it was in my wife's name, if I remember.

Q. Do you remember that she endorsed it? A. She had to endorse it; yes, sir. I know that she had to endorse it because I deposited it.

Q. And she gave it to you? A. Yes.

Q. You are quite sure of that? A. Well, I can't swear about it.

Q. You are sure, though, are you not now, that the $7,600 was in the form of a check or draft drawn by this Company in Boston? A. It was either a check or draft.

Q. To either her order, or yours; or are you sure it was to her order? A. I don't know whether it was in both names, or in one name; I cannot tell you.

Q. Did you pay the money to this Boston Company for the purchase of the certificate that they sent you? A. My wife used to give me money, and I used to send it with my check.

Q. Send it with your check? A. Yes, sir.

Q. And how long had the balance there, to your credit, represented by these certificates, been as much as $7,600?

Mr. Walscheid: Oh, how is that material? I object to it.

The Vice Chancellor: I do not see anything to it.

Mr. Ockford: Well, it all depends upon his answer.

The Vice Chancellor: Why, his answer is that this $7,600 is for certificates he got from this Boston concern.

Mr. Ockford: I am asking him how he paid for them.

The Vice Chancellor: He said his wife gave him the money, and he sent the money on with his check; and then, when he drew it out, the draft came to his order, or to his wife's order, or their joint order; and his wife had to endorse the check.

Mr. Ockford: He testified the account was originally in his name; and it is important to know whether a part of it remained in his name, and, if so, how much.

Mr. Walscheid: I do not think that is important, at all.

The Vice Chancellor: I do not see it.

Mr. Walscheid: He had a right to do with his money as he pleased.

Mr. Ockford: True enough; but he has not told us—

The Vice Chancellor: I will allow you to go ahead with it; we will save time by letting it in.

Q. Did you send any of this money, at any time, to this Company in Boston for the purchase of these certificates? A. Previous to 1920.

Q. Well, the money that you sent, did you draw it out at any time? A. Yes, I drew it out.

Q. When? A. That was around 1920.

Q. And all of the money that was there in May, 1923, was your wife's money—was that right—all of it? A. In 1923?

Q. At the time you drew the $7,600, was that all her money, or was it partly yours and partly hers? A. I cannot tell you exactly whether it was absolutely all hers, or not; there might have been some of mine left over there, but the account was hers; it was in her name.

Q. Have you any letters or statements from that Company in your possession at the present time? A. No.

Q. What is the address of the Company in Boston, do you know? A. I think it was on Beacon Street; I don't remember exactly; but it was on Beacon Street, I know.

Q. Do you know the name of any official of that Company? A. That is all I know—the Company by that name. I have a friend who was working in the Company, and, through that friend of mine, I had given my money for investment. When I finished that account my wife thought it was a good investment, and she invested her money over there.

Q. Through the same friend? A. Yes.

Q. What is the name of that friend? A. Dabarissian.

Q. Can you write it? A. I cannot tell you the

exact spelling of it, but I am telling you the last name. I call him "Bose Dabarrissian."

Q. Where does he live? A. He was not in Boston; the last I knew he was in Centre Street in one of the towns near Boston, I don't remember the name.

Q. Well, let us understand—the money that you forwarded to Boston, did you send it to this Company, or did you send it to your friend? A. To the Company.

Q. Directly? A. Directly.

Q. And got the Company's receipts and certificates, is that right? A. The Company used to send me every month a statement.

Q. Well, you paid the money to the Company in Boston, direct?

The Vice Chancellor: He said that half-a-dozen times, Mr. Ockford.

Q. By check?

The Vice Chancellor: He said by check, yes.

Q. Have you any cancelled checks here of any single payment to that Company? A. I haven't kept the checks because, after—well, I have no checks for the last six months, anyway; but seven or eight months ago, when I made the change in my office, I made a clean-up of a lot of papers, old papers; I just threw them out; and I haven't kept any checks since 1925, in September.

Q. And in September, 1925, you did have all these old checks? A. No; you know, before then I haven't kept any checks.

Q. Oh, you mean you have checks since then, but not before, is that right? A. Yes, I have the checks since then, whatever I have. I have them, but no old checks previously.

Q. Well, the payments made to the Company in Boston were made by checks that you do not have now, is that right? A. I have none of those checks yet, kept.

Q. And they are lost or destroyed, you say? A. Destroyed, I suppose.

Q. Have you any records, whatsoever, of the accounts with that Company—statements that they sent you? A. No, I have none, because I have closed the account long ago there.

Q. Is that account still in existence? A. No, no.

Q. It is entirely closed? A. Entirely closed.

Q. And do you recall when the last time was you paid any money to that Company? A. I cannot tell you.

Q. Well, did you make payments to that Company after the withdrawal of the $7,600? A. Oh, yes—not after that—that is to say, after that they were not my own moneys left over there; my own account was closed with them in 1920.

By the Vice Chancellor:

Q. Yes, but what he wants to know is, after you drew the $7,600 was there any money of yours in Boston? A. Yes, sir; we deposited again.

Q. You deposited there again? A. Yes, I deposited again; I gave them checks afterwards.

By Mr. Ockford:

Q. And when you closed the account out did you receive a further check from the Company? A. Well, we had to send them a certificate, and they had to send us the money, and that was all of it.

Q. I say, after you got the $7,600 then you received another payment from them in exchange for the certificates you turned in? A. We had

made more than one payment afterwards—after this $7,600.

Q. I am talking about when you closed it out, didn't you receive money from the Company? A. We had to send them a certificate, and they had to send me a check; and then it was finished, it was closed.

Q. All right—when was that? A. I don't remember the date when that was.

Q. Well, how much did you get, as near as you can remember? A. Well, it was more than a year.

Q. How much, I say, in dollars? A. Oh, I cannot tell you.

Q. Well, about? A. I don't know; if I tell you I don't know, because that check was in my wife's name, and I don't remember how much was the amount.

Q. Well, into what bank account did it go, if you know? A. I don't remember that, either.

Q. Do you recall whether the $7,600 was in one check, or more? A. From Boston—the one that we received from Boston?

Q. Yes? A. I don't remember whether it was two or one; I think it was one; that is what I remember.

Q. And was it for $7,600, or less? A. That was the check, if I remember.

Q. Well, how much? A. That amount.

Mr. Walscheid: Well, say it—how much?
The Witness: $7,614.70.

Q. In this account did you, at any time, deposit any other check from this Boston Company, beside the one for $7,614.70? A. Oh, yes, previously; I got another check some time ago.

By the Vice Chancellor:

Q. Well, he says "after this"? A. Oh, after this

one we closed our account; we received what we had and closed it.

By Mr. Walscheid:

Q. What he wants to know is whether, after you put in $7,614.70 from Boston, whether, after that date, you deposited any further moneys from Boston into this particular account? A. I cannot tell you.

By Mr. Ockford:

Q. When you gave the $8,000 to the people from whom 13 Oak Street was purchased— A. (Interrupting) I did not give it, my wife gave it.

Q. All right—that was your wife's money? A. That was the money that she had already previously gave to me to keep for her.

Q. In other words, it was not a gift from you to her, was it? The $8,000 used to buy 13 Oak Street was not a gift by you to your wife, was it? A. Well, if you will have some explanation before I say "Yes", or "No"?

Q. Well, what was it—tell us what it was? A. Well, my wife had given all her money to me for me to keep, and she never asked no account about it; she never told me how much money she had with me, and she never said nothing; she trusted me through and through; and when I wanted to buy this property for her I didn't say nothing to her until the last day, when I said, "I am going to buy this property and I am going to give it to you."

Q. I am asking you now whether that was a gift from you to her?

Mr. Walscheid: I object, on the ground that the evidence is in, and it is for the

court to decide whether it is a gift, or not, on the facts.

Mr. Ockford: Well, it is so doubtful.

The Vice Chancellor: I do not think there is any doubt about it.

Q. Well, what is your present statement, Doctor, as to the $8,000 transaction—was it your wife's money, or was it not? A. It was her money, but I did give back to her a present equal to that.

Q. Well, in giving it back to her, in equal amount, did you give it back with your money? A. Her money was with me. That was her money.

Q. The $500 deposit paid for the purchase of 13 Oak Street, whose money was that? A. It was my wife's money, too.

Q. And out of what account did that come? A. What account?

Q. Yes, what bank account did you draw it out of—the savings bank account, or was it in this Hudson Trust account? A. I don't remember which account I gave it to her from, but it was on the check account, I suppose, when I gave a check.

Q. Well, was it your check account? A. That was my check when I gave it.

Q. $500, on the Hudson Trust Company? A. On the Hudson Trust Company.

Q. Now, whose money was that $500? A. That was the money she had with me; and I had to draw it from her money and put it in the check account for her, to cover the check.

Q. Did you keep any account of this money that you say was in your hands belonging to your wife? A. No.

Q. Do you know how much money your wife gave to you during the period from the time you were married down to May 31, 1923? A. I cannot

tell you, but the amount was over ten thousand dollars.

Q. And did you get this money from your wife in cash? A. She used to give it to me in cash because she used to receive it in cash.

Q. What was the largest single amount which she gave you at any one time? A. I couldn't tell you how much it was.

Q. Well, what was the largest amount, about, that you can remember? A. Well, during the ten years I cannot remember what was the largest amount, but I can tell you that I have received, at times, $300, and even $400; between three and four hundred dollars I received from her.

Q. This savings acocunt, No. 6998, contains deposits of your own money, does it not? A. Not my own money.

Q. None of it? A. Not all my money.

Q. I say, does it contain any deposits of your own money? A. Part of my money.

Q. And prior to May 26, 1923, did you deposit in that account any of your own money? A. In this book?

Q. Yes. A. Yes.

Q. At that time you had a check account in the Hudson Trust Company, did you not? (No response.)

Mr. Ockford: I offer the whole book now in evidence.

(Admitted and marked Exhibit C-6.)

Q. Did you have any other savings bank account in May, 1923? A. In the same bank?

Q. In any bank—any other savings account in any bank, beside the one his Honor is looking at? A. Previous to that?

Q. Did you have any other savings bank account? A. No, this is the only place—the Commonwealth Trust.

Q. Is that the only savings account you ever had? A. Excepting money that we used to send to Boston, of my wife's.

Q. Well, that was not a savings bank; I am talking about a savings bank? A. That is the only one I have.

Q. And that account was opened prior to the date of that book—that is, this was the second book (referring to the passbook Exhibit C-6), was it not? A. No.

Q. Is that the first book? A. That is the first book.

Q. It says here "Book balanced September 8, 1915, $500"—wasn't that in another book like this? A. No, sir; that was the first book I got from them.

Q. Well, was this $500 deposit paid you in cash?

Mr. Walscheid: How is that material?

The Vice Chancellor: I cannot tell you.

Mr. Ockford: Well, I want to know whether there was a prior account; it may be important.

The Vice Chancellor: Well, if he made a gift to her he had a right to do it at that time. He says he did not.

Mr. Ockford: Well, that is what I want to know. We have his own story, under oath, which is entirely different.

The Vice Chancellor: I don't care what you say about it; if he made her a gift he had a right to do it; he didn't owe you money at that time; it was not defrauding any creditors for him to give her any property.

Mr. Ockford: No, but I think we ought to be entitled to know what the fact is.

The Vice Chancellor: It is interesting, but it is not useful.

Mr. Ockford: It may become so.

Q. Is this Hudson Trust Company account the check account that you had in May, 1923? A. No.

Q. You had this Hudson Trust Company account in May, 1923, had you not? A. I had that check account, yes.

Q. Did you draw any money from this account in connection with buying 13 Oak Street? A. I had to deposit some money and draw out a check at the same time.

Q. Can you find that entry? A. (Examining the book.) On May 3d I deposited $400; I had somewhere about $200 left, and I had to put in $400 to cover my $500 check.

By Mr. Walscheid:

Q. And on May 4th you drew the $500? A. $500.

By Mr. Ockford:

Q. Well, where did the $500 come from? A. I had to take it from the savings account, I suppose; and I had some money my wife gave me to deposit to cover the check.

Q. Have you the check there? Is that the check in your hands? A. No, sir; this is not the check. We had to deposit some money, which money I received partly from my wife, and part I drew from my savings account, and covered that check.

Q. I call your attention to a withdrawal of May 3d, 1923, of $400—didn't you draw the whole amount from the savings account? A. Well, that might be the case—four hundred dollars.

Q. From your account? A. Yes.

Q. Now, the $500 which you received October 11th, 1923, as shown by the check Exhibit C-3, was deposited in what account by you?

The Vice Chancellor: What bank was it deposited in?

Mr. Ockford: The Commonwealth.

Q. Was it deposited in a savings account, or in a check account? A. I don't remember.

Mr. Walscheid: It was October 15th; it is not there.

Q. Well, did you, in October, 1923, have a check account with the Commonwealth Trust Company?

The Vice Chancellor: Well, this was not deposited, it was paid by the Commonwealth Trust Company October 15th; there is the date stamp on it (exhibiting the check to examining counsel).

Mr. Ockford: Well, it is drawn on the National Bank of North Hudson. That is evidently a clearing stamp, as I see it; I may be wrong, perhaps.

The Vice Chancellor: No—

Mr. Walscheid: I think you are right, your Honor. In other words, it was drawn on the Commonwealth and seems to have been cashed there.

Mr. Ockford: No, but the Commonwealth stamp is when they receive the money from the drawee—the Bank stamps it.

The Vice Chancellor: Then, if your theory is correct, the Commonwealth, on October 15th, had this deposit with it and paid it. It does not appear to have been put to any account, because it has not got the usual deposit stamp on it.

Mr. Ockford: Well, there is the endorsement. It might be the depositor's only method of depositing the check.

The Vice Chancellor: Oh, no; when a bank sends along a check to another bank it stamps it in a certain fashion.

Q. Well, can you tell us, Doctor, did you cash this check, or did you deposit it to the credit of your account? A. I cannot remember.

Q. Well, did you have a check account in the Commonwealth Trust Company at that time? A. A check account in the Commonwealth Trust Company—no; I always had with the Hudson Trust Company my check account.

Q. And this check was not deposited in the Hudson Trust Company, was it? A. I don't know.

Mr. Walscheid: He says he don't know.

Mr. Ockford: I am trying to find out.

The Witness: I don't know whether it was in the Commonwealth or in the Hudson Trust; I don't know; I don't remember.

Q. Well, what did you do with the five hundred dollars represented by this check, Exhibit C-3, after you received it? A. I hate to tell you.

Q. Well, what I want to know it, did you keep it, or use it, or give it to your wife? A. I have given it to the lawyers.

Q. What I want to know is whether you retained this five hundred dollars and used the money for any purpose, or did you turn it over to someone else? A. No; I retained it, and used it for fighting this case.

Q. You did not turn the five hundred dollars over to Mrs. Pohan, did you? A. No.

Q. Now, with respect to 13 Oak Street, from the time the title was passed did you collect the rents?

The Vice Chancellor: What is the difference? His wife swears he did. You cannot add much to that by having him say it. You have got all you can get on that; and he may go further and say he did not.

Mr. Ockford: Well, that is true.

Q. Let me ask you, generally, what disposition was made of the rents collected on the Oak Street property after they were collected?

Mr. Walscheid: I object to that as immaterial.

The Vice Chancellor: I overrule the objection.

A. I turned it over to my wife. What ever bills there were to be paid I used to pay, and the rest hand to my wife.

Q. Did you keep any record of the amounts received and paid out in connection with this property? A. No, sir, I have not kept any record.

Q. Did you, at any time, pay to your wife, in cash or by check, any of the money representing what she had invested through you?

Mr. Walscheid: I object to that.

The Vice Chancellor: I will sustain the objection.

Q. Did you deliver to your wife any of the mortgage certificates that you say you received from

the Boston Company? A. She had them; we had them; they were kept in the home; and she usually takes care of those papers.

Q. Did you, in connection with the Oak Street property, pay any of your own funds—did you use any of your own money in connection with buying the Oak Street property?

The Vice Chancellor: He answered that a half a dozen times.

Mr. Ockford: I don't think he did.

The Vice Chancellor: He said possibly some of it went into it, and there was $8,000 of his wife's. Now, I think that is just going around in a circle all the time. I do not see that you are getting any place with that. You have got all the evidence that I think you can get out of this witness on the subject of buying the Oak Street property.

Mr. Ockford: Well, of course I have in mind the previous sworn statements of the same witness, and I do want to involve the record in contradiction between what he said under oath before and what he says now; but I have these things in mind, and I want to give him the benefit of this opportunity of being sure that what he is saying is so. Now, if he is satisfied to rest on what he says now as being so, I am satisfied, too. That is all.

No cross examination.

OTTO SALDARINI, Esq., sworn.

Direct Examination by Mr. Ockford:

Q. Mr. Saldarini, are you a member of the Bar of this State? A. Yes, sir.

Q. And I show you a paper marked Exhibit J. E. W.-1 for identification, and ask you if that paper was prepared in your office under your direction? A. Yes, sir.

Q. Who first came to your office in connection with this transaction of sale between Pohan and Rizzi?

The Vice Chancellor: What paper is that?

Mr. Ockford: This is the contract that was never signed. It is marked for identification J. E. W.-1.

Mr. Walscheid: Why don't you offer it in evidence? It is your privilege.

Mr. Ockford: I do not know that I want to.

The Vice Chancellor: Well, you cannot examine the witness unless you do. You cannot have an exhibit half-way in the doorway and half-way out; you must either let it go all in, or all out.

Mr Ockford: Well, it is in by the other side marking it for identification. I do not think I am bound to put it in evidence; that is their privilege. I am entitled to examine him as to something offered for identification.

Mr. Walscheid: Certainly he has no right to examine on a paper that is merely offered for identification.

The Vice Chancellor: The paper was shown a witness, and marked J. E. W.-1 for identification. Now, that is all the testimony there is to that. If you want to examine as to that paper you will have to offer it in evidence.

Mr. Ockford: I do not want to examine him in reference to it; I just called his attention to a paper that has been marked for identification.

The Vice Chancellor: If you want to do that you must wait until the rebuttal comes around. I have made my ruling, and if I am wrong the Court of Errors can correct me.

Mr. Ockford: I do not understand at all that your Honor ruled on any objection or any offer; I have made no offer.

The Vice Chancellor: No, but there is an objection made that you must offer it in evidence, and I have ruled that that paper cannot be examined upon unless it is offered in evidence.

Mr. Ockford: I am not going to do it.

The Vice Chancellor: Well, then, take up some other matter.

Mr. Ockford: I am going to. But I am not using the paper. If they do not want it in, I do not want it in.

