Court of Appeals.

ATTILIO DE CICCO,

Plaintiff-Respondent,

against

JOSEPH SCHWEIZER,

Defendant-Appellant,

AND ERNESTINE SCHWEIZER,

Defendant.

Case on Appeal.

ELBRIDGE G. DUVALL,

Attorney for Defendant-Appellant JOSEPH SCHWEIZER,

277 Broadway,

New York City.

GINO C. SPERANZA,

Attorney for Plaintiff-Respondent,

44 Pine Street,

New York City.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Oct. 15. 1917 - Hon Willard Bartlett, for Appellt.
Michael Schneidermann, for Respdt.

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Supreme Court, New York County, 1

APPELLATE DIVISION—FIRST DEPARTMENT.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.

Statement under Rule 41. 2

This action was commenced by service of a summons on the defendant Joseph Schweizer, May 14th, 1913. The complaint was served on said defendant on July 31st, 1913. The answer of the defendant Joseph Schweizer was served September 8th, 1913. The names of the parties appear in full in the above title. There has been no change of parties or attorneys since the commencement of this action.

The issues herein were duly tried before Hon. Mitchell L. Erlanger and a jury at a Trial Term, Part II of the Supreme Court on the 22nd day of January 1914, and a verdict was rendered by direction of the Court in favor of the plaintiff for $84.00 and interest. Judgment was entered thereon on 3
March 3rd, 1914 for the sum of $99 70. Order denying motion of defendant, Joseph Schweizer, for a new trial was duly made and entered on March 10th, 1914. Notice of appeal of the defendant Joseph Schweizer from said judgment and order was served and filed March 30th, 1914.

The plaintiff also moved to set aside the verdict and for a new trial for insufficiency and the order denying the plaintiff's motion was duly made and entered on the 3rd day of March 1914. The cross notice of appeal from the said judgment and order was served and filed by the plaintiff on the 30th day of April, 1914.

4 **Notice of Appeal.**

SUPREME COURT,

NEW YORK COUNTY.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.

County Clerk's No. 13116
Year 1913

5 TAKE NOTICE, that the defendant Joseph Schweizer hereby appeals to the Appellate Division of the Supreme Court in and for the First Judicial Department from the judgment of this Court in favor of the plaintiff and against the defendant Joseph Schweizer for the sum of ninety nine and 70/100 dollars dated March 3rd, 1914, and entered on that day in the office of the Clerk of New York County, and from the order denying the motion of the defendant Joseph Schweizer to set aside the verdict rendered herein, and for a new trial dated March 10th, 1914, and duly entered on that day in the office of the Clerk of New York County, and that the said defendant Joseph Schweizer appeals from each and every part of said judgment and
6 order and from the whole thereof.

Dated, March 28th, 1914.

ELBRIDGE G. DUVALL,
Attorney for defendant Joseph Schweizer,
Office & P. O. address
277 Broadway,
Borough of Manhattan,
City of New York.

To

GINO C. SPERANZA, ESQ.,
Attorney for plaintiff,
40 Pine Street,
New York City.

" CLERK OF THE COUNTY OF NEW YORK.

Plaintiff's Notice of Appeal.

SUPREME COURT, NEW YORK COUNTY.

ATTILIO DE CICCO,
Plaintiff,
Appellant,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.
Respondents.

SIR:—

Please Take Notice, that the plaintiff appellant Attilio De Cicco, appeals to the Appellate Division of the Supreme Court in and for the First Department, from so much of the judgment entered in this action, on the 3rd day of March, 1914, in the office of the County Clerk of the County of New York, as directs that the plaintiff recover from the defendant the sum of $99.70 only, the amount found by the jury by direction of the Court and from the order entered herein on the 3rd day of March, 1914, denying the plaintiff's motion to set aside the verdict in favor of the plaintiff for the sum of $84.00 only by direction of the Court and for a new trial, and from the whole and each and every part of the said order.

Dated, New York, April 27th, 1914.

Yours Etc.,
GINO C. SPERANZA,
Atty. for Plaintiff,
No. 40 Pine Street,
New York City, N. Y.

To:—
ELBRIDGE G. DUVALL,
Atty. for Defendant,
No. 277 Broadway,
New York City, N. Y.

10

Summons.

SUPREME COURT—COUNTY OF NEW YORK.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER & ERNESTINE TERESA SCHWEIZER,
Defendants.

Summons.

11

TO THE ABOVE NAMED DEFENDANTS:

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

Dated New York April 17th 1913

GINO C. SPERANZA,
Plaintiff's Attorney,

12

Office and Post Office Address,
No. 40-44 Pine Street,
New York City, N. Y.

Complaint.

SUPREME COURT, NEW YORK COUNTY.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.

The plaintiff above named complaining of the defendants herein, respectfully shows to this Court and alleges:

1st—Upon information and belief that Blanche Josephine Schweizer is the lawful daughter of the defendants herein, and the lawful issue of their marriage.

2nd—Upon information and belief that heretofore and on or about the 16th day of January, 1902, at the City of New York, the said Blanche Josephine Schweizer, the daughter of the defendants herein was desirous of entering into lawful wedlock with Count Alberto Giacomo Giovanni Francesco Mario Gulinelli.

3rd—Upon information and belief that on or about the 16th day of January, 1902, at the City of New York, the defendants duly made and entered into an agreement with the said Count Alberto Giacomo Giovanni Francesco Maria Gulinelli, wherein and whereby the defendant Joseph Schweizer, duly promised and agreed with the said Count Alberto Giacomo Giovanni Francesco Maria Gulinelli, that

16 in consideration of and upon the marriage of the said Count Alberto Giacomo Giovanni Francesco Maria Gulinelli to and with the said Blanche Josephine Schweizer, the defendant Joseph Schweizer would pay and send to the said Blanche Josephine Schweizer the sum of $2,500. on the 20th day of January, 1902, and the sum of $2,500 annually thereafter during the lifetime of said Blanche Josephine Schweizer and the natural life of the said defendant.

4th—Upon information and belief that thereafter and prior to the 20th day of January, 1902, the said
17 Count Alberto Giacomo Giovanni Francesco Maria Gulinelli, pursuant to the said agreement did lawfully marry and enter into lawful wedlock with said Blanche Josephine Schweizer at the City of New York and that they have continued and still continue to live together as husband and wife, and that said Count Alberto Giacomo Francesco Maria Gulinelli, and Blanche Josephine Schweizer have otherwise fully and completely performed all the terms and conditions of said agreement on their part.

5th—Upon information and belief that under and
18 pursuant to the said agreement, there became due and payable from the defendant Joseph Schweizer to the said Blanche Josephine Schweizer, the annual sum of $2,500 on the 20th day of January, 1912, or its equivalent in Italian money.

6th—Upon information and belief, that there is now due and owing on and under said agreement from the defendant Joseph Schweizer to said Blanche Josephine Schweizer, the said sum of $2,500 no part of which has been paid although duly demanded and the defendant Joseph Schweizer, has failed, neglected and refused, in violation

of said agreement, to pay or send to said Blanche 19
Josephine Schweizer the said sum of $2,500 or the equivalent in Italian money or any part thereof.

7th—That thereafter and prior to the commencement of this action the said Blanche Josephine Schweizer now Countess Alberto Giacomo Giovanni Francesco Maria Gulinelli, duly transferred and assigned all her right, title and interest in and to the said sum of $2,500 to the plaintiff herein who is the lawful owner and holder thereof.

Wherefore the plaintiff demands judgment against the defendant herein for the sum of $2,500, with 20
interest thereon from the 20th day of January, 1912, besides the costs and disbursements of this action.

Yours Etc.,

GINO C. SPERANZA,
Attorney for Plaintiff,
No. 40 Pine Street,
New York City, N. Y.

City and County of New York, ss:

ATTILIO DE CICCO, being duly sworn, says that he is the plaintiff herein, that he has read the foregoing complaint and knows the contents thereof; 21
that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to those matters he believes it to be true.

ATTILIO DE CICCO.

Sworn to before me this
30th day of July, 1913.

P. DE CICCO,
Notary Public,
N. Y. Co.

22

Answer.

SUPREME COURT,

NEW YORK COUNTY.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.

No. 13116-1913.

23

The above-named defendant, Joseph Schweizer answering the complaint of the plaintiff by Elbridge G. Duvall, his attorney, respectfully shows to this Court and alleges:

1st:—The said defendant answering paragraph numbered "Third" of the complaint denies each and every allegation in said paragraph contained.

2nd:—The said defendant answering paragraph numbered "Fourth" of the complaint admits that Count Alberto Giacomo Giovanni Francesco Maria Gulinelli married Blanche Josephine Schweizer but this defendant denies that Count Alberto Giacomo
24 Giovanni Francesco Maria Gulinelli married Blanche Josephine Schweizer pursuant to the alleged agreement set up in the complaint or pursuant to any other agreement between this defendant and the said Count Alberto Giacomo Giovanni Francesco Maria Gulinelli or pursuant to any agreement between this defendant and any other person. The said defendant admits upon information and belief that the said Count Alberto Giacomo Giovanni Francesco Maria Gulinelli and the said Blanche Josephine Schweizer lived together and still live together as husband and wife. The said defendant denies each and every other allegation in said paragraph contained.

3rd:—The said defendant answering paragraph numbered "Fifth" of the complaint denies each and every allegation in said paragraph contained. 25

4th:—The said defendant answering paragraph numbered "Sixth" of the complaint denies each and every allegation in said paragraph contained, excepting he admits that he has made no payment to Blanche Josephine Schweizer, as therein alleged.

5th:—The said defendant answering paragraph numbered "Seventh" of the complaint denies that he has any knowledge or information of any of the allegations in said paragraph contained sufficient to form a belief.

26

Wherefore said defendant demands judgment against the plaintiff that the complaint herein be dismissed and that this defendant have his costs and disbursements of this action.

ELBRIDGE G. DUVALL
Attorney for defendant, Joseph Schweizer,
277 Broadway,
Borough of Manhattan,
City of New York.

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

JOSEPH SCHWEIZER, being duly sworn, says: 27

That he is one of the defendants herein.

That he has read the foregoing answer and knows the contents thereof.

That the same is true of his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOSEPH SCHWEIZER

Sworn to before me this sixth day of September, 1913.

CHAS. F. WRIGHT,
Notary Public # 4127
New York.

28

Extract from Minutes.

SUPREME COURT, TRIAL TERM, PART II,

FEBRUARY 27TH, 1914.

ATTILIO DE CICCO,
plaintiff,

AGAINST

JOSEPH SCHWEIZER, and ano.
Defendants.

29

I hereby certify that this cause was tried before Hon. Mitchell L. Erlanger and a jury on the 22 day of January 1914, for the plaintiff for the sum of $84,00 with interest upon a verdict directed in accordance with the stipulation of the parties, 30 days' stay of execution, after notice of entry of judgment, sixty days to make a case.

WILLIAM F. SCHNEIDER,
Clerk.

30

Judgment.

SUPREME COURT, NEW YORK COUNTY.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.

The issues in this action having come on for trial before Mr. Justice Erlanger, and a Jury, at a Trial Term of this Court, Part II thereof, at the County Court House, in the Borough of Manhattan, City, County and State of New York, on the 22nd day of January, 1914, and the allegations and proofs on the part of both parties having been heard and considered and submitted to the Jury, and the Jury having rendered a verdict by direction of the Court, in favor of the plaintiff and against the defendant in the sum of $84.00 with interest from January 20th, 1911, and the costs of the plaintiff having been taxed and adjusted at the sum of $.

Now, on motion of Gino C. Speranza, Esq., attorney for the plaintiff herein, it is

Adjudged that the plaintiff do recover of defendant the sum of $84.00 found by the Jury by direction of the Court and $15.70 the interest thereon, with $ costs amounting in all to the sum of $99.70 and that the plaintiff have execution therefor.

Judgment signed and entered the 3rd day of March, 1914.

WILLIAM F. SCHNEIDER,
Clerk.

34 **Notice of Motion for New Trial.**

SUPREME COURT,

NEW YORK COUNTY.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.

35 TAKE NOTICE, that upon the Judge's minutes taken at the trial in the above action, I will move this Court before Mr. Justice Erlanger, at Trial Term, Part II (January Term), to be held at the court room occupied by Trial Term, Part XIV, at the County Court House, in the Borough of Manhattan, City of New York, on the 20th day of February 1914, at 10.30 in the forenoon to set aside the verdict directed in favor of the plaintiff for the sum of eighty-four dollars on the 13th day of February, 1914, and for a new trial upon the exceptions taken at said trial, and because the verdict is for excessive damages and otherwise contrary to the evidence and contrary to law, and on all the other grounds
36 mentioned in Section 999 of the Code of Civil Procedure, except that said verdict is for insufficient damages.

Dated, February 17th, 1914.

ELBRIDGE G. DUVALL,
Attorney for defendant Joseph Schweizer,
Office & P. O. address,
277 Broadway,
Borough of Manhattan,
City of New York.

To GINO C. SPERANZA, ESQ.,
Attorney for plaintiff,
40 Pine Street,
New York City.

Plaintiff's Notice of Motion for New Trial.

SUPREME COURT, NEW YORK COUNTY.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER, and ERNESTINE SCHWEIZER,
Defendants.

Please Take Notice, that a motion will be made before Mr. Justice Erlanger, at a Trial Term Part II of the Supreme Court, New York County, being held in the Court Room of Trial Term Part XIV, at the County Court House, in the Borough of Manhattan, City of New York, on the 20th day February, 1914, at 10:30 o'clock, in the forenoon of that day or as soon thereafter as counsel can be heard, upon the Judge's minutes, to set aside the verdict of the jury, directed in favor of the plaintiff, for the sum of $84.00, on the 13th day of February, 1914, and for a new trial, on the ground that the verdict is for insufficient damages, contrary to the evidence and contrary to law.

Dated, New York, February 16th, 1914.

Yours Etc.,

GINO C. SPERANZA,
Atty. for Plaintiff,
No. 40 Pine Street,
New York City, N. Y.

Order denying Defendant-Appellant's Motion for a New Trial.

At a Trial Term (January Term) of the Supreme Court, Part II, held in and for the County of New York, at the County Court House, Borough of Manhattan, City of New York, on the 10th day of Mch., 1914.

Present,
Hon. MITCHELL L. ERLANGER,
Justice.

ATTILIO DE CICCO,
Plaintiff,

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER,
Defendants.

The issues in this action having been brought on for trial before Mr. Justice Mitchell L. Erlanger and a Jury in Trial Term, Part II of the Supreme Court, County of New York, on the 22nd day of January 1914, and the parties appearing by their respective counsel, and the evidence having been adduced in behalf of the plaintiff, and defendant Joseph Schweizer, and a verdict having thereafter on February 13th, 1914, been directed by the Court in favor of the plaintiff for the sum of eighty four dollars and interest, and the defendant, Joseph Schweizer, having thereupon moved before Mr. Justice Erlanger to set aside said verdict and for a new trial upon the exceptions taken at said trial, and on

the ground that said verdict is contrary to law, 43
against the weight of evidence and excessive in amount, and upon all the other grounds stated in Section 999 of the Code of Civil Procedure, except the insufficiency thereof,

NOW AFTER HEARING Elbridge G. Duvall, counsel for defendant Joseph Schweizer in support of said motion, and Gino C. Speranza of counsel for plaintiff, in opposition thereto,

AND ON MOTION of Gino C. Speranza, attorney for plaintiff, it is

ORDERED, that said motion be and the same hereby 44
is in all respects denied.

Enter

M. L. E.
J. S. C.

45

Order Denying Plaintiff's Motion for New Trial.

At a Trial Term Part II of the Supreme Court held in and for the County of New York at the County Court House in the Borough of Manhattan, City of New York, on the 3rd of March 1914.

Present
Honorable MITCHELL L. ERLANGER,
Justice.

ATTILIO DE CICCO,
Plaintiff

AGAINST

JOSEPH SCHWEIZER and ERNESTINE SCHWEIZER
Defendants

This cause having duly come on for trial before Mr. Justice Mitchell L. Erlanger and a Jury at a Trial Term Part II of this Court on the 22nd day of January 1914, the issues having been duly tried therein and the plaintiff having moved for the direction of a verdict in favor of the plaintiff for the sum of $2500.00 and interest and the Court having taken the motion under advisement and having thereafter directed a verdict in favor of the plaintiff for the sum of $84.00 and interest only and the Jury having rendered a verdict by direction of the Court for the sum of $84.00 only and the attorney for the plaintiff having thereafter made a motion, upon notice, to vacate and set aside the verdict, as directed by the Court, and for a new trial on the ground that the verdict is for insufficient damages, contrary to

the evidence and contrary to law, as mentioned 49
in section 999 of the Code of Civil Procedure,

Now upon reading and filing the Notice of said motion, dated February 16th, 1914 and after hearing Michael Schneiderman Esq. counsel for the plaintiff in support of said motion and Frank G. Wild Esq. counsel for the defendant in opposition thereto and due deliberation having been had, it is

Ordered that the said motion to set aside the verdict for $84.00 as directed by the Court and for a new trial be and the same hereby is in all respects denied

Enter 50

M. L. E.

J. S. C.

51

52 **Case.**

NEW YORK SUPREME COURT

TRIAL TERM PART II.

ATTILIO DE CICCO,
Plaintiff,

vs.

JOSEPH SCHWEIZER and ER-
53 NESTINE SCHWEIZER,
Defendants.

Before:
ERLANGER, *J.*,
and a Jury.
Second Action.

NEW YORK, January 22nd, 1914.

APPEARANCES:

MR. GINO C. SPERANZA, attorney for Plaintiff.
MR. MICHAEL SCHNEIDERMAN, of Counsel.
MR. ELBRIDGE G. DUVALL, attorney for Defendant Joseph Schweizer. MR. FRANK G. WILD, of Counsel.

