INDEX

PAGE

Notice of Appeal 1
Grounds of Appeal 2
Order Satisfying Judgment 3
Order to Show Cause 5
Original Judgment 6

DEPOSITIONS.

LEO S. SULLIVAN:
Direct 8
Cross 11

THOMAS F. MEEHAN:
Direct 20
Cross 22
Re-Direct 23

RICHARD DOHERTY:
Direct 24
Cross 27
Re-Direct 29

CHARLES GILMAN:
Direct 29
Cross 31

Commissioner's Certification 36
Exhibit P-1 37
Exhibit P-2 38
Exhibit P-3 39
Exhibit P-4 40

Exhibit D-1—Rule to Show Cause 42
Exhibit D-2—Notice 43
Exhibit D-3 44
Exhibit D-4 44
Exhibit D-5 46

FURTHER DEPOSITIONS.

THOMAS FEMIANO:
Direct 47
Cross 50
Re-Direct 54

LOUIS FEMIANO:
Direct 55
Cross 56
Re-Direct 56

RICHARD DOHERTY:
Direct 57
Cross 57

LEO F. SULLIVAN:
Direct 58
Cross 59

Opinion 62

Notice of Appeal.

NEW JERSEY SUPREME COURT.

10

CHARLES GILMAN, *Plaintiff,* *vs.* THOMAS SORRENTINO, *Defendant.*	Action at Law.

20

TAKE NOTICE, that the above named plaintiff hereby appeals to the New Jersey Court of Errors and Appeals from the judgment of the New Jersey Supreme Court in the above matter, cancelling the judgment in favor of the plaintiff and against the defendant herein.

Dated October 10, 1925.

30

Respectfully,

RICHARD DOHERTY,
Attorney of Plaintiff-Appellant.

To:
SULLIVAN & MEEHAN,
Attorneys of Defendant.

40

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES GILMAN, *Plaintiff-Appellant.* *vs.* THOMAS SORRENTINO, *Defendant-Appellee.*	On Appeal.

10

TAKE NOTICE that the plaintiff-appellant relies upon the following grounds for the reversal of the judgment of the Supreme Court, directing the cancellation of the judgment in the above entitled cause:

20

1. There was presented to the Supreme Court, no evidence from which an accord and satisfaction between the plaintiff and the defendant could be inferred.

2. There was presented to the Supreme Court, no evidence from which a novation could be inferred among the plaintiff, the defendant and the person from whom the defendant alleged that he borrowed the money wherewith to satisfy the judgment.

30

3. The defendant failed to show a right to have the judgment cancelled by proof that was clear and convincing.

40

4. The Supreme Court abused its discretion in directing the cancellation of the judgment.

5. The Supreme Court erred in point of law, in directing that the judgment be cancelled upon the evidence submitted.

Dated October 20, 1925.

RICHARD DOHERTY,
Attorney of Plaintiff-Appellant.

10

To:
SULLIVAN & MEEHAN,
Attorneys of Defendant-Appellant.

Order Satisfying Judgment.

NEW JERSEY SUPREME COURT.

20

CHARLES GILMAN, *Plaintiff*, vs. THOMAS SORRENTINO, *Defendant*.	Action at Law.

The rule to show cause dated February 28th, 1925, granted in this matter, why the judgment herein should not be satisfied of record, having been heard by the consent of the parties before Honorable James F. Minturn, one of the Juctices of this Court and the testimony and affidavits taken under said rule having been read and considered and the Court having also heard and considered the arguments of Richard Doherty, Esq.,

30

40

Order Satisfying Judgment.

of counsel with plaintiff and Harry A. Stiles, of counsel with defendant, and the court being of opinion that the defendant is entitled to have the judgment in this cause satisfied of record;

It is, on this 10th day of October, 1925, on motion of Harry A. Stiles, of counsel with defendant,
10 Ordered, that the judgment in this cause be satisfied of record and that the Clerk of this Court do enter a satisfaction thereof.

James F. Minturn,
J. S. C.

20

30

40

Order to Show Cause.

NEW JERSEY SUPREME COURT.

CHARLES GILMAN, *Plaintiff*, vs. THOMAS SORRENTINO, *Defendant*.	Action at Law.