Q. Did Mr. Rizzi and Dr. Pohan attend at your office in connection with a transaction in October, 1923, Mr. Saldarini? A. Yes, sir.

Q. And who was present upon the occasion when they were there? A. There was Dr. Pohan, Lepore, DeSena and Rizzi.

Q. Did you hear any conversation at that time between Dr. Pohan and the other parties and yourself regarding the property 13 Oak Street—was there any conversation in your presence about the property? A. They came down for the purpose of drawing a contract.

Q. Now, let me understand—did they all come at the same time? A. I could not say.

Q. In the transaction did you meet the Doctor's wife, Mrs. Pohan? A. No, sir.

By the Vice Chancellor:

Q. You did not meet the Doctor's wife? A. No, sir.

By Mr. Ockford:

Q. Was there any discussion in your office between the parties with respect to a deposit? A. They came down to draw—

Mr. Walscheid: Answer the question "Yes" or "No."

Mr. Ockford: I do not want to ask any leading question.

A. That had already been made.

Q. That is what I do not know; I want you to tell us what, if anything, took place in your presence, in the way of discussion, about a deposit? A. Yes.

Q. What was said, and who said it? A. Well, they brought a receipt down that had been signed by the Doctor saying that he had received five hundred dollars as a part deposit for the buying of that house.

Q. And were you shown the paper, Exhibit C-2 (showing the same to the witness)? A. Yes.

Q. And who showed that paper to you? A. I don't know; somebody in the office.

Q. Had the signatures been annexed before the paper reached your office? A. Yes.

Q. And when the parties talked about this matter in your office, what, if anything, did you do? A. I had to draw a formal contract.

Q. And at whose request? A. At everybody's request; that is what we all came there for.

Q. And did the parties attend at your office on

a subsequent date? A. There was two or three conferences—I don't know—and on two distinct occasions they were all there; once on one day and once on a subsequent day.

Q. The deposit was paid in your presence, or was it not?

Mr. Walscheid: Which deposit?

Mr. Ockford: The $500.

A. Rizzi had already signed the receipt for $500 when they came to the office.

Cross Examination by Mr. Walscheid:

Q. Whom did you represent in the transaction? A. I represented the purchaser.

Q. Mr. Rizzi? A. Yes, sir.

Q. And the receipt which you speak of is this paper (showing the witness Exhibit C-2)? A. This was brought in the office.

Q. This paper which you call a "receipt"? A. Yes, sir.

Q. And Mr. Rizzi brought you that, didn't he? A. Yes—well, Rizzi or Lepore. It was brought in, I know.

Q. Well, you know Lepore came in with Rizzi? A. Yes.

Q. And he came in to you because you were Rizzi's lawyer? A. Yes.

Q. And they showed you that paper? A. Yes.

Q. And then you suggested to them that they should draw formal contracts, didn't you? A. Yes.

Q. Well, didn't you advise Mr. Rizzi about that paper—did you tell him that that was a receipt for money? A. Well, I only told him it was a receipt.

Q. A receipt for money? A. Yes.

Q. And told him that a formal contract should

be drawn? A. No, they came down for the purpose of having it drawn; that is what they came down for; that is what they told me they wanted—a formal contract.

Q. Now, you knew that Rizzi had not signed this particular paper that was exhibited to you, C-2? A. No, not this one.

Q. And you also knew there was no copy in existence, didn't you? A. No, I did not.

Q. Didn't know it? A. No.

Q. And did you discuss with him the advisability of signing that particular paper, C-2? A. No, I wanted a formal contract.

Q. You wanted a formal contract? A. Yes.

Q. And you told them you wanted a formal contract? A. Yes.

Q. Tell us just how you told Rizzi that you wanted a formal contract? A. When they came in the office they came in with the express purpose of having a formal contract drawn, and I looked at this, and I says "You can take your information from this," and I went ahead drawing the contract and using this as my guide for the financial terms.

Q. For the financial terms? A. Yes.

Q. Then, in addition to the financial terms in that paper, you added other terms, did you not? A. Well, they were printed in the contract.

Q. And you used a printed form containing other terms that were not in that paper? A. Yes, sir.

Q. And that was the form that you then submitted to Rizzi for signature? A. Well, when I finished drawing it they both looked at it; and I did not submit it to Rizzi for signature, I submitted it to the Doctor.

Q. And then the Doctor took it away with him? A. Yes, sir.

Q. And said he wanted to show it to his lawyer? A. Yes.

Q. To see whether its terms were all right? A. Yes, sir.

Q. And then the Doctor came back on another occasion, didn't he? A. Yes.

Q. And then he had some suggestions as to changes, hadn't he? A. He had further additions.

Q. And as to those additions you did not agree? A. At the beginning, no; but at the end, to all except one or two of them.

Q. Well, you did not agree to have your client, Rizzi, sign the contract in the form in which the Doctor brought it back? A. No.

Q. And in the form in which he wanted it? A. No.

Q. So that the contract fell through because you and Dr. Pohan could not settle upon the final terms of the agreement which was to be signed? A. Not because I could not settle.

Q. Well, you representing Rizzi—is not that so? Yes, sir.

Q. And you at that time advised Rizzi not to sign the contract? A. Yes, sir.

Q. The contract which you had drawn, and which Dr. Pohan had taken away and had brought back in corrected form? A. Yes.

Re-direct Examination by Mr. Ockford:

Q. Were there any discussions, at any time, in your presence, about Rizzi signing this paper Exhibit C-2, or a similar one? A. No.

Q. You only talked about the one paper that you had drawn, and that the Doctor's lawyer had added conditions to? A. Yes.

By the Vice Chancellor:

Q. Well, why didn't you carry out the terms of

the contract on the basis of the letter and receipt? A. Well, they came down and said that that was only a temporary receipt; and they came down for the purpose of drawing a contract, and I was doing as they told me to do—"a formal contract", as they expressed it.

Q. Was Dr. Pohan there at the time? A. Yes.

Q. Did he want a formal contract, too? A. Well, I said we had to draw it, and nobody objected to it, and it was only when I finished it that the Doctor took it away; and when he came back he objected to it.

Q. You said they said "this was only a temporary contract or receipt"—was that right? A. Yes.

Q. Who said that? A. Well, it seemed to be the consensus of opinion that that was not the contract, it was only a temporary binding receipt until a formal contract had been drawn.

By Mr. Ockford:

Q. Did you, or did you not, say that anything was said by the parties to that effect?

Mr. Walscheid: That is what he said.

Mr. Ockford: No, he said "it was the consensus of opinion."

Q. Was anything said by anyone that "without a formal contract nothing would be done"? A. No, they came down for the purpose of drawing the formal contract.

Q. And you then drew a form of contract to meet what you understood to be the desire of everybody, is that right? A. The financial terms. I did not stop to think that the printed form was an addition at that time. To me, I thought all I had to do was—

Q. (Interrupting) When Dr. Pohan came back with the draft that you had prepared, with additions made by his lawyer, was anything said about having the contract go through on the original receipt, Exhibit C-2? A. No.

Q. The question did not come up, one way or the other, at that time? A. No.

Q. They just failed to agree on the new form of contract? A. Yes, sir.

By the Vice Chancellor:

Q. Well, you represented Mr. Rizzi, didn't you? A. Yes.

Q. Did you tell Dr. Pohan that you wanted him to deliver a deed in accordance with the terms of the receipt? A. The receipt did not specify any contract.

Q. No, but did you tell him you wanted him to deliver a deed in accordance with the terms of the receipt? A. No, I did not explain the contract to him. He took it away with him.

Q. Why don't you answer my question? At any time after you could not agree upon the form of contract, did you tell, or did Mr. Rizzi, at your advice, tell Dr. Pohan that you wanted a deed in accordance with the written receipt? A. No.

Q. Did you tell him that you were willing to take the title according to the terms of the written receipt? A. No; I did not think that we had to.

Q. You did not think you had to? Then, as matter of fact, unless you got something different than that receipt called for, you would have abandoned your contract, would you? A. Well, I wanted a more specific contract. I was not thinking of the receipt.

By Mr. Ockford:

Q. Do I understand that nothing was said by

you, or any of the parties definitely, as to what should happen to the original arrangement? A. No, no.

The complainants rest.

The Vice Chancellor: Do I understand that this Exhibit C-2 was drawn by the attorney of Mr. Rizzi?

Mr. Walscheid: Not by the attorney, by the broker.

THE CASE FOR THE DEFENDANTS.

AMATO RIZZI, sworn.

Direct Examination by Mr. Walscheid:

Q. Where do you live? A. No. 11 Oak Street.

Q. No. 11 Oak Street? A. Yes, sir.

Q. And that is right next door to No. 13, is it not? A. Yes.

Q. How long have you lived there? A. About two years, very near.

Q. You bought that place, No. 11, in 1923, didn't you? A. Yes.

Q. Do you know about when you bought it? A. About November, I guess.

Q. November, 1923? A. Something like that.

Q. In other words, you bought it right after you got this paper, Exhibit C-2? A. Yes.

Q. And when this contract did not go through—when you did not buy this property—then you bought No. 11, right next door? A. Yes.

Q. The same kind of a house, is it not? A. Well, the same kind, yes.

Q. And how much did you pay for that?

Mr. Ockford: I object to it, as immaterial.

The Vice Chancellor: Yes (objection sustained).

Q. And you refused to sign that paper, Exhibit C-2, didn't you? A. No.

Mr. Ockford: I object to that, on the ground that it is cross examination of his own witness, without any foundation.

The Vice Chancellor: He said "No."

Q. Did not Mr. Lepore take you to the house of Dr. Pohan, and didn't you then refuse to sign that paper, on October 11th, 1923? A. No.

Q. You did not? A. No.

Q. You were always willing to sign it? A. I was ready to sign it.

Q. Always ready to sign it? A. Always, down in the office of Mr. Saldarini.

Q. Now, you testified on the 18th day of March, 1922, didn't you, in the Hudson County Court House? A. I think so.

Q. At the first trial—do you remember? A. Yes.

Q. And at that time where did you live? A. 520 Sims Street, West Hoboken.

Q. And didn't you then say, referring to Exhibit C-2, that you understood that that was not a contract? A. I don't get you; I don't know what you are saying; I couldn't understand that.

Q. Didn't you say that that was not the contract? A. This here?

Q. Is not that what you said? A. This is the contract that was made. Mr. Lepore said—

Q. (Interrupting) Listen to this: Were you asked this question (p. 23): "Q. Were you to sign a contract for Dr. Pohan in which the same condi-

tions that were in this agreement were to be in the other contract? A. Yes—his agreement not contract"—you said that didn't you? A. I said—

Q. Yes or no? A. I don't get you.

Q. You said that, didn't you?

Mr. Ockford: I object to that; he doesn't understand the question.

Mr. Walscheid: He has not said that.

The Witness: This is the contract, you know—

Q. (Interrupting) Didn't you, on that occasion say, "Yes—his agreement, not contract"? Yes or no—did you say that? A. I don't get you; I don't understand what you say; because he has got something—

The Vice Chancellor (to the Witness): Keep quiet.

Q. (Last question repeated.) A. I don't remember.

Q. You did not say it? A. I don't remember.

Q. You don't remember? A. No.

Q. Well, if you did say it, was it true? A. You know, this is—

Q. Answer the question—if you did say it, was it true? A. I don't remember; I don't know.

Q. Now, you never did sign Exhibit C-2 did you? A. No, I no sign it.

Q. You did not sign it? A. No.

Q. Why didn't you sign it? A. I no signed it because Dr. Pohan he changed the contract with different things, what he got the day before—one or two days before; I don't remember.

Q. Is it not a fact that you refused to sign this paper, C-2, because you wanted to show it to your

lawyer, Otto Saldarini? A. I didn't refuse to sign this paper. He wanted to make the contract—

Q. (Question repeated.) A. Show it to my lawyer, yes, down in his office; and I just didn't sign it because—

Q. (Interrupting) I am asking about this paper (referring to Exhibit C-2).

Mr. Ockford: I submit he ought to be allowed to explain. I object to the question on the ground that the witness has stated fully what happened with respect to his not signing the paper.

The Vice Chancellor: Well, if he has I did not understand what he said. I will overrule the objection.

Q. Now, look at the paper here, C-2—you did not sign that? A. No, I no sign it.

Q. And is it not a fact that you did not sign that, and refused to sign it, because you wanted to show it to your lawyer, Otto Saldarini? A. Otto Saldarini—that is right.

Q. That is right, is it not?

Mr. Ockford: I object; it is quite apparent that the witness don't understand the question, at all.

The Vice Chancellor: You can straighten him out on cross examination.

Q. Did you, on March 18, 1924, before Judge Cutler, say, in reference to this paper, Exhibit C-2, the following (p. 31): "Q. Mr. Rizzi— A. Yes. Q.—was there any reason why you did not sign the contract that Dr. Pohan and his wife signed and delivered to you? A. I no signed it. Q. Why? A. Because I wanted to find out my lawyer, because I

don't know everything what you read, what you read me, you know; I want to find out from my lawyer. Q. Did you show the paper then to your lawyer? A. Yes. Q. Did he read it? A. Yes. Q. Did he explain to you what was in it? A. He explained to me everything about it. Q. What did he do? A. He explained. The Court: He said what? The Witness: He said, you make the contract, you sign the— Mr. Lepore: He advised you to sign the contract? The Witness: Yes, sir. Mr. Lepore: That it was all right? The Witness: Yes, sir. The Court: Why didn't you sign it? A. The Witness: I don't sign it because the Doctor claim he did not agree—he didn't want to do what we need done; he didn't want to repair stoop, what you go down; got bad break outside; need paint, you know, and he no want to paint it. That is why I did not sign the contract"—you said that, didn't you? A. I don't remember; it has been so long ago.

Q. Well, if you did say it, was it true? Didn't you sign any of these papers because you wanted Pohan to repair the stoop? A. No.

Q. Where you go down? A. No, because—

Q. (Interrupting) And did you want him to paint the property? A. No.

Q. (Continuing reading from the minutes of former trial): "The Court: You wanted him to do some painting, then? The Witness: He got to paint the room; the rooms in is bad condition. The Court: You wanted him to do that, and he would not do it? The Witness: He wouldn't do it. The Court: It wasn't in the original contract about painting the house? The Witness: And the repairs before he didn't do, see. Q. (By Mr. Lepore) Mr. Rizzi, besides that difference, after your lawyer saw this paper— A. Yes. Q.—what did he do on your behalf? A. He do— Q. Answer the question, please, Do you know what your lawyer did for you? A.

Sure. Q. What did he do? A. He done he said he got the tunnel, he passes tunnel over." Did you testify to all of that?

Mr. Ockford: I object to that, upon the ground that it is entirely immaterial. It is perfectly apparent that the testimony, as just read by counsel, question and answer, was a working at cross purposes; the answers do not answer the questions; it is quite apparent the witness did not understand it.

The Vice Chancellor: It is the testimony upon which this case was tried in the Circuit before a verdict given?

Mr. Walscheid: Yes, sir; that is the testimony on which it was tried in the Circuit, and it was nonsuited the first time.

Mr. Ockford: But in the case that the present action is based upon, may I say, in the second trial, we had an interpreter, and his answers are intelligible.

Mr. Walscheid: All right; I will go through the second trial, too.

Mr. Ockford: Yes; it would be more illuminating.

Mr. Walscheid: You mean it will please you more.

The Vice Chancellor: If that is the case, why not offer his testimony in both cases in evidence? I am satisfied you cannot make head or tail out of this witness.

Mr. Walscheid: In other words, he won't now testify—

The Vice Chancellor: Oh, no.

Mr. Ockford: Not at all; I object to that. I haven't the slightest objection to your offering the stenographic transcript of the

first trial, that resulted in a non-suit, and the second, that resulted in a judgment.

Mr. Walscheid: Well, we may do that, too.

Q. Now, did you further say, in reference to Exhibit C-2: "Q. Why didn't you sign it? A. I no sign it because I wanted to show my lawyer, what he say; if he get something wrong, cannot sign the contract, because when you sign the contract you have got to buy the house. Q. You were never willing to sign this contract, were you? A. No." Did you say that?

Mr. Ockford: I object to that, on the ground that it does not appear, at all, that the contract that was being discussed was the paper that had been signed; in fact it appears to be the unsigned contract.

Mr. Walscheid: It does, and for this reason—because he says it is the contract that he wanted to show his lawyer.

The Vice Chancellor: I am not going to listen to all this discussion; I will admit it. Didn't you have an interpreter in the first trial for this man?

Mr. Ockford: No; on the first trial there was not; on the second trial there was. I will ask that the entire transcript in both trials be offered in evidnce.

Mr. Walscheid: I offer what I have read in evidence; I have no objection to counsel offering the rest of it; I have offered no objection to counsel offering both of these records, if your Honor wishes to see them.

Mr. Ockford: Well, I should like to offer them both. I have one here—a copy of the first trial; I thought I had a copy of the second. Mr. Walscheid has them both here.

The Vice Chancellor: You might offer not the

whole record, but just the testimony of this witness taken on the first and second trial.

Mr. Ockford: Yes, sir; also the evidence of Lepore, if he wants it.

Mr. Walscheid: Well, I have culled from this book what I wanted.

The Vice Chancellor: Oh, yes—in other words, wherever a witness has been confronted with his testimony taken at either the first or second trial, it is considered in evidence; and wherever this witness testified in the first or second trial, it is offered in evidence.

Mr. Ockford: Yes, sir.

Mr. Walscheid: I will take the testimony on the second trial: Suppose I read at this time (of course I can only do this with the consent of counsel on the other side) what I think the pertinent fact is in this man's testimony on the second trial?

Mr. Ockford: Well, if this testimony on the second trial is going in, it becomes a matter of argument as to the effect of it. I do not think we need go into a discussion of this witness's testimony unless we have an interpreter; it will only add to the confusion.

The Vice Chancellor: I know, but he has not changed what Mr. Saldarini said; Mr. Saldarini said he would not allow him to take the property under that contract.

Mr. Walscheid: Except he has added that he would not take the property unless there was painting done, or repairs made.

Mr. Ockford: Well, as to that, I submit that the court can only judge of the effect of his testimony if the tesimony were offered at both trials.

Mr. Walscheid: I submit both books, and your Honor can take such parts as your Honor desires. I have no further examination from this witness.

No cross examination.

The Vice Chancellor: You are not offering that entire record in the other suits in evidence?

Mr. Ockford: The testimony of Rizzi; and we have already stipulated the testimony of Lepore.

Mr. Walscheid: The testimony of Rizzi in both of these cases?

Mr. Ockford: Yes, sir.

The Vice Chancellor: And wherever you have confronted a witness with his testimony?