A jury was duly empaneled and sworn.

54 Mr. Wild: I move to dismiss the complaint in this action on the ground that it states no cause of action against the defendants.

Motion denied. Exception.

Mr. Wild: I move to amend the answer in this second action by setting forth a plea of partial payment before the prayer, by inserting the following:

For a further separate and partial defense, this defendant alleges that prior to the commencement of this action and the demand men-

tioned in the complaint, he paid to the plaintiff's assignor on account of the annual payment mentioned in the instrument mentioned in the complaint for the year ending January 20th, 1912, the sum of $2,191. 55

Mr. Schneiderman: In the second action we are only suing for the annual instalment that fell due on January 20th, 1912, and I will object to an amendment where they set forth payment, after having specifically admitted that they did not pay it.

Mr. Wild: We claim we paid $2,191 on account of the instalment of $2,500, leaving a balance of three or four hundred dollars. 56

Mr. Schneiderman: No objection.

The Court: Motion granted.

The case was opened to the jury by Mr. Schneiderman, on behalf of plaintiff.

Mr. Wild: We ask permission to defer the opening of defendant's case until the close of plaintiff's case.

ELBRIDGE G. DUVALL, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

57

DIRECT-EXAMINATION BY MR. SCHNEIDERMAN:

Q. Mr. Duvall, what is your profession? A. Lawyer.

Q. Do you know the defendant, Mr. Schweizer? A. I do.

Q. You are his attorney? A. Yes.

Q. You were his attorney in January, 1902? A. I was.

Q. And you are also the attorney of record in the two actions that are now pending in this court? A. Yes; I was substituted.

58 Q. You were substituted in this action, too? A. No, I was substituted in the first action.

Q. Who was the attorney who brought the first action? A. George M. Baker.

Q. He was connected with your office, was he not? A. Yes.

Q. And he commenced the action upon your request? A. Yes.

Q. I mean, defended the action upon your request? A. Yes, at Mr. Schweizer's request.

Q. Do you remember some time in January, 1902, being consulted by Mr. Schweizer regarding the preparation of an agreement? A. Mr. Schweizer
59 called on me, yes.

Q. And he gave you certain data at that time? A. Yes.

Q. Gave you certain information, did he not? A. Well, I don't know just what information he gave me.

Q. Didn't he ask you to prepare an agreement with reference to a marriage that was to be entered into between Count Gulinelli and his daughter Blanche Schweizer? A. He did.

Q. And you prepared such an agreement? A. I did.

Q. In English? A. In English.

Q. And you subsequently had that English copy
60 translated into Italian? A. I did.

Q. How many copies did you obtain? A. Italian?

Q. Yes. A. I never saw it in Italian.

Q. You never saw the Italian translations? A. Not until recently, when I got a copy from you.

Q. To whom did you give the English copy to make the translations into Italian? A. I gave it to an Italian who was employed at the New York Life Insurance.

Q. Do you remember his name? A. I do not.

Q. Did you subsequently receive those transla-

tions from him? A. I don't remember whether I got 61
them or whether they were sent to Mr. Schweizer.

Q. Now, Mr. Duvall, as a matter of fact, weren't those translations delivered to you by the man to whom you delivered the English copy? A. I don't remember; they may have been sent up to Mr. Schweizer; I cannot remember that.

Q. I show you this paper and ask you if you have ever seen that before? A. I think I saw this paper before, about two week ago, in your office; I never saw it prior to that time.

Q. Did you ever see this paper before? A. Now, let me see this one.

Q. Just let me have that? A. Well, I don't know 63
which one I saw in your office; they seem to be duplicates.

Q. Did you ever see that before to-day, this one here? A. I cannot tell you; I saw one of these papers, or a similar paper in your office; I never saw it before.

Q. If I told you, Mr. Duvall, that you personally obtained these two translations from the man to whom you delivered the English copy, would that refresh your recollection? A. Repeat your question.

Q. (Question repeated) A. It would not; I haven't any recollection; I have a recollection of going up there.

Q. At the time that you delivered the English 63
copy to this translator in the New York Life, had you ever met him before? A. Not to my knowledge; I don't think I ever met him before.

Q. Did you give the Italian translator the name and address of Mr. Schweizer? A. I cannot remember that; it is too long ago.

Q. The address of Mr. Schweizer was not contained in the original English copy that you delivered to him? A. I might have given him the address and told him to send them up there.

Q. Who paid the Italian translator for making

64 the translation? A. I don't know whether I paid him or not; I may have paid him; I can't remember those trifling things.

Mr. Wild: Counsel having stated the purpose for which he is asking these questions, I move to strike out the testimony of the witness as immaterial. All counsel has to do is to offer his exhibit in evidence; it is acknowledged, and that is all there is to it.

The Court: We will let it stand.

Mr. Wild: Exception.

DINO BIGONGIARI, called as a witness on behalf of
65 the plaintiff, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SCHNEIDERMAN:

Q. What is your profession, Professor Bigongiari? A. Instructor in Columbia University.

Q. Do you speak the Italian language? A. I do.

Q. You are an Italian? A. I am an Italian.

Q. And you speak the English language? A. I do.

Q. How long have you been speaking the English language? A. Sixteen or seventeen years or thereabouts.

Q. What subject do you teach in Columbia Uni-
66 versity? A. Italian.

Q. How long have you taught Italian? A. Since 1906.

Q. Have you been connected with any other institutions prior to teaching in Columbia University? A. Not teaching in institutions; I have been in Italian newspaper work.

Q. And in the course of that work you were required to make translations from Italian into English, and from English into Italian? A. Frequently.

Q. Have you ever had any occasion to testify in

Court as to translations from the English into the Italian language, and from the Italian into the English? 67

The Court: You need not qualify him as an expert.

Mr. Schneiderman: If your Honor accepts him as an expert, that is sufficient for me.

The Court: Yes, we will accept him as an expert.

Q. Professor Bigongiari, have you ever seen this paper before? A. Yes, sir.

Mr. Schneiderman: I ask that it be marked for Identification. 68

Marked for Identification 1.

Q. You have read over the contents of this paper marked for identification 1? A. Yes.

Q. That is written in the Italian language? A. That is written in the Italian language.

Q. Have you made a translation of this paper marked for identification 1? A. I have, sir.

Q. Is this a copy of the translation that you made of Exhibit for Identification 1? A. It is.

Q. You personally made that translation? A. I personally made it.

Q. You have compared the translation with the text in Italian in the exhibit marked for Identification 1? A. Yes, that paper there. 69

Q. And the paper, the translation that you have in your hand is a true, authentic and correct translation into the English language of the Italian text contained in this paper marked 1 for Identification? A. It is.

Mr. Schneiderman: I offer them both in evidence.

Received and marked Plaintiff's Exhibits 1 and 2.

70 Mr. Wild: I did not notice a certain point in the contract. I object to the introduction of this contract in evidence on the ground that it is not the contract pleaded in the complaint; it seems to be a contract made by Count Gulinelli and Mr. and Mrs. Schweizer, and there is no such claim. The claim is that the contract was made by Mr. Schweizer alone.

Objection overruled. Exception.

Q. Is this a duplicate and correct copy in the Italian of this exhibit marked Number 1 in evidence?

71 Mr. Wild: I object to that as incompetent, immaterial and irrelevant.

The Court: Mark that for the present for identification.

A. It is the same.

Mr. Schneiderman: Then I ask that it also be marked in evidence.

Mr. Wild: I object to it as immaterial at the present time.

Objection overruled. Exception.

Received and marked Plaintiff's Exhibit 3.

72 CROSS-EXAMINATION BY MR. WILD:

Q. Professor, calling your attention to the first page of this Italian document, Plaintiff's Exhibit 3, the tenth line and the first four words, I will spell them out, "é adesso promessa sposa", will you give us the literal translation of those four words? A. "And is now affianced, engaged."

Q. The word "é" is the third person, singular of the present indicative of the verb to be, and means "is"? A. Yes.

Q. The word "adesso" is an adverb, and it means "now"? A. "Now."

Q. The word "promessa" is an adjective, and it means "promised", doesn't it? 73

Mr. Schneiderman: I object to that, because it is in conflict of your Honor's own knowledge of the English language; it is not an adjective; it is either a noun or a verb.

A. Well, "promessa sposa" which is concentrated by literary use, is one word; it means just one thing, that is, "engaged" or "affianced".

Q. There are two words there, are there not? A. Yes.

Q. "Promessa" and "sposa"? A. Yes, and they mean one thing.

Q. Doesn't the word "promessa" mean "promised"? A. Yes. 74

Q. And "sposa" means "wife", doesn't it? A. Well, sometimes it does, yes.

Q. Well, doesn't it? A. But "promessa sposa" only means one thing in the Italian.

Q. Translating the two words literally, do not the words, "promessa sposa" mean "promised wife"?

Mr. Schneiderman: I object on the ground that counsel is segregating a word which is used in that agreement, and it is incompetent, immaterial and irrelevant, and improper.

Objection overruled. Exception.

75

A. Well, I refuse to treat the term in Italian the way you suggest, because the Italian language cannot be treated that way.

Q. (Repeated) A. Yes. Now, shall I reply to that question?

Q. No, you said, "Yes" to that question; that is all I want. A. No, I did not say yes, oh, no; the word "promessa" means a thousand different things and "sposa" means a thousand different things.

Mr. Wild: I move to strike that out.

The Court: Strike it out.

76 Q. Tell me how the English word "promised" is expressed in Italian? A. One of the ways is "promessa."

Q. And how is the English word "wife" or "spouse" expressed in Italian? A. "Moglie."

Q. What does the word "sposa" mean, the Italian word "sposa"? A. Betrothed.

Q. Then the four words "ó adesso promessa sposa" mean, "Is now the promised betrothed"? A. No; it does not mean that.

Q. Don't those four words mean "Is now the promised wife"? A. Yes, but what would happen if you translate literally in any other language.

77 Mr. Wild: I move to strke out that testimony.

The Court: Strike it out.

By the Court:

Q. He wants the literal meaning of the four words, and not the liberal translation? A. Yes, I know, but the two words "promessa sposa"——

Q. But literally, that is what he means? A. It is a compound word, and you know what happens when you break up the compound words.

By Mr. Wild:

Q. Now, what is the literal meaning of those four words? A. "ó," "is"; "adesso," "now"; "pro-
78 messa," "promised"; "sposa," "betrothed."

REDIRECT-EXAMINATION BY MR. SCHNEIDERMAN:

Q. Now, will you tell us what is the idiomatic and proper translation of that phrase into English from the Italian? A. "Is now affianced or engaged to."

BLANCHE JOSEPHINE GULINELLI, called as a witness 79
on behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SCHNEIDERMAN:

Q. Where do you reside, Countess Gulinelli? A. In Ferrara, Italy.

Q. You are the daughter of the defendant, Joseph Schweizer? A. I am.

Q. And you are at present the wife of Count Gulinelli? A. I am.

Q. When did you first meet Count Gulinelli?

Mr. Wild: Objected to as immaterial. 80
Objection sustained. Exception.

Q. Where did you first meet Count Gulinelli?

Mr. Wild: Objected to as immaterial.
Objection sustained. Exception.

Q. In the year 1900 you were visiting in Italy, Countess Gulinelli?

Mr. Wild: Same objection.
Objection overruled. Exception.

A. Yes.

Q. And when did you come back to your father's home? 81

Mr. Wild: I make the same objection.
Objection overruled. Exception.

A. About the beginning of October.

Q. Of 1901? A. Of 1901.

Q. After that, did you see Count Gulinelli here in New York?

Mr. Wild: I make the same objection, as entirely immaterial.

82 Q. Countess Gulinelli, did you receive the sum of $2,500 which became due under the agreement marked Plaintiff's Exhibit 3, and Plaintiff's Exhibit 2, which fell due on January 20th, 1912? A. Never.

Q. Did you receive one cent of that allowance of $2,500 which fell due on January 20th, 1912 under the agreements marked Plaintiff's Exhibits 1 and 3? A. Never.

Q. Did you ask your father for the payment of that allowance?

Mr. Wild: Objected to as immaterial.
Objection overruled. Exception.

83 A. I did not.

Q. At any time after January 20th, 1912, when that allowance became due under the terms of the agreement, did you see your father regarding that allowance?

Mr. Wild: I object to it as immaterial. This is after the money became due, after January, 1912.

A. I did not understand the question.

Mr. Schneiderman: May I ask the question again?

84 Q. Did you understand that question. A. I did not understand the question.

Q. How long have you been living in Italy, Countess Gulinelli?

Mr. Wild: Objected to as immaterial.

A. About twelve years.

Q. And while in Italy you have been speaking continuously the Italian language? A. Always speaking in Italian.

Q. I will ask you again, at any time after January 20th, 1912, when the allowance of $2,500 be-

came due under the agreement, did you see your father and ask him for the payment of that? 85

Mr. Wild: I object to that as immaterial.
Objection overruled. Exception.

A. I did not see him.

Q. In the year 1912? A. I am a little confused as to the dates.

Q. Before this action was brought, Countess Gulinelli, did you see your father and ask him for the payment of that money which fell due for the year 1912?

Mr. Wild: Objected to as immaterial.
Objection overruled. Exception. 86

A. I really don't remember.

Mr. Schneiderman: I offer in evidence an assignment of the allowance that fell due on January 20th, 1912, duly acknowledged before the American Consul.

Mr. Wild: That is objected to as not an assignment of the cause of action mentioned in the complaint; it is an instrument executed by the Count and the Countess, whereas the complaint sets forth an instrument executed by the Countess alone, and it assigns or purports to assign moneys due to both of them under an instrument, due from Joseph Schweizer, on January 20th, 1912. 87

Objection overruled. Exception.
Received and marked Plaintiff's Exhibit 4.

Q. When were you married to Count Gulinelli?

Mr. Wild: Objected to as immaterial.
Objection overruled. Exception.

A. The 20th day of January, 1902.

Q. And here in the City of New York? A. Here in the City of New York.

88 Q. Was your father present at the marriage? A. My father was present at the marriage.

Q. And since then you have lived continuously with Count Gulinelli? A. I have always lived with Count Gulinelli.

Q. How many children are there of the marriage?

Mr. Wild: Objected to as immaterial.
Objection overruled. Exception.

A. I have two daughters.

CROSS-EXAMINATION BY MR. WILD:

Q. Madame, your father did pay you money, did
89 he not, about January 20th, 1902, and since that time?

Mr. Schneiderman: I object to that as irrelevant and immaterial, and incompetent, and nothing to do with the issues in this action.
Objection overruled. Exception.

A. He paid from 1902, January, until 1909.

Q. Have you any record of the payments which he made to you? A. He paid twelve thousand, five hundred francs.

Q. I ask you if you have any record? A. I don't understand the word; I don't know what you mean.

90 Q. Did you keep an account book, any account. A. I did keep it in a private account book.

Q. Have you the book here? A. I have not; I have a copy of it.

By Mr. Schneiderman:

Q. This is the copy that you refer to? A. Yes, that is the copy I refer to.

Q. Look at it; it is in your own handwriting? A. It is in my handwriting.

Q. Copied from your private memorandum book? A. Copied from my book.

By Mr. Wild: 91

Q. May I look at it, please? A. (Paper shown counsel).

Mr. Wild: May I have this a moment; I wish to check off this with what we have, and see where the discrepancies are.

The Court: Very well.

Q. Have you any other record than the paper which you have shown me just now? A. Except my private book at home.

Q. And this is a copy of your private book? A. That is a copy of my private book.

Q. And all the payments which are in your little 92
private book are mentioned on this paper? A. They are mentioned on that paper.

Q. Outside of your memorandum book have you a personal recollection of the money that he paid you? A. Yes.

Q. Could you remember outside of the book the different amounts and at the different times? A. Yes.

Q. When was the first payment made? A. Oh, really the date, I don't remember.

Q. What was the amount of the first payment he made to you?

Mr. Schneiderman: I submit, if your Honor 93
please, that that is entirely incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. I will tell you now that the only thing I recollect is the first seven years from 1902 until 1908, the end of 1908, I received twelve thousand, five hundred francs; the detail of the day and the amount I don't recollect.

Q. Then your recollection depends, does it not, upon your memorandum book of which this is a copy? A. Yes, it depends on that.

94 ALBERTO GIACOMO GIOVANNI FRANCESCO MARIA GULINELLI, called as a witness on behalf of the plaintiff, having been duly sworn by Interpreter, testified as follows:

DIRECT-EXAMINATION BY MR. SCHNEIDERMAN:

Q. Count Gulinelli, what is your official title? A. Count.

Q. What is your calling? A. Industrial and land owner.

Q. With what industries are you connected, Count Gulinelli?

95 Mr. Wild: Is this material?

Objection overruled.

A. Sugar, marble and insurance.

Q. In what capacities? A. I am director.

Q. And you are also an alderman of the Commune where you reside? A. Which corresponds to our alderman here.

Q. You are the husband of Countess Gulinelli? A. Yes, sir.

Q. And you are the Count Gulinelli mentioned in this exhibit marked Plaintiff's Exhibit 1? A. Yes, sir.

Q. And that Exhibit marked No. 1 was delivered
96 to you? A. Yes, sir.

Q. By whom? A. By Mr. Schweizer.

Q. Your father-in-law? A. Yes.

Q. When was this Exhibit No. 1 delivered to you by Mr. Schweizer?

Mr. Wild: Objected to as irrelevant and immaterial; he says he got it and that is enough.

Objection overruled. Exception.

A. He gave it to me on the 18th of January, 1902.

No cross-examination.

[PLAINTIFF RESTS.]