10

On reading and filing the affidavit of Leo S. Sullivan, IT IS, on this Twenty-eighth day of February, 1925, ORDERED that Charles Gillman, the plaintiff in the above cause, show cause before me on the Fourteenth day of March, 1925, at ten o'clock in the forenoon, at the Hudson County Court House why he, the said plaintiff and Richard Doherty, his attorney, should not be ordered and directed by this Court to satisfy the judgment in the above entitled cause, or why the said judgment should not be satisfied by the order of this Court.

20

And it is further ordered that in the meantime, and until the further order of this Court, all proceedings upon the said judgment or against the bail for the said defendant, be and the same are hereby stayed.

30

40

And it is further ordered that the said defendant may take affidavits to be used on the hearing of this rule before a Supreme Court Commissioner on four days' notice to the said plaintiff or his attorney.

JAMES F. MINTURN,
J. S. C.

10

Original Judgment.

NEW JERSEY SUPREME COURT.

CHARLES GILMAN, *Plaintiff,* *vs.* THOMAS SORRENTINO, *Defendant.*	Action at Law. Postea.

20

The above entitled action was tried April 22nd, 1924, at Jersey City, Hudson County, before Honorable Willard W. Cutler, Circuit Court Judge and a jury, and a verdict was rendered by the jury in favor of the plaintiff and against the defendant, and the damages of the plaintiff were assessed by the jury in the sum of $25,000.00, apportioned by the jury as follows: compensatory damages, $5,000.00 and exemplary damages $20,000.00.

30

Dated May 9, 1924.

WILLARD W. CUTLER,
Circuit Judge.

40

Filed and Judgment entered May 10, 1924.

Depositions.

NEW JERSEY SUPREME COURT.

CHARLES GILMAN, *Plaintiff*, *vs.* THOMAS SORRENTINO, *Defendant.*	Action at Law. On Rule to Show Cause.

10

Depositions in the above entitled cause, taken before me, Pierre F. Cook, a Supreme Court Commissioner of the State of New Jersey, at my office, 1 Exchange Place, Jersey City, New Jersey, this thirteenth day of March, 1925, at three o'clock in the afternoon, pursuant to an order for proofs made herein and bearing date February 18, 1925.

20

APPEARANCES:

RICHARD DOHERTY. Esq.,
Attorney for Plaintiff;
MESSRS. SULLIVAN & MEEHAN,
Attorneys for Defendant.
HARRY A. STILES, Esquire,
of Counsel.

30

It is stipulated that the depositions be taken stenographically and the signature of the witnesses waived.

40

State of New Jersey } ss.:
County of Hudson }

Leo S. Sullivan, being first duly sworn according to law, on his oath deposes and says:

10 Direct Examination by Mr. Stiles:

Q. Judge Sullivan, you are a practising attorney of the State of New Jersey? A. I am.

Q. You represented one Thomas Sorrentino in a civil action started by Charles Gilman, plaintiff? A. I did.

Q. That is, your firm, Sullivan & Meehan, represented him? A. Yes, sir.

20 Q. You were in charge of the civil action? A. I was.

Q. Prior to the time this action was brought did you have any conversation with Judge Doherty, representing the plaintiff, with regard to the amount to be paid in settlement of the case? A. I did.

Q. Did you make any offer of settlement to Judge Doherty? A. I did.

Q. What amount was offered to him in settlement? A. I offered $500. in settlement of the case.

30

Q. Did he accept that amount? A. He did not.

Q. Did he make any counter offer? A. He did.

Q. What was the amount of the counter offer? A. $1000.

Q. Was that acceptable to you or your clients? A. I discussed the matter with my clients but they were not willing to pay that amount.

40 Q. And the case was tried? A. Yes.

Q. This action was brought in the New Jer-

sey Supreme Court, was it not? A. Yes.

Q. And tried before Judge Cutler? A. Right.

Q. Do you know whether a rule to show cause was applied for after judgment obtained in this case? A. I do; applied for and granted.

Q. You did not apply for it? A. I did not apply for it; Mr. Meehan, my partner, applied for it. 10

MR. STILES: I don't think there is any objection to using the rule to show cause, is there, Judge, and putting it in evidence?

MR. DOHERTY: No.

MR. STILES: I would like to offer the rule to show cause and the notice of motion made thereunder, both of which were acknowledged by Judge Doherty. 20

Marked Exhibits D-1 and D-2 in evidence.