Mr. Walscheid: Yes, sir.

(The two books of transcripts of the trials referred to were thereupon marked, respectively, Exhibit D-2 and Exhibit D-3).

Mr. Walscheid: I now offer in evidence this contract J. E. W.-1.

(The same is admitted and now marked Exhibit D-4.)

The Vice Chancellor: Has the defendant tendered to the complainant the deposit? This lady said she told her husband he ought to give back the $500.

Mr. Walscheid: And he says he spent it in counsel fees.

Mr. Ockford: There has been no tender.

Mr. Walscheid: There has been no tender of the $500. Now, you have not your judgment records here.

Mr. Ockford: They are admitted in the answer.

Mr. Walscheid: No, it is not; there was nothing admitted. The judgment was not admitted; and the reason I call your Honor's attention to that is this—because the suit by Rizzi is against Dr. Pohan; the agreement is signed by Mr. and Mrs. Pohan, acknowledging the receipt; so that they went to law and sued Dr. Pohan alone, thereby waiving, I say, any claim that they had under that agreement against Mrs. Pohan.

The Vice Chancellor: Well, was the suit on this agreement?

Mr. Walscheid: Certainly—to recover the deposit.

The Vice Chancellor: I cannot tell that, without the record.

Mr. Walscheid: That is why I wanted the record.

The Vice Chancellor: I see.

Mr. Ockford: I do not understand that the defendants are closing their side of the case now?

Mr. Walscheid: I am resting; only I contend that you have not made out or completed your case, because you have not put in your records.

The Vice Chancellor: There is no judgment record here.

Mr. Ockford: As I understand the case, there is an admission of the judgment; and the facts with respect to it are set forth in the bill. Now, of course if counsel desires to have a transcript of the judgment, I would be very happy to put it in. As I understand, there is an express admission in the answer that such a judgment was recovered.

Mr. Walscheid: Where is it? If there is such an admission, I want to know it.

The Vice Chancellor (after further discussion): I think you ought to have a copy of the record here, and the judgment.

Mr. Ockford: Then I ask leave to submit a certified copy of the judgment records.

The Vice Chancellor: Cannot you agree upon it?

Mr. Walscheid (to Mr. Ockford): You can make up the judgment roll and let me see it; you certify it and let me see it.

Mr. Ockford: You want the pleadings, the postea and the judgment; and we have the testimony here.

The Vice Chancellor: Is it in the Supreme Court?

Mr. Ockford: Yes. I have, of course, copies; I can make up the complete record; and if you want to add something we can possibly agree upon that.

The Vice Chancellor: All right.

(Testimony closed. Case held for briefs.)

Exhibit C-1.

I agree to pay to DeSena & Lepore, Real Estate Brokers of 543 Bergenline Avenue, West Hoboken, a commission of $985.00 for selling my house to Mr. Amato Rizzi.

Premises known as street No. 13 Oak Street, Weehawken Heights, N. J., one-half of commission to be paid on signing of contract.

Oct. 11th, 1923.

HOVAGIM POHAN.

Exhibit C-2.

West Hoboken, N. J.,
Oct. 11th, 1923.

For the consideration of five hundred ($500) dollars as a deposit I agree to sell my house known as stréet No. 13 Oak St., Weehawken Heights, N. J., under the following conditions to Amato Rizzi:

Price.... $31,000.00
Cash 8,000.00

Subject to a first mortgage of $10,000.00 due in 1927, and a second mortgage of $5,000.00 due in 1925.

I agree to take back a third mortgage of $8,000.00

payable in installments of $100.00 every three months with interest up to August 1st, 1925, on such time the second mortgage comes due and if the second mortgagee does not renew his mortgage Mr. Rizzi shall pay off the second mortgage and terms shall be agreed upon by both parties Mr. Rizzi and Mr. Pohan, if the second mortgagee renews his mortgage then $5,000.00 will be paid to the third mortgagee and the balance shall be agreed upon how to be paid by both parties Mr. Rizzi and Mr. Pohan, there shall be no bonus paid by Mr. Rizzi for renewal of the second or third mortgage.

(Signed) HAIGAUOOSH POHAN,
(Signed) HAVAGIM POHAN.

Witnessed:
JOSEPH DESENA,
GEORGE S. LEPORE.

Exhibit C-3.

THE NATIONAL BANK OF NORTH HUDSON

Transfer Station

West Hoboken, N. J., October 11th, 1923 No. 206

Pay to the order of DeSena & Lepore $500.00
Five Hundred .....00/100 Dollars

AMATO RIZZI.

Endorsement:

DeSena & Lepore,
Per Geo. S. Lepore.
Dr. H. Pohan.

Perforated:

Paid 10-15-23.

(Seal of Commonwealth Trust Co., West Hoboken, attached marked "Paid Oct. 15, 1923. Endorsements guaranteed.")

Exhibit C-4.

ARTICLES OF AGREEMENT, made the Second day of May in the year of Our Lord One Thousand Nine Hundred and Twenty-three,

BETWEEN Abraham Fine and Pauline Fine, his wife, of the Town of Union, in the County of Hudson, and State of New Jersey, party of the first part;

AND Haiganoosh Pohan, of the Town of West Hoboken, in the County of Hudson, and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Twenty-three thousand five hundred ($23,500) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty, free from all encumbrance, on or before the First day of June, 1923, next ensuing the date hereof, all that tract, or parcel of land and premises, hereinafter particularly described situate, lying and being in the Township of Weehawken, in the County of Hudson and State of New Jersey, known by street number as 13 Oak Street, Weehawken, N. J. Size of the lot is about 33x90 feet, being a six-family brick building erected thereon.

And the said parties of the second part for their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators

and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty-three thousand five hundred ($23,500) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt	$500
On delivery of deed, cash	8,000
By assuming first mortgage in the amount of $10,000 which has four and one-half years more to run from the date hereof, due July 1/1927..	10,000
By assuming second mortgage in the amount of $5,000 has two and one-half years more to run from the date hereof. Due Aug 1/1925.....	5,000
	$23,500

It is understood that all the tenants are monthly tenants and at present the monthly rents are $304 each month.

It is understood that all the coal is now in the said premises, shall remain in the said premises.

Subject to Pennsylvania tunnel easement and party walls.

And the said party of the first part hereby agrees to pay to Haig Simsarian a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the

second part, their heirs and assigns, may enter into and upon the said land and premises on the First day of June, 1923, next ensuing the date hereof, and from thence take the rents, issues and profits to their and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the office of Haig Simsarian, 467 Bergenline Avenue, West Hoboken, N. J., between the hours of nine in the forenoon and three o'clock in the afternoon on the said First day of June, 1923, next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for nonpayment of the municipal taxes or assessments, or adverse or color of title possession.

The premises above described are sold subject to restrictions appearing of record, if any.

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including *those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby* and shall be paid and discharged by the seller thereof, upon the delivery of the deed. Unconfirmed improvements or assessments, if any, shall be paid and allowed by the seller on account of the purchase price, if the improvement or work has been completed on or before

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

IN WITNESS WHEREOF, the said parties have

hereunto interchangeably set their hands and seals the day and year first above mentioned.

ABRAHAM FINE (Seal)
PAULINE FINE (Seal)
HAIGANOOSH POHAN (Seal)

Signed, Sealed and Delivered
in the presence of

HAIG SIMSARIAN.

Exhibit C-5.

COMMONWEALTH TRUST COMPANY
WEST HOBOKEN, N. J.

December 23, 1925.

To Whom It May Concern:

This is to certify that the Commonwealth Trust Co. issued the following "Treasurer's Checks",

#15043 dated May 31, 1923, to the order of Haignoosh Pohan for $7000, bearing the following endorsements, pay to the order of Pauline Fine, Haignoosh Pohan, for deposit only to the account of Pauline Fine, Pauline Fine, Hudson Trust Company, June 4th, 1923 (West Hoboken).

#15044 dated May 31, 1923, to the order of Haignoosh Pohan for $1000, bearing the following endorsements, pay to the order of Pauline Fine, Haignoosh Pohan, Pauline Fine, Pay Commonwealth Trust Company, or order, Haig Simsarian.

Very truly yours,

/s/ Henry Kohlmeyer,
Treasurer.

Exhibit C-6.

Entry in pass-book #6998 in the name of H. Pohan, M. D. on the Commonwealth Trust Company of West Hoboken, dated May 21st, 1923, showing a withdrawal of $8000.00 from account.

Exhibit D-1.

JOSEPH DESENA
547 Bergenline Avenue

West Hoboken, N. J., Oct. 11th, 1923.

For the consideration of five ($500.00) dollars as a deposit I agree to sell my house known as street number No. 13 Oak St., Weehawken Heights, N. J. under the following conditions to Amato Rizzi

Price $31,000.00
Cash 8,000.00

Subject to a 1st mtge of $10,000.00 dew 1927
2nd mtge of 5,000.00 " 1925

I agree to take back a 3rd *Purchase* money mortgage of ($8,000.00) payable in installments of $100.00 every 3 months with interest, up to Aug. 1st, 1925 on such time the second mtge comes dew and if the 2nd mtge does not renew his mtge, Mr. Rizzi shall pay off the 2nd mtge, *then third mtge will take place of the 2nd* and the terms shall be agreed upon by both parties and if the 2nd mtgee renews his mtge then five $5,000.00 will be paid to the 3rd mortgee, and the balance shall be agreed upon how to be paid by both parties, *there shall* be no bonus paid by Mr. Rizzi for renewal of *2nd mtge.*

Exhibit D-2—Testimony of Amato Rizzi Offered in the Case of DeSena, et als. v. Pohan, Tried March 18th, 1924.

IMITO RIZZI, sworn for plaintiffs.

Direct Examination by Mr. Lepore:

Q. Mr. Rizzi, where do you live? A. 520..... Street, West Hoboken.

Q. Do you know Mr. Lepore? A. Yes, sir.

Q. Do you know Mr. Joseph DeSena? A. Yes, sir.

Q. Do you know Dr. Pohan? A. Yes, sir.

Q. Did you ever have any business with George Lepore? A. Yes.

Q. Did you ever have any business with Dr. Pohan? A. Yes.

Q. Did you ever see any property at No. 13 Oak Street, Weehawken? A. Yes, sir.

Q. In October of 1923? A. Yes, sir.

Q. Who showed you the property? A. Mr. Lepore and Joseph DeSena.

Q. Did they tell you the conditions under which you could buy the property?

Mr. Eastmead: I object to what they told him unless it was in the presence of the defendant.

The Court: Yes; of course, it must be in the presence of the defendant.

Q. (By Mr. Lepore) Did you ever visit Dr. Pohan? A. Yes, sir.

Q. And did you talk about the purchase of No. 13 Oak Street? A. Yes, sir; talk about the property.

Q. Were the conditions under which you could buy it discussed in his presence? A. Yes.

Q. At that time? A. Yes.

Q. Did you ever agree to buy that property? A. Yes, sir; supposed to buy it.

Q. Did you pay Dr. Pohan and his wife five hundred dollars as a deposit for the purchase of that property? A. For the purchase, supposed to buy the house, five hundred dollar check.

Q. Did that check ever come back to you unpaid? A. No.

Mr. Eastmead: I object to that. We have no objection, we admit we got the five hundred.

Mr. Lepore: All right.

Q. (By Mr. Lepore) Do you remember ever seeing this paper? A. Yes, sir; yes, sir.

Q. Can you read it or understand it? A. I cannot read good, see.

Q. Cannot read very well. You understood in October, the 11th, 1923 the conditions under which you were buying that property, did you not? A. Yes, sir.

Q. Was that put all into this paper? A. Yes, because I have got proof there, you have got this paper; I go see the house, me and Lepore and Mr. DeSena, we go and see couple of floor up there.

Q. Were you to sign a contract for Dr. Pohan under which the same conditions that were in this agreement were to be in the other contract? A. Yes, his agreement, not contract.

Mr. Eastmead: Agreement, not a contract.

Q. Then, under the agreement that you were to sign, was it ever tendered to you? A. Yes.

Q. Why didn't you sign it?

Mr. Eastmead: I object to that as calling for a conclusion.

The Court: No, I do not think that is, why this witness did not sign it.

Mr. Eastmead: All we are interested in is whether he signed or not. I withdraw the objection.

Q. (By Mr. Lepore) Why didn't you sign the contract for Dr. Pohan? A. I signed the contract for the house, to give five hundred dollars deposit, eight thousand dollars cash,—what you got, the contract.

Q. You received the contract that he signed for you, when you gave him five hundred dollars, did you not?

Mr. Eastmead: I object to counsel's leading.

A. I gave five hundred dollars, gave you the check, and you brought it, what you call the (speaking in Italian).

Q. Did you ever sign a contract to Dr. Pohan? A. Yes.

Q. Did you sign one? A. I signed that thing what you—let me see paper over there.

The Court: Let's see what he signed, if he signed anything.

Q. Did you sign that paper? A. No, I no sign.

Q. You would have signed a paper, would you not? A. No, I didn't sign nothing.

Q. All you know, you gave him five hundred dollars? A. I gave him five hundred dollars, one check, received the check.

Q. Yes. Did you ever go to Dr. Pohan and demand the—

Mr. Eastmead: I object—

Q. (Continuing)—return of the five hundred dollars?

Mr. Eastmead (continuing): —not material to this case.

The Witness: Yes.

The Court: I will let him answer that question.

Mr. Eastmead: I do not see how that is material; we admit we still have the five hundred dollars.

Q. (By Mr. Lepore) What did Dr. Pohan say to you when you demanded the return of your money?

Mr. Eastmead: I object to that as immaterial. Just a minute, if the court please; I submit I am entitled to a hearing on this. I do not see how that is in any way material in this case. That is a separate transaction between this man and Pohan and has absolutely nothing to do with the issues in this case. The question in this case is: Did they or did they not sell the property?—and I therefore object.

The Court: I do not think he can go into that.

Mr. Lepore: If your Honor please, we have got to show that we did all we could to make the sale; we have got to show who was at fault for this property not being sold according to the contract.

The Court: That is very true, but the fact that the witness came there and demanded back his money, that has nothing to do with this case.

Mr. Lepore (after reading of portion of testimony by stenographer): All right, that question was permitted and Dr. Pohan said "No." The next question is—

Q. Did Dr. Pohan say to you why he would not return the money?

Mr. Lepore: I think we are entitled to find out.

Mr. Eastmead: That is objected to.

The Court: No, that is a matter between Dr. Pohan and this man; whether he can recover the five hundred dollars is another matter. The question now is whether or not the plaintiffs made the sale. If the plaintiffs did not make the sale, they were not and are not entitled to any commission.

Mr. Lepore: I contend that we have made a sale under this very agreement that Dr. Pohan signed, and the other man is bound by giving the deposit—

The Court: Oh, no; the New Jersey statute says otherwise.

Mr. Lepore: —and further, if Rizzi was to sign the agreement, I have a right to show why it was not signed.

The Court: I have allowed you to go ahead on that. You are not asking that; you are trying to find out why he did not get his money back.

Mr. Lepore: I am trying the round-about way to get the facts.

The Court: But why the doctor didn't give him back his money, I do not think that has anything to do with this case.

Q. (By Mr. Lepore) Mr. Rizzi— A. Yes.

Q. —did you ever go to Dr. Pohan and have him to sign a contract like this, another one? A. Yes, I tell you—

Mr. Eastmead: I object. Just a minute, I object to his endeavoring to connect any other contract but this one; this contract is the only one that is in evidence.

The Court: You may find out what he offered to sign.

Q. (By Mr. Lepore) Did you offer to sign a contract like this one? A. He come to the office, doctor and Lepore, one night—

Q. What office? A. —about five o'clock.

Q. What office? A. Office of Mr. Simsarian. Then he got something.....of his contract—

Q. He had something added to the contract? A. Added to this contract.

Mr. Eastmead: Does he mean this contract?

The Witness: No, you have got the contract now in the office of Mr. Soldarini, and the doctor is coming, he wanted to do something and get something wrong about the contract, and the contract he got.

Q. Was that something— A. Wrong.

Q. —different? A. Different.

Q. —than what the original terms were? A. The original terms were in that paper.

Q. Was that the reason you would not sign it? A. I don't want to sign it because he has got something, you know, he wants to take out what he got in the agreement; he want to put in something else.

Q. I show you a paper. Did you ever see that one? A. This was in the office of Mr. Soldarini?

Q. Yes; did you ever see that paper before? A. Yes.

Q. Tell the court and jury why you would not sign that contract.

Mr. Eastmead: I object to that; the contract is not in evidence.

A. Because—

Mr. Eastmead: Just a minute, I object to any questions being put to this witness unless the contract is put in evidence or admitted to be put into evidence and I have an opportunity to examine it. He is being asked about some paper that counsel has in his hand; I do not know anything about it.

The Court: Show it to the other side before you ask the witness why he would not sign that paper.

Mr. Eastmead (examining): This was never executed—

Mr. Lepore: I know it isn't;—

Mr. Eastmead: —by anybody.

Mr. Lepore: I know it isn't; satisfied?

Mr. Eastmead: Not that it go in evidence; there has got to be some proof about what this is.

Mr. Lepore: I am trying to do that.

Mr. Eastmead: No signatures on it whatsoever.

Q. (By Mr. Lepore) Mr. Rizzi— A. Yes.

Mr. Lepore: It is admitted that there are no signatures on the instrument.

Q. (Continuing by Mr. Lepore)—Have you ever seen this paper? Yes, I have—

Mr. Eastmead: I object to the leading him.

A. —seen this paper.

The Court: Where did you see it?

Mr. Lepore: He testifies as to that that he saw it in Soldarini's office.

The Court: Where did you see it?

The Witness: Yes, in the office of Mr. Soldarini.

Q. (by Mr. Lepore) Who was there? A. Lepore, Mr. DeSena, Mr. Soldarini and myself,—

Mr. Eastmead: I do not see how this is binding on us, if the court please.

A. —(continuing) and the doctor.

Mr. Eastmead: Oh, the doctor was there; I withdraw the objection.

The Witness: The doctor was there.

The Court: All right, proceed.

Q. (By Mr. Lepore) The doctor was there? A. Yes. Yes, me write, here,.....something passes tunnel over there, passes the tunnel, and he find out, doctor says to me, then he don't sell me the house.

Q. Was there anything else told you which had been told before— A. And he told me—

Q. (Continuing)—that was put into this paper purporting to be a contract? A. This is different thing what you have got to the other one, see? I refused to sign.

Q. For that reason? A. For that reason. As you get some repairs done, he didn't want it done, and some what you call pipe see?