Mr. Wild: I renew my motion to dismiss on 97
the ground that the plaintiff has not made out a cause of action, as well as renewing it upon the ground that the complaint in its inception did not state a cause of action; and I call your Honor's attention now in addition to the matters which appeared upon the face of the complaint, that it now appears from the document itself that at the time when this agreement was made, the parties were already at that time engaged to be married; that is to say, there was a binding contract of marriage between them at that time, and if there were any consideration whatever for this document at all, it would 98
be a consideration of the actual marriage of the parties which they had previously at that time entered into a binding contract to perform.

Motion denied. Exception.

The case was thereupon opened to the jury by Mr. Wild, on behalf of the defendants.

JOSEPH SCHWEIZER, called as a witness on behalf of defendants, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. WILD: 99

Q. Mr. Schweizer, you are the defendant in this action, are you not? A. I am.

Q. Between the 20th day of January, 1902, and the 15th day of July, 1911, did you make certain payments to the Countess Gulinelli? A. I did.

Q. Have you a record of those payments. A. I have.

Q. Are you able to testify as to the payments without refreshing your recollection from a mem-

100 orandum? A. I have to take my memorandum; I have it right here.

Mr. Schneiderman: I object to it on the ground that no proper foundation has been laid.

Mr. Wild: What is the matter with the question, in what respect haven't I laid the foundation for this?

Mr. Schneiderman: There is nothing to show other than the fact that there is now a paper in this Court, that the witness has ever had any notice of it, has ever seen it or prepared it, or has any bearing at all upon his knowledge, and
101 in that respect I can take any paper from my table here, and ask him whether that refreshes his recollection, and while the witness may answer yes, that would not qualify him or enable him to use that memorandum to refresh his recollection. It is defective in the respect that he has not laid the foundation for the use of the memorandum to aid the witness in refreshing his recollection and to testify from that memorandum. More specifically, the counsel has not shown that the witness has ever at any time before to day seen the memorandum, has ever prepared such a memorandum, that it ever was
102 in existence, and that he has ever seen it before this time.

Q. Have you prepared a memorandum of the payments which you have made to the Countess? A. I have.

Q. After you have looked at this memorandum, can you testify—does that refresh your memory so that you remember the payments? A. It does.

Q. After you have refreshed your memory as to the statements on the paper, Mr. Schweizer, as to the payments, do you recall of your own knowledge,

can you recall of your own knowledge whether or not you made the payments? A. I can. 103

Mr. Schneiderman: I make the same objection on the ground that it is incompetent, immaterial and irrelevant, and no proper foundation having been laid, and nothing to show that the paper is physically one that would refresh the witness' recollection and restore a personal knowledge in the witness of the transactions to which he is going to testify.

Objection overruled. Exception.

Q. Mr. Schweizer, when did you make the first payment to the Countess? A. On January 20th, 1902. 104

Q. And how much was it? A. Twelve thousand, six hundred and twenty-five francs.

Q. Now, outside of the paper, do you recall that you made that payment, of your own knowledge? A. I do.

Q. How was it made? A. It was made by a letter of credit.

Q. To whose order? A. To the order of Blanche Gulinelli, the Countess.

Q. What did you do with the letter of credit? A. I gave her the letter of credit, and I paid some money to Brown Brothers & Company for the letter of credit. 105

By the Court:

Q. That makes the $2,500, I suppose? A. Yes.

The Court: The first seven years are admitted, from 1902 to 1908 inclusive.

Mr. Schneiderman: Yes, your Honor.

Mr. Wild: I have got to prove these payments; it was not exactly twelve thousand five hundred francs each year, some years we paid her more at her request.

The Court: You may do so.

106 By Mr. Wild:

Q. When did you make the next payment? A. I made the next payment on the 20th of January, the same day, $80.

Q. How was that payment made? A. In cash.

Q. And was anything said between you and the Countess at the time on the subject of making this payment? A. The Countess was not in position to use this letter of credit until she would reach Paris or some other place abroad, the letter of credit being payable in Europe, and she asked for some money, and I gave her $80.

107 Mr. Schneiderman: I object to that, and ask that it be stricken out on the ground that it is incompetent, immaterial and irrelevant, and not admissible under the issues.

Objection overruled; motion denied. Exception.

Q. Was anything said as to whether it was a gift or what it was? A. I gave her this money as part, or such money as I voluntarily gave her hereafter——

Mr. Schneiderman: I object to that and ask that it be stricken out as stating a conclusion of the witness, and not binding on the Countess
108 Gulinelli.

Objection overruled. Exception.

Q. Was anything said by you to the Countess about that? A. No.

Q. Did she say anything to you about whether this $80 was or was not to be applied on the allowance? A. No.

Mr. Schneiderman: Now I ask that the answer be stricken out.

Motion denied. Exception.

Q. You mean to tell us that you just handed her the $80? A. I just handed her the $80. 109

Q. There wasn't anything said——

Mr. Schneiderman: I object to that as already answered and leading.

Objection overruled. Exception.

Q. Wasn't anything said between you and the Countess as to whether or not this was to apply on the allowance? A. No.

Q. When did you make the next payment, Mr. Schweizer? A. The next payment, December 29th, 1902. 110

Q. Asides from the paper, do you remember the fact of making that payment? A. I would not have remembered the fact if I had not looked up the voucher for this payment, which I have.

Q. Do you remember it now? A. I remember it now, because I gave the National City Bank an equivalent of six thousand two hundred and fifty francs and forwarded it to the Countess.

Q. Tell us just how you did that? A. I sent our cashier to the National City bank to buy exchange; I received the exchange, original and duplicate; most of the time, sometimes not, I sent the original to the Countess, and paid the National City Bank for such exchange; the original goes to the Countess. 111

Q. You sent that amount then of six thousand, two hundred and fifty francs to the countess? A. December 29th, 1902.

Q. Did you receive from Brown Brothers the duplicate original of this? A. That was not Brown Brothers; the National City Bank.

Q. The National City Bank? A. I received a duplicate at that time, yes.

Q. Is this the duplicate? A. This is the duplicate.

Q. I notice that this is payable to your order.

112 Did you endorse the one that you sent to the Countess? A. It was endorsed, and the receipt of a registered letter sent to the Countess was taken and attached to the draft.

Mr. Wild: I offer the duplicate and the receipt in evidence.

Mr. Schneiderman: I object to it on the ground that it is incompetent, immaterial and irrelevant, and not binding on the assignors, and no proper foundation laid.

Objection overruled. Exception.

Received and marked Defendants' Exhibits A and B.

113 Q. When did you make the next payment to your daughter, Mr. Schweizer?

Mr. Schneiderman: In order to preserve my right, I wish to object to all these questions, so far as they refer to this paper to refreshing his recollection, on the same grounds.

Objection overruled. Exception.

A. June 11th, 1903.

Q. How much money? A. Six thousand, two hundred and fifty francs.

Q. Do you remember the fact of that payment? A. I remember the fact of the payment.

114 Q. After that, did you receive a letter from the Countess? A. I did.

Q. Is this the letter? A. It is.

Mr. Wild: I offer it in evidence.

Q. Mr. Schweizer, what did you do with the National City Bank draft, Defendant's Exhibit A, which I show you? A. I put it in an envelope, endorsed it, and put it in the mail, and sent it by the registered mail to the Countess.

Q. Where, what is the address of the Countess?

A. Her address I could not recollect, but it must be 115
on the receipt of the post office registered letter.

Q. Look at the receipt, and see if that refreshes your recollection? A. Ferrara.

Q. Italy? A. Italy.

Q. Postage paid? A. Postage paid.

Q. Was it a sealed envelope? A. It was a sealed envelope; you could not send it without sealing it in the registered mail.

By Mr. Schneiderman:

Q. Did you do that personally; did you have that transaction yourself or somebody else do it for you? A. I had the transaction myself. 116

Q. You addressed the envelope, you mailed it, and had it registered? A. I had it mailed, and a registry receipt given.

Q. You did that yourself? A. I addressed the envelope myself; you asked the question.

Q. You addressed the envelope yourself? A. I did.

Q. Did you have the letter registered yourself? A. I had the letter registered.

Q. But did you do it yourself? A. No.

Mr. Schneiderman: Then I object to the last part of the witness' answer, and ask that it be 117
stricken out on the same grounds.

By Mr. Wild:

Q. Who is the man who did this? A. We sent all our registered mail by regular messenger to the post office where these letters are registered, and receipts are brought back from the post office for such registered mail and given to whoever they belong to.

Q. That was your course of business? A. That is the course of business of thirty-five years.

118 Q. Who do you get to send these letters? A. They are generally boys employed in the various offices who attend to this matter.

Q. You mean messenger boys? A. No, boys employed by us to attend to mail matters, mail boys.

Q. And in cases where you sent moneys to your daughter where you did not do it personally, is that the course you pursued? A. That is the course I pursued.

Q. Mr. Schweizer, tell us in detail just what you did in the matter of sending this draft to the Countess, Defendants' Exhibit A? A. The registered letters are sent by a special——

119 Q. Just what you did in this case? A. The registered letter was sent by a special messenger to the post office who returns a receipt for such letter, and that is all.

Q. Do you remember who that messenger was? A. No, I could not; it was in 1902.

Q. Was that some one in your employment? A. It was a man in our employment, a boy.

Q. Do you remember giving it to him? A. I do.

Q. What did he do then? A. He went to the post office.

Q. Well, he went out? A. He went away.

Q. Taking the letter with him? A. Undoubtedly.

Q. Well, did he? A. Yes.

120 Q. Did he have the letter with him when he went? A. He must, otherwise he could not have gotten that receipt.

Mr. Wild: I now re-offer the letter in evidence.

Mr. Schneiderman: I do not object to the letter, because it is a letter, but I object to it on the ground that it is irrelevant and immaterial; it has no bearing upon the issues before the Court.

The Court: Only a part of this letter should go in evidence.

Q. After sending the money on the 11th of June, 121
did you receive a letter from the Countess? A. I did.

Q. Is that the letter? A. This is the letter.

Q. Read the first few lines? A. "Thanks for the check received."

Q. Had you sent her any other money between the receipt of that letter and the 11th of June? A. No.

Mr. Wild: Perhaps we had better not have the whole letter marked in evidence.

Q. When did you make the next payment, Mr. Schweizer? A. February 15th, 1904.

Q. Do you recall the fact of that payment now 122
that you have refreshed your memory? A. I do.

Q. How did you make that payment? A. I sent a check for seven thousand francs on the National City Bank to the order of the Countess, and mailed it to her.

Q. Yourself? A. I did.

Q. Was the mailing done by yourself? A. I did it myself.

Q. How was the check or draft enclosed? A. In an envelope; it was written by myself, put in an envelope and mailed; it was addressed to the Countess Gulinelli in Ferrara.

Q. Italy? A. Italy.

Q. And postage paid? A. Postage paid. 122

Q. And do you know the amount of postage required to send letters from the United States to Italy? A. Five cents.

Q. Was five cents put on it? A. A five cent stamp put on it.

Q. After you put the check in, did you seal the envelope? A. I sealed the envelope.

Q. Is this a duplicate of the check which you sent, Mr. Schweizer? A. This is a duplicate, yes, sir.

Mr. Wild: I offer it in evidence.

Mr. Schneiderman: I object to this as incom-

124 petent, immaterial and irrelevant, no proper foundation having been laid, and not binding on the assignor.

Objection sustained.

Q. Where did you get this? A. From the National City Bank.

Mr. Wild: What is the matter with this, Mr. Schneiderman? In what respect has a foundation not been laid?

Mr. Schneiderman: No foundation has been laid to show any connection between that paper and the assignor or to make it binding upon her.

125 Objection overruled. Exception.

Received and marked Defendants' Exhibit C.

Q. When did you make the next payment? A. June 28th, 1904.

Q. And how much money then? A. Fifty-five hundred francs, check from Brown Brothers.

Q. What did you do with the check? A. I put the check in an envelope, sealed the envelope, put a postage stamp on it, and mailed it.

Q. After that, did you receive a letter from the Countess? A. Here is a letter from the Countess.

Q. Is that the letter? A. That is the letter.

Mr. Wild: I offer the letter in evidence.

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Q. Mr. Schweizer, will you read the first four lines of the letter? A. "I received your letter of June 29th, enclosing fifty-five hundred francs, for which I thank you."

Q. What is the date of that letter? A. July 14th, 1904.

Q. That is your daughter's handwriting? A. My daughter's handwriting, and signed.

Q. When did you make the next payment, Mr. Schweizer? A. February 8th, 1905.

Q. How was that done? A. A check of six thou-

sand two hundred and fifty francs drawn by Brown Brothers and mailed, sealed and forwarded, with a stamped envelope, five cents. 127

Q. When was the check sent? A. Six thousand, two hundred and fifty francs was sent to the Countess Gulinelli.

Q. On what date? A. On February 8th, 1905.

Q. After that, did you receive a letter from her? I show you that paper, and ask you if that is the letter you received from her afterwards? A. I received this letter afterwards dated—no date.

Q. Is that in her handwriting? A. That is in her handwriting.

Mr. Schneiderman: Here is a date, May 11th, 1905. 128

Q. Will you read the first two lines of that letter? A. "Received check for six thousand, two hundred and fifty francs, six thousand two hundred and fifty francs written out in letters, semi-annual allowance; many thanks."

Q. What is the date of that letter? A. May 11th, 1905.

By the Court:

Q. And that acknowledges this last draft that you refer to? A. Six thousand, two hundred and fifty francs. 129

Q. Six thousand, two hundred and fifty francs? A. Yes.

By Mr. Wild:

Q. As to all these payments as to which you have given testimony, Mr. Schweizer, where you have first refreshed your memory from a paper, and then laid aside the paper, have you testified from your actual recollection as to each payment? A. As far as I can recollect.

130 Q. You have testified about certain payments here and you have looked at your paper, and after you have looked at that paper, have you had actual memory or recollection of the payment? A. I have.

Q. When did you make the next payment? A. June 28th, 1905.

Q. How much was that? A. Seventy-five hundred francs on Brown Brothers & Company.

Q. After the mailing of that seventy-five hundred francs, did you receive a letter from the Countess, and if so, is that the letter? A. This is the letter from the Countess, acknowledging the receipt of seventy-five hundred francs.

131 Q. Was that in answer to the draft of fifty-five hundred francs? A. It is in answer to the draft of fifty-five hundred francs.

Q. What does it say? A. "Bassano, July 13th, 1905. Dear Papa: Acknowledge receipt of check for seventy-five hundred francs," and then it is written in letters, "seventy-five hundred francs."

Q. When did you make the next payment, Mr. Schweizer? A. 1906, February 16th, eight thousand francs, check of Brown Brothers & Company to the order of the Countess.

Q. Do you recall the fact of the payment? A. I recall the fact of the payment.

132 Q. What did you do with the check? A. I enclosed it in an envelope, sealed it, and mailed it, put a five-cent stamp on it.

By the Court:

Q. But it must have been addressed? A. I addressed it to the Countess Gulinelli.

By Mr. Wild:

Q. What address? A. Ferrara.

Q. Itaty? A. Italy.

Q. Postage paid? A. Postage paid.

Q. Did you get a receipt from Brown Brothers for the check? A. I got a receipt from Brown Brothers for the check. 133

Mr. Schneiderman: I object to that as incompetent, immaterial and irrelevant, and not binding on the assignors, and I ask that the answer be stricken out.

The Court: Strike it out.

Q. Did you testify that you sent the draft to the Countess? A. To the Countess, yes, sir.

Q. To whose order was it? A. To the order of the Countess, Gulinelli.

Q. For eight thousand francs? A. For eight thousand francs. 134

Q. Now, I think I did not ask you in regard to the payment which you made on June 28th, 1905; do you remember the fact of making that payment now? A. I do.

Q. And also as to this payment of February 16th, 1906? A. I do.

Q. When did you make the next payment? A. The next payment I made January 17th, 1907.

Q. Have you testified as to a payment of August 16th, 1906? A. No, I have not; August 16th, 1906.

Q. Do you remember the fact of that payment? A. Yes, it was a check on the International Banking Company to the order of the Countess. 135

Q. How much? A. Seven thousand francs.

Q. What did you do with it? A. I enclosed it in an envelope, sealed it, addressed it to the Countess Gulinelli, and mailed it with a five cent stamp.

Q. Addressed to where? A. To Bassano.

Q. Italy? A. Italy.

Q. After that, did you receive a letter from the Countess? A. I received a letter from the Countess.

Q. Read the date and the first few lines of it? A. August 27th. "August 27th. My dear Papa: I was

136 just writing you when I received your very welcome letter and check for seven thousand francs for which I acknowledge you receipt."

Q. Was that the seven thousand francs sent her on August 16th, 1906? A. That is the seven thousand francs I refer to, sent on August 16th, 1906, and addressed to the Countess Gulinelli.

Q. Now, when was the next payment? A. January 17th, 1907.

Q. And what was that? A. Sixteen hundred francs.

Recess.

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AFTER RECESS.

Mr. Schneiderman: On the question of payments, we won't insist upon the formal proof required this morning, that is to say, the proof of mailing and addressing the envelopes and the other details, but we do want proof from the witness that he made the payments which he claims; we won't insist upon any technical formalities.

Mr. Wild: Are there any payments on which we are going to differ?

138 Mr. Schneiderman: I want to call your Honor's attention that, assuming all the figures stated in this list are true, and that the total amount paid is one hundred and twenty-four thousand, five hundred and eighty lires, there would still be a balance of some $84 on the basis of this statement up to and including the allowance for 1911, so that there is absolutely no proof whatever, and the list has absolutely no bearing at all on the allowance that fell due for the year 1912, for this reason, that from 1902 to 1911, are ten years, because both dates are inclusive, and that would make $25,000, one hundred and

twenty-four thousand, five hundred and eighty 139
lires, and that still leaves a balance of $84 for the year 1911.

Mr. Wild: This action is for the instalment of January 20th, 1911 to January 20, 1912.