Q. This civil case was started by capias, was it not? A. It was.

Q. What was the amount of the recognizance upon the capias? A. To the best of my knowledge, $4000.

Q. After the judgment was obtained in this case was there any talk of settlement of the case with Judge Doherty? A. There was. 30

Q. Did he make an offer to you at that time? A. I made an offer to him of $1000. which he refused.

Q. Did he make any offer to you to settle the case? A. He told me he would take $2000. in view of the size of the verdict they had received; they had received a large verdict.

Q. Did you pay him any money? A. I paid him $2000. 40

Q. Was there any conversation had at the time you paid him the $2000, between you and him? A. There was.

Q. What was the conversation? A. I offered him $2000; I got the $2000. from Mr. Famiano, who is a brother-in-law of Sorrentino's offered it to Mr. Doherty and said, "I have the $2000. which you agreed to accept in this case", and I gave it to him; that is as far as I can remember the conversation.

Q. This $2000. was in satisfaction of the judgment obtained? A. The judgment obtained—

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

Mr. Stiles: I will withdraw the question.

Q. What was the $2000. paid for? A. In satisfaction of the judgment.

Q. After paying this $2000. to Judge Doherty, do you know what was done with regard to the rule to show cause and notice served upon it? A. It was never prosecuted.

Q. Was there any agreement, when you paid this money to Judge Doherty, about handing a satisfaction piece to you? A. No; there was not.

Q. I show you a copy of a letter dated August 22, 1924, addressed and directed to Richard Doherty, 921 Bergen Avenue, Jersey City.

Mr. Stiles: Have you the orginal of that?

Mr. Doherty: Yes, I have. (Producing letter.)

Mr. Stiles: You admit the receipt of this letter of August 22nd, don't you?

Mr. Doherty: Yes.

Letter dated August 22, 1924, offered in

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

Q. Did you receive the letter which I hand you here, dated August 26, 1924, signed by Richard Doherty? A. I did.

Letter dated August 26, 1924, offered in evidence, admitted without objection and marked Exhibit D-4.

10

Q. You did not obtain this rule to show cause yourself; that was obtained by your partner, Mr. Meehan? A. Yes.

CROSS EXAMINATION BY MR. DOHERTY:

Q. You represented Sorrentino in both the civil case that you have referred to, and also on an indictment that grew out of the same act? A. I did.

20

Q. And your advice to him was to plead non vult, which he did? A. Right; that is so.

Q. Do you recall that that was done some months before the trial? A. That is when he pleaded, you mean?

Q. Yes.

30

MR. STILES: There is no denial, is there, that you received this $2000?

MR. DOHERTY: Oh, no.

MR. STILES: And no denial that is was paid over on May 2nd?

MR. DOHERTY: I think I endorsed on the back of the Ca. Sa. I credited him for $2000.

MR. STILES: So that we can put in here that $2000. was paid on May 2nd by Judge Sullivan to yourself; that is admitted?

40

MR. DOHERTY: Yes.

A. On January 17th he pleaded non vult.

Q. Do you recall that the verdict in the civil case was rendered on April 22nd? A. It was the latter part of April some time, April 22nd or 26th, to the best of my recollection.

Q. And on the plea of non vult, in the regular course, he was up before Judge Lazarus for sentence, wasn't he? A. He was.

Q. And you were concerned in having Judge Lazarus extend clemency to him? A. I was.

Q. And to that end you and Judge Lazarus had some conferences in the late Judge's chambers? A. In your presence.

Q. Well now, just answer the question; I didn't ask you that. You had the conference, did you? A. Judge Lazarus, you and I held conferences.

Q. In the Judge's chambers? A. In his chambers.

Q. Are you positive now that I was present at all of them? A. No, you were not present at all of them; the first conference was held when you were not in the case.

Q. At that conference, Mr. Gilman, who was the complainant in the indictment, was present, wasn't he? A. He was.

Q. And Judge Lazarus expressed a view that in order to obtain leniency from the court, Sorrentino should exhibit some spirit of justice towards Gilman on account of the injury? A. (No answer).

Q. That is my question. Was that the Judge's attitude? A. The Judge's attitude was that Mr. Sorrentino should pay Mr. Gilman something, yes.

Q. And that was expresed by Judge Lazarus

at that first conference, at which Gilman was present, and from which I was absent? A. It was; that is so.