Q. In other words, you would not sign this agreement because it contained additional agreements than what the original terms were? Is that so? A. Yes.

Q. Mr. Rizzi, when this paper purporting to be a contract was shown to you originally it had the same terms that this paper had in, didn't it? A. Yes, sir.

Q. Were you willing to sign such an agreement?

Mr. Eastmead: I object to that now.

A. Yes, sir.

Mr. Eastmead: Just a minute, I object. I do not see why counsel is using this paper which he has. He is asking the witness whether this contained other provisions to this one. He did not draw the contract, and he has testified that he does not read very well. How can he testify that this contained the original terms, contained the provisions of the other contract.

The Court: What is this paper you are referring to? Has it been offered?

Mr. Eastmead: It has not been offered yet.

The Court: You might find out why he did not sign the original contract.

Mr. Lepore: Yes; your Honor, I did attempt to find that out.

Q. Mr. Rizzi— A. Yes.

Q. —was there any reason why you did not sign the contract that Dr. Pohan and his wife signed and delivered to you? A. I no signed it.

Q. Why? A. Because I wanted to find out my lawyer, because I don't know anything what you read, what you read me, you know, I want to find out from my lawyer.

Q. Did you show the paper then to your lawyer? A. Yes.

Q. Did he read it? A. Yes.

Q. Did he explain to you what was in it? A. He explained to me everything about it.

Q. What did he do? A. He explained.

The Court: He said what?

The Witness: He said, you make the contract, you sign the—

Mr. Lepore: He advised you to sign the contract?

The Witness: Yes, sir.

The Court: Why didn't you sign it?

The Witness: I don't sign it because the doctor claim he did not agree—he didn't want to do what we need done; he didn't want to repair stoop, what you go down, got bad break outside; need paint, you know, and he no want to paint it. That is why I did not sign the contract.

The Court: You wanted him to do some painting then?

The Witness: He got to paint the room; the rooms is in bad condition.

The Court: You wanted him to do that, and he would not do it.

The Witness: He wouldn't do it.

The Court: It wasn't in the original contract about painting the house?

The Witness: And the repairs before he didn't do, see?

Q. (By Mr. Lepore) Mr. Rizzi, besides that difference, after your lawyer saw this paper— A. Yes.

Q. —what did he do on your behalf? A. He do—

Mr. Eastmead: I object to that, unless he knows what his lawyer did.

Mr. Lepore: That is what I am asking.

Mr. Eastmead: I see, I did not hear the last. I do not see how this witness could know what his lawyer did.

The Court: I do not know; he may answer the question, if he knows.

Q. (By Mr. Lepore) Answer the question please. Do you know what your lawyer did for you? A. Sure.

Q. What did he do? A. He done he said he got the tunnel he passes tunnel over.

Q. What else did he tell you further. What beside telling you that there was a tunnel over there —what else did he tell you? A. He tell me, he has got to repair to the house.

Q. What else? Did he tell you anything else? A. He got it done, got to fix the stoop outside.

Mr. Eastmead: I submit that this is all not binding on us, unless Mr. Pohan was present.

Mr. Lepore: I move to strike it out because it is not responsive to what I am asking for anyway.

The Court: Let me see that contract.

Mr. Eastmead: I call your Honor's attention to the fact that that substitute agreement was never signed by us.

The Court: I understand. You may proceed.

Q. (By Mr. Lepore) After you received this agreement from Dr. Pohan, did you turn this over to your lawyer? A. Yes.

Q. Did you instruct him what to do next? A. Yes.

Q. All right; that is all.

Cross Examination by Mr. Eastmead:

Q. Just a minute; I want to ask you a few questions. You never signed this contract, did you? A. No.

Q. And that contract contained all of the terms, didn't it; that was your agreement with Dr. Pohan? A. Yes.

Q. But you never signed it, did you? A. No.

Q. Why didn't you sign it? A. I no sign it because I wanted to show my lawyer, what he say; if he get something wrong, cannot sign the contract, because when you sign the contract you have got to buy the house.

Q. You were never willing to sign this contract, were you? A. No.

Q. You never paid any additional money to that first five hundred dollars, did you? A. No, I give him check for five hundred dollars.

Q. Did you ever start suit to get back your deposit? Withdraw that. Did you ever start suit to get back that five hundred dollars?

Mr. Lepore: I object to that as immaterial.

Mr. Eastmead: Counsel has opened the door on the other side.

The Court: It is immaterial, whether he has or not; it has nothing to do with this case.

Mr. Eastmead: All right; I won't press it.

Q. Did you ever sign any contract for the purchase of this property? A. (No audible response.)

Q. And Dr. Pohan still owns the property? A. (No audible response.)

Q. That is all.

Mr. Eastmead: Witness shakes his head "no."

Exhibit D-3—Testimony of Amato Rizzi Offered in the Case of DeSena, et als. v. Pohan, Tried February 4th, 1925.

AMATO RIZZI, sworn:

Direct Examination by Mr. Ockford:

Q. Speak up so that we can all hear you. If you don't understand questions, please say so. Where do you live, Mr. Rizzi? A. 11 Park Street.

Q. Weehawken? A. Weehawken.

Q. What is your business? A. Carpenter.

Q. Do you work for somebody else, or are you a boss carpenter? A. No, I work for myself.

Q. Do you remember October, 1923, going with George Lepore to look at the property 13 Oak Street, Weehawken? A. Yes, sir.

Q. Who first asked you to go look at that property? A. What you say?

Q. Who first asked you to go and look that property over? A. Mr. Lepore.

Q. Did you go there? A. Yes, sir.

Q. You looked at the property? A. Yes, sir.

Q. Were you told that the price was $31,000? A. Yes, sir.

Q. Eight thousand dollars cash? A. Yes, sir.

Q. I show you a paper, Plaintiff's Exhibit P-3 and ask you if that is a check signed by you (handing witness)? A. Yes, that is my check.

Q. Did you make out the check on the date you looked at the house? A. Yes, sir.

Q. You gave the check to Mr. Lepore? A. Mr. Lepore.

Q. Later on, did you meet Dr. Pohan? A. Yes, sir.

Q. You went to see him? A. Yes, sir.

Q. Who went with you? A. Mr. Lepore and DeSena.

Q. Where did you go, to the doctor's house, his office or where? A. The doctor's house.

Q. Do you remember about what time of day it was when you saw the doctor? A. The day I gave the check.

Q. But what time of the day, morning or afternoon? A. I see him in the afternoon; in the night time.

Q. I show you a paper marked Exhibit P-1. Can you read English? A. No; I seen I signed there (indicating).

Q. You saw this paper before? A. Yes, sir.

Q. George Lepore gave it to you? A. George Lepore and DeSena.

Q. You kept it? A. Yes, sir.

Q. When you went to the doctor's house, were these two papers, Exhibits P-1 and P-5 for identification, both there. Just look at that and see if you remember? A. This is the contract from the house.

Q. Now, what, if anything, did the doctor say to you about you signing one of these papers?

Mr. Rothstein: Just a moment. When was this; after the original contract was signed or before it had been signed?

Mr. Ockford: I am asking about the first time he got to the doctor's house.

Q. That is the first time that you talked to the doctor about it? A. Yes, sir.

Q. After you had given a check and after you had gotten the paper, you went to the doctor's house? A. Yes, sir.

Q. At that time, just recall, did the doctor say anything to you about you signing your name to one of these two papers?

Mr. Rothstein: I object on the ground that it is leading.

The Court: I don't think it is. It is calling his attention as to whether anything was said on that subject. You may ask him.

Q. You understand the question? A. Yes, I understand the question.

Q. What did he say? A. We gone over to the doctor and he say, "No need you to sign the contract. I got your check in my hand," and I gone away.

Q. Was anything said by you to the doctor or by the doctor to you as to what you were to do next? A. He say, go on to the lawyer and make the search.

Q. And then did you go away? A. I gone away and next morning I gone to my lawyer.

Q. At the time you were at the doctor's house, were you willing to buy that house for $31,000,

$8,000 cash and the balance on mortgages? A. Yes, sir.

Q. Were you able to go through with this transaction; did you have $8,000 cash? A. Yes, sir.

Mr. Rothstein: I object to that as calling for a conclusion, whether he was able to go through with it.

The Court: He is asking him whether he had $8,000 cash.

Q. Did you see Dr. Pohan at Mr. Saldarini's office later on? A. Yes, in the office.

Q. After the time, how long after the time that you have just told us about did you see the doctor at the lawyer's office, two weeks, a month? A. I think after a couple days.

Q. I show you a paper marked Exhibit P-4 for identification and I ask you if you remember seeing that paper there at Saldarini's office at the time the doctor was there two or three days later? A. This here got in the office.

Q. Did you see that paper there? A. Yes, this is in the office to my lawyer.

Q. Can you read this? A. A little bit.

Mr. Rothstein: I object; on a previous question the witness said he cannot read English. How can he read that.

The Court: Yes.

The Witness: I cannot see. I understand a little bit. I cannot read it.

Q. Did anyone ask you at that time to sign this paper? A. In the office to my lawyer?

Q. Did anyone ask you to sign that paper that I show you now; did anyone ask you to put your name on it? A. This paper here in the office, my lawyer down there, see.

Q. I understand. Did anyone there ask you to sign this paper; put your name on it? A. Is my lawyer.

Q. Well, now, you went to the office of the lawyer this day; Dr. Pohan was there, Saldarini was there. Do you remember what the doctor said about this paper? Do you remember any of the conversation? Is that question plain to you? A. Well, just, see, what you mean. I can't see what you mean by this. I don't know what you mean.

Q. We will try to make it a little plainer. At the time you were in the lawyer's office, did Dr. Pohan talk to you or your lawyer about this paper that I show you now? A. The paper, yes, sir.

Q. Do you remember what he said about it? A. He say he want to take over, to bring him for over to the lawyer and after he come back.

Q. Was that another day? A. Not another day, a couple days I guess.

Q. When he came back, you met there again? A. Yes, sir.

Q. What did the doctor say about the paper on that occasion? A. The paper; he put something on the paper and he got something joined up the contract. He put something in the paper, and just, I no want to sign because he got something wrong.

Mr. Ockford: Well, now, I think maybe we ought to have the interpreter. I would like to get this right.

(Examination continued with the Italian interpreter.)

Mr. Ockford: I want to put the same question and see if he understood it.

Q. When you went to the lawyer's office the second time about this paper, what did Dr. Pohan

say about the changes in that paper, if anything? A. He put on the bottom here about the house, and that he wasn't responsible any more, anything at all.

Q. Was the part in that paper that is in pen and ink read to you by anyone or explained to you by anyone? A. Yes, it was explained to me.

Q. Who explained it? A. My lawyer.

Q. What did he say to you that the words written in there in pen and ink meant?

Mr. Rothstein: I object; what bearing has this on the case.

Mr. Ockford: Dr. Pohan was present at the time.

Mr. Rothstein: What the words meant is a question of law for the court.

The Court: What he said to Dr. Pohan is proper. Or what Dr. Pohan said.

The Witness: The doctor said that he wanted those conditions to stand there and then I refused to sign it.

Q. Did the doctor say who had written in the part in pen and ink? A. You mean this one here (indicating)?

Q. Yes? A. My lawyer.

Q. You mean your lawyer or his lawyer? A. I cannot read it. If you read me in Italian. I don't know if my lawyer done it or his lawyer.

Q. Do you remember whether the doctor said anything about who wrote that in? A. No.

Q. Were you asked by anyone at that time to sign this paper, Exhibit P-5 for identification? A. Yes, sir.

Q. What did you say; that you would or would not sign that paper? A. Yes, I did.

Q. I don't understand the answer. Do you mean by that that you said you would sign it? A. If that is the contract about $500 I gave him, certainly I should sign it.

Q. Did anyone ask you to sign that paper? A. We went to the doctor's house and Dr. Pohan, he said he would not do anything because he had $500 in his hands.

Q. And after that, did Dr. Pohan or anybody else ask you to sign your name to that paper? A. And then I went to my lawyer to make a search.

Q. At the time you were at the office of the lawyer, either the first time or the second time, were you asked by anyone to sign this paper.

Mr. Rothstein: I object to that question; it has been asked three times and every time he answered it.

Q. At the lawyer's office, Saldarini's office, the first time or the second time, did anyone ask you to sign that paper? A. Yes, sir.

The Court: Who asked you?
The Witness: The lawyer.

Q. Which lawyer? A. Mr. Saldarini.

Q. Let us understand. Mr. Saldarini asked you to sign that paper? A. What is this, the contract.

Mr. Ockford: Show him that paper. He doesn't understand, I think, that we are talking about that paper.

The Interpreter: He doesn't know what the paper is. He wants to know from you whether it is the contract or what it is.

The Court: He can't read English; he wants to know what it is.

Q. Did Mr. Saldarini ask you to write your name on this paper; I am not talking about any other paper? A. If I sign, he must have said "Yes, it is right."

The Court: Mr. Puglia can explain to him what the paper is.

Q. Now Mr. Rizzi, I show you this other paper, Exhibit P-4 for identification. You told us that you would not sign that paper, is that so. A. No; yes, I said no.

Q. Were you asked to sign any other paper at that time? A. No.

Cross Examination by Mr. Rothstein:

Q. Mr. Rizzi, you remember testifying in this same case last March? A. Yes, sir.

Q. In the same court? A. Yes, sir.

Q. And do you remember what you testified to at that time? A. No.

Q. When was the first time that you saw Dr. Pohan? A. When I went to see the house.

Q. Was that before you wrote out the check for $500? A. Yes, sir.

Q. How long before; how many days? A. About a couple days.

Q. And at the time that you wrote out the check for $500 where did you write out that check? A. My house.

Q. At No. 11 Oak Street; is that your house? A. No; 520 Syms Street.

Q. How far away is 520 Syms Street from the doctor's office where you signed?

Mr. Ockford: I object; it is immaterial how far he lived away from the doctor.

The Court: Overruled.

A. About three blocks.

Q. And you gave that check to Mr. Lepore to take over to the doctor? A. Yes, sir.

Q. At the time that you gave the check to Mr. Lepore, was Mr. Lepore's partner, Mr. DeSena, with him? A. Yes, sir.

Q. What time of the day was this? A. Three in the afternoon.

Q. Why didn't you go over with Mr. Lepore and Mr. DeSena to the doctor's house?

Mr. Ockford: I object to that as irelevant and immaterial.

The Court: He may answer the question.

A. Because I had no time.

Q. What were you doing at the time? A. I was working.

Q. Working in your house? A. No, I had left my work and I went to my house.

Q. Did you give the check to Mr. Lepore at your house? A. Yes; I did. I left the work and I went there.

Q. You were not working at the time you gave the check, were you? A. I left the job to go then to the house.

Q. To give the check to Mr. Lepore? A. Yes, sir.

Q. Why didn't you go then with Mr. Lepore to the house of the doctor? A. Because I had no time.

Mr. Ockford: I object to the question. I cannot possibly see any materiality.

The Court: Sustained. I think you have gone as far as you ought on that. I don't see how it throws any light on the subject.

Q. You say you cannot read English? A. Yes, sir.

Q. Well, how do you know that this was the paper which your lawyer drew up and gave to you. Perhaps he gave you some other paper. How do you know? A. I want to tell you. It seems to me this is the paper, that's all.

Q. How do you know?

Mr. Ockford: I object. He has answered it.

The Court: You may answer the question.

A. I can identify this paper because my lawyer put cross lines here, for marks, and also added something to it and took something away from here.

Q. Who gave you this, Mr. Lepore? A. Mr. Lepore and Mr. DeSena.

Q. And where did they give you this? A. In my house.

Q. When, the same day you gave the check? A. Yes, sir.

Q. And when you got that paper, what did you do? A. I went up with Mr. Lepore and DeSena and went to the doctor.

Q. Why did you go to the doctor? Lepore says, "Come up with me and we will go up to the doctor."

Q. Now, then, when you took that contract to your lawyer, did you show it to him? A. Yes, sir.

Q. And did he explain it to you? A. Yes, sir.

Q. And what did he tell you to do? A. To make a search.

Q. Anything else? A. No.

Q. Did he tell you to sign that contract? A. No.

Q. Did he tell you not to sign it? A. No.

Q. Did he say to you anything about making another contract? A. Not at that time.

Q. When? A. That is the day after the check was made.

Q. What did you say?

Mr. Ockford: I object to that, as to what he said to his lawyer.

The Court: The objection is as to the conversation between lawyer and client.

Mr. Rothstein: The witness, if he wants to, can answer the question. The attorney is not obliged to divulge any confidential communication, but the client certainly can.

The Court: He can, if he wants to. You may ask that question.

Q. (Question repeated as follows: What did you say?) A. I told him to prepare the search.

Q. You said you had $8,000 at that time? A. Yes, sir.

Q. Where did you have it? A. At the bank.

Q. In what Bank? A. Some in the Hudson Trust Company.

Q. Let me ask you; why is it you would not sign the copy of this contract? A. I didn't sign that contract, because the doctor said he had the $500 in his hand.

Q. Is that the only reason? A. Yes, sir.

Q. You are positive that was the only reason? A. Yes, sir.

Q. Isn't it a fact that you didn't want to sign the copy of that contract because you first wanted to show it to your lawyer, Mr. Saldarini?

Mr. Ockford: I object to the question on the ground that the proof plainly is that the doctor had possession of that paper from the time of the first transaction and he was not called upon to sign his own copy.

The Court: Well, isn't that so.

Mr. Rothstein: No, sir. The testimony was that they took him up there and that he saw both copies up at the doctor's and the doctor said that it is not necessary for him to sign it because he has got his check. That was his testimony.

The Court: You may ask whether he said that to the doctor.

Q. Isn't it a fact that the reason that you didn't sign the copy of that contract is because you wanted to show your contract first to your lawyer, Mr. Saldarini? A. No.

Q. You are sure about that? A. Sure.

Q. And you are sure that you never said that before? A. No.

Q. I want to call your attention to a question which was asked you at the former trial, page 32, where your attorney, Mr. Lepore, at that time asked you "Why didn't you sign it," meaning the contract, the copy of the contract?

Mr. Ockford: I object to that statement "his attorney", because in this other case, he was only a witness. He wasn't a party.

Mr. Rothstein: That is right.

Mr. Ockford: I just don't want any misunderstanding.

Q. On page 31, the question was asked by Mr. Lepore, the attorney in the case, "Was there any reason why you didn't sign the contract that Dr. Pohan and his wife sent over to you", and you answered "I no sign it." Then, "Why?" and your answer "Because I wanted to find out my lawyer, because I don't know what. When he read me, I want to know. I want to find out from my lawyer." Do you remember saying that? A. I don't know.