Mr. Schneiderman: The second action is brought to recover the allowance which fell due on the 20th of January, 1912. At this time I move to strike out all the evidence that has been offered in support of the defense of payment on the ground that it appears affirmatively that such payments up to and including the year 1911 were in themselves less than the total amount that had accrued up to and including 140
1911, and that none of the payments relate to the allowance that fell due on January 20th, 1912.

Motion denied. Exception.

By Mr. Wild:

Q. Take your memorandum, and refreshing your memory from it, tell us the last payment to which you testified? A. August 16th, 1906 I testified to seven thousand francs.

Q. Refreshing your memory from you memorandum, tell us what payments you made after that? 141

Mr. Schneiderman: For the purpose of saving time, I will repeat the same objection.

Q. Go on and tell us what other payments were made? A. January 17th, 1907, sixteen hundred francs.

Q. Go on and name each payment, Mr. Schweizer, the date and the amount? A. January 25th, 1907, six thousand, two hundred and fifty francs; June 17th, 1907, six thousand, three hundred and sixty francs; December 9th, 1907, cash, one thousand

142 francs; December 9th, 1907, passage money of the Countess, three thousand, two hundred and seventy-seven francs; 1908, February 17th, check, three thousand and sixty-eight francs; May 8th, 1908, two hundred francs; June 23rd, 1908, five thousand francs; October 26th, 1908, ten hundred and fifty francs; February 16th, 1909, five thousand francs; July 26th, 1909, five thousand francs; January 3rd, 1910, seven thousand francs; July 18th, 1910, three thousand francs; January 20th, 1911, five thousand francs; July 15th, 1911, five thousand francs.

Q. Making a total of how much? A. One hundred and twenty-four thousand, five hundred and
143 eighty francs.

Q. How much is that in American dollars? A. $24,916.

Q. Now, go back, Mr. Schweizer, to the payment of January 17th, 1907, sixteen hundred francs, what were the facts about that? A. The Countess asked me in her letter to purchase a pair of studs for the Count.

Q. Go on and tell what the facts were? A. I purchased these studs and paid sixteen hundred francs for them, and sent them to the Countess.

Q. Was anything said by the Countess about how these payments were to be charged? A. She asked me to advance her some money on her allowance to
144 purchase these studs for the Count.

Q. And you did so? A. I did.

Q. Did you send her the pearls? A. I sent her the pearls.

Q. Did she acknowledge receipt of them? A. She acknowledged them.

Q. Take the next payment? A. Six thousand, two hundred and fifty francs on January 25th, check to Blanche Gulinelli, National City Bank.

Q. Where was she at that time? A. In Bassano or Ferrara.

Q. I don't want that payment; I want the pay-

ment of December 9th and 10th, 1907? A. December 9th, 1907, the Countess was in New York. 145

Q. Your payment of December 9th and 10th, 1907, of one thousand francs, tell us the circumstances under which that was made? A. The Countess came to New York alone; she had no money, and she wanted some; I gave it to her, and she told me to advance her some money on account of her allowance. I told her there was nothing due on her allowance, that I paid her allowance; she said, Well, take it off from the allowance that comes due next year.

Q. Did you do it, did you pay her the amount? A. I paid her $200 in cash at once.

Q. Equal to one thousand francs? A. Equal to one thousand francs. 146

Q. Now, the next item of thirty-two hundred and seventy-seven francs? A. The Countess wanted to stay with me, and I wouldn't have it, and I sent her back; I didn't want her to stay with me. She wanted to separate from her husband, and she asked me for the money,——

Mr. Schneiderman: I object to that, and ask that it be stricken out, and ask your Honor to instruct the jury to refrain from considering it.

The Court: Yes, strike it out.

A. She wanted to go back, she had no money to go back, and I paid her passage money back. She asked me to advance it on account of her allowance, $300, and she wanted money to make some purchases at various stores, at which I had an account, and she asked me if she could do so. I was very sick, and I told her she might do so, and charge these accounts to me, and she did so. 147

Q. Was anything said about how the payment of these articles was to be charged in relation to her allowance? A. She told me that inasmuch as I did not owe her anything, and I had paid her all the

148 money that was coming to her, if I would not advance those funds from some future allowance.

Q. What did you say? A. Well, I said I would.

Q. Now, take the payment of May 8th, 1908? A. That was for a wreath purchased on her order, by cable.

Q. Was anything said about what was to be done with that? A. She cabled me to purchase this wreath; no, she did not say anything else.

Q. Now, with the exception of these payments, the payment of January 17th, 1907, the payment of December 9 and 10, 1907, the two payments of that date, the payment of May 8th, 1908, which you
149 have just testified to, is it or is it not a fact that each of the other payments which you have testified to have been made, were made by checks, your checks, and the checks which you have purchased from the bankers, and sent to her by mail, postage prepaid, addressed to her at her address in Italy, and sealed? A. It was.

Q. Now, in some of the years, Mr. Schweizer, was it a fact that payments were made by you in excess of the twelve thousand five hundred francs or $2,500? A. It was.

Q. Where those instances occurred, according to the dates which you have testified to, tell us under what circumstances the excess payments were
150 made? A. The Countess claimed that she had to purchase some matters for which she wanted me to advance her funds to pay for, and to take it from her allowance, which I did.

Mr. Schneiderman: I again move to strike out all the evidence given by the defendant regarding the payments made from January, 1902 to January 19th, 1912, on the ground that they are incompetent, immaterial, irrelevant, inadmissible under the pleadings, and nothing to do with the issues in this action.

Motion denied. Exception.

CROSS-EXAMINATION BY MR. SCHNEIDERMAN: 151

Q. Have you made any payments at all to your daughter, Countess Gulinelli, subsequent or after July 15th, 1911? A. No.

Q. Have you made any payments at all to your daughter, Countess Gulinelli, from January 20th, 1912, to January 19, 1913? A. No.

Mr. Wild: Objected to as immaterial; it is not in this case.

Objection sustained. Exception.

Q. Have you made any other payments to your daughter, Countess Gulinelli, other than you have testified to as contained in this list? 152

Mr. Wild: The same objection.

Objection overruled. Exception.

A. No.

Q. You have here on January 20th, 1902, the payment of $80. You had no talk with your daughter regarding that payment, did you? A. I don't recollect if I had or not.

Q. That four hundred francs was given to her for her personal money on the trip, wasn't it? A. For her personal trip.

Q. Mr. Schweizer have you any draft or letter in connection with the payment that you testified you 153 made on February 16th, 1906, of eight thousand lires or francs? A. No.

Q. You have no record at all? A. No.

Mr. Wild: We have got Brown Brothers' check for that.

Mr. Schneiderman: Can I see that?

(Paper shown counsel.)

Q. Is this the only record that you have, Mr. Schweizer, that that money went to your daughter, Countess Gulinelli? A. Yes.

154 Q. Well, what enables you to refresh your recollection so positively now that this money was sent to your daughter? A. I sent to Brown Brothers, who have shown their books, that it was sent.

Q. When did you see their books? A. I did not see them; I sent our cashier down to look at them.

Q. Is your cashier here? A. No.

Q. The cashier of the Ansonia Clock Company? A. Yes.

Q. From 1902 to the present time, you have had a great many cash transactions, haven't you? A. No.

Q. Do you remember absolutely the various payments that you have testified to? A. As far as I
155 have testified, I do.

Q. And you have now a present recollection, a present knowledge in your mind, have you, of having sent this amount that is referred to on this slip? A. Absolutely.

Q. Now, for the year 1906, it appears, according to your list and from what you have testified, that you sent fifteen thousand francs; is that correct? A. Yes.

Q. Now, will you tell us why in the year 1906 you sent twenty-five hundred francs in excess of the allowance for that year. A. Because the Countess asked me for it.

Q. Have you got any letter to that effect? A.
156 No, I have no letters to that effect, but she wrote me about it.

Q. What enables you to say now that she wrote you asking for an excess payment? A. From my recollection.

Q. About how many different individual payments did you make during the eleven years from the beginning of the contract? A. To whom?

Q. To your daughter—I mean, without looking at your list? A. Oh, I could not tell you that.

Q. So that when you testified to payments, Mr. Schweizer, as a matter of fact you rely entirely

upon the record that you have on that list, isn't 157
that so? A. No; I rely on the record that I have over there.

Q. Over where? Well, have you any record there of the fifteen thousand francs having been sent during the year 1906? A. Undoubtedly.

Q. Have you preserved all the letters that you received from your daughter? A. No.

Q. Why didn't you preserve the letter in which the eight thousand francs is admitted to have been received? A. I did not receive a letter like that.

Q. So that when you testify now that you sent a payment of eight thousand francs to your daughter in February, 1906, you are simply testifying to 158
your recollection? A. No, I do not; I did not say so.

Q. You have present in your mind now the date and the amount and everything that took place at that transaction? A. I have the amount in my recollection.

Q. Can you distinguish in your mind now the transaction that occurred on February 16th, 1906, from any of the other transactions in sending payments to your daughter? A. I cannot.

Q. So that when you testify that you sent this eight thousand francs to your daughter, you only believe you did, isn't that so? A. I did not say
I believed I did; I did. 159

Q. Well, I want to know upon what you base your knowledge, your positive knowledge, now that you sent that payment? A. On the receipts which I have for having made the payment.

Q. Well, where are those receipts, that is what I am asking you? A. Receipt No. 8.

(Paper produced.)

Q. Is there anything about that receipt that enables you to say that that was a transmission of money to your daughter? A. Yes.

160 Q. What is there about it? A. I had such funds as I had sent to my daughter in an envelope, and fished them out as the case came up.

Q. Will you answer the question, what fact, what particular fact enables you now to say positively that this money referred to in that paper was sent by you to your daughter, Countess Gulinelli? A. Such funds as I sent to the Countess Gulinelli, receipts or vouchers which we consider quite competent in business circles I filed away in an envelope, and in order to sustain my claim that this was sent to the Countess Gulinelli, I have the endorsement of Brown Brothers & Company in this City, stating
161 that this money was paid to Blanche Guilnelli, as you see it here.

Q. When did you obtain that, Mr. Schweizer? A. I obtained that some time ago when I tried to put together my vouchers.

Q. With reference to date, how long ago was it that you obtained that recept? A. I could not tell you exactly the date.

Q. What year? A. This year.

By the Court:

Q. Did you send the equivalent of American money in Italian lires to any other person? A. No,
162 not a one.

By Mr. Schneiderman:

Q. So that when you looked among your papers, Mr. Schweizer, you did not find any record or paper, regarding a payment of eight thousand francs having been made in February, 1906, isn't that so? A. I did not say that.

Q. Didn't you say a moment ago that you got this paper only recently from Brown Brothers? A. I did not say that; I mean I have this paper since 1906, in my possession since February 16th, 1906.

Q. You got that paper on the day that it bears 163
date? A. On the date that it bears, because it is a receipt for the money that I paid these people.

Q. Did you get that paper on that day that it is dated? A. I did.

Q. Now, didn't you, during the years from 1902 up to July, 1911, send moneys to your wife in Europe? A. I did not.

Q. You sent no payments at all? A. No.

Q. You sent no money abroad to your wife? A. No.

Q. You are absolutely sure about that? A. No.

By the Court: 164

Q. You mean you are not sure? A. He asked me if I sent money to my wife from this date up to now, and I did not.

By Mr. Schneiderman:

Q. No, not from that date; from January, 1902, up to January, 1911? A. I did; I will change that; I misunderstood you.

By the Court:

Q. What enables you from that paper in your hand to testify that that particular eight thousand 165
lire was sent to the Countess? A. I have sent no money in lire to anyone since the 1st day of January, 1905, your Honor; the only payments in lire I made since 1905 were to the Countess.

Q. Do I understand you to testify that to make sure of it, you sent that receipt which you obtained at the time you sent the money to the Countess, to Brown Brothers for the purpose of having them look into the matter for you? A. Exactly, your Honor.

Q. And they did? A. Exactly.

Q. In whose handwriting is that on the back of

166 that paper? A. The bookkeeper of Brown Brothers & Company, 59 Wall Street.

Q. And then their records show that that particular eight thousand lire was sent to the Countess? A. Was paid to the Countess.

Q. Was paid to the Countess? A. Yes, sir.

By Mr. Schneiderman:

Q. From 1902 up to the end of 1911, your wife has been residing in Europe, has she not?

Mr. Wild: Objected to as immaterial.
Objection overruled. Exception.

167 A. No, she has not.

Q. Hasn't she been residing away from the United States? A. Yes.

Q. And haven't you during that period sent money to your wife? A. Not after 1905.

Q. Now, Mr. Schweizer, weren't you confined to your home with illness from June 1912 to December 1913?

Mr. Wild: I object to that as immaterial.
Objection overruled.

A. No, I was not.

168 Q. Do you remember the time when the Countess came to New York during the period from June 1912 to December 1913? A. No, I don't.

Q. You testified that you bought some pearls at the request of your daughter? A. Yes.

Q. Was that request made to you in person or in writing? A. By letter.

Q. It was made by letter? A. By letter.

Q. And in that letter you say that your daughter asked you to deduct the cost of those studs or pearls from the allowance? A. Not in that letter.

Q. Did she tell you to do that after you bought

the studs or before? A. Before I bought the 169
studs.

Q. Do you remember now that your daughter asked you to deduct the cost of those studs from her allowance before you actually bought them, is that right? A. You did not ask the question before like this at all.

Q. Well, answer this question? A. Which question?

Question withdrawn.

Q. Did your daughter make a request to you to deduct the cost of the studs from her allowances before you actually bought them? A. Not that way.
Q. In what way did she do it? A. She asked me 170
to buy a pair of studs for her husband in a letter.

Q. And to deduct the cost from the allowances to which she was entitled? A. Just so.

Q. Now, when you bought the studs and you sent them abroad, didn't you deduct the cost of those studs from her allowances? A. No.

Q. Why didn't you do it? A. Because I simply charged her like any other remittances which I have sent her.

Q. I beg your pardon? A. I simply put it down to my account as having paid her.

Q. But you knew that she had told you to deduct
the cost of those studs from her allowance, didn't 171
she? A. She asked me to advance some money, not to deduct; she never said so.

Q. And after you bought those studs you did make other payments? A. Yes.

Q. Then why didn't you deduct the cost of the studs from the payments that you made subsequently? A. Because I did not want to, because she wanted to return the studs, and said they were not big enough, they did not suit her.

Q. Did she say that in a letter? A. Yes.

172 Q. Have you that letter? A. Yes.

Mr. Schneiderman: May I see that letter? (Paper produced.)

Q. Now, those studs were bought in January, 1907, were they not, Mr. Schweizer? A. Yes, about that time.

Q. And since then you have made various payments on account of allowances? A. Yes.

Q. Now, why didn't you at any time after that deduct from the amount of your allowances the cost of those studs? A. Because the Countess had told me that she wanted to return these studs and then
173 afterwards she wrote me, and the letter was here, that she would return them when she would see me next, and that took quite a long while.

Q. Will you read this letter and see whether it does contain what you say? A. No, there is another letter.

Q. Where is that letter? A. Right there; "I sent you the size of the pearls for Comme and if you think them too large I leave it to your taste; size of the pearls are in the letter."

Q. Is there anything in there that she desired to return the pearls? A. It comes in another letter.

Mr. Schneiderman: Have you got that letter?
174 (Paper produced.)

Q. This letter is dated December, 1906. Now, since December, 1906, you have made other payments under this agreement, have you not, Mr. Schweizer? A. Let me see if this letter was dated that day.

Q. All right, sir; you may see it (showing witness). A. It was not; December 12th that letter is dated.

Q. 1906? A. Yes.

Q. Very well. My question, Mr. Schweizer is,

since the date of that letter, whether you have made payments under the agreement? A. I have. 175

Q. Now, why didn't you at any time after December 12, 1906, the date of this letter, deduct the cost of those studs, from the subsequent allowances? A. Because the Countess told me that these studs were not large enough and her husband wanted them larger and she would return them when she would see me. I said that once before.

Q. Now, you have here a payment of two hundred francs for a wreath purchased? A. Yes.

Q. Was that request made to you by letter? A. By cable.

Q. And for whom was that wreath? A. For my son who died. 176

Q. And you have, you say, a letter from the Countess for that? A. A cable from the Countess.

Q. And why didn't you deduct that two hundred francs from the allowance sent that year or the following years? A. I simply considered that this was a payment and I would settle when I would find time; I did not make my payments regularly at all; the deduction that you talk about don't come in the statement whatsoever.

Q. Let me ask you, Mr. Schweizer, each year when you made your payments to your daughter, didn't you have in mind that at those times, what the total amount was that had been made up to then? A. I did not. 177

Q. So that at the end of any given year you were not really aware how much you had actually paid under the agreement to your daughter, is that right? A. I was aware what I had paid to her, yes sir, certainly I was.

Q. Well, at the end of 1905, did you know at that time the total amount that you had paid out under the agreement? A. I could not recollect it; it is too far back.

Q. When you made any payments after 1905, did

178 you have in mind at the time of making the payment, how much had been paid under the agreement up to date? A. Depending on the circumstances and requests.

Q. Is that the best answer you can give, Mr. Schweizer? A. Yes, the best answer I can give.

Q. Now, coming to 1909, I notice that you have here the total amount paid for that year was ten thousand francs, is that right? A. Yes.

Q. When you divided the payments into five thousand francs each, was there any special reason why you only sent five thousand francs? A. No.

Q. You did not at that time have in mind that be-
179 fore then you had made larger payments, did you? A. Oh yes, I think I had.

Q. You had that in your mind? A. Yes.

Mr. Wild: Now, will you tell me if there are any other payments other than the ones about which you have asked Mr. Schneiderman that you question, so that I may put in other proof of them, if necessary?