Q. And there the matter of money was talked of, wasn't it? A. It was.

Q. And $400. was mentioned? A. It was.

Q. Now, you say in your testimony that the offer to settle for $500. emanated from me; isn't it true that that offer— A. No, I didn't say that; if I did, I made a mistake; I did not state that; I said I offered $500. which you refused to accept, as I recollect my testimony. 10

Q. Now, the offer of $500. was made by you to Mr. Gilman? A. Yes.

Q. Before you made it to me? A. Yes; and accepted by Mr. Gilman. 20

Q. And afterwards I said it was inadequate, didn't I? A. Yes.

Q. Do you remember that I accompanied that refusal with an explanation why it was inadequate? A. No; I do not.

Q. Didn't I tell you that Gilman had a bullet nestling against his heart, that he knew nothing of, because the doctor advised that he be not apprised of it, and that was why he was willing to take the $500? A. You never told me—I don't recall whether you told me that or not. 30

Q. In these exchanges between you and me as to settlement you also sought to make it clear that Sorrentino himself had no money, didn't you? A. Yes.

Q. Is that the fact? A. That was the fact.

Q. Did you place your appeals for a settlement on the ground that he would have to borrow money from somebody? A. I may have; I have no recollection whether I did or not. 40

Q. The matter of the sentence of Sorrentino was deferred until after the civil trial? A. Yes.

Q. Do you recall that the civil case was tried on Tuesday? A. No, I do not.

Q. Do you recall that it was Thursday of the week following the trial that we gathered in Judge Lazarus's chambers? A. It was after the trial sometime; I don't know when.

Q. Was it not the day before you gave me the money? A. That I don't know.

Q. Was Judge Lazarus a party to this payment of the money to me? A. No.

Q. Did he in any way suggest that that money should be paid before he would be lenient with Sorrentino? A. He did not suggest that the money should be paid, no.

Q. Judge, didn't you hear Judge Lazarus tell Sorrentino that the panalty was—the maximum penalty was seven years, and that he stood ready to give him severe punishment if he did not do something to expiate the damage that he had inflicted on Gilman? A. No, I did not hear him say that.

Q. Do you recall the circumstances of the matter being laid over by Judge Lazarus until he heard from me that the money had been paid? A. I do.

Q. How long was it laid over, do you know? A. I don't know.

Q. Was it the next day? That I don't know; I can't say whether it was the next day or not.

Q. In the meantime this money had been borrowed from Famiano? A. Yes.

Q. A kinsman or relative? A. A kinsman; a brother-in-law of his.

Q. It was borrowed for delivery to me before sentence was imposed by Judge Lazarus, wasn't it? A. Yes; with the understanding that it was in satisfaction of the judgment.

Q. I didn't ask you that. A. You asked my understanding of how the money was delivered to you and I am trying to explain it to you. 10

Q. Now, Judge, isn't it true that it was borrowed for delivery to me to concilate Judge Lazarus, and for no other purpose? A. No, it is not the truth.

Q. You say that there was another interest felt in this pauper paying $2000. on an uncollectible judgment? A. I don't understand the question.

Mr. Stiles: I object to that question. 20

Q. Was there another interest felt by you or anyone else in Sorrentino, a man of no means, paying $2000. on a judgment which was normally uncollectible?

Mr. Stile: I object to that; I think it is a mis-statement of the facts that we have before us.

A. I don't really understand that question yet. 30

Q. Do you understand that you have testified that Sorrentino had no money? A. Yes.

Q. Now, a man with no money is a poverty stricken man, isn't he? A. Yes.

Q. You understand that the money was borrowed from his brother-in-law? A. His brother-in-law; who had retained me in the case; yes

Q. You say that that money was borrowed from his brother-in-law not to conciliate Judge Lazarus, but in order that this man without any 40

money, and against whom the judgment was uncollectible, might pay $2000? A. Yes; to save him from going to jail on a capias; on a civil capias.

Q. But not to save him from going to jail on the indictment? A. No.

10 Q. Don't you know that he had been warned by the Judge that he would go to jail on the indictment if he did not pay the money? A. No, I don't; neither do you.

Q. You say you did not get a satisfaction of judgment? A. I did not.

Q. Nor you didn't get a receipt? A. I did not.

Q. Can you explain why? A. Because you would not give it to me.

20 Q. Did you ask for it? A. I did.

Q. When? A. I wrote to you and asked you for it.

Q. Let us have a copy of that letter, will you, Judge?

Counsel for the defendant produces copy of letter and hands same to examining counsel.