Q. But you say now that the reason why you didn't sign is because the doctor said to you it wasn't necessary he had your $500.

Mr. Ockford: I object, because it is very plain that in this other question they were talking about this copy—

The Court: Proceed.

Q. Do you remember this question being asked of you, on page 32, at the top. By the court it was asked: "Why didn't you sign it", meaning the contract.

Mr. Ockford: I object to counsel reading something in that is not there. He should go back a few questions, back further, to after the question "Did you show this paper then to your lawyer", and the answer "Yes".

Q. (Reading) "Did he read it? A. Yes. Q. Did he explain to you what was in it? A. He explained to me everything about it. Q. What did he do? A. He explained. The Court: He said what? The Witness: He said 'You make the contract, you sign.'" (End of reading.) Mr. Lepore then asked—

Mr. Ockford: At that time wasn't the witness without the interpreter, and wasn't he not allowed to finish his answer.

Q. Mr. Lepore then asked the witness: "It was all right? A. Yes." Then he was asked "Why didn't you sign it? A. I didn't sign because Dr. Pohan claimed he didn't care. He didn't care about it. He had the contract, no need, want to have it. That was why I didn't sign the contract." Do you remember those questions being asked? A. No.

Q. Did you ever offer to the doctor the balance of the cash which he was to get according to the contract? A. No.

Q. Did you ever ask the doctor to give you a deed to that house? A. No, I never asked him.

Q. Do you know whether or not your lawyer ever asked the doctor for a deed for you? A. No, that I do not know.

Q. At the time that this paper which you say you recognized was drawn up by your lawyer, Mr. Saldarini, did your lawyer ask you to sign that? A. He asked me that question that he put on the bottom and that Dr. Pohan put in things that didn't belong there.

Q. Who put things in that didn't belong there? A. His lawyer put it in.

Q. And that is why you didn't want to sign it? A. Yes, sir.

Q. Did your lawyer tell you about that? A. Yes, sir.

Q. That other paper isn't the same as the one signed by the doctor, is it?

Mr. Ockford: I object to that question; it is perfectly manifest—

The Court: The paper is in evidence.

Mr. Rothstein: One is marked for identification and the other is in evidence.

Mr. Ockford: Well, I will mark it in now.

Q. Mr. Rizzi, did you buy the property No. 11 Oak Street, next to the doctor's?

Mr. Ockford: I fail to see the relevancy or materiality of this. If he bought something else, it might very well show his readiness and willingness to buy.

The Court: He may answer the question.

Q. (Question read as follows: Did you buy the property No. 11 Oak Street, next to the doctor's?) A. Yes, sir.

Q. How much did you pay for it?

Mr. Ockford: I object to that.

The Court: He may answer it.

A. $32,000.

Q. From whom did you buy it? A. Mr. Bazarini.

Q. When he sold it to you, who were the agents who brought you around there?

Mr. Ockford: I object to that; how is it material?

The Court: That is immaterial.

Q. When did you buy this, how soon after the time you were supposed to buy from the doctor? A. About a month and a half or two months later.

Q. How much cash did you pay for it?

Mr. Ockford: I object to that; it is immaterial and irrelevant.

The Court: That is not material at all.

Q. In the former trial in this case, there was a question put to you by the attorney for the plaintiff at that time. This is the question put to you: "In other words, you would not sign this agreement because it contained additional agreements", meaning this one here "Because it contained additional agreements than what the original terms were"? and you answered "Yes". And the question previous to that: "This paper, purporting to be a contract, this is different to what you have got, to the other one", and you say "I refused to sign for that reason". Do you remember answering to these questions? A. No.

Q. Do you know whether or not your lawyer ever made a search on that house?

The Court: Did this witness speak through the interpreter at the last trial.

Mr. Rothstein: I don't think so.

Mr. Ockford: He did not.

The Court: I don't think it makes so much difference, as his answers clearly show that he didn't understand what he was being asked.

Q. (Question repeated as follows: "Do you know whether or not your lawyer ever made a search on that house?") A. No.

Q. On page 34 of the former trial, do you remember this on cross examination: "Q. You never signed this contract did you? A. No. Q. And that contract contained all the terms, didn't it, that was your agreement with Dr. Pohan? A. Yes, sir. Q. You never signed it? A. No. Q. Why didn't you sign? A. I no sign because I want show my lawyer, what he say, if he got something wrong, could not sign, because when you sign a contract, you have got to buy the house." You were never willing to sign that contract, were you? A. No.

The Court: You see, you don't say what contract.

Q. Were you willing to sign this contract (P-5 for identification)? A. Yes, sir.

Q. Were you willing to sign this contract (P-4 for identification)? A. No.

Q. Why not? A. Because he put things here which were not in this paper here.

Q. Did you ever sign any contract for the purchase of this property? A. No.

Q. Did your lawyer ever tell you to sign the contract? A. No.

(Witness excused.)

Exhibit D-4.

ARTICLES OF AGREEMENT, made the day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty-three

BETWEEN Haiganoosh Pohan and Hovagin Pohan, husband and wife of the Town of West Hoboken in the County of Hudson and State of New Jersey, party of the first part; AND Amato Rizzi of the Town of West Hoboken in the County of Hudson and State of New Jersey, party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Thirty-one thousand ($31,000.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of full covenant and warranty free from all encumbrance except as hereinafter stated on or before the fifteenth day of November, next ensuing the date hereof, all that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Township of Weehawken in the County of Hudson and State of New Jersey, known as Number 13 Oak Street, Weehawken, N. J.

AND the said party of the first part for him and his heirs, executors and administrators, doth covenant, promise and agree to and with the said party

of the first part, their heirs, executors, administrators and assigns, that them, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Thirty-one thousand ($31,000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt ..	$500.00
On delivery of deed, cash	$7500.00
By assuming mortgage at present a lien on the premises, and paying the same according to the terms thereof, second mortgage	$5000.00
Assuming first Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at six per cent. payable in 1927.....	$10,000.00

Party of the first part agrees to take back a purchase money mortgage of $8,000.00 payable in installments of $100.00 every three months together with interest at six per cent. per annum to become due when the second mortgage becomes due, viz: Oct. 1, 1926. It is agreed that if the second mortgagee does not renew the second mortgage then in that case the party of the first part

shall pay off the second mortgage and the party of the first part shall loan to the party of the second party on a third bond and mortgage the sum of $5,000.00 to. If the second mortgagee will renew his second mortgage August 1, 1925, then it is agreed that the party of the second part shall pay to the party of the first part the sum of $5,000 on the third mortgage on October 1, 1926.

This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the first part hereby agrees to pay to a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

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

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at between the hours of in the noon and o'clock in the noon on the said day of next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if

any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part,

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or adverse or color of title possession.

The premises above described are sold subject to restrictions appearing of record, if any.

If at the time for the delivery of the deeds, the

premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed. Unconfirmed improvements or assessments, if any, shall be paid and allowed by the seller on account of the purchase price, if the improvement or work has been completed on or before

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

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

Signed, Sealed and Delivered
in the presence of

Final Decree.

(Filed June 28, 1926.)

IN CHANCERY OF NEW JERSEY.

57-585

Between

AMATO RIZZI, GEORGE S. LEPORE and JOSEPH DESENA, Complainants,

and

HOVAGIM POHAN and HAIGANOOSH POHAN, his wife, Defendants.

On Bill, &c.

This cause coming on to be heard in the presence of John W. Ockford, Solicitor for and of counsel with complainants, and Messrs. Rothstein & Hurwitz, Solicitors for, and J. Emil Walscheid, of Counsel with the defendants, and the evidence on behalf of the respective parties having been taken, and the pleadings and proofs having been read, and the arguments of the respective counsels having been heard and considered; and it appearing to the court that the complainant, Amato Rizzi, is entitled to the relief sought and prayed for by him in the Bill of Complaint; and it further appearing that the complainants, George S. Lepore and Joseph DeSena, are not entitled to the relief sought and prayed for by them in the Bill of Complaint.

It is, on this 28th day of June, 1926, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED and DECREED, that the complainant, Amato Rizzi, be and he here-

by is decreed to have a lien upon the premises described in the Bill of Complaint, in the sum of $500.00, with interest from February 16th, 1925; and it is further

ORDERED, ADJUDGED and DECREED, that unless the defendants, or one of them, pay or cause to be paid to the said complainant, or his solicitor, the said sum of $500.00 with interest as aforesaid, within ten days from the date hereof, the said premises be sold to raise and satisfy the said sum of money due to the said complainant, that is to say, the sum of $500.00, together with lawful interest thereon, to be computed from the 16th day of February, 1925, with costs to be taxed, and that a Writ of fieri facias do issue for that purpose out of this court, directed to the Sheriff of the County of Hudson, commanding him to make sale, according to law, of the said premises, and that out of the money arising from such sale, pay to the complainant, or to his solicitor, the said sum aforesaid; and in case more money should be raised by the said sale than shall be sufficient to make such payments, that the surplus be brought in this court, to abide the further order of this court, and that the said Sheriff make return without delay of his proceeding by virtue of the said writ; and it is further

ORDERED, ADJUDGED and DECREED, that as against the complainants, George S. Lepore and Joseph DeSena, the Bill of Complaint be, and the same hereby is, dismissed without prejudice and without costs or counsel fees against said complainants.

Respectfully advised,

E. R. WALKER,
C.

JOHN GRIFFIN,
V. C.

Conclusions.

(Filed Oct. 16, 1926.)

IN CHANCERY OF NEW JERSEY.

Between AMATO RIZZI, GEORGE S. LEPORE and JOSEPH DESENA, Complainants, and HOVAGIM POHAN and HAIGANOOSH POHAN, Defendants.	On Bill, etc.

Submitted, May 5, 1926; decided, May 18, 1926.

For the Complainants, Mr. JOHN W. OCKFORD.
For the Defendants, Messrs. HURWITZ & ROTHSTEIN and Mr. J. EMIL WALSCHEID.

GRIFFIN, V. C.:

On October 11th, 1923, an informal agreement was drawn by the complainant, Lepore, a real estate agent, for the sale of certain lands at 13 Oak Street, Weehawken Heights, N. J., to the complainant, Amato Rizzi, for $31,000. Five hundred dollars was paid to Hovagim as a deposit. This contract was signed by the defendants alone. There seems to have been an understanding that a formal agreement should be signed and such contract was drafted by the attorney of Rizzi, who engrafted new terms upon the informal agreement. The defendant, Hovagim, attended to the matter for his wife, and when the formal contract was drawn, said he desired to submit it to his lawyer. He

then discovered that it did not contain a clause conveying subject to the Pennsylvania Tunnel easement, it appearing that the Pennsylvania Tunnel was under the premises. The contract fell through. After the informal agreement was signed, and as part of the same transaction, the complainant, Lepore, drew up a commission agreement, signed by the defendant Hovagim alone, in which Hovagim agreed to pay to the complainants Lepore and DeSena $985 as commission.

Afterwards Rizzi and Lepore & DeSena commenced a joint action, as plaintiffs, against Hovagim in the Supreme Court—Rizzi for the $500 deposit, and Lepore & DeSena for the $985 commission.

Hovagim filed his answer. The case was tried before his Honor, Willard W. Cutler, and judgment was entered in favor of the plaintiff Rizzi for $500, with interest amounting to $39.50, and in favor of Lepore & DeSena for $985 and interest.

Being unable to collect on their judgment, complainants filed their bill in this cause, among other things praying that "a decree may be made impressing the lien of the aforesaid judgment upon the premises described in the bill of complaint, and that said premises be sold to satisfy said lien." The bill alleges that at the trial at law Hovagim testified under oath, in the presence of his wife, Haiganoosh, that he was the owner of said premises; and they aver the fact to be that Hovagim is the owner of the premises, but that the legal title thereto is in the name of the said Haiganoosh, and that the said Hovagim and Haiganoosh are estopped from asserting otherwise as against the complainants.

The answer filed by the defendants places in issue all the material facts of the bill except the entry of the judgment.

On the trial of the cause the complainants' solicitor said there was no claim for commissions against Mrs. Pohan in the other case, or in this case, either. The Vice-Chancellor then remarked "Then your whole case must rest upon the theory that Mrs. Pohan stood by and saw her husband contract to sell this property as his own, and signed a contract with you, whereby you lost your commission and the vendee lost his five hundred dollars—that is your whole case?" "Mr. Ockford: We go beyond that; we say it was his property." On these admissions, I take it that if the complainants failed to establish that the property in question was that of Hovagim, then they should fail as to the claim of Lepore & DeSena upon their judgment of $985 commissions.

The evidence in the case is overwhelming that this property was bought with the funds of Mrs. Pohan, and that it was her property and not that of her husband; and, therefore, the bill, as to the claim of Lepore & DeSena should be dismissed without prejudice.

The claim of the complainant Rizzi stands on a different footing. In the informal contract it says, "For the consideration of five hundred dollars as a deposit I agree to sell my house, known as No. 13 Oak Street, Weehawken Heights, N. J.," etc. This contract was signed by both defendants; but it was drawn with the idea that Hovagim was the owner. Lepore, the agent, when the contract was being signed, asked to have Haiganoosh sign it. Hovagim said, "You don't need my wife's signature; everything in it is perfectly all right; I am the owner of the property." Lepore said, "No, it is best to have your wife sign it, because, under the law, the wife has to sign a contract of sale; so that is how his wife signed it." It is there-

fore plain that when Haiganoosh signed this contract to sell and her husband received the five hundred dollars, she was aware of the misrepresentation as to ownership. Haiganoosh, in her testimony, said she signed the contract; that her husband asked her if she desired to sell, and she said, "Yes", and she told him to sell it; and then the contract was signed and the deposit check taken by her husband. Her husband showed her the check, and she said, "it was not enough of a deposit to sell that house," and he said, "We are going to get some more when we sell the house." Afterwards, when the contract fell through, she says she told her husband "to give the check back to him" (Rizzi).

The Fifth Paragraph of the bill alleges that Dr. Pohan, in the suit at law, testified under oath, in the presence of his wife, that he was the owner of the aforesaid premises. The defendants, in their answer, deny the Fifth Paragraph, and say that "if the Doctor did so testify he answered without a proper understanding of the question; and further, because of the fact that he may have gotten into the habit of calling the property his own property, since it belonged to his wife * * * and since he has been collecting the rents for the same and generally taking care of it." I cannot attribute this view to the Doctor's answer, because, on page 52 of the record at law, the defendants' counsel asked the Doctor this question: "You still own that property of yours, don't you, Doctor?" to which the Doctor replied, "Yes, sir"—which indicates that his own counsel, at that time, did not know that the property was in the wife's name; and Mrs. Pohan did not testify that she did not hear her husband so testify, and she testified in that suit. It is quite evident that neither the complainants nor counsel upon either knew who was the owner until after the judgment was entered.

Neither Dr. nor Mrs. Pohan deny that Dr. Pohan represented to the agent that the Doctor was the owner of the property, and that, upon the faith of that, he received the $500 deposit. This money was received by the Doctor with the knowledge and consent of his wife, for her use and benefit, the same as the rents were collected and other moneys received by him upon her account. The defense interposed by her husband was her defense. If her husband prevailed, the judgment would operate as an estoppel in her favor. In view of the continued claim of the defendants, from the time of the making of the contract until the close of the trial of the suit at law in which the judgments were obtained, that the husband was the owner of the property, they are now estopped from setting up that it was the property of the wife for the purpose of defeating the judgment of Rizzi. *Peregallo* v. *Oneto,* 98 N. J. Eq., 74; af'd 4 N. J. Adv. Rep., page 935; *Lyon* v. *Stanford,* 42 N. J. Eq., 411; *Straus* v. *Loudenslager,* 96 N. J. Eq., 678; *Clark Thread Co.* v. *William Clark Company,* 55 N. J. Eq., 658; s. c. on appeal, 56 N. J. Eq., 789, *modified and reversed on another point; Ludy* v. *Larsen,* 78 N. J. Eq., 237; *Lake* v. *Weaver* 80 N. J. Eq., 395, af'd. id., 554.

In the defendants' brief counsel asserts that the defendants were jointly liable for the return of this deposit, but Rizzi elected, for some reason, to sue but one of them, the husband, and obtained a judgment against the husband alone upon this joint liability, and it is my contention that he thereby made an election to pursue the husband alone, and that the cause of action which he had against the wife up to the time of the entry of that judgment

disappeared and was merged in the judgment against the husband, citing *Coles* v. *McKenna,* 80 N. J. Law, 48. There is quite a difference between that case and the instant one. In the Coles case the plaintiff brought his action against four defendants jointly, and entered final judgment against two of the defendants by default, and subsequently entered a final judgment, after verdict, against the other defendants. The court held "that where a judgment final is entered the original cause of action is merged in the judgment, and, in the case of a joint debt, whatever merges the cause of action as to one merges it as to all." Here, the complainants did not sue the defendants as joint debtors, but sued the husband alone on the representation aforesaid that he was the owner, and, in effect, the wife had merely a dower right. The husband, at the trial, in answer to a question of his own counsel, said that he was still the owner. Had he told the truth, the plaintiffs might have either taken a non-suit and begun another suit against the husband and wife, or they might have had a juror withdraw and obtained leave to amend by bringing in the wife as a party; but, relying upon the representation of the husband, under oath, that he was the owner, they entered judgment against him. This was clearly a mistake that the plaintiffs at law (the complainants here) were led into by the untrue statement of the husband that he was the owner. In the Coles case (supra), it was perfectly plain that the plaintiffs had full knowledge of the facts. Here, on the contrary, the complainants (plaintiffs at law) were ignorant of the facts, and were confirmed in their view that the ownership was in the husband, and therefore they could not be charged with having made an election.

In the case of *Browning's Ex'r* v. *Rittenhouse,* 40 N. J. Law, 230, 237, the defendant, a late sheriff, was sued for an escape. It appears that one, John Lawyer, was taken in execution on a *ca. sa.,* and the sheriff, after the arrest, permitted the defendant to remain at home on a promise to go, the same day, with a surety, to the sheriff's office to give bail for his appearance. This was held to be an escape. But, being in actual custody, he gave a bond and inventory, under section 2 of the Insolvent Laws, and applied to the court for the benefit of said laws. The plaintiff, having knowledge of the escape, appeared in court as a creditor and opposed the debtor's discharge, and he was thereupon remanded and surrendered into the custody of the sheriff. The court held that an election was made and the action for escape waived. In the course of the opinion, Mr. Justice Scudder (p. 237) cites the case of *Dash* v. *VanKleeck,* 7 Johns., 477. That case was quite similar to the Browning case, excepting this, that the debtor, not knowing that there had been an escape without the prison limits, opposed the application, in consequence of which the prisoner remained in custody. It was held that this was not a waiver of the escape. The court said, "But Kent, J. says (p. 500) 'He undoubtedly might, with knowledge of the escape, have waived his remedy against the defendant and have elected to affirm his debtor in custody under the succeeding sheriff; but, without such knowledge, the law will not infer any determination of the party prejudicial to his rights.'" (See also, *Titus* v. *Phillips,* 18 N. J. Eq., 541; *Greenberg* v. *Palmieri,* 71 N. J. Law, 83.