Mr. Schneiderman: I think this whole thing is entirely unfair——

The Court: You answer that question, yes or no; there is nothing fairer to ask of a counsel in a Court of Law than what has been asked you;
180 he asked you whether you contest any other item before his witnesses depart, and you say it is unfair. Now then, you need not answer it, but if you do not answer it these cases go to the foot of the Calendar.

Mr. Schneiderman: I do not contest any of the cash payments that agree and are in harmony with our list, but in so far as I have examined Mr. Schweizer about payments, I do not want to be placed in the position of having admitted simply because he so testified, but

other than that I of course do not question them further 181

The Court: If you understand what that means——

Mr. Wild: I do not.

The Court: Neither do I.

Mr. Schneiderman: What I mean to say, I am not admitting that everything that the witness testified on the stand is true or is the fact; that is what I mean to say.

The Court: The question is—repeat your question.

Mr. Wild: I will preface this by saying, by calling to his attention that before we left Court for the noon recess, I gave him a typewritten list of the payments which we claim to have made, and at the suggestion of the Court it was agreed that counsel should go over this typewritten list with his client and mark any payments which were disagreed to, and that our proof should be confined to those items. Now, if I am wrong your Honor will correct me. 182

The Court: You are quite right.

Mr. Wild: Now, I have not yet discovered what payments they are going to object to and what they are not. Now I ask him if he is going to question the fact, the application of any other payments than those upon which he has cross-examined Mr. Schweizer. 183

Mr. Schneiderman: We do not object to the payments but we do not admit that all of the payments were made under the agreement.

The Court: Do you understand that?

Mr. Wild: No, I don't. I don't see, under that, but what I have got to produce the evidence.

Mr. Schneiderman: For the purpose of the second action only we will admit that all pay-

184 ments enumerated in the list were paid, for the purposes of the second action only, and that is to be in no way binding upon the assignors in the first action.

Mr. Wild: As long as counsel has admitted all the payments that we claim to have made, I do not see that I have got anything else to prove here, and I rest.

[CASE CLOSED.]

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185 Mr. Wild: Both sides having rested, I renew my motion to dismiss, and I move for the direction of a verdict upon the ground that the plaintiff has not made out a case, also upon the ground that the defendant has affirmatively proved a defense. I base that proposition first, upon this ground, that this complaint in this action is for the installment for the year ending January 20, 1912, and that we had all the year to make it. Now, at the best, there is $84 due under this complaint, if he is entitled to recover anything. Of course, I claim, as a proposition of law, that this is not a contract which can be enforced here and is not a binding contract.

186 That is my claim.

The Court: There is nothing on the record that there is anything defective legally about this contract.

Mr. Wild: My motion is—I make my motion first for a dismissal upon the ground, renewing my motion for a dismissal upon the ground that the plaintiff has not made out a case, and also I move that your Honor direct a verdict in favor of the defendant on the ground that it has not been proved that he is liable for a payment of anything in this action.

The Court: Except, perhaps, for the $84. 187

Mr. Wild: I was about to mention that. I move further, without waiving the other positions which I have taken, that the defendant is in no wise liable in this action. If your Honor disagrees and holds that the contract is an enforcible contract in all aspects which we have discussed here, if your Honor so holds, I consent to a verdict in favor of the plaintiff for $84.

The Court: Well, you have not yet pointed out to me any vice or infirmity in the legal relation of the parties so far as this contract is concerned. What is there about the contract that is not enforcible? 188

Mr. Wild: To make my motion more specific, I call to your Honor's attention the fact that this contract is without consideration such as will support an action at law. On the contrary, it affirmatively appears from the contract itself, that the consideration, the only consideration was an antecedent engagement between the parties, thereby involving a subsequent marriage which they were bound to perform in any event. Furthermore, that the assignment of this instrument, the assignment of the rights under this contract which has been proved here carries nothing at all, that the assignment of such a claim is against public 189 policy.

Now, I am making my claim on this contract as a proposition of law, that is all I have got here; either this is a good contract or it is not. Further also I call the attention of the Court to the fact that the plaintiff's assignor is not a party to this instrument, the instrument itself being made between the defendant and the husband of the plaintiff's assignor, and she

190 or her assignee is not entitled, as a matter of law, to maintain this action.

Mr. Schneiderman: I move for the direction of a verdict in favor of the plaintiff for the sum of $2,500 with interest from January 20, 1912.

It is stipulated that the direction may be made in the absence of the jury, with like force and effect as if the jury were present, the case to be taken by the Court in the meantime under advisement; the January Term to be continued until after the decision so as to enable the losing party to move within the Term
191 for a new trial.

Briefs to be submitted on Friday, at the opening of Court, the 30th instant.

By consent of counsel action number one is sent to the foot of the General Calendar.

The foregoing contains all the evidence given upon the trial of this action.

192

Plaintiff's Exhibit 1.

193

Articoli di contratto stipulato e conchiuso oggidì Sedici di Gennaio Mille novecento due da e fra: I. Signor Joseph Schweizer, II. Signora Ernestina Teresa Schweizer, moglie del detto Joseph Schweizer, III. il Sig. Conte Oberto Giacomo Giovanni Francesco Maria Gulinelli, come qui seguente:—

In quanto che la Signorina Blanche Josephine Schweizer figlia del detto Sig. Joseph Schweizer e della detta Signora Ernestine Teresa Schweizer, è adesso promessa sposa e sta per contrarre matrimonio col sopra detto Sig. Conte Oberto Giacomo Giovanni Francesco Maria Gulinelli.

194

In considerazione di quanto qui esposto il suddetto Sig. Joseph Schweizer promette e si obbliga espressamente col presente contratto ad assegnare annualmente durante la sua propria vita e spedire alla sua detta figlia Blanche, durante la di lei vita, la somma di Duemilacinquecento dollari o l'equivalente di detta somma in Franchi, il primo pagamento di detta somma da farsi il 20 Gennaio 1902.

E per la medesima ragione su esposta il sopradetto Sig. Joseph Schweizer promette e si obbliga espressamente col presente contratto a non alterare o mutare la clausola inserita nel suo ultimo testamento, riguardante la sua detta figlia Blanche e precisamente nel quarto paragrafo del detto Testamento datato ed eseguito il 26 Luglio Mille Ottocento novantasette, o riguardante i di lei eredi, per come è espresso e stabilito in detto Testamento, e nella forma seguente:

195

"Quarto. Alla morte della mia detta moglie è mia volontà che il mio patrimonio venga di viso tra i miei figli allora viventi e fra la prole di qualsiasi dei miei figli morti in parti uquali, tale prole se ve ne fosse, da aversi quella stessa porzione che sarebbe spettata al genitore o genitrice se fosse

196 stata o stato vivente, tale prole rappresentando la porzione del genitore o genitrice"

ma che l'interesse della sua detta figlia e quello dei di lei figli nel di lui detto patrimonio rimarrà inviolato e non alterato.

E la detta Signora Ernestine Teresa Schweizer, in vista di quanto viene qui esposto si obbliga col presente contratto e promette che alla morte del detto Sig. Joseph Schweizer pagherà annualmente alla detta Blanche Josephine Schweizer la somma di Duemilacinquecento dollari o l'equivalente della detta somma in Franchi, durante la sua propria vita e durante la vita della sua detta figlia:

197 In testimonianza di che il detto Sig. Joseph Schweizer e la detta Signora Ernestina Teresa Schweizer hanno qui apposto la loro rispettiva firma l'istesso giorno ed anno che a capo inseriti.

JOSEPH SCHWEIZER
ERNESTINE TERESA SCHWEIZER

Alla presensa di
DEXTER B. HORTON
E. HENDERSHOTT

STATO DI NEW YORK
Contea di New York

198 Oggidì diciotto di gennaio Millenovecento due sono apparsi alla mia presenza e personalmente i qui su menzionati Joseph Schweizer ed Ernestine Teresa Schweizer entrambi a me noto essere le persone qui descritte che hanno eseguito l'istrumento qui sopra e che hanno rispettivamente e legalmente dichiarato essere le medesime che l'hanno eseguite.

DEXTER B. HORTON,
Notary Public, # 174
New York County.

Plaintiff's Exhibit 1.

STATE OF NEW YORK
City and County of New York

On this 18th day of January One Thousand Nine Hundred and two before me personally came Joseph Schweizer and Ernestine Teresa Schweizer to me known to be the individuals described in and who executed the foregoing instrument and they severally acknowledged to me that they executed the same.

DEXTER B. HORTON
Notary Nublic, # 174
New York County

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

I, THOMAS L. HAMILTON, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That Dexter B. Horton, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the day of 190

THOS. L. HAMILTON,
Clerk.

[L. S.]

202 **Plaintiff's Exhibit 2.**

Articles of Agreement entered into and executed this 16th day of January 1902, between 1st Mr. Joseph Schweizer 2nd Mrs. Ernestine Teresa Schweizer, wife of said Joseph Schweizer, and Count Oberto Giacomo Giovanni Francesco Maria Gulinelli, as follows:

Whereas, Miss. Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Guli-
203 nelli,

Now, in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of Two Thousand Five Hundred dollars, or the equivalent of said sum in Francs, the first payment of said amount to be made on the 20th day of January 1902.

And for the same reason heretofore set forth, the said Mr. Joseph Schweizer, promises and expressly agrees by the present contract not to alter or change the provision regarding his said daughter Blanche in
204 his last Will and Testament, and more specifically the fourth paragraph of his said Will and Testament, dated and executed the 26th day of July 1897, or regarding her heirs, as set forth and provided in said Testament in the words following: "Fourth—
" Upon the death of my said wife, it is my will that
" my estate shall be divided among my children
" then living and among the issues of any such
" children as shall have died, share and share alike,
" such issue if there be any, to have the same por-
" tion to which his father or mother would have
" been entitled if he or she have been living. Such
" issue representing the share of the father or

" mother " but expressly agrees that the interest of 205
his said daughter and that of her children in his estate shall remain inviolate and unaltered.

And the said Mrs. Ernestine Teresa Schweizer, in view of what has been herein set forth, agrees by the present contract and hereby promises that at the death of said Mr. Joseph Schweizer, she will pay yearly to said Blanche Josephine Schweizer, the sum of Two Thousand Five Hundred dollars or its equivalent in Francs, during her own lifetime and during the lifetime of her said daughter.

In witness whereof the said Mr. Joseph Schweizer and the said Mrs. Ernestine Teresa Schweizer, have hereunto set their hands and seals the day and year 206
first above written.

JOSEPH SCHWEIZER
ERNESTINE TERESA SCHWEIZER

In the presence of

DEXTER B. HORTON
E. HENDERSHOTT

STATE OF NEW YORK
County of New York

On this 18th day of January 1902 before me personally appeared the above Joseph Schweizer and 207
Ernestine Teresa Schweizer, both to me know and known to me to be the individuals mentioned and described in said instrument and who executed same and who duly acknowledged to me that they executed the same.

DEXTER B. HORTON
Notary Public 174
N. Y. County.

208 **Plaintiff's Exhibit 3.**

Plaintiff's Exhibit 3 is identical with Plaintiff's Exhibit 1.

Plaintiffs Exhibit 4.

In consideration of the sum of One ($1.00) Dollar and other good and valuable considerations to us in hand paid by Attilio De Cicco of the Borough of
209 Manhattan, City of New York, we and each of us do hereby sell, assign, transfer and set over unto the said Attilio De Cicco, his executors, administrators and assigns all our right, title and interest in and to the certain sum or allowance of $2500, which became due and payable to us and each of us from Joseph Schweizer, on or about January 20th, 1912, under and pursuant to a certain contract or agreement made with us by the said Joseph Schweizer, dated on or about January 16th, 1902.

Dated, January 1913.

BLANCHE GULINELLI (L. S.)
GIANOBERTO GULINELLI (L. S.)

210

KINGDOM OF ITALY }
CITY OF VENICE } ss:
United States Consulate }

On this first day of April One thousand nine hundred and thirteen before me James Verner Long, Consul of the United States of America at Venice, personally came Blanche Gulinelli and Gianoberto Gulinelli known to me to be the persons described in and who executed the certificate hereunto at-

tached and acknowledged the same to be their act and deed and declared that they executed the same freely and voluntarily, to the use and for the purpose therein mentioned. 211

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Consulate at Venice, the day and year above written.

JAMES VERNER LONG
Consul of the United States of America.

[SEAL]

American Consulate Service $2 Fee Stamp 212

Stipulation Settling Case and that it contains all the evidence.

IT is hereby stipulated that the foregoing case contains all the evidence given on the trial of this action and the exceptions and that the same be settled and ordered to be filed and annexed to the judgment roll herein,

213

Dated June 17, 1914.

GINO C. SPERANZA,
Attorney for plaintiff,

ELBRIDGE G. DUBAL,
Attorney for defendant,
Joseph Schweizer.

214 **Order Settling Case upon the above stipulation.**

The forgoing case on appeal is hereby settled and ordered on file.

Dated June 23, 1914.

MITCHELL L. ERLANGER,
J. S. C.

Stipulation Waiving Certification.

215

Pursuant to Section 3301 of the Code of Civil Procedure. IT IS HEREBY STIPULATED that the foregoing are true copies of the judgment roll, notices of motion for new trial, orders denying defendant-appellant's, and plaintiffs-appellants' motions for new trial, notices of appeal, Case and exceptions as settled and of the whole thereof, now on file in the office of the Clerk of New York County and Certification thereof by said Clerk, pursuant to Section 3352, is hereby waived.

Dated June 19, 1914.

216

Eldridge L. Owen
attorney for Joseph Schlanger
defendant-respondent-appellant

Gino C. Speranza
attorney for plaintiff-respondent-
appellant.

Opinion.

217

NEW YORK SUPREME COURT,

TRIAL TERM, PART II.

ATTILIO DE CICO,
plaintiff,

AGAINST

JOSEPH SCHWEIZER, *et al.*
defendants.

218

MITCHELL L. ERLANGER, *J.*

The enforcibility of the marriage settlement agreement upon which the plaintiff sues is assailed upon the ground that the obligation assumed by the defendant Joseph Schweizer to pay an annual sum to his daughter (the plaintiff's assignor) was void in that the consideration moving to this defendant was no more than the promise of the daughter's affianced to perform his contract already made to marry her. It is contended for the defendant that 219
when the contract in suit was executed there was a ~~sustaining~~ subsisting engagement to marry and that the defendant's promise to pay was based upon nothing more than a recognition of that engagement; hence that the contract was unilateral, as between the affianced husband and the parent of the bride, and so could not be enforced by the latter, the person for whose benefit the promise to pay was made. The fact essential to this theory that prior to the agreement there existed an engagement to marry is supported by no proof independently of the recitals of the agreement itself upon the subject. The

220 document is in Italian and, as translated, reads: "Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli; now, in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche during his own life and to send to her during her lifetime the sum of $2,500, or the equivalent of said sum in francs, the first payment of said amount to be made on the 20th day
221 of January, 1902." The recital that Miss Schweizer "is now affianced to" Count Gulinelli is not necessarily to be read as evidencing a concluded engagement to marry prior to and independently of the execution of this agreement. That promise may well have been contemporaneous and recited to exist as a part of the agreement itself, the word "now" having reference to the date of execution -- the present rather than the past. But, assuming an existing engagement, the defendant's contract to pay is none the less binding. Agreements of this character are supported upon the consideration of the marriage itself, and it is apparent that, according to the ordinary meaning of language, this
222 defendant's promise was not based upon the mere engagement of his daughter and upon her right, as against her affianced, to enforce his agreement to marry her, but proceeded upon the assurance to the defendant that the marriage would in fact take place. He (the defendant) promised to pay "in consideration of all that is herein set forth," and the salient fact set forth was that the daughter "is to be married to the above said Count Gulinelli." The promise to marry, only as executed by the marriage itself, was the consideration moving to the defendant—the father of the bride—and was quite distinct

from the promise to the daughter for the breach of 223
which she might obtain solace by an award of damages. The father apparently had an independent interest, deemed by him sufficient, in having the marriage in fact performed, and his agreement conditioned upon that fact was not unilateral. The point was so ruled in Sarasohn *v.* Kamaiky (193 N. Y., 203, 216), and the distinction was there clearly drawn between an agreement made upon no better consideration than the intended husband's merely repeated promise to the bride to be and an agreement founded upon the execution of that promise when made independently to a parent or other person having an interest in the expected 224
marriage. To the same effect is the opinion of the Court in Kramer *v.* Kramer (90 App. Div., 176), which expresses the judicial view in this department, although the result was upon other grounds disapproved (181 N. Y., 477), it appearing that the promise was made after the marriage itself. I find, therefore, that the contract is enforcible, but the recovery must be limited to $84, the amount actually unpaid upon instalments due up to the 20th of January, 1912. There can be no doubt that the annual payments of $2,500 were due only at the end of each year, except as to the first payment, which, according to the agreement, was to be made on January 20, 1902. No provision being contained in the 225
contract for payment in advance, any "annual" payment was due only at the end of the period which it was to cover (see Goldsmith *v.* Schroeder, 93 App. Div., 206), and upon the proof before me it is clear that no more than $84 remained due on January 20, 1912. The plaintiff's case is not aided by the fact that the action was commenced after the expiration of one year from that date, since his right of recovery is limited to the assigned cause of action upon which he sues and the assignment covers no more than "the sum or allowance of $2,500 which became

226 due and payable to us and to each of us from Joseph Schweizer on or about January 20, 1912." There should be judgment for the plaintiff in the sum of $84, with interest, upon a verdict directed in accordance with the stipulation of the parties. Thirty days' stay of execution and sixty days to make a case.

Order Filing Record in Appellate Division.

Pursuant to Section 1353 of the Code of Civil Pro-
227 cedure, it is

Ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the First Judicial Department.

Dated, June 23, 1914.