Mr. Doherty: I am asking for the copy
30 of the letter that he wrote in which he asked for a receipt.

A. For a receipt or satisfaction?

Q. A receipt.

Mr. Stiles: You have the original, haven't you, Judge?

Mr. Doherty: No, I haven't.

Mr. Stiles: Of our letter to you?

Mr. Doherty: No, I haven't.

40 A. Here is a copy of a letter dated October 4th; and here is one prior to that, September 3rd, in which I ask for a receipt.

Q. Is the literal situation this, that on August 22nd you asked me to send you a satisfaction of judgment, and on September 3rd you asked me to send you a receipt? A. I don't know. On August 22nd, you say?

Q. No; you have already identified the letter of August 22nd; that one of August 22nd asked for the satisfaction? A. Right. 10

Q. And then on September 3d you were asking for the receipt? A. Right.

Q. Up to August 22d you asked for nothing, did you? A. No, I don't think I did.

Q. Did you orally ask me for a receipt then on August 22d? A. No, I didn't.

Q. Did you ask for it at the time you delivered the money? A. To the best of my recollection I asked for a satisfaction; I am not sure of that; I don't know. 20

Q. You are not sure? A. No.

Q. Would your memory be aided, Judge, if you were told that a receipt was offered to you by me at the time and that you refused to take it? A. I don't remember.

Q. Do you recall the circumstances of giving two reasons why you did not want a receipt? A. No, I don't. 30

Q. You don't recall that? A. No, I don't.

Q. The return of the rule to show cause was extended to the October Term on account of the shortness of time, wasn't it? A. I believe it was.

Q. Now, how do you explain, Judge, that you were inactive as to this whole matter from the time that the money was paid until August 22d? A. Because my clients came and asked me for a satisfaction of judgment at the time. 40

Q. And it was acting upon that spur that you wrote the letter? A. Yes.

Q. Have you got the original of a letter that I wrote you under date of October 3d? A. Here is it (producing letter).

10 Letter dated September 3d, 1924, offered in evidence, admitted without objection, and marked Exhibit P-3.

Letter dated October 3, 1924, offered in evidence, admitted without objection, and marked Exhibit P-2.

Q. In reply to that last letter that was shown to you did you write me the letter of October 4th? A. Yes; that is in answer to that.

20 Q. Then did I rejoin to that letter by sending you that one—the date of this letter is October 6th? A. Yes.

Q. Isn't it true, Judge, that you wrote me that letter of August 22d because the time was approaching for you to perfect the rule to show cause, rather than that you were urged to do it by the request for a satisfaction from your client? A. No, it is not true.

Q. The rule, you say, was abandoned? A. The
30 rule had been abandoned at that time.

Q. When you say it had been adandoned, had you done anything affirmatively to abandon it? A. Yes, I will show you what I did; after I had made the settlement, when that rule was obtained, Mr. Meehan got it, and I asked him why he did that, that the case had been settled, and Mr. Meehan said, "What shall I do?" So this notation was made here, "Settled for $2000, May
40 2".

Q. What did you do intra coram in the way of abandoning that rule; did you file anything? A. No; never prosecuted it.

Q. I served you with notice of a motion to dismiss the rule at the January Term, didn't I? A. Yes.

Q. And you did not appear in response to that? A. I never appeared. **10**

Q. The money was paid in cash, was it not? A. The money was paid in cash.

Q. Do you remember when you paid it you stated that you did not want a receipt, for two reasons; first, that it was not Sorrentino's money, but Famiano's; and second, that all you sought was for me to tell Judge Lazarus that I have received the payment? A. I don't recall saying that. **20**

Q. Did I go and tell Judge Lazarus? A. I don't know whether you told Judge Lazarus or I did.

Q. Did we not go into the court room together and I indicate to him that the money had been paid? A. That may be so; I don't know if that is so or not; I know he was told, but whether you told him or I told him, I don't know.