I will advise a decree impressing a lien upon the premises in question for the sum of $500, with interest, in favor of the complainant, Rizzi.

New Jersey Court of Errors and Appeals

Between

AMATO RIZZI, *et als.*,
Complainants-Appellees,

and

HOVAGIM POHAN, *et al.*,
Defendants-Appellants.

On appeal from the Court of Chancery.

APPELLEES' POINTS.

This case involves the question of when a wife may be held to be estopped by her conduct to deny her husband's ownership to defeat a judgment against him.

The Court of Chancery has impressed a lien upon certain premises of the defendant-wife for the amount of a deposit paid by one of complainants on account of the proposed purchase of such premises.

The contract did not go through, and the complainant who had paid same became entitled to a return of it. The complainant obtained a judgment at law for the amount of the deposit, and has now obtained a decree impressing a lien upon the premises which were the subject matter of the proposed sale.

This is not the case of a judgment against a husband arising in connection with the husband's business, but in this case the judgment arose directly out of a transaction involving the actual property against which the lien has been impressed.

The basis of the estoppel lies in the wife having

stood by during the whole transaction, with full knowledge of all the facts, and having permitted her husband to pose as the owner of the property. The Court below held that under all the circumstances of the case, the wife was clearly estopped from claiming ownership as against this complainant who had paid the deposit.

The wife joined in the proposed contract and signed with her husband, who represented that he was the owner. She testified that she was entirely familiar with the details of the transaction and knew about the deposit of $500.00 being paid to her husband, as owner, by complainant Rizzi. She also testified that her husband showed her the deposit check, and she further testified that when the contract fell through, she told her husband to give the check back to Rizzi. (Case, page 75, folio 2.)

At the trial of the law action which was brought against the husband, the wife testified as a witness for her husband. In that action the husband testified that he was the owner of the property.

There are, doubtless, many, many cases where creditors have been defeated in the collection of just claims by the device of concealing the ownership of property. One of the favorite devices for a judgment debtor is to have his property in his wife's name, and it frequently happens that notwithstanding flimsy stories to account for the wife having the money, the judgment debtor is successful in evading his obligations. Many are the stories told by women who hold their husband's property to account for their ownership of having earned large sums of money, notwithstanding they are busily occupied taking care of a house and children. It is safe to say that nearly all of these stories are fairy tales.

But the present case goes far beyond, because here there is not the shadow of an excuse for the holding of the $500.00 deposit. The wife agreed to the sale; she authorized her husband to accept the $500.00 deposit; she knew that the transaction fell through; she knew that she had no right to keep the deposit, and her final word was:

> "Q. Did you say anything more to your husband about the $500.00 deposit?
> A. I told him to give it back to him."
> (Case, page 75, folios 1-3.)

But her husband did not give back the deposit. He was sued for it, because at that time Rizzi was still ignorant as to title being in the wife's name, it having been represented to him that it was the husband's property. The case was contested by the husband. In the case he did not deny ownership, but swore that he was the owner. His wife was present in court at the time. He lost the case. There was a judgment against him. Execution was issued. Then Rizzi for the first time learned that the title was in the wife's name. He thereupon joined in the Bill of Complaint herein.

Notwithstanding the clear merit of his claim, defendant-husband and defendant-wife still resist, and her counsel now argues that she has never had her day in the law court, and has never had an opportunity to offer a defense, but no meritorious defense is even hinted at.

POINT I.

The wife is estopped from claiming ownership to defeat the judgment against the husband because she signed the contract to sell the property, with knowledge of her husband's representation that he owned it, and in the suit to recover the deposit, both she and he contended that the property was the husband's.

That a married woman may be estopped from claiming ownership to property is undoubtedly the law, and this doctrine of estoppel is applicable both at law and in equity.

Brinkerhoff v. *Brinkerhoff,* 23 N. J. Eq. 477;
Besson v. *Eveland,* 26 N. J. Eq. 468;
National Bank v. *Hamilton,* 34 N. J. Eq. 158;
Francis v. *Lawrence,* 48 N. J. Eq. 508;
Ruckelschaus v. *Oehme,* 48 N. J. Eq. 436;
Ruckelschaus v. *Borcherling,* 54 N. J. Eq. 344, Affirmed 55 N. J. Eq. 589;
Wheeler & Wilson Mfg. Co. v. *Litwin,* 57 N. J. Eq. 660;
Mertens v. *Schlemme,* 68 N. J. Eq. 544;
Mayer v. *Kane,* 69 N. J. Eq. 733;
Neslor v. *Grove,* 90 N. J. Eq. 554;
National Bank v. *Rutter,* 91 N. J. Law 424; Affirmed 92 N. J. Law 621;
Hamlen's Adm. v. *Bennett,* 52 N. J. Eq. 70;
Peregallo v. *Oneto,* 98 N. J. E. 74; Affirmed 4 N. J. Adv. Rep. 935.

In the case of *Wysakowska* v. *Polish American Ass'n,* 96 N. J. L. 447, this Court held that permitting another, not known to be an agent, to contract as apparent principal, he is estopped thereafter from asserting that which would prevent the buyer from being placed in the same situation as if the agent had been the real contracting party.

The particular facts which appellees contend amount to an estoppel in this case are these:

(a) The wife stood by and remained silent during the transaction, wherein the deposit was paid to the husband as owner.

(b) The contract was signed by husband and wife, wherein it appears that the property was the husband's.

(c) The commission agreement was signed by the husband as owner, the wife having knowledge.

(d) In the wife's presence, the husband stated that the property was his and it was not necessary for his wife to sign, but did sign because the real estate broker suggested that the wife's signature was necessary even though her husband was the owner of the property. (Case, page 20, folio 20.)

(e) The husband was sued for the amount of the deposit, and in his wife's presence testified that he was still the owner of the property, and she having testified in the case, did not deny her husband's testimony and remained silent as to her own alleged ownership.

(f) She knew that the deposit check had been given to her husband, and knew that

he had the money representing the check, and with knowledge ratified the transaction whereby he had received the check as owner.

(g) With knowledge of all the facts, she allowed her husband to resist the repayment of the deposit, and did not do anything about returning it herself other than instructing her husband to give it back.

POINT II.

The defendant-wife is also estopped from claiming ownership of the property because she voluntarily permitted her property to be so mixed with her husband's as to be indistinguishable.

In the recent Chancery case of *Vigne* v. *Vigne, et al.,* 98 N. J. E. 274, the general rule above referred to was recognized and followed.

In this aspect of the case, it is necessary to refer to the facts surrounding the original acquisition of the property.

The premises in question, No. 13 Oak Street, Weehawken Hights, New Jersey, were originally purchased under a contract with one, Abraham Fine. (Case, page 130, Exhibit C-4.)

All of the cash paid for the premises by the Pohans came directly from a savings account with the Commonwealth Trust Company in the name of the husband alone, and which, as he testified, included his own moneys. (Case, page 93.)

It was testified that the money in this husband's account had been, at some time previous, given to him by his wife, but neither he nor she could give any specific statement of amounts or dates.

Neither he nor she ever had any accounting between themselves with respect to these moneys. The husband could not tell how much was his, and how much was hers. She testified that she allowed him to mingle the money with his own and do as he pleased with it. (Case, page 71, folio 18. Case, page 63, folio 10. Case, page 65, folio 20.)

She had no bank account of her own until after complainants obtained their law judgment. Her testimony at this point is significant.

> "Q. Did you pay any part of this money that you gave your husband during the time, by your check?
>
> A. No, I always gave it to him; I handed him the money; I never kept a check account until just lately, about a year, that I have been keeping it, because he said that he would not handle my money any more since he had that unrighteous judgment against him." (Case, page 62, folio 20.)

Is it because these parties apparently thought that the judgment was unrighteous, that this claim of ownership by the wife is unsupported by any documentary evidence tending to show that it was her money that had been used to buy the property?

The defendants rested upon their own mere say-so, uncorroborated by any other testimony or documentary evidence. This testimony was to the effect that the wife earned and saved large sums of money and gave this money to her husband to take care of for her.

One of her explanations to account for not being able to give any details with respect to the purchase of the Oak Street property, which cost $8,500.00 in cash, was as follows:

"Q. Well, it was May 1923—did you have many transactions involving $8,500.00?

A. Well, I have been a poor woman, and I trusted him. I said, 'Whatever money is necessary to buy that property, you can ask them to send it.'" (Case, page 69, folio 10.)

In other words, she could not give any detailed explanation with respect to the transaction as to how this $8,500.00 found its way into her husband's bank account, although she and he did tell a vague and very general story about the "them" referred to in her answer.

This is the story they told. There was a company known as the Mortgage and Equity Company of Boston. (Case, page 66, folio 2.)

Neither husband nor wife were able to give the address, nor could they give the address of the friend through whom the transactions with the Boston company are supposed to have been had.

From time to time, money was sent to this Boston Company, and at the time the Oak Street property was purchased, there is a record in the defendant-husband's passbook of the deposit of $7,614.70 under date of May 26th, 1923. (Case, page 94, folio 5.) This, together with moneys admittedly belonging to the husband, made up the cash payment to buy the Oak Street property. This $7,614.70 is supposed to have come from this Boston Company, which was sent upon the surrender of a certificate. (Case, page 95, folio 10.) But defendants did not even produce the deposit slip showing whether this $7,614.70 came from out of town. They produced nothing whatsoever in writing, nor any evidence of any kind to corroborate their story.

If it were true that over a long period of time moneys had been sent to a Boston Company, and

certificates issued which were later cancelled and the money withdrawn, would there not be some evidence to show it? Would there not have been at least letters from this Boston Company? Nothing at all to corroborate this story was presented. Nothing certain, definite, reliable or convincing, and yet we are supposed to give credence to this testimony to the effect that the Oak Street property was bought by the defendant-wife with her own money.

During all of the time that the wife says she was earning money and turning it over to her husband, she kept no bank account and no records of moneys held by her husband for herself. She says that the largest single sum she gave her husband at any one time was about $500.00. (Case, page 60, folio 1.) To earn and save $10,000.00 in the period of time, and in the circumstances as stated by her, would be a marvelous achievement.

It is true that stories of this kind are frequently told in court, but that does not say that the stories are truthful.

It is not sufficient for the wife to merely say that the money in the hands of her husband is hers, but she must prove the fact beyond her mere say-so.

Adoue v. *Spencer*, 62 N. J. E. 782, s. c. 49 Atl. 10.

The opinion in that case quotes from the one in

Cole v. *Lee*, 45 N. J. E. 779 at 785, s. c. 18 Atl. 854 at 856.

In the Lee case, the court referred to the rule as stated in

Perry on Trusts, Sec. 679:

> "As all transfers from the wife to the husband are somewhat suspicious by reason of the relation and the danger of some secret influence, gifts of the capital sum are not presumed in the first instance."

The Court said further:

> "When claims of a wife upon her husband come in conflict with claims of his creditors, the transaction out of which her claim arose ought doubtless to be scrutinized with great care because the marital relation and influence affords opportunity for the fabrication of such claims. Therefore, clear proof ought to be exacted of the reception by the husband of the wife's money."

Having these rules in mind, it would seem that something more than the word of the husband and wife is required. Primarily, of course, the court is interested in ascertaining the truth. There should be a belief that the testimony is true.

The parties should inform the court and should give the court assistance in placing before it facts and circumstances readily presentable so that the court should not be asked to put belief in an incredible story.

Where such facts can be shown, and where there is, of necessity, corroborating evidence in existence, failure to produce such should raise the inference that such evidence, if produced, would disprove the story instead of corroborating it.

POINT III.

Complainants' judgment is well founded in law and in equity, and the defense is wholly lacking in merit.

Discussion has been had above as to the claim for the deposit, and it is unnecessary at this point to repeat what has been said.

A return of this deposit has been withheld from the purchaser since about October 1923. Rizzi gave his check for a deposit in good faith. It was to the order of the brokers and they endorsed it over to defendant Pohan. (Case, page 129, folio 30.)

The check went into the husband's bank account, and not the slightest effort has been made by either he or his wife to return this deposit. No reason is given as to why it should not be returned, and no reason is given why the deposit has been withheld all this time.

The parties resisted the brokers' claim for a commission upon the ground that the contract had not been entered into, and whereas they had a perfect right to litigate this question, but it is difficult to see what process of reasoning could possibly justify them in continuing to hold the deposit.

The brokers, too, obtained a judgment after a trial because the jury evidently believed their testimony and disbelieved the testimony of the defendant, Hovagim Pohan. The brokers obtained a verdict because they had produced a buyer, ready, willing and able to purchase, on the terms specified by the owner, the owner having prevented the completion of the sale.

Steinberg v. *Mindlin,* 96 N. J. L. 306.
Leschiner v. *Bauman,* 83 N. J. L. 743.
Lehrhoff v. *Schwintsky,* 125 Atl. 496.

As pointed out by the Court below, if the husband had prevailed in the law action, the wife would have received the benefit of such judgment, and she should not now be heard to complain, especially as the court below has dealt very leniently with her, and only impressed a lien for the amount of the deposit and not for the full amount of the judgment, which included the brokers' commission claim.

It is respectfully submitted that in so far as the decree is appealed from, it should be affirmed.

JOHN W. OCKFORD,
Solicitor for and of Counsel with Complainants-Appellees.

New Jersey Court of Errors and Appeals

AMATO RIZZI, et als., Complainants-Appellees, v. HOVAGIM POHAN, et al., Defendants-Appellants.	On Appeal from Court of Chancery.

BRIEF FOR DEFENDANT, HAIGANOOSH POHAN.

Statement.

The record in this case brings into this court the decree made in the Court of Chancery in a suit to impress the lien of a law judgment, rendered in favor of Amato Rizzi, one of several complainants, against Hovagim Pohan, *one* of the defendants in Chancery, upon real property of Haiganoosh Pohan, wife of Hovagim Pohan and the *other* defendant in Chancery.

The complainants in the Chancery suit were Joseph De Sena and George S. Lepore, as partners, and Amato Rizzi, the present complainant-appellee.

Joseph De Sena and George S. Lepore, as partners, recovered against the defendant, Hovagim Pohan, a judgment at law for $985.00 and interest (p. 172, fol. 23) for commissions earned by them under a paper writing marked in evidence as Ex. C-1 (p. 128, fol. 15).

Amato Rizzi, the complainant-appellee, recovered against the defendant, Hovagim Pohan, a judgment at law for $500.00 with interest amounting to $39.50 (p. 172, fol. 22), based upon a paper writing offered in evidence as Ex. C-2 (p. 128, fol. 30).

DeSena and Lepore and Amato Rizzi jointly instituted their suit (p. 172, fol. 30) and recovered a single judgment.

The learned Vice Chancellor, who heard the case, decided against the claim of DeSena and Lepore and dismissed the bill as to them (p. 170, fol. 32), but impressed upon the real estate, which was the subject of the proposed sale mentioned in Ex. C-2 (p. 120, fol. 30) and which belonged to the defendant, Haiganoosh Pohan, the lien of the judgment which Rizzi had recovered against the defendant, Hovagim Pohan (p. 170, fol. 10).

It is from that portion of the decree, which thus impresses upon the lands of the defendant, Haiganoosh Pohan, the judgment of Rizzi, that this appeal is taken.

In examining this record I desire particularly to call the attention of the court to the fact that Ex. C-2 (p. 128, fol. 30), *upon which the judgment of Rizzi is founded,* is *signed* by Haiganoosh Pohan, the woman defendant, *as one of the contracting parties,* and that the judgment taken by Rizzi was recovered in a suit instituted in the Supreme Court *against Hovagim Pohan alone* (p. 172, fol. 15),—the other contracting party,—and *that Haiganoosh Pohan, the female owner of the property, has never had her day in a law court and has never had an opportunity to offer such defenses as she might have to the claims of Rizzi for the recovery of the $500.00 acknowledged to have been received by her under Ex. C-2.*

The bill of complaint is based upon the claim

that Haiganoosh Pohan, who is the wife of the defendant, Hovagim Pohan, stood by in silence while Hovagim, the husband, claimed title to the property at the time when Ex. C-2 was signed, and upon the further claim that upon the trial of the suit at law her husband *in her presence* swore he owned the property, and that, *because of the silence* of Haiganoosh on these two occasions, she has estopped herself from claiming title to the premises in question as against the complainant Rizzi.

The bill of complaint also alleges that Hovagim Pohan was in fact the real owner of the property.

The material allegations of the bill of complaint showing these several allegations are as follows:

> "1. On or about October 11, 1923, the complainants, Lepore and DeSena, were employed by one Hovagim Pohan, to act for him as real estate brokers to procure a buyer for certain premises known as 13 Oak Street, Weehawken, N. J., upon certain terms and conditions, and the said Pohan *then and there* represented to the said Lepore and DeSena that *he,* the said Pohan, *was the owner of said premises* (pp. 6-7).
>
> 2. Thereafter the complainants, Lepore and DeSena, did procure a buyer for such property, who was the complainant, Amato Rizzi. That such employment was accompanied by a written agreement for commissions (E. C-1, p. 128) *in* which the said Pohan represented that *he* was the owner of said premises. That such representations and such agreement were made by the said Pohan *in the presence of his wife,* whose name is Haiganoosh Pohan, and were in nowise disputed by the said Haiganoosh Pohan (p. 7).

3. Thereafter an action was commenced in the New Jersey Supreme Court, Hudson Circuit, by the complainants against the said Hovagim Pohan, *wherein and whereby the complainant, Rizzi, sought to recover the return of a deposit made by him on account of the proposed purchase by him of such property,* and by the complainants, Lepore and DeSena, to recover the sum of $958.00 for commissions earned by them in connection with such sale (p. 7).

4. Thereafter the said action came on for trial and resulted in a verdict and judgment in favor of the complainants and against the said Hovagim Pohan, which judgment was and is for the sum of $1524.50 with costs amounting to $63.51, together with interest thereon from February 16, 1925. That the aforesaid judgment was duly recorded in the office of the Clerk of the New Jersey Supreme Court (pp. 7-8).