Mitchell L. Erlanger

J. S. C.

228

Order of Affirmance of Appellate Division.

229

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 22nd day of January 1915.

Present:

Hon. GEORGE L. INGRAHAM,
Presiding Justice.

CHESTER B. McLAUGHLIN,
FRANCIS M. SCOTT
VICTOR J. DOWLING
FRANK C. LAUGHLIN
Justices.

230

ATTILIO DE CICCO
Plaintiff-Respondent
Appellant,

AGAINST

JOSEPH SCHWEIZER,
Defendant-Respondent
Appellant

231

An appeal having been taken to this Court by the defendant Joseph Schweizer from the judgment of the Supreme Court entered in this action in the Office of the Clerk of New York County on the 3rd day of March 1914 upon the verdict of a jury rendered by direction of the Court and from an Order made by said Court denying a motion by said defendant for a new trial entered on the 10th day of March 1914, and the plaintiff having taken a cross-appeal from so much of the said judgment in his favor and against the said defendant as awards the sum of $97.70 only without costs and having also appealed from an order made by said Court and en-

232 tered on the 3rd day of March 1914, denying a motion by the plaintiff to set aside the verdict as directed by the Court in plaintiff's favor for $84.00 only and said appeals having been argued by Mr. Frank G. Wild of Counsel for said defendant and by Mr. Michael Schneiderman of Counsel for the plaintiff and due deliberation having been had thereon, it is hereby unanimously

ORDERED AND ADJUDGED, that the said judgment for $97.70 entered herein on the 3rd day of March 1914 so appealed from be and the same hereby is modified, so that it shall direct and award judgment in favor of the plaintiff and against the de-
233 fendant Joseph Schweizer herein, for the sum of $2500.00 with interest thereon from January 20th, 1912 together with the costs and disbursements of this action to be taxed by the Clerk of said Court and that the plaintiff shall have execution therefor and as so modified, the said judgment be and the same is hereby affirmed; and that the plaintiff recover of the defendant Joseph Schweizer the costs of this appeal, and it is further unanimously

ORDERED AND ADJUDGED that the plaintiff shall have the right and be entitled to file with the Clerk of New York County and to enter in the office of said Clerk a new judgment modified in the respects
234 and particulars as herein provided, which shall supersede and take the place of the original judgment herein and the Clerk of the County of New York is hereby required and directed to enter the said modified judgment accordingly, and it is further unanimously

ORDERED AND ADJUDGED that the said orders entered herein on the 3rd day of March 1914 and on the 10th day of March 1914, so appealed from be and the same are hereby affirmed without costs to either party.

Judgment of Affirmance of Appellate Division.

235

SUPREME COURT, NEW YORK COUNTY.

ATTILIO DE CICCO
Plaintiff

AGAINST

JOSEPH SCHWEIZER,
Defendant

236

The appeal taken by the defendant Joseph Schweizer, from the judgment duly entered in this action in the office of the Clerk of the County of New York, on the 3rd day of March 1914, upon the verdict of a Jury rendered by direction of the Court and from an order made by this Court denying defendant's motion for a new trial entered in the office of the Clerk of the County of New York on the 10th day of March 1914 and the cross-appeal taken by the plaintiff from so much of said judgment in his favor and against said defendant as awards the sum of $97.70 only, without costs and 237
the appeal taken by the plaintiff also from an order made by this Court and entered on the 3rd day of March 1914 denying a motion by the plaintiff to set aside the verdict as directed by the Court in plaintiff's favor for $84.00 only having been brought to a hearing and heard at a Term of the Appellate Division of the Supreme Court, First Department, held at the Court House on the 7th day of January 1915 and the Appellate Division having unanimously modified the said judgment for $97.70 entered herein, on the 3rd day of March 1914 so that

238 it shall direct and award judgment in favor of the plaintiff and against the defendant Joseph Schweizer herein for the sum of $2500.00 with interest thereon from January 20th–1912 together with the costs and disbursements of this action to be taxed by the Clerk of this Court and that the plaintiff shall have execution therefor and having unanimously affirmed the said judgment as so modified with costs of said appeal to the plaintiff and having also affirmed unanimously the said orders entered herein on March 3rd 1914, and on March 10th, 1914 respectively without costs and having further directed that the plaintiff shall have the right and be
239 entitled to file with the Clerk of New York County and to enter in the office of said Clerk a new judgment modified in the respects and particulars specified aforesaid to supersede and take the place of the original judgment herein and directing and requiring the Clerk of the County of New York to enter the said modified judgment accordingly, by an order duly made by the said Appellate Division of the Supreme Court, First Department and entered in the Office of the Clerk of the said Appellate Division on the 22nd day of January 1915 and the remittitur of the Appellate Division, having been duly filed in the office of the Clerk of the County of New York on the 28th day of January 1915, now on motion of
240 Gino C. Speranza, attorney for the plaintiff, it is hereby

ADJUDGED that the said orders of March 3rd, 1914 and March 10th, 1914, and the said judgment for $97.70 entered on March 3rd 1914, as so modified be and the same hereby are unanimously affirmed and it is further

ADJUDGED that the plaintiff do recover of the defendant Joseph Schweizer, the sum of $2500.00 and $318.75 the interest thereon from January 20th–1912

with $103.82 costs, of this action, amounting in all to the sum of $2922.57 and that the plaintiff have execution therefor and that the said sum of $2922.57 shall be entered in the original judgment herein in place and stead of the sum of $97.70, as of said date by the Clerk of this Court and it is further 241

ADJUDGED that the plaintiff recover of the defendant Joseph Schweizer the sum of $108.20 the costs of said Appeal and that the plaintiff have execution therefor.

Judgment signed and entered this 2 day of February 1915.

WM. F. SCHNEIDER, Clerk. 242

243

244 **Notice of Appeal to Court of Appeals.**

SUPREME COURT,

COUNTY OF NEW YORK.

ATTILIO DE CICCO, Plaintiff-respondent, AGAINST JOSEPH SCHWEIZER, Defendant-appellant.	1913 13116

245

TAKE NOTICE, that the above named defendant Joseph Schweizer hereby appeals to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court for the First Department, dated February 2nd, 1915, entered herein in the office of the Clerk of the County of New York on February 2nd, 1915, and the said defendant appeals from each and every part of said judgment as well as from the whole thereof.

Dated, February 9th, 1915.

246

ELBRIDGE G. DUVALL,
Attorney for defendant-appellant,
Office & P. O. address
277 Broadway,
Borough of Manhattan,
City of New York.

To

CLERK OF THE COUNTY OF NEW YORK

" GINO C. SPERANZO,
Attorney for plaintiff-respondent.

Affidavit of No Opinion by Appellate Division.

247

COURT OF APPEALS.

ATTILIO DE CICCO,
Respondent,

AGAINST

JOSEPH SCHWEIZER,
Appellant.

248

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

ELBRIDGE G. DUVALL being duly sworn, says that he is attorney for the above named appellant Joseph Schweizer; that no written opinion or memorandum was handed down by the Appellate Division in deciding this appeal and rendering the judgment appealed from except the words

" Judgment modified so as to provide for a recovery by plaintiff of the sum of $2,500, with interest from January 20, 1912, and as so modified affirmed, with costs to plaintiff. 249
Orders appealed from affirmed, without costs.
No opinion. Settle order on notice ".

E. G. DUVALL.

Sworn to before me this 11th day of February 1915.

WINTHROP STEARNS,
Commissioner of Deeds, City of New York,
Residing in the Borough of Brooklyn.
Certificate filed in Kings and N. Y. County Clerk's Offices.

250

Waiver of Certification.

It is hereby stipulated between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the notice of appeal to the Court of Appeals, the order of the Appellate Division, First Department, entered in the office of the Clerk of said Court on January 27, 1915, the judgment of affirmance entered thereon in the office of the Clerk of New York County on February 2, 1915, being the judgment appealed from, the judgment roll and all other papers upon which the Appellate Division acted in making such order, all of which
251 papers or certified copies thereof are now on file in the office of the Clerk of New York County and certification thereof pursuant to Sections 1353 and 3301 of the Code of Civil Procedure is hereby waived.

Dated, March 19, 1915.

GINO C. SPERANZO,
Attorney for Plaintiff-Respondent.

ELBRIDGE G. DUVALL.
Attorney for Joseph Schweizer,
Defendant-Appellant.

252

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

To be argued by
WILLARD BARTLETT.

Court of Appeals.

ATTILIO DI CICCO,
Respondent,

AGAINST

JOSEPH H. SCHWEIZER, impleaded with another,
Appellant.

BRIEF FOR APPELLANT.

History of Case and Statement of Facts.

This case comes before the Court of Appeals upon a modification and affirmance, by the Appellate Division in the First Department, of a judgment in favor of the plaintiff upon a verdict directed by the Court after both parties had moved for a direction.

The question of law which it is desired to present, is raised by the defendant's exception to the ruling of the Trial Judge directing the verdict. That exception did not appear in the record as originally made up; but it has since been inserted therein by order of the Appellate Division.

The suit is an action at law brought to recover the sum of $2,500, claimed to have become due to Blanche Josephine Schweizer, the daughter of the appellant, upon an agreement in writing, between the appellant and his wife and one Count Gulinelli,

dated January 16, 1902, which recited that the appellant's daughter "is now affianced to and is to be married to the above said Count * * * Gulinelli", whereby the appellant "in consideration of all that is herein set forth" agreed among other things to pay annually to his daughter during his life the sum of $2,500, the first payment to be made on the 20th day of January, 1902 (Appeal Book, fols. 193-202).

The appellant paid to his daughter pursuant to this agreement, between January 20, 1902, and July 15, 1911, the sum of $24,916. (fols. 103-143). The fact of the payment of these moneys was conceded by plaintiff's counsel (fols. 183-184), and the only questions in dispute upon the trial were whether the agreement sued on constituted an enforceable contract, and whether under the agreement payments were to be made in advance, *i. e.*, whether the action was for an installment of $2,500 due in advance of January 20, 1912, to cover the year ending January 19, 1913, or for an installment of $2,500 payable at any time during the twelve months ending January 19, 1912, and so overdue and payable on January 20, 1912. There was no conflict of testimony, and there are no disputed questions of fact in the case.

The plaintiff sues as the assignee of the appellant's daughter (fol. 19). The Trial Judge held that there was a sufficient consideration for the contract sued upon inasmuch as the "defendant's promise was not based upon the mere engagement of his daughter and upon her right as against her affianced to enforce his agreement to marry her but proceeded upon the assurance to the defendant that the marriage would in fact take place" (fol. 222). The Court, however, construed the contract as requiring the annual payments to be made only at the end of each year and therefore, while directing a verdict for the plaintiff, limited the recovery to the sum of $84, which was the amount remaining due on January 20, 1912 (fol. 225). Both parties appealed to the

Appellate Division and that Court modified the judgment by increasing the amount of the plaintiff's recovery to the sum of $2,500, with interest and costs, and affirmed the same as thus modified (fol. 249).

The propositions upon which we ask a reversal of the judgment are as follows:

1. There is no presumption of a consideration for the contract sued upon, arising from the character of the instrument.

2. The Trial Court erred in construing that portion of the instrument relating to the alleged consideration.

3. The fulfilment of an engagement to marry, subsisting at the time the instrument was executed, could not be a sufficient consideration for the promise of a third party to pay money.

4. The instrument sued upon is not supported by any consideration and is therefore not an enforceable contract.

5. The instrument in controversy is not within the class of ante-nuptial contracts which are said to be favored by the courts.

POINT I.

There is no presumption of a consideration for the contract sued upon arising from the character of the instrument.

Although the instrument in controversy recites that the parties have set their seals thereto, the original paper does not in fact bear any seals, and therefore furnishes no presumptive evidence of a sufficient consideration under our statute (Code of

Civ. Proc., Sec. 840). If, however, it were under seal and the seal imported a consideration, it would not be incumbent upon the party seeking to avoid it, to show that the agreement was without consideration inasmuch as the instrument itself states what the consideration is. Under these circumstances, if the consideration recited in the paper can be varied at all—which is subject to grave doubt,—the burden of proof would rest on the party asserting that the consideration was different from that which is expressed in the instrument.

Here, the promise and agreement of the appellant is expressly stated in the instrument to be made "in consideration of all that is herein set forth" (Appeal Book, fol. 203). The only matter set forth in the instrument to which this language could possibly refer is the preceding recital, which reads as follows: "Whereas Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Alberto Giacomo Giovanni Francesco Maria Gulinelli" (fol. 202).

In brief, therefore, the consideration recited for the promise of the appellant was the existing engagement on the part of his daughter to marry Count Gulinelli.

We shall endeavor to show that this was not and is not a sufficient consideration to support the agreement.

"It is not and cannot be claimed that a sealed instrument imports a valid consideration when it shows by its own condition and recitation that it is in fact, not founded upon a consideration; in other words, the presumption of consideration arising from a seal will not overcome the express language and conditions of a sealed instrument showing that it is without consideration. We think this proposition need only be stated to gain assent. It does not demand in its support, the citation of any authority".

Bender v. *Been* (78 Iowa, 283).

POINT II.

The Trial Court erred in construing that portion of the instrument relating to the alleged consideration.

We submit that the learned Trial Justice did not correctly construe the instrument when he said that the recital that defendant's daughter "is now affianced to Count Gulinelli" was not necessarily to be read as evidencing a prior engagement independent of the agreement, and that the promise might have been contemporaneous and recited to exist as a part of the instrument (fol. 221). We think he did not give proper effect to the plain meaning of the words, and was led into speculation as to whether or not the promise was contemporaneous with the instrument and consequent upon it. If such was the fact, plaintiff should have proved it. The defendant went as far as it was necessary to go in pointing out that the plain meaning of the words was that the parties were in fact actually engaged at the time the agreement was made, from which it must follow that the engagement preceded the instrument and was not dependent upon it. And further, we submit that the learned Trial Justice erred in holding that, assuming the engagement to have antedated the agreement, the defendant's contract to pay was none the less binding (fols. 221–222). He considered that the fact that the parties were to be married, or, in other words, were to execute the agreement previously made between them, was a sufficient consideration for the defendant's promise to pay.

The real ground, however, on which the decision of the Trial Judge rests is that the marriage of the appellant's daughter to Count Gulinelli is, of itself, a sufficient consideration. Now, of course, a marriage may be a sufficient consideration for a promise, but that is not the point in the present case.

The question is whether a marriage which a person is under a legal obligation to perform or suffer damages for its breach is a consideration for the promise of a third party to pay money? We shall endeavor to show under the next point that a marriage is no more a consideration under such circumstances than would be a conveyance of land which the promisee was already under a contract to make.

POINT III.

The fulfillment of an engagement to marry, subsisting at the time the instrument was executed, could not be a sufficient consideration for the promise of a third party to pay money.

The law is well settled in this State that the performance of an obligatory contract by a person is not a good consideration for a promise either by the other party to the contract or by a third party.

"Neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law or by a subsisting contract with the other party." *Pollock on Principles of Contract*, 161. Quoted with approval in *Vanderbilt* v. *Schreyer* (91 N. Y. 392, 401).

"The performance of an act which a party is under a legal obligation to perform cannot constitute a consideration for a new contract." *Robinson* v. *Jewett* (116 N. Y. 40). See also *Kramer* v. *Kramer* (181 N. Y. 477).

The rule is recognized by the leading text-writers and prevails in most of the States of the Union.

"The doing of what one is bound in law to do or promising so to do, are neither of them considerations for a promise made to the person upon whom the legal liability rests to induce him to perform such act or make such promise." *Page on Contracts* (Sec. 311).

"Nor is the performance of that which the party was under a previous legal valid obligation to do a sufficient consideration for a new contract. *2 Parsons on Contracts* (437).

"A promise to perform an existing legal obligation without some new consideration to support it, is a voluntary promise, which unless made under seal, does not create any new obligation." *Leake on Contracts* (6 Ed., 444).

"A promise by a party to do what he is bound in law to do is not an illegal consideration but *is the same as no consideration at all* and is merely void; in other words, it is insufficient but not illegal." *Cobb* v. *Cowdery* (40 Vermont, 25).

"The performance of that which the party was under a prior legal obligation to perform is not a sufficient consideration, because there is neither loss on the one side nor benefit or advantage on the other. By virtue of the prior obligation, the promisee is bound to do precisely what he does or stipulates to do by the subsequent contract, and for the doing of which he has already received a sufficient consideration. The performance of the subsequent contract by the promisee gives to the promisor nothing to which he is not already entitled." *Conover* v. *Stillwell* (34 N. J. Law, 54).

"We think the law is settled by the great weight of authority that the mere agreement to perform an existing contract obligation by one party to a contract is not a valid consideration for a new promise by the other party." *Wescott* v. *Mitchell* (95 Maine, 377, 383).

An agreement to do what one is already under a legal obligation to do, does not constitute a consideration for a contract; this rule applied in the

case of a contract for the construction of a railroad where, after part performance, the contractor refused to go on with the work unless his creditors were paid and the President of the railroad company instructed him to go on and promised that they should be paid. It was held that the agreement of the President of the railroad company was without consideration. *Ayers* v. *The C. R. I. & P. R. Co.* (52 Iowa 478).

The plaintiff was bound by a contract to perform certain work for the defendant corporation; it was held that a promise by the plaintiff to a third party to perform this contract, could furnish no consideration for a promise by such third party to make a payment thereunder. *Ellison* v. *Jackson Water Co.* (12 Cal. 542).

"The rule is elementary that neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor." *Esterly Harvesting Machine Co.* v. *Pringle* (41 Neb. 265).

A promise to pay a man for doing that which he is already under contract to do, is without consideration. "The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reason ought to shake it; but it is carrying coals to Newcastle to add authorities on a proposition so universally accepted and so inherently just and right in itself. * * * What we hold is that when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as *nudum pactum* and will not lend its process to aid in the wrong." *Lingenfelder* v. *Wainwright Brewing Co.* (103 Mo. 579, 593, 595).