Q. And he suspended the sentence? A. Yes; he sentenced him to the County Penitentiary for one year and then he suspended the sentence. **30**

Q. Surrentino lives in Brooklyn? A. He lives in Brooklyn, yes.

Q. Are you aware that a scire facias was issued on this recognizance? A. Yes, I am.

Q. And that it was served on the bondsman Russo? A. Yes.

Q. And there was a nihil as to Sorrentino? A. Yes. **40**

Q. And that is still pending? A. I suppose so; I don't know.

By Mr. Stiles:

Q. Who is Miss O'Byrne, Judge Sullivan? A. One of the stenograper's in by office.

10

Taken and sworn to before me }
this 13 day of March, 1925. }

Pierre F. Cook,
Supreme Court Commissioner.

State of New Jersey }
County of Hudson. } ss.:

20

Thomas F. Meehan, being first duly sworn according to law, on his oath deposes and says:

Direct Examination by Mr. Stiles:

Q. Mr. Meehan, you are an attorney and counselor-at-law? A. I am.

Q. And a member of the firm of Sulivan & Meehan? A. I am.

30

Q. After judgment was secured in the case of *Gilman v. Sorrentino,* did you apply for a rule to show cause? A. I did. The verdict of the jury in this matter, as I recollect it, I was in court at the time the jury returned with their verdict, they found for the plaintiff and against the defendant, and assessed damages at $5000. compensatory damages and $20,000. punitive damages; I thought a verdict of that kind was excessive, and after a conference with Judge Sullivan I applied for a rule to show cause, and the rule was

40

granted and signed by Judge Cutler. We were running towards the end of the term, and in order to get the record printed we had to have more time, and I served that notice on Judge Doherty to apply for an extension or to carry the matter over to the next term of court.

Q. Were you present at the time the money was paid over to Judge Doherty by Mr. Sullivan, your partner? A. No; I was not. 10

Q. Did you meet Mr. Sullivan the day that that money was turned over, on the second of May? A. I did.

Q. Did you have any conversation with him that day?

MR. DOHERTY: I object to that as immaterial and irrelevant. 20

A. I had a conversation with him about this case.

Q. What did he say to you with regard to the payment of money to Judge Doherty, if anything?

MR. DOHERTY: That is objected to.

A. Consequent upon my conversation with Judge Sullivan, I abandoned the prosecution, or at least we abandoned the prosecution of the rule to show cause; my information was that the case had been settled for $2000. so the stenographer, Miss O'Byrne, was so instructed and she endorsed on the file, "Case settled May 2, $2000"; the rule to show cause was not filed. 30

Q. The rule to show cause was not filed by you? A. No.

Q. Why wasn't it filed? A. Because the case was settled. 40

Q. Why did you abandon your proceedings? A. On the information that I received from Judge Sullivan that he and Judge Doherty had gotten together on the matter and settled the case for $2000.

10 Q. I show you this folder and the notation there, "Settled for $2000. May 2"? A. That is Miss O'Byrne's handwriting; our stenographer.

Q. Did you handle this civil case prior to trial, or was that in the charge of your partner, Mr. Sullivan? A. The case was in charge of Judge Sullivan.

Q. You knew nothing about the offers of settlement prior to the trial? A. I did not; not to my own knowledge; Judge Sullivan told me,

20 of course, of his offers, but I cannot testify to what he told me.

Cross Examination by Mr. Doherty:

Q. Did you do anything in a formal way to abandon the rule to show cause? A. After the signing of the rule and I took it back to the office, I got the information from Judge Sullivan when I sat down with Judge Sullivan.

30 Q. The matter was suffered to lapse? A. Why, the rule was never prosecuted.

Q. You knew there was a rocognizance furnished on the case, didn't you? A. I knew that Sorrentino had been picked up on a civil capias.

Q. And that he had given bail? A. I don't know whether I did or not at that time.

Q. Well, in any event, you did nothing at all to procure an exoneratur, did you, for the bail,

40 to let the bail out? A. At what time?

Q. After that conversation with Judge Sulli-

van. A. No; I did not. My understanding was that when suit was started the man was picked up on a civil capias and the bond was put up as a bond for appearance and he responded.

RE-DIRECT EXAMINATION BY MR. STILES:

10

Q. Do you know what the amount of the recognizance was on this capias? A. I never saw it, but I heard it was $4000; I heard that here today.

Taken and sworn to before me}
this 13th day of March, 1925.}

PIERRE F. COOK,

Supreme Court Commissioner.

20

It is stipulated that if Miss O'Bryne, stenographer of Sullivan & Meehan, were called as a witness, she would testify that on May 2d she marked in the folder of the file of *Gilman vs. Sorrentino* the following words: "Settled for $2000. on May 2d", having received this information from Mr. Meehan, of the firm of Sullivan & Meehan; to which Judge Doherty will object on the ground that it is immaterial, irrelevant and incompetent.