5. *At the trial* of the *aforesaid* action, the *said Hovagim Pohan testified under oath, and in the presence of the said Haiganoosh Pohan, that he was the owner of the aforesaid premises* (p. 8).

6. Complainants aver the fact to be that the said Hovagim Pohan *is* the owner of such premises, but *that the legal title thereto is* in the name of the said Haiganoosh Pohan; and the complainants further allege that the said Hovagim Pohan and the said Haiganoosh Pohan are estopped from asserting otherwise as against these complainants by reason of the facts and circumstances above set forth" (p. 8).

There is no proof in the case to establish the allegation set out in paragraph 6 of the complaint that Hovagim Pohan was or is the real owner of the premises. *The undisputed evidence shows that the real owner of this property is Haiganoosh Pohan,* and the learned Vice Chancellor finds that:

> "The evidence is overwhelming that this property was bought with the funds of Mrs. Pohan and that it was her property and not that of her husband" (p. 173, fol. 20).

The learned Vice Chancellor, after finding ownership in the defendant, Haiganoosh Pohan, dismissed the bill as to DeSena & Lepore, and then proceeded to find in favor of the complainant Rizzi (p. 173, fol. 25), and his conclusion that Rizzi is entitled to relief is based *solely* upon the principle that the defendant Haiganoosh has as against Rizzi *estopped herself from claiming title to the property in question* (p. 175, fols. 10-30). Thus he finds:

> "In view of the *continued* claim of the *defendants* (please note plural) from the time of the making of the contract until the close of the trial of the suit at law, in which the judgments were obtained, that the husband was the owner of the property, *they* are now estopped from setting up that it was the property of the wife for the purpose of defeating the judgment of Rizzi" (p. 175, fols. 15-25).

The question of whether Hovagim Pohan, the husband, is estopped is of course immaterial. He is *not* the owner of the property and as to *him* the principle of estoppel need not be invoked. *He has had his day in court and as to him the law judg-*

ment is a finality, but as to the wife, the decree must stand or fall on the principle of estoppel. As to her, the sole question is whether, under the allegations of the bill *and the evidence,* adduced in Chancery, *she* is estopped by any action on *her* part from claiming to be the owner of the property involved as against Rizzi, and whether Rizzi is, because of *her* action, entitled to a decree impressing the lien of his judgment against her husband upon *her* property.

The only statements in the bill of complaint *of the claim made by Rizzi* is found in paragraphs three and five of that document.

In paragraph three (p. 7, fol. 22), it is alleged that Rizzi, together with DeSena & Lepore, instituted their suit "wherein and whereby the complainant Rizzi *sought to recover the return of a deposit* made by him on account of the proposed purchase by him of such property."

In paragraph five of the complaint (p. 8, fol. 5) it is alleged that *long after the deposit* had been made; *long* after Rizzi had received Ex. C-2 (p. 128, fol. 30), signed *first* by the wife *and then* by her husband, in which *she* acknowledged that *she* had received the deposit; *long* after the legal rights of Rizzi under Ex. C-2 *had crystallized and become fixed,* and at the trial of the lawsuit for the recovery of the deposit, Hovagim testified in the *presence* of the wife Haiganoosh that *he,* Hovagim, was the owner of the property.

These are the allegations of the bill upon which the claim of estoppel is founded.

As to the evidence adduced at the hearing in Chancery, an examination of the trial record in this case will disclose that Ex. C-2,—the paper under which Rizzi claims,—was signed *before* Ex. C-1,—the paper under which DeSena and Lepore claim

their commissions,—was executed (p. 23, fols. 1-10; p. 23, fol. 20), and the manner of the execution of Ex. C-2, upon which Rizzi relies, is detailed by Lepore, the *only* witness speaking to the matter, as follows:

> "Q. Well, just tell us what happened at the time this paper, Exhibit C, 2, and the paper Exhibit C, 1, were signed? A. When I wrote the contract up, I asked the Doctor to sign it, and then, *after he signed it,* he said he was the owner, and I had to attend to the business through him; and I asked, 'Now have your wife sign it'; he said, 'Well, you don't need my wife's signature', he said, 'everything in it is perfectly all right; I am the owner of the property.' I said, *'No, it is best to have your wife sign it because under the law, the wife has to sign a contract of sale';* so that is how his wife signed it" (p. 20, fol. 15 et seq.).

Lepore then testified that Haiganoosh Pohan *was there* at the time that conversation took place (p. 20, fol. 30), but there is *no other evidence* in the case showing *any action* on the part of Haiganoosh Pohan in connection with the execution of Ex. C-2. *Nor is there any evidence in this case showing that Hovagim, her husband, testified at the trial of the lawsuit and in her presence that he owned the property* or that Haiganoosh *on any other occasion* than that of signing Ex. C-2 met either Rizzi, or his representatives, during the negotiations which followed the execution of Ex. C-2.

Under the circumstances the statement contained in the learned Vice Chancellor's opinion (p. 175, fols. 10-30), and hereinbefore quoted, that *both* defendants continuously claimed that Hovagim, the

man, was the owner of this property, is not an *accurate conclusion* drawn from the evidence. The evidence adduced in the Court of Chancery merely shows that Haiganoosh, the woman, was present at the *time of the execution* of Ex. C-2, when her husband claimed to be the owner of the property; there is no evidence to show that she *heard* her husband make the claim of ownership; nor was any evidence produced before the Vice Chancellor to show that the husband in the law action and in the *presence* of the wife and *in her hearing* testified that he owned the property.

As I view this case it resolves itself into this question. Does the fact that this wife *was present* at the execution of an agreement to sell real estate, —in the execution of which paper *she joins as one of the contracting parties,*—and during the execution of which her husband claims to be the owner of the property,—by her mere silence when this claim of ownership was made by her husband, estop herself from subsequently claiming title to the land as against the law judgment of complainant Rizzi?

The Vice Chancellor, who heard the case, at the trial also considered this to be the *sole* issue (p. 173, fol. 10).

POINT 1.

The rights of complainant Rizzi should under no circumstances be judged by the principles of an equitable estoppel.

It was not necessary for Rizzi to come into equity to obtain relief against the woman defendant, Haiganoosh Pohan. He had her contract. He had her *signature* to Ex. C-2; he had her signature as the

owner of the property, for in the paper Ex. C-2, she agrees to convey the premises *as her property.* Certainly, if by reason of any breach by either of the defendants of this agreement to convey, complainant Rizzi became entitled to a return of the deposit of $500.00, his *legal remedy* against the woman defendant, Haiganoosh Pohan, and his right to recover a *judgment at law* against her, was *full, complete* and *adequate* without the intervention of equity.

The claims of complainant Rizzi arise solely out of the agreement or "receipt", Ex. C-2. Both Mr. and Mrs. Pohan in this paper agreed to sell; both in this paper acknowledged the receipt of the deposit; they therefore *both* impliedly *bound themselves to refund this deposit* if they should fail to keep their agreement to convey. Rizzi held the joint obligation of the two defendants for a refund of his deposit.

The rule is, that several persons contracting together with the same party, for one and the same act, shall be regarded as *jointly* and *not* individually or separately liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten upon the promisers.

1 Chit. Pl. Star, page 41.

The woman defendant, Haiganoosh Pohan, was therefore fully as liable as was her husband for any breach of her contract.

Assuming that she was jointly liable with him,— and my insistment is that she was thus liable,— it was the *duty* of Rizzi to join her as a defendant in the action which he instituted against her husband for the recovery of the deposit.

His *right* thus to sue her and his *duty* thus to sue her arose out of her contract and existed as a contractual right *in spite of any representations which either she or her husband may have made in relation to the ownership of the property,* and if he had thus joined her as a defendant with her husband, she could not have defended on the ground that she did not own the property, first, because her liability did not rest upon the ownership of the property, but upon her contractual obligation (Sadler v. Young, 78 N. J. L., 594); and secondly, because she would have been estopped, even at law (Wysokowski v. Polish Am. Asso., 95 N. J. L., 352), from denying her ownership of the property since such denial would have been in direct contradiction of her statement in her contract (Ex. C-2) *that she did own it.*

Complainant, therefore, at the time of the alleged breach of contract which lead to the institution of his law action, had a full, complete and adequate remedy at law against the woman defendant and also against the male defendant, and it was *not* necessary for him to come into equity to enforce his rights to the deposit as against either of them.

Complainant Rizzi, however, instead of pursuing his legal remedy against both defendants, instituted his suit against the husband alone and obtained a judgment against him.

It is the contention of the appellant that in taking this step the complainant *made an election,* and that as the result of this election the cause of action which he theretofore had against the woman defendant was *destroyed,* was *lost* and was *merged* in the judgment which he obtained against the male defendant.

Where parties defendant have entered into a joint obligation they must be sued jointly. In such a case judgment against one *is a bar to any subsequent actions against the other joint contractor,* because, the contract being joint, there can be but one recovery. Consequently the plaintiff, if he proceeds against only one of two joint promissors, loses his security against the other, the rule being that by the recovery of judgment the contract is merged and a higher security is substituted for the debt.

15 R. C. L., 1031, Section 506;
Sessions v. Johnson, 95 U. S., 347, 24 L. ed., 596;
Russell v. McCall, 141 N. Y., 437;
Coles v. McKenna, 80 N. J. L., 48.

In Barnes, et al. v. Gibbs, 31 N. J. L., 317, it is held that the effect of a common law judgment is practically to destroy, so long as it exists, the *grounds* upon which it rests.

In Coles v. McKenna, 80 N. J. L., 48, the Supreme Court says:

> "The cause of action merged in the judgment, and in the case of a joint debt whatever extinguishes or merges the debt as to one, merges it as to all."

The joint liability of the parties *not* sued with those against whom the judgment is recovered being extinguished, *their entire liability is gone.* They cannot be sued separately for they have incurred no several obligation; they cannot be sued jointly with the others because judgment has already been recovered against the latter, who would

otherwise be subjected to two suits for the same cause of action.

15 R. C. L., 1031, Section 506;
Mason v. Eldred, 6 Wall., 231, 18 L., ed., 783;
Coles v. McKenna, 80 N. J. L., 48.

And the rule that judgment against one of several joint debtors bars action against the other rests upon the doctrine of election by a creditor to take such a judgment, in which case the extinguishment of the cause of action against the other by the recovery of judgment *is presumed to have been intended.*

15 R. C. L., 1032, section 506.

If, however, the court should disagree as to the joint liability of Mr. and Mrs. Pohan, then certainly they were each severally liable, and in that event also complainant had a full, complete and adequate remedy at law against Mrs. Pohan upon her contractual obligation, independent of any representations as to the ownership of the property.

In the event of a several liability the complainant was also put to an election. He could elect either to sue both or either one of the contracting parties, but, if he elected to sue one and pursued his remedy to judgment, the result again would be the same as in the case of joint debtors.

The situation is dealt with in Coles v. McKenna, 80 N. J. L., 48, where Mr. Justice Swayze, in speaking of the dilemma which confronted plaintiff in that suit at the time of the institution of the same, said at page 51:

> "It may be that plaintiff had the election to hold either one of the corporations or Meyer and McKenna. She sought to avoid such an election by suing all parties. She could not prove a joint contract and up to the time when she entered judgment against the corporations, it was still open to discontinue as to the corporations and to hold Meyer and McKenna, but by entering that judgment, she evinced an election to hold the corporation, and could not thereafter hold Meyer and McKenna.
>
> The cause of action was single, and could not be the basis of two distinct judgments."

The learned Vice-Chancellor meets this point and says:

> "Here the complainant did not sue the defendants as joint debtors but sued the husband alone on the representations aforesaid that he was the owner and in effect the wife had merely a dower right" (p. 176, l. 20).

There is no testimony in this case to indicate that this is the reason why complainant Rizzi sued the husband alone. Nor does the fact that the wife merely had a dower right in the premises afford any excuse for not suing her. On the contrary the fact that she had a dower right and that she signed the agreement, Ex. C-2, was in itself a powerful reason to make her a party defendant to the law suit, because it would enable the plaintiff at law *to cut off her dower right* if he were forced to sell any real estate belonging to the husband in any attempt made to collect his judgment.

The learned Vice Chancellor also says:

> "The husband at the trial in answer to a question of his own counsel said that he was still the owner" (p. 176, fol. 20).

There is no evidence in *this* case showing that such a question was *asked or answered.* The learned Vice Chancellor fell into error here by examining evidence adduced at one of the two law trials which was *not* adduced before him, but which was in the transcript of the testimony of one of these two law cases. The learned Vice Chancellor expressly directed that the testimony contained in these transcripts should not be considered in evidence *except* as to the testimony of complainant Rizzi. This will appear from the colloquy between court and counsel upon pages 124-126 of the case, which in part reads as follows:

> "Vice Chancellor: You might offer *not* the whole record but just the testimony of *this* witness (Rizzi) taken on the first and second trial.
>
> Mr. Ockford: Yes, sir, also the evidence of Lepore, *if he wants it.*
>
> Mr. Walscheid: Well, I have called from this book what I wanted.
>
> Vice Chancellor: Oh, yes, in other words wherever a witness has been confronted by this testimony taken at either the first or second trial, it is considered in evidence, *and wherever this witness (Rizzi) testified in the first or second trial, it is offered in evidence.*
>
> Mr. Ockford: Yes, sir."

This colloquy finally ends upon page 126, where the learned Vice Chancellor says:

> "Vice Chancellor: You are not offering that entire record in the other suits in evidence?
>
> Mr. Ockford: The testimony of Rizzi and we have already stipulated the testimony of Lepore.

> Mr. Walscheid: The testimony of Rizzi in both of these cases?
>
> Mr. Ockford: Yes, sir.
>
> Vice Chancellor: And wherever you have confronted a witness with this testimony?
>
> Mr. Walscheid: Yes, sir" (p. 126, fols. 1-10).

The husband at the Chancery hearing was certainly *not* confronted with his testimony in the other trials; *nor was he asked to explain it.* The state of the case as made up in this case has been accepted by the complainant without criticism and *no such evidence appears in this record.*

I therefore submit that it was error for the learned Vice Chancellor to consider, in determining this case, the testimony of the husband given at the trial of one of the law suits, that he was the owner of the property.

Again, assuming that the husband did so testify, such statement is not material in the *absence* of testimony that the wife heard the husband so testify *and there is no such testimony in this case.*

But the learned Vice Chancellor says as to this:

> "Mrs. Pohan did not testify that she did not hear her husband so testify, and she testified in that suit" (p. 174, fol. 40).

This plainly refers to the testimony given by Mrs. Pohan in the Chancery suit and to the fact that she, in the Chancery suit, did not testify that she did not hear her husband testify concerning the ownership of the property in the law suits.

When Mrs. Pohan testified in the Chancery suit there was absolutely *no* evidence in this case *concerning the testimony given by her husband in either of the law suits.* Nor did any such testimony come into the trial before the Vice Chancellor.

Under the circumstances, it was not incumbent upon Mrs. Pohan to testify that she did *not* hear her husband testify concerning the ownership of the property and the learned Vice Chancellor in thus disposing of this matter again draws into the case the fact that Mrs. Pohan testified in one of these law suits, of which there also is no evidence in this Chancery suit.

The learned Vice Chancellor further said:

> "This (the election to sue the husband alone) was clearly a mistake that the plaintiffs at law (the complainants here) were lead into by the untrue statement of the husband that he was the owner. In the Coles case, supra, it was perfectly plain that the plaintiffs *had full knowledge of the facts.* Here, on the contrary, the complainants (plaintiffs at law) were ignorant of the facts and were confirmed in their view that the ownership was in the husband, and therefore they could not be charged with having made an election."

I readily agree that the failure to sue the wife at law was a mistake as the learned Vice Chancellor found, but there is no testimony in this case that plaintiffs ever claimed they made this mistake in suing the husband alone, or that they were induced thus to sue by the statements of the husband that he was the owner, or that they were ignorant of the facts necessary to enable them to make an election.

The criticism of the learned Vice Chancellor's language, however, goes deeper.

The facts of which Rizzi was, in the opinion of the Vice Chancellor, ignorant *were material to the election which he was called upon to make* when he sued the husband alone. It was immaterial

whether husband or wife or both owned the property in so far as the election of remedy is concerned, *since the liability of both rested upon their contractual obligation,* of which the complainant Rizzi had full knowledge and the legal effect of which knowledge is chargeable to him under the law.

The learned Vice Chancellor also cites the case of Browning's Executors v. Rittenhouse, 40 N. J. L., 230, 237, and several other cases showing that no election can take place where the elector has not knowledge of the *necessary* facts upon which to base an election.

I agree to this in principle, but assert that in the cases cited by the learned Vice Chancellor, and in all other like cases, knowledge of the facts, of which the elector did not have knowledge, was in each instance *material to the election,* while in this case the facts of which he claims not to have had knowledge were immaterial to such election.

I therefore submit that when Rizzi filed his bill against the female defendant, he had no cause of action whatsoever against her, and that his bill of complaint should have been dismissed.

This point also disposes of any equitable appeal which complainant Rizzi might make in this case to the conscience of the court for a return by Mrs. Pohan of the $500.00 deposit. Having made his *election* to pursue his remedy against Dr. Pohan and his rights against Mrs. Pohan *having merged* in the judgment against the husband, there is no equitable claim to have the $500.00 returned by Mrs. Pohan.

POINT 2.

The matter alleged in the complaint as amounting to an estoppel and the evidence given in support thereof are not sufficient to estop the defendant, Haiganoosh Pohan, from claiming title.

Assuming that Hovagim Pohan claimed title to the property of his wife on October 11th, 1923, at the time when Exhibit C-2 was executed, it is certain that Lepore, the agent of complainant Rizzi, *did not in any way rely or act upon this declaration* of title in paying the $500.00 for Rizzi or in accepting the so-called receipt (Ex. C-2), for *he insisted* upon having the *signature* of Haiganoosh Pohan upon Exhibit C-2 with the result that no matter what the representation of Hovagim Pohan may have been, the representation did not and could not injure the complainant Rizzi or affect his rights.

The rights of complainant Rizzi must be measured by the language of his contract, Exhibit C-2.

Under the language of the contract Exhibit C-2, complainant Rizzi obtained the right to purchase the property involved, just as fully and just as completely as if both parties defendant had declared the woman defendant to have been the owner.

And an examination of Exhibit C-2 will disclose that Haiganoosh Pohan apparently either *first* signed that document or, if she signed the document after her husband, that her name was by her written in *over that of her husband.*

An examination of Exhibit C-2 further discloses that in it *Haiganoosh Pohan* acknowledges the receipt of $500.00 as and for a deposit on *"my* house", because in said paper she says: *"I* agree to sell *my* house, etc.", and then signs the same.