The doing of that which it is the plain duty of a party to do under the provisions of a contract in full force and effect can furnish no consideration for any agreement made by the other party in reference thereto. *Lewis* v. *McReavy* (7 Wash. 294).

No consideration for a promise by a landlord to repair the demised premises before the tenant's term expires arises out of an agreement by the tenant that he will not abandon the property during the term. The tenant is bound to retain the premises during the term whether the landlord repairs them or not, and, therefore, his agreement to continue the tenancy furnishes no consideration for the promise to repair. *Elbin* v. *Miller's Ex'r* (78 Kentucky, 371).

A tenant being bound by law to pay to his landlord the stipulated rent when it becomes due, a promise by the landlord in the contract of letting, that in consideration of the faithful and prompt payment of the rent, he will, as a gratuity, present to the tenant eight mules as a premium for promptly paying the rent, is *nudum pactum*. *Bush* v. *Rawlins* (89 Georgia, 117).

" The agreement to do or the doing of that which a person is under a legal obligation to do is not a sufficient consideration for a new promise." *Schuler* v. *Myton* (48 Kan. 282).

The doing of an act which the party was under a legal obligation to do is not a sufficient consideration for a promise to pay or reward the party for such performance of his legal duty. *Keith & Hastings* v. *Miles* (39 Miss. 442).

A principal of a school contracted to bring and associate his wife with him, in teaching the school and then refused to comply with such contract; it was held that a promise by a third party to give the principal $2,500 in order to induce him to comply therewith, was without consideration. *Johnson's Adm'r* v. *Sellers' Adm'r* (33 Ala. 265).

POINT IV.

The instrument sued upon is not supported by any consideration and is therefore not an enforceable contract.

We have endeavored to establish the absence of any sufficient consideration by what has already been said in this brief.

The opinion of the learned Judge who tried the case entirely ignored the general rule declared and applied in the cases cited above, that a promise in consideration of the doing of something which the party is already under an obligation to do is insufficient as a consideration.

The cases cited in the opinion at Trial Term do not support the reasoning or the conclusion reached therein.

In *Sarasohn* v. *Kamaiky* (193 N. Y. 203), the plaintiff was engaged to be married, and after the engagement, but before the marriage, and in consideration of the cancellation of a certain mortgage by the son, and of the marriage, the father agreed to give the plaintiff certain benefits. The case was tried before Mr. Justice Greenbaum. He held that under the circumstances of the case the cancellation of the mortgage did not furnish a consideration, and then said (52 Misc. 394):

> "It is important to differentiate the cases under this point that refer to marriage settlements and agreements made before or at the time of the promise to marry from those made after the existence of a valid promise to marry. In the former class of cases there seems to be no doubt that the consideration of marriage is adequate. In the latter there is considerable doubt, and in my opinion, the weight of authority is with those that hold that a unilaterial promise to a party based upon the performance of an existing obligation of that party is invalid."

The Appellate Division affirmed Mr. Justice Greenbaum (120 A. D. 110), but the question of the marriage contract was not even mentioned in the opinion. The Court of Appeals reversed the Appellate Division (193 N. Y. 203), upon the ground that there was a sufficient consideration in the cancellation of the mortgage, and expressly said, at page 216:

> "And the interesting question as to the validity of an agreement based upon a promise to marry made after and entirely independent of a prior promise to marry as between the parties is not now necessarily before us."

It thus appears that the opinion of Mr. Justice Greenbaum that a contract made after and in consideration of a prior binding promise to marry is without consideration was not disapproved, and that the Court of Appeals expressly stated that it did not consider this point.

The case of *Kramer* v. *Kramer* (90 A. D. 176, reversed in 181 N. Y. 477), so far from being an authority in support of the plaintiff's position, is an authority the other way.

The facts were that after the engagement, but before the marriage, the husband agreed to give his wife certain property. After the marriage the husband procured from his brother a promissory note to the order of the wife, there being no consideration between the husband and his brother. He then gave the note to the wife in fulfillment of the promise made before marriage. It thus appears that the contract was an executed contract, and the question was whether the note had consideration in an action on the note by the wife against the brother.

The Appellate Division did say at page 180 that the promise of the husband had reference to the consummation of the marriage and was quite distinct from the promise to marry and that this was sufficient. The case, however, was reversed by the Court of Appeals (181 N. Y. 477), on the ground that the note was without consideration, and the

Court expressly referred to the point that the antecedent engagement furnished no consideration in these words:

> "The learned Judge who directed the verdict for the defendant in this case at the trial has stated the question so clearly and so much better than I can state it that his language may be quoted.
>
> "There was no consideration moving to the defendant, and the plaintiff had the note, *not for money paid by her to her husband nor yet in payment of a pre-existing debt.* Nor, *in fact, in satisfaction of any legal obligation on the husband's part.* It follows, in my judgment, there being no consideration for the note, in any aspect of the case, that the verdict should be directed for the defendant."

Thus the Court of Appeals directly held that a promissory note without consideration between the maker and the payee, and given by the payee to his wife in fulfillment of a promise made after their engagement, and before their marriage, was without consideration in any aspect of the case, and the theory of the Appellate Division (90 A. D., at 182) that the promise of the husband made with reference to the consummation of the marriage and quite distinct from the earlier promise to marry had sufficient consideration, was disapproved.

In all the cases referred to by Mr. Justice Hatch at the Appellate Division in *Kramer* v. *Kramer* (*supra*), there was ample consideration for the contract apart from the marriage, even though there was an existing agreement to marry at the time the contract was made. In *Johnston* v. *Spicer* (107 N. Y. 185), it was agreed by the marriage settlement that on the death of either party, the property should go to the survivor. In *Borland* v. *Welch* (162 N. Y. 104), a marriage settlement was made in 1838, when a husband still possessed all his common law rights in the property of a wife. In that case, she conveyed the property then possessed by her to trustees of certain trusts and agreed to transfer any

property which she might afterwards acquire to the trustees on the same trusts. The husband agreed on his part, to transfer to the trustees any property his wife might receive during their marriage which otherwise, under the law as it then existed, would have gone to him. There could be no doubt as to the validity of the agreement; the sole question was, as to what persons had the right to take advantage of it. In *Phalen* v. *U. S. Trust Co.* (186 N. Y. 178), the consideration was unquestionable. The marriage settlement was executed by the parents of both the bride and groom; and the parties on each side covenanted to settle property upon them.

POINT V.

The instrument in controversy is not within the class of antenuptial contracts which are said to be favored by the courts.

It is doubtless true, as was said by Chief Judge Ruger in *Johnston* v. *Spicer* (107 N. Y. 191), that antenuptial contracts are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises; but the contracts which he had in mind and in reference to which he used this language, were those "by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death". It is manifest that the instrument upon which the present suit is brought is not a contract of that character.

POINT VI.

The judgment should be reversed and the complaint dismissed.

Unless a different rule is to obtain in this State in reference to contracts in consideration of marriage from that which prevails in regard to all other contracts, a contract to pay money or convey property based wholly on an existing contract of marriage, is unenforceable for lack of consideration. There is no valid ground for any distinction; the question is an open one in this Court; the authorities in the cases most nearly resembling this are all in our favor; and we therefore ask that the general rule shall be applied to the instrument in controversy and that the contract be adjudged to be without consideration and hence not enforceable.

All of which is

Respectfully submitted,

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To be argued by
MICHAEL SCHNEIDERMAN.

Court of Appeals

STATE OF NEW YORK.

ATTILIO DE CICCO,
Respondent,

against

JOSEPH H. SCHWEIZER, impleaded with another
Appellant.

BRIEF FOR RESPONDENT.

Statement.

This is an appeal by the defendant from a judgment of the Appellate Division, First Department, which unanimously modified the judgment of the Trial Court entered upon a directed verdict in favor of the plaintiff for $84 only and increased the recovery for the plaintiff to the sum of $2,500.

Facts.

This action is to recover the sum of $2,500, the annual instalment or allowance, which fell due and became payable on the 20th day of January, 1912, under the terms of an "antenuptial agreement" or "marriage settlement" made and executed in the Italian language on the 16th day of January, 1912, and duly acknowledged before a notary public and entered into between (1) the defendant, Joseph H. Schweizer, (2) Ernestine Schweizer, his wife, and (3) Count Alberto Gulinelli, the prospective husband of their daughter, Blanche Schweizer (Pl. Exs. 1 and 2, pp. 65-69).

Under this agreement the defendant, *on his part* promised and agreed, *inter alia*, "to pay *annually* to his said daughter, Blanche, during his own life and to send her during her lifetime, the sum of $2,500 * * * the *first* payment of said amount to be made on the 20th day of January, 1902", four days after the date of the agreement.

Pursuant to the plain language of this express promise, the *eleventh* annual instalment or allowance, accrued and became payable to the daughter Blanche Gulinelli from the father, Joseph Schweizer, on January 20th, 1912, but concededly no part of this specific annual instalment was ever paid by the promisor, Joseph Schweizer, and the beneficiary, Blanche Gulinelli, duly assigned this payment (Pl. Ex. 4, p. 70) to the plaintiff, who commenced this action at law for its recovery.

Upon the trial the defendant contended that only the *tenth* payment fell due on January 20th, 1912, on the alleged ground that the payments

did not accrue on January 20th of every year but at the end of each yearly period.

The plaintiff claimed that beginning on January 20, 1902, an instalment became payable on every January 20th thereafter, and accordingly that on January 20th, 1912, the eleventh instalment fell due.

At the close of the case the defendant moved for the direction of a verdict, on the ground that the "antenuptial agreement" was not a legal and enforceable contract and the plaintiff, likewise, moved for a direction in his favor for $2,500 the full amount of the eleventh instalment.

The Trial Court decided that the "marriage settlement agreement" was a binding and enforceable contract, but awarded a recovery and directed a verdict for the plaintiff for the sum of $84 only, on the alleged ground that "no more remained due on January 20th, 1912" (see Opinion, p. 73).

Both parties took an appeal to the Appellate Division, where both questions were considered—the validity of the antenuptial agreement, and the time when the payments accrued and fell due. The Appellate Division unanimously modified the judgment below and awarded the plaintiff a recovery for the entire instalment of $2,500, with interest from January 20th, 1912, and affirmed in all other respects.

On the present appeal the defendant raises only one main point that the antenuptial agreement is not supported by any consideration in law.

POINT I.

The instrument made and executed by defendant on Jan. 16th, 1902, is a marriage settlement and the meaning and legality of its provisions should be construed and measured by the rule governing marriage settlements.

It has already been observed in the foregoing statement that this instrument dated January 16th, 1902, was made and entered into in *tri-party* form between (1) defendant Joseph Schweizer, (2) Ernestine Schweizer, his wife, (3) Count Gulinelli, the prospective bridegroom of their daughter Blanche Schweizer, who alone is made the beneficiary of its provisions. A mere examination of the instrument reveals that the underlying purpose and intent is to make a proper and considerate provision by the parents for their daughter Blanche and her children, upon and after her marriage with Count Gulinelli—in express terms it binds not only the defendant Joseph Schweizer, but also his wife Ernestine Schweizer and further it obligates each of them mutually to leave by will a specified share of their estates to their said daughter Blanche and her children. The marriage contemplated by this instrument was celebrated between Count Gulinelli and Blanche, the defendant's daughter, on January 20th, 1902 (fol. 87), four days after its execution.

It should be noted also that the text of the instrument is written in the Italian language, and

that while the English translation substantially corresponds with the original, distinct and idiomatic phrases having a peculiar meaning in Italian, can not readily be rendered into English, so that the language of the translation does not possess the same perfection and completeness of expression and idea as the original composition. The spirit and intent of the entire instrument should, therefore, control in construing its provisions and measured in that light and also by the rule of liberal interpretation, it is quite plain that the promise of the defendant made "*now, in consideration of all that is herein set forth*" was fairly and reasonably based upon the consummation of a marriage between Count Gulinelli and the daughter Blanche Schweizer and *also* upon the consideration of the reciprocal promise made by the defendant's wife Ernestine Schweizer. It must be conceded that the beneficiary Blanche would not have been entitled to any payments whatever unless and on condition of the actual marriage of Count Gulinelli with the said Blanche. It must accordingly follow by necessary inference, that the defendant's promise contemplated and was made partly in consideration, *inter alia,* of the performance and consummation of the marriage of Count Gulinelli with Blanche Schweizer.

This interpretation is entirely in accord with the rule of construction applicable to antenuptial agreements.

As was declared by the Court in *Dickenson* vs. *Seaman,* 193 N. Y., 18:

> "Regard must be paid not only to the language but also to what the law implies therefrom, in view of their situation."

And also in *Gorham* vs. *Fillmore,* 111 N. Y., 251, the Court says:

> "But following the rule which obtains in the construction of all contracts, namely that *the intentions of the parties must control,* we can reach a conclusion which seems to us to be reasonably satisfactory. * * * This contract must be regarded as one drawn with great care, with a full understanding of the precise meaning of the language employed, and an intention that each word and sentence shall have its appropriate influence and effect upon the construction of the instrument. * * * The case must, therefore, be decided by the construction to be given to the peculiar language of the particular contract and the inferences which we are able to draw therefrom, as to the intention of the parties, in view of their situation and conditions in life and circumstances surrounding them."

In construing the proper meaning and effect of the language of this instrument, it is also important to bear in mind that the instrument was drawn and prepared by Mr. Duval, the attorney for the defendant who is now assailing the agreement as invalid (fols. 59-60). Surely it was the *intention* to prepare an agreement which was binding and enforceable in law, and each provision must be regarded as being included with the particular intent and purpose of making the instrument a valid contract in law. The mutual and reciprocal promise of Mrs. Schweizer, the defendant's wife, is, therefore, especially sig-

nificant and may well be treated as one of the legal considerations intended to support the instrument as a valid marriage settlement.

The validity of the instrument as an enforceable contract must, therefore, be tested as a marriage settlement.

POINT II.

The promise of the defendant is a binding contract and is amply sustained by valid considerations (a) the consummation of the marriage with his daughter, (b) the mutual and reciprocal promise of his wife.

A.

Antenuptial agreements or so-called marriage settlements have been recognized and upheld as valid contracts in law from the earliest times; in fact they have been considered by the Courts in a separate class in the law of contracts and the ordinary rules have been somewhat relaxed when applied to agreements of this special character.

Thus the Courts have made a distinction, in determining the question of consideration, between the act of marriage and a promise to marry, and while the latter has been held insufficient to support a promise made after and

subsequent to an existing promise to marry, the former has been invariably upheld as a valid and sufficient consideration to sustain an *antenuptial promise,* although the promisee was already under a binding promise of marriage. An examination of the record on appeal in the reported cases involving marriage settlements, will show that the marriage was the sole consideration for the antenuptial promise and that the agreements uniformly contain the identical recitals, *as in the case at bar,* that the parties are actually affianced or engaged to marry.

In the very recent case of *Sarasohn* vs. *Kamaiky,* 193 N. Y., 203, the favorite position which marriage settlements occupy in the eyes of the law, is reviewed at great length and the recognized difference between *a promise to marry* and *the marriage* as a sufficient and valid consideration in law for the antenuptial agreement is very forcibly pointed out. The Court of Appeals says:

> "Any evidence that shows that the parties to a written instrument intend that the same should be operative and binding upon them is sufficient in an action to enforce its provisions * * *. Contracts by which third persons covenant to perform certain promises, **in consideration of a marriage** are frequently upheld (*Phalen* vs. *U. S. T. Co.,* 186 N. Y., 178; *Johnson* vs. *Spicer,* 107 N. Y., 185). * * * And the interesting question as to the validity of an agreement based *upon a promise to marry* made after and entirely independent of a prior promise to marry as between the parties, is not necessarily before us."

This language is so plain that the doctrine must be considered as finally settled that *the marriage,* following an existing engagement, constitutes a legal consideration to sustain a separate antenuptial promise, although the Court of Appeals declined to express any opinion as to the sufficiency of a *promise to marry,* succeeding a binding betrothal, as a valid consideration.

This case is also cited by the appellant (App. Br., p. 10) as the *principal* authority for his contention, but a cursory examination of the extracts from the opinion quoted by the appellant plainly shows that they are in no way pertinent to the appellant's claim and that the appellant has either misconstrued or misunderstood the opinions of the several Courts in that case.

The quotation from the opinion of Mr. Justice Greenbaum is clearly contrary to the settled law of this State and was expressly disapproved and unanimously reversed by the Court of Appeals (Mr. Justice Willard Bartlett also concurring). The suggestion of the appellant that the Court of Appeals reversed the Special Term and upheld the antenuptial contract involved in that case, on the *sole* ground that the cancellation of the mortgage *only* constituted a valid consideration for the promise is both untenable and without support in fact. Instead the cancellation of the mortgage was deemed by the Court of Appeals merely a further and independent consideration for the promise, for Mr. Justice Chase, writing for a unanimous Court, says at page 217:

> "The provision in the agreement that the mortgage therein referred to shall be void or cancelled **also** constitutes a valuable consideration for the agreement."

And the following excerpt:

> "And the interesting question as to the validity of an agreement based upon a *promise to marry* made *after* and entirely *independent* of a prior promise to marry between the parties is not necessarily before us,"

upon which appellant relies to show that the mortgage cancellation was the only consideration and that the marriage was not a valid consideration, plainly demonstrates the unsoundness of his reasons and his interpretation of simple language. This reference too obviously relates to *a promise to marry* made after an existing promise to marry as distinguished from *the marriage,* as a consideration to support a contract.