Under the circumstances it does seem *immaterial whether Hovagim Pohan made the representations charged to him.* Rizzi certainly did not rely upon the representations in making the payment of $500.00; in fact, he had no knowledge of the representations. He was not present when the representations of October 11th was made (p. 24, fol. 30) and there is no evidence that his agent Lepore ever told him that it had been made.

Rizzi relied upon the language of Exhibit C-2 and his legal rights and the rights of all the parties concerned must, under the circumstances, be tested, not by the alleged representations of Hovagim Pohan, but by the legal effect of Exhibit C-2,—that being the written contract between the parties. In other words, Rizzi did *not* alter or injure his position by reason of the representations and was not induced to make the payment *by reason of the* representation, but he altered his position and was *induced* to make the payment because Haiganoosh Pohan and Hovagim Pohan *both signed* Exhibit C-2.

In connection with the execution of Exhibit C-2 it may be well to call the attention of the court to the fact that no attempt was made by Lepore at the time when Exhibit C-2 was signed to have it acknowledged either by the wife or by the husband. Both defendants at that time evidently did everything that Lepore asked them to do in reference to the execution of Exhibit C-2. He asked them both to sign the so-called contract and they both obeyed. Nothing else was asked of them at that time and in the absence of the acknowledgment, which was not requested, Rizzi received from Mr. and Mrs.

Pohan at that time *all that he could possibly ask by way of contract* for his $500.00, especially since his agent Lepore drew the contract and was representing him in the transaction.

Under the circumstances it seems difficult indeed to understand just how the statement alleged to have been made by Dr. Pohan at the time of the execution of Exhibit C-2 as to his relation to the property could have in any way injured or affected Rizzi in any of his legal rights under Exhibit C-2.

> "Where it does not appear that a party claiming an estoppel has lost or will lose something of value, in consequence of the act or omission of his adversary which he makes the basis of his claim, his claim must be adjudged groundless."
>
> Hart v. Kennedy, 47 N. J. Eq., 51.

> "When the acts or statements of a person are not done or made to influence the conduct of the third party *and the latter does not rely upon them,* no estoppel arises in his behalf."
>
> Kuhl v. Mayor of Jersey City, 23 N. J. Eq., 84.

> "An estoppel in pais can only arise where the parties have acted upon the faith of representations made to them, or on the faith of statements or conduct on the part of another, and have, as a result thereof, changed their position *to their detriment.*"
>
> Cartun v. Myers, 78 N. J. Eq., 303;
> Wysakowska v. Polish-American, &c., Asso., 95 N. J. L., 352; affd. 96 N. J. L., 447.

Whatever may be the real intention of the party making the representation, it is *absolutely essential* that this representation, whether consisting of words, action or silence, should be believed and *relied upon* as an *inducement for action* by the party who claims the benefit of the estoppel and that, so relying upon it and induced by it, he should have taken some action.

2 Pom. Eq. Jur., page 1443, sect. 812.

It is the contention of the defendant that, conceding the alleged statement by Hovagim Pohan to have been made, that the complainant Rizzi did not act thereon, did not change his position by reason thereof, and did not suffer any detriment as the result thereof.

The other allegation contained in the complaint, but of which there is no evidence in the record, is that at the trial of the cause for the recovery of the $500.00 deposit, Hovagim Pohan, in the presence of his wife, testified that he was the owner of the property, and that she remained silent on that occasion.

There is no claim *even* in the complaint that Haiganoosh Pohan *heard* her husband make the statement he is supposed to have made at the trial or that she was *within hearing distance* of the statement when sworn to, but, conceding that she heard and remained silent, *again* I urge that the alleged statement, thus sworn to by the husband, cannot operate as an estoppel against Haiganoosh Pohan because again the complainant did not act upon *this statement,* did not change his position by reason of this statement and did not suffer any damage by reason of this statement.

And certainly, to charge upon the property of Mrs. Pohan the judgment recovered against her

husband in that action because of the alleged statement sworn to by the husband at the trial is carrying the doctrine of estoppel far beyond the limits of any possible injury that could possibly have been inflicted upon the complainant *by reason of the silence of Haiganoosh Pohan.*

The estoppel must not be carried beyond the limits of the injury so that instead of preventing fraud, its enforcement would produce a greater injury than the one intended to be prevented.

Phillipsburgh Bank v. Fulmar, 31 N. J. L., 52, 55;
Richman v. Baldwin, 21 N. J. L., 395, 403;
Dewees v. Manhattan Insurance Co., 35 N. J. L., 366, 376.

Assuming for the moment that it was the duty of Haiganoosh Pohan to break her silence and to claim title to the property *if* and *when* she *heard* her husband swear at the law trial that he was the owner of the property, and assuming that if she had thus broken her silence and had claimed title to the property, the result would have been a mistrial and a new trial against her upon proper pleadings; *in that event Mrs. Pohan would have had her day in court and might have submitted to a law court the many defenses which, from an examination of this record, evidently exist in favor of Haiganoosh Pohan and against the repayment of the* $500.00 *to Rizzi.*

Certain it is that the alleged act of estoppel *at the trial* of the lawsuit could not in any way affect the act of Rizzi in signing Ex. C-2. Certain it also is that the same act of estoppel could not in any way affect the act of Rizzi *in starting* his suit against Hovagim Pohan alone, because when the testimony was given by Hovagim Pohan, that

suit had already been started and was then being tried. And since there is no lawful evidence before the court that the husband testified in the law court to the ownership of the property and no evidence whatever that the wife heard him so swear, if he did so testify, I submit that there is no evidence in this case warranting a finding that there was an estoppel.

POINT 3.

Neither the silence of Haiganoosh Pohan at the time of the execution of Ex. C-2 or at the time of the trial of the lawsuit can amount to an estoppel.

Haiganoosh Pohan is the wife of Hovagim Pohan. She is charged with no *active* representation or fraud. She is charged merely with remaining *silent in the presence of her husband* on two occasions when it is alleged fraudulently to have represented himself as the owner of her property.

The representation thus made by the husband is a fraud and a tort, and under ordinary circumstances, silence by another interested in the statement, at a time when such other would be called upon to speak, would in turn amount to a fraud and a tort in the other.

There is, however, an exception under our law *in the case of a wife.* Assuming that these representations of ownership were made by someone *other* than the husband in the presence of this wife, but in the absence of the husband, the silence of the wife under such circumstances would have amounted to a tort,—yet it is different when the

conduct of the wife *is in the presence of the husband.*

At common law the husband is liable for the wife's torts committed during coverture, and if a tort is committed by the wife *in the presence of the husband,* the law presumes coercion on his part which excuses her from liability. That presumption may, however, be rebutted by proof.

Hildreth v. Camp, 41 N. J. L., 306.

In the case at bar the only wrongdoing charged to the wife is that she *remained silent* in the presence of her husband and there is *no evidence* in the case to *rebut* the presumption *that what she then did was under coercion* by her husband.

Hildreth v. Camp, supra, is still the law of the State of New Jersey and the principles therein enunciated have been repeatedly affirmed by our courts.

O'Brien v. Walsh, 63 N. J. L., 350;
Wolff v. Lozier, 68 N. J. L., 103;
Emmons v. Stevane, 73 N. J. L., 349;
Emmons v. Stevane, 77 N. J. L., 570;
State v. Martini, 80 N. J. L., 685;
State v. Goldfarb, 96 N. J. L., 61;
Majowitz v. Magda, 2 Misc. Rep., 61;
Sargent v. Fedor, 3 Misc., 802.

And the principle of Hildreth v. Camp, has been directly applied to attempts to charge married women by way of estoppel in cases analogous to the case at bar.

Thus, it has been held in this court that a wife's separate estate will not be charged with her husband's debts *merely because she stood by in silence while her husband represented himself to be the*

owner of such estate as an inducement to the creditor to give credit and by such representation deceived the creditor.

Carpenter v. Carpenter's Executors, 27 N. J. Eq., 502;
Kinsey v. Feller, 64 N. J. Eq., 367.

I have said that there is no evidence in the case to rebut the presumption of coercion, arising out of the relation of husband and wife. On the contrary there is evidence in this case which plainly indicates that this wife acted *throughout the whole proceeding under the control of her husband.*

Haiganoosh Pohan is an Armenian woman (p. 77, fol. 30). She was called as a witness for the complainant; she frankly told her story and gave an insight into her relation with her husband when she, in speaking about her money, testified:

> "Yes, he always showed me the money, but I would always give it back to him *because in our country, we left our husbands manage for us, we do not manage it ourselves"* (p. 72, fol. 1).

Assuming, therefore, that it is true that Haiganoosh Pohan remained silent on the two occasions when her husband is supposed to have represented himself as the owner of the property, I submit that such silence under the circumstances cannot operate as an estoppel against her.

The learned Vice Chancellor, in dealing with this point, does not deal with the law as laid down in Hildreth v. Camp, supra, and the cases that follow it. He passes over the opinion rendered in Carpenter v. Carpenter's Executors, supra, and Kinsey v. Feller supra, in silence. He finds that

neither Dr. or Mrs. Pohan denies that Dr. Pohan represented to the agent of Rizzi that the doctor was the owner of the property (p. 175, fol. 3); he takes into consideration the fact (which, as has been shown, was not in evidence before him) that the doctor replied yes to the question if he still owned the property at the time of the law trial (p. 174, fol. 30); he comments on the fact that Mrs. Pohan did *not* testify that she did *not* hear her husband so testify, although she also testified in the law suit (p. 174, fol. 30), (which latter fact was also not in evidence before him), and then concludes that the defense interposed by her husband to the law suit was *her* defense, and concludes that:

> "In view of the *continued* claim of the defendants (plural) *from the time* of the making of the contract *until* the close of the trial of the suit at law in which the judgments were obtained, that the husband was the owner of the property, they are now estopped from setting up that it was the property of the wife for the purpose of defeating the judgment of Rizzi" (p. 175, l. 20).

I respectfully submit that under the evidence before the learned Vice Chancellor, he was not justified in making any such findings of fact; that the *only lawful evidence* before him, *binding* the wife, is the testimony that she, when she signed Exhibit C-2 as *owner* of the property, and when the deposit was accepted, remained silent while her husband asserted ownership in her property. No other action *of the wife,* so far as any evidence in *this* case discloses, was communicated to Rizzi, and the wife, in the absence of evidence that she was acting as

a free agent, without coercion by her husband, cannot be held to an estoppel by reason of such silence.

The learned Vice Chancellor, in support of his finding of an estoppel, cities six cases (p. 175, fol. 20). Peregallo v. Oneto, 98 N. J. Eq., 74, affd. 4 N. J. Adv. Rep., 935; Straus v. Loudenslager, 96 N. J. Eq., 678; Lake v. Weaver, 80 N. J. Eq., 395, affd. Id., 554; Ludy v. Larsen, 78 N. J. Eq., 237; Clark Thread Co. v. William Clark Company, 55 N. J. Eq., 658; s. c., on appeal, 56 N. J. Eq., 789 and Lyon v. Stanford, 42 N. J. Eq., 411.

Of the six cases thus cited only three in any way deal with the action of married women. They are the cases of Peregallo v. Oneto; Lake v. Weaver and Lyon v. Stanford.

None of the three cases deal with the common law rule concerning the liability of the husband for the torts committed by the wife in the presence of the husband, and in my opinion none of the cases cited are apposite to this case.

In Peregallo v. Oneto, supra, a married woman allowed title to her property to remain in her husband for twelve years, during which time she knew that her husband was heavily indebted, that he was in a losing business, that he owed money to complainant, that a portion of the money received by her husband went to the improvement of the property thus held by her husband. In that case the married woman endorsed the note, the proceeds of which thus benefited her separate estate, and successfully perpetrated a fraud upon the law court by filing a separate defense therein, claiming to be an accommodation endorser when she was joined as a defendant with her husband in an action on this note. These facts and others found in the opinion plainly indicate that the married woman in this case was acting actively and independently of her

husband and on all principles of equity should have been estopped from claiming title to the property which had been transferred to her after the indebtedness accrued and just prior to the institution of the law suit. The principle that the husband is liable for the torts of his wife, committed in his presence, was not and could not have been raised in the case of Peregallo v. Oneto.

In Lake v. Weaver, supra, the principle that the husband is liable for the torts of his wife was *not* and could not be invoked, and the case is not even decided on any question of estoppel. The case, at page 401, contains a reference to and citation of the case of Lyon v. Stanford, supra. But this is dictum. The case was decided upon other grounds (p. 402).

The case of Lyon v. Stanford, supra, is perhaps somewhat nearer the mark, but in my opinion can very readily be distinguished. The opinion in this case is written by Mr. Justice Dixon, who prior thereto sat in the case of Hildreth v. Camp, 41 N. J. L., 306, who wrote the opinion in Carpenter v. Carpenter's Executors, 27 N. J. E., 502, in which the Court of Errors divided six to four, and subsequently sat in Kinsey v. Felter, 64 N. J. E., 367, when that court unanimously followed the Carpenter case.

The syllabus in Lyon v. Stanford, I understand, to be by the court. In it Mr. Justice Dixon says:

> "Under special circumstances a wife was held bound by a judgment at law against her husband on the ground that she was the real, though not a nominal party, to the litigation."

An examination of the opinion discloses these special circumstances.

I do not here intend to set out all the special circumstances which thus disclose that Ann Lyon was a real active force in the law suit involved in that case. Suffice it to say, "that when complainant remonstrated with Ann Lyon against the erection of the new building in the yard, *she* told him *she* had no authority *and he must see her husband*", and that the law action, which was in aid of a chancery action theretofore instituted against *her* and her husband, was defended *on her title by the same means, in the same manner* and to the *same extent* as if she *had been* a party to the record (p. 414).

Undoubtedly Mr. Justice Dixon in writing the opinion in Lyon v. Stanford, supra, had in mind his opinion in the Carpenter case, supra, and the opinion in Hildreth v. Camp, supra. Undoubtedly he found *special circumstances* in the Lyons case which made the rule laid down in the other two cases inapplicable, just as I believe this court will have little difficulty in distinguishing the Lyons case from the case at bar. In the Lyons case the fact that the married woman, *in the absence of her husband,* told Stanford that *she* had no authority, and that *he* must see her husband is in itself an *active* act by the wife *done not in the presence of her husband* which is sufficient to create an estoppel against her. Add to this the fact that she *was* a party to the chancery suit, and that *full justice was done to her cause in the law trial* when it was defended on *her* title, by the *same* means, in the *same* manner and to the *same* extent as if *she* had been a *party to the record* and you have a case in which the female defendant in that case actually had her day in court upon all the issues which she *did* or *might have presented.*

There is nothing in this record to justify the

court in saying that the law suits, to which Mrs. Pohan was *not* a party, were defended on her title, by the *same* means, in the *same* manner and to the *same* extent as if she had been a party to the record. In fact, a reading of the record must disclose that no proper defence to the claim of Rizzi was interposed.

I submit that neither the Lyon case or any of the other cases cited by the learned Vice Chancellor should control the disposition of this case.

I submit that in equity this complainant must do equity and that she has no right to take from Mrs. Pohan her separate estate simply because she has obtained a judgment against her husband, unless she give her *her day in court,* upon the *merits* of the questions upon which the judgment against her husband was founded. The has no right *deliberately to leave her out* of the law suit in which Rizzi was the plaintiff and in which the meritorious question could properly have been tried and thereafter claim that she is *bound by the judgment* rendered in that cause.

POINT 4.

The evidence adduced by complainant is not sufficient to turn this legal owner of the land into a trustee ex delicto for the benefit of the complainant and a fraudulent intent is necessary in an estoppel affecting the legal title to land.

There is no evidence that this married woman had any fraudulent intent when she remained silent while her husband claimed title to her land.

And fraudulent intent is necessary in an estoppel affecting the legal title to land.

2 Pom. Eq. Juris, page 1432, par. 807, et seq.

Professor Pomeroy says:

> "The general rule is, that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representations specifically good. * * * This equity, being merely *an instance of fraud,* requires *intentional* deceit, or at least that *gross* negligence which is *evidence* of an *intent* to deceive. In the language of a most recent decision, to preclude the owner of land from asserting his *legal* title or interest under such circumstances, 'there must be shown either *actual* fraud, or fault or negligence *equivalent to fraud,* on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in Storrs v. Barker, 6 Johns. Ch., 166,—so as to render it just that as between him and the party acting upon his suggestion he should bear the loss.' What is the reason for this rule? It is accurately explained in the same decision. While the owner of land may by his acts *in pais* preclude himself from asserting his legal title, 'it is obvious that the doctrine should be carefully and sparingly applied and *only* on the disclosure of clear and satisfactory grounds of justice and equity. *It is opposed to the*

letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of *light or doubtful character.'* The most important 'grounds of justice and equity' admitted by courts of equity to uplift and displace the statute of frauds concerning legal titles to lands, by fastening a liability upon the wrongdoer, *is fraud.* There are many instances in which equity *thus* compels the owner of lands to forego the benefits of his legal title and to admit the equitable claims of another in direct contravention of the literal requirements of the statute, *but they all depend upon the same principle."*

"The rule under consideration is strictly analogous to another familiar rule that a legal owner of land cannot be turned into a trustee ex delicto by any mere words *or* conduct. A constructive trust ex delicto can never be impressed upon land as against the legal title by any verbal stipulation, however, definite, *nor* by any mere conduct; such trust can only arise where the verbal stipulation *and* conduct *together* amount to fraud in the contemplation of equity. Both the rule under consideration and the rule concerning trusts rests upon the same reasons. The doctrine had its origin, as has been said, prior to and independently of the modern doctrine of equitable estoppel by conduct, and was confined in its operation to courts of equity. Even at the present day, this particular instance of the equitable estoppel by which the owner of land is precluded from asserting his legal title is distinctively equitable; it is not admitted and enforced by law, except in states where the principles of

equity are administered through the means of legal actions and remedies, and in those where legal and equitable rights and reliefs are combined in the administration of justice under the reformed procedure."

So in the case at bar also, we cannot assume that if Haiganoosh Pohan had been *asked* if she owned the property that she would have denied her title.

And fraudulent intent is also necessary to establish a trust ex delicto.

Where it is sought to establish a trust on account a mala fides, the fraud must be proved.

Cort v. Skillin, 29 N. J. E., 70.

I submit that the evidence in this case is not sufficient to establish either an equitable estoppel or a trust ex delicto within the principles above laid down.

Conclusion.

It is respectfully submitted that the portion of the decree from which the appeal is taken be reversed, and that the bill of complaint be dismissed.

Respectfully submitted,

J. EMIL WALSCHEID,
Of Counsel with Defendants-Appellants.

May Term, 1927.

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