In the leading case of *Phalen* vs. *U. S. T. Co.,* 186 N. Y., 178, cited in the Sarasohn decision, *supra,* the printed record shows that not only was there a subsisting engagement to marry but, *as in the case at bar,* the antenuptial contract expressly recited the fact. Mr. Justice Werner, writing for the majority of the Court upholding the marriage as an enforceable agreement, says:

> "We now pass to that phase of the discussion in which it is argued that there was no *consideration,* as between father and son, which enables the latter to maintain an action to enforce the agreement * * *. This action is founded upon what are known as *formal marriage articles,* whereby certain property is settled or agreed to be settled

upon either one or both of the spouses about to be married. Instead of being frowned upon, such agreements are favored by the Courts and have been upheld and enforced whenever the contingency provided by the contract arose (*Johnson* vs. *Spicer,* 107 N. Y., 185), and they usually proceed from the prudence and foresight of friends or the warm and anxious affection of parents; and if fairly made *they ought to be supported according to the true intent and meaning of the instrument by which they are created* * * * He was a party to the agreement and performed on his part by the *marriage with his wife.* He had a legal interest in the complete execution of the contract and under the principle now well established, he can compel performance, unless some good reason is made to appear why he should not be permitted to do so. * * * It is the rule, both in law and equity, as was held in *Borland* vs. *Welch* (162 N. Y., 104), that such agreements cannot be enforced by mere volunteers or strangers to the consideration, but there Judge Cullen referred to the rules subscribed to by this Court, that even a person not a party to such a contract may compel performance if it has been made for his benefit. In one case it was held that the relation of parent and child (*Tard* vs. *Weber,* 95 N. Y., 181), and in another husband and wife (*Buchanan* vs. *Tilden,* 158 N. Y., 109), *sufficient consideration* to support the action. It is not necessary to go so far in this case. Here the plaintiff was not only within the influence of the consideration, as

it was called, but was actually a party to the contract."

In *Kramer* vs. *Kramer,* 90 A. D., 176, also mentioned in the opinion of the Trial Court (fol. 224), the precise question involved on this appeal, was presented, whether the *marriage*—differentiated from a promise to marry—was a sufficient consideration in law to support a promise, made subsequent to an existing engagement and the Appellate Division of the First Department by a unanimous Court held:

> "After this testimony had been given, the plaintiff was called as a witness in rebuttal and testified that she became engaged to be married to Alfred E. Kramer in May, 1898, and that the engagement was consummated by marriage November 9th, of the same year; that between the date of the engagement and the marriage she had a great many conversations with Alfred E. Kramer about giving her some property prior to the marriage. * * * The latter holding seems to be based upon the ground that at the time when the agreement was made to give the plaintiff $10,000 and such additional sums as he was able, it was in consideration of the promise to marry, and that such promise had already been given, and there was then a subsisting engagement by mutual promise that as there was no consideration for it, and such promise being thereafter fulfilled by marriage, without further contract or condition, there was no consideration for anything. * * * *There is an essen-*

tial difference between a promise to marry and a contract made in consideration of marriage. A promise to marry is binding although verbal. A contract in consideration of marriage is void, unless in writing under the third subdivision of the Statute of Frauds. * * * Valid contracts in consideration of marriage may be specifically enforced. (Schouler Dom. Rel., 5th *et seq.*). Marriage is among the highest considerations known to the law and is sufficient in support of a voluntary settlement based upon it. (*Sterry vs. Arden,* 1 Johns. Ch., 260; *Henry* vs. *Henry,* 27 Ohio St., 121). In *Ayerst* vs. *Jenkins* (L. R., 16 Eq. Cas., 1873) a settlement in consideration of marriage was upheld as against the personal representatives of the settlor, although the marriage under the laws of England was invalid. The law has always jealously guarded the rights secured to the wife by antenuptial agreements *in consideration of marriage* and has safeguarded the interest of the wife whenever it was possible in application of legal rules. * * * If the evidence justifies a finding of the existence of *an agreement in consideration of marriage Courts will support it.* In the present case the evidence upon the part of the plaintiff is sufficient to justify the finding of an agreement made in consideration of marriage. The conversation relating thereto was after the engagement of the parties to marry. *It related to a consummation by marriage and was, therefore, quite distinct and independent of the promise to marry.* It was before the marriage that the agreement was

made to pay the money and such payment was based upon the proposed consummation of the parties' engagement to marry. The engagement itself was not mentioned as forming any part of the consideration, but the evidence was that upon marriage the plaintiff would give the specified sum. To hold that under such circumstances the consideration for the agreement to pay was the promise to marry *would work a destruction of every antenuptial contract.* In all of them the engagement to marry existed and the language of the settlement on marriage recited in usual form 'Whereas a marriage is intended to be solemnized between,' etc., 'Witnesseth that in further performance of the said agreement and in consideration of the said intended marriage it is hereby agreed and declared,' etc. (Vaiz Sett., 108.) In the present case the evidence shows a promise to marry and then follows an agreement to pay followed by the marriage, and if the jury found that this evidence was true they could not only find but the irresistible conclusion would be that the agreement to pay was based upon the consideration of marriage, and consequently if it was properly evidenced *all the elements of a good promise in consideration of marriage would exist.*"

While it is true that the Appellate Division was subsequently reversed, the Court of Appeals did **not disapprove of or disagree with the** foregoing principles of law expressed by that Court, as to the sufficiency of the marriage as a valid consideration, but the reversal was based

upon a different construction and conclusion on the facts. The Appellate Division determined as a fact that the antenuptial promise was made *intermediate* the engagement and the marriage, so that the promise was in consideration of the marriage, but the Court of Appeals (by a divided court of 4 to 3) decided, that the promise to pay was in fact made two years after the marriage was consummated and accordingly in no sense could it be held that the promise to pay was made in consideration of the marriage. The following is the language of the Court (181 N. Y., 477 at 480):

> "It was not given in consideration of a promise on the part of the plaintiff to marry the defendant's brother since it was given more than two years after the marriage was consummated. * * * A marriage already consummated could not very well constitute a valid consideration for the note."

The appellant's contentions (Ap. Br., p. 12) are readily conceded (1) that "the antecedent engagement furnished no consideration" for the note, for it is the consummation of the marriage that constitutes the consideration; and (2) that it was held "that the note was without consideration," but that conclusion necessarily followed the determination of the Court of Appeals that the promise to pay was made two years after the marriage. As no other consideration was alleged or proven, it was solely in this connection that the Court very properly observed that there was "no consideration for the note in *any aspect of the case.*"

The doctrine laid down by this Court in the Kramer case, *supra* is, therefore, directly in point and should be controlling on this appeal.

The opinion of the Court in *Buchanan* vs. *Tilden,* 158 N. Y., 109, is also quite pertinent to the case at bar. The Court says:

> "The authorities in support of the doctrine that the relation of husband and wife afford ample consideration for the covenants of third parties with the husband inuring to the benefit of the wife collated and approved * * * We do not think it will be seriously questioned on principle that the relation of husband and wife is fully equal to that of *parent and child as a consideration to support a promise* * * * Assuming that she (the wife) had food, raiment and shelter—necessaries of life—can it be said that these represent the full measure of the moral or legal obligation imposed upon the husband by the common law. In a jurisdiction where the doctrine of *Lawrence* vs. *Fox* is the settled law, there is no difficulty in sustaining both at law and in equity, the kindred principle announced in *Dutton* vs. *Pool.*"

And the decision in *Borland* vs. *Welch,* 162 N. Y., 104, also involving a marriage settlement, is equally significant. The Court writes:

> "In *Todd* vs. *Weber* (95 N. Y., 181) it was held that the *relation of parent and child was a suwcient consideration* for a contract made by the parent with others for the support of the child and that the latter might

> enforce it by action * * * They make an exception, however, to the rule in favor of a wife and children; and the reason for this exception is that for them the settlor is under a natural and moral obligation to provide. Such persons alone are within the influence of the marriage consideration."

See also

> *Bouton* vs. *Welch,* 170 N. Y., 554;
> *Peck* vs. *Vandemark,* 99 N. Y., 29;
> *Schouler's Domestic Relations,* Sec. 178, quoted with approval in the Phalen case, *supra.*

The decisions from other states cited in appellant's brief (Point 3) declare only general legal principles but are in no way analogous or applicable to the case at bar.

Other citations deserving comment are *Blanshan, as admr.* vs. *Russel as exec.,* 32 A. D., 103, affd. 161 N. Y., 629, where the original parties died before the consummation of the marriage, and also *Cloyes* vs. *Cloyes,* 36 Hun, 145. These cases are fully discussed by the Appellate Division in *Kramer* vs. *Kramer, supra,* and it is sufficient to call attention to the following language:

> "Nothing contained in *Blanshan* vs. *Russel* (32 A. D., 103, affd. 161 N. Y., 629) or in *Cloyes* vs. *Cloyes* (36 Hun, 145), is in conflict with this view.
>
> In the *first* of these cases it appeared that the engagement of marriage was existing at the time the promise was made to give the

note. A marriage was never consummated between the parties nor was there evidence from which it could be *inferred* that the note was to be given in consideration of marriage. Under these circumstances the Court properly held that there was no consideration for the note and that the mere existence of the engagement would not support an executory contract to pay money.

In the *second* case there was an attempt to enforce payment of a check, which had been given to the wife on the night of the marriage. There was no prior agreement to give it, the wife knew nothing about it and did not see it until after the ceremony of marriage had been performed and she testified that it was a surprise to her. The wife delivered the check to the defendant for safekeeping. Difference having subsequently arisen between the parties, she brought action to recover the amount of the check. The Court held that a subsisting contract to marry was not a good consideration for the check and that such agreement could not be enforced, unless a contract was made, having for its basis the consideration of marriage and this was not shown to exist; that the check could not be enforced as a gift, as it transferred nothing. We recognize the rule of these cases. The distinction, however is plain, for here the evidence is sufficient to warrant the jury in finding that the note was given in consideration of marriage, based upon an agreement entered into after the engagement. We conclude, there-

> fore, that the oral agreement, if established, followed by marriage was sufficient upon which to found a promise to pay money by husband to wife; *that it was made in consideration of marriage and not of the promise to marry,* and that the jury would be authorized to so find."

The appellant in his brief (P. 12) refers to the cases of *Johnston* vs. *Spicer* (107 N. Y. 185), *Borland* vs. *Welch* (162 N. Y. 104) and *Phalen* vs. *U. S. Trust Co.* (186 N. Y. 178) all involving marriage settlement agreements and although the Court of Appeals in each instance upheld the marriage settlement as a valid contract, the appellant contends that these cases are not authority for but distinguishable from the case at bar, for the mere reason that there were other considerations *besides the marriage* to sustain the marriage settlements as binding contracts. But this distinction is clearly negligible, for if more than one consideration exists for a marriage settlement, it does not follow that the marriage is not a valid consideration in law sufficient to support the agreement.

Besides it should be noted that the very distinction pointed out by the appellant that there were mutual promises in the marriage settlement, in addition to the marriage, which constituted a sufficient consideration in those cases, is eminently applicable to the case at bar, for the defendant's wife, also a party to the marriage settlement agreement, likewise enters into a mutual and reciprocal promise expressly in consideration of the promise of the defendant, as will now be fully discussed.

Under the authorities, therefore, the antenuptial promise of the defendant is supported by a valid consideration in the consummation of the marriage by the promisee Count Gulinelli with the beneficiary Blanche Schweizer and constitutes a legal and enforceable contract.

B.

The instrument of January 16th, 1902, is *also* sustained by a *further* and *independent* consideration of the most fundamental character emphatically expressed within its four corners. Even the appellant must concede that if any consideration in law appears upon the face of the instrument it is enforceable. To be sure it is no objection that a contract is founded on more than one consideration and the agreement is binding if one or more of the considerations is valid in law.

It is a legal axiom with very few exceptions, that a promise is always a good and sufficient consideration for a reciprocal promise. An inspection of the instrument shows two separate mutual promises by (1) the defendant and (2) his wife, made, *inter alia,* in consideration of each other.

The defendant in part undertakes "*now, in consideration of all that is herein set forth, the said Joseph Schweizer promises and expressly agrees by the present contract to pay,* etc." (fol. 203) and Mrs. Schweizer the defendant's wife, **also a party to the agreement** in turn, assumes the reciprocal obligation "*And the said Mrs. Ernestine Schweizer, in view of what has been herein set forth, agrees by the present contract and hereby promises that at the death of said Mr. Schweizer, she will pay, etc.,*" (fol. 205).

Mrs. Schweizer was under no legal duty to become a party to this contract and voluntarily

made the promise as an additional consideration for the agreement of the defendant.

It is too obvious, therefore, for further discussion that the promise of the defendant is abundantly supported by ample legal consideration, either the consummation of the marriage or the reciprocal promise or both and the instrument involved on this appeal is a valid, binding and enforceable contract and the Trial Court was not only justified but required to uphold its legality and to direct a verdict for the plaintiff, for $2500.

It might be claimed by the appellant that the Trial Court did not pass upon the mutual promise of the defendant's wife as a sufficient consideration but merely considered and rested its decision upon the consummation of the marriage by Count Gulinelli as a sufficient and valid consideration to support the defendant's promise but it is submitted that such an objection is purely trivial. The action is upon a written instrument and this Court should consider the instrument in its entirety in determining whether it is supported by a valid consideration or assigned erroneous reasons in the opinion is not important on this appeal. The controlling question is whether this written instrument is supported by *any* valid consideration in law—be it the consummation of the marriage by Count Gulinelli or the mutual promise of defendant's wife or both.

THE FACT THAT THE LOWER COURT O... THE INSTRUMENT FROM ONLY ONE ... ON THE QUESTION OF CONSIDE...

Therefore even if this Court should decide that the mutual promise of the defendant's wife was — and the consummation of the marriage was not — a sufficient and valid consideration to support the instrument as a binding and enforceable contract, it is respectfully submitted that the judgment should nevertheless be affirmed under Sec. 1317 of the Code of Civil Procedure.

POINT III.

The judgment should be affirmed with costs.

Respectfully submitted.

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The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

Argued by
WILLARD BARTLETT.

Court of Appeals.

ATTILIO DI CICCO,
Respondent,

AGAINST

JOSEPH H. SCHWEIZER, Impleaded with another,
Appellant.

Appellant's Reply Brief.

POINT I.

In an action at law upon a contract, the only intention to be considered is the intention disclosed by the language of the contract.

It is needless to cite authorities in support of the proposition that regard must be paid to the intention of the parties in construing a contract. The suggestion, however, that because it was the intention of the gentleman who drew up the agreement in suit to prepare one which should be binding and enforceable in law, it is not available to the respondent. If it were, it would utterly destroy the defense of no consideration in all cases; for we suppose that every attorney who prepares an agreement in writing intends to draw up a valid instrument. The intention of the attorney really has not anything to do with the case; but if it had, it does not follow that he intended to prepare a contract which should be enforceable in an action *at law*.

POINT II.

Assuming (which we deny) that such an agreement in suit is enforceable at all, it can only be enforced in an equity suit to which all the persons interested are parties.

Even if the learned counsel for the respondent correctly interprets the *Sarasohn* case (193 N. Y. 203) and an agreement made after a previous promise to marry and in consideration thereof may be enforced, it seems to us perfectly plain that, in analogy to cases arising upon family settlements, the enforcement can be had only in equity, where all the persons interested in any way in the contract can be heard. Thus in an equity suit upon the present agreement, the Countess Gullinelli, the plaintiff's assignor, would necessarily be a party.

The present action, however, is plainly and unquestionably an action at law. The requirement that a party asserting rights under an agreement of this nature, must proceed in equity and cannot assert his claim at law, is not merely formal and technical but is essential and a matter of substance. The leading modern case on the subject of these family agreements is *Winne* v. *Winne* (166 N. Y. 263), in which the opinion was written by Judge Martin. It was a suit in equity upon a contract of adoption, not strictly legal. Judge Martin conceded in his opinion that the agreement was not enforceable at law, saying:

> "Nor is it a bar to the granting of such relief that an action at common law cannot be maintained upon the agreement. There are many contracts upon which an action at law cannot be maintained which are enforced in equity by a decree for specific performance."

And he proceeds to quote with approval from POMEROY on Specific Performance (Section 31), where that learned and accomplished text writer says:

> "There are agreements which the common law by virtue of its own doctrine, irrespective of statutory regulation, treats as invalid; as not contracts and for which it furnishes no remedy; but which equity in the application of its conscientious principles considers as binding and enforces by awarding its relief of a specific performance."

The foregoing proposition is peculiarly applicable to the present case. Here we have an agreement which the common law by virtue of its own doctrine, treats as invalid and as not being a contract at all; but it is conceivable that if all the facts concerning the circumstances under which it was entered into and the present relations of the parties, were laid before a Court of Equity it might be induced to enforce it. On the other hand, it is equally conceivable that if all such facts were laid before the court in an equity suit, it would hold that the plaintiff's claim was without support in equity and would therefore, refuse to enforce it. As Judge Martin says in *Winne* v. *Winne* (*supra*):

> ". . . in cases of this character where it appears for any reason that the enforcement of an agreement would be unfair, unequitable or unjust, the remedy should be denied. Each case must be governed by its own facts and circumstances and unless the proof discloses a situation where good, conscientious and natural justice require the enforcement of the agreement, the relief should not be awarded."

POINT III.

The promise by Mrs. Schweizer was not a consideration moving to the appellant.

Counsel for the appellant finds it impossible to perceive how the undertaking on the part of Mrs. Schweizer to make payments to Countess Gulinelli after the death of her husband could in any possible view constitute a consideration for his promise. It did not benefit Mr. Schweizer in any way. It did not relieve him of any obligation, or protect him against any demand or indeed affect him or his estate. This promise on the part of the wife lacked every element necessary to a consideration moving to the husband and cannot properly have any influence upon the disposition of the present litigation.

All of which is

Respectfully submitted,

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