30

40

State of New Jersey }
County of Hudson. } ss.:

Richard Doherty, being first duly sworn according to law, on his oath deposes and says:

10 ~~Direct Examination by Mr. Stiles~~:

A. I was the attorney for Charles Gilman in a proceeding brought in the Supreme Court against Thomas Sorrentino, to recover damages for an injury received by shooting at the hands of Sorrentino. An order was made to hold to bail and the defendant was placed under arrest. A recognizance in the sum of $4000. was furnished by Francesco Russo. The action was commenced by
20 the service of the capias on February 7, 1924. At the time of the shooting the defendant was apprehended on a criminal charge, and, before the institution of the civil suit, was indicted. On the day that the capias was served, the defendant was present in the Hudson County Court House to plead to such indictment. About a week later his case was up for consideration in the matter of sentence and, I learned later, that Mr. Gilman, the plaintiff, was present and was consulted by
30 the Judge as to the extent of his injuries. Sentence was not disposed of then, nor until May 2d, the day on which the money was paid as testified by Judge Sullivan. The case was tried and a verdict rendered on April 22d. On the Thursday of the week following, Sorrentino being on the list for sentence, Gilman, Judge Sullivan, myself and Sorrentino, and some friends of his, met in Judge Lazarus's office, and I heard Judge Lazarus tell
40 Sorrentino that in order to receive lenient treat-

ment on his plea, it would be necessary for him to exhibit a spirit of justice towards Gilman; I heard the Judge refer in terms to the verdict that had been rendered and to say that that verdict furnished to him a sort of admonition as to how the case should be handled; he further told Sorrentino that the maximum sentence authorized by the law was seven years, and that in consideration of that and the magnitude of the verdict, he felt that Sorrentino should make some substantial payment to Gilman to relieve his distress so far as Sorrentino was able. Judge Sullivan told the Court that Sorrentino was a man of no menas, and that it was necessary that he should borrow any money that he might advance to Gilman. After a protracted conference, Judge Sullivan said that he would have Sorrentino endeavor to raise $2000. but stated that he could give no assurance that it could be done. It was then arranged that Judge Sullivan and I should meet again in Judge Lazarus's chambers the following day. I met him there and he had $2000. in currency, which he turned over to me. I was at that time sitting at Judge Lazarus's desk, which was equipped with stationery, and I asked Judge Sullivan if he wanted a receipt; he said that he did not want a receipt, because the money was not Sorrentino's, but Famiano's, and that his concern was only to have Judge Lazarus know that the payment was made, and he asked me to go into the court room where Judge Lazarus was sitting, and to give him the information that I had gotten the money. That was done and we parted. I took no further action in the matter, because the rule to show cause was continued until the October Term. On August 22d, at a time when I was

expecting the case to be served upon me, I received a letter from Judge Sullivan, which is in evidence and marked D-3. I answered it on August 26th by the letter marked D-4, expressing the view in that letter that I did not consider the——

10 MR. STILES: Of course I object to that. The letter speaks for itself.

A. My next communication in the matter was from Judge Sullivan on September 3d. which is Marked P-1, to which I replied by the letter of October 3d, marked P-2, Judge Sullivan answered the latter communication with the letter of October 4th, which is marked P-3, and replied with the letter of October 6th, which is marked P-4.
20 The rule to show cause was not argued, nor was anything done under it, as testified to by Mr. Meehan, and I gave notice of a motion to dismiss it at the January, 1925, Term. It was dismissed and a rule dismissing it was entered January 6, 1925. On January 7th a ca. sa. was sealed by the Clerk, and on January 10th he sealed a scire facias against Sorrentino and the surety, which was delivered to the Sheriff of Hudson County on January 12th. This was served per-
30 sonally upon Russo on January 13th, and was returned nihil as to Sorrentino. The respondent Russo filed what was styled as answer to the scire facias, and I served notice of a motion to strike it out at the March Term of the Supreme Court. On the Saturday preceding, a rule to show cause in the present matter was signed by Justice Minturn, on February 28th, and on the opening day of the term the motion to strike out
40 the answer was referred to him for disposition along with the present rule.

All the conversations which I had with Judge Sullivan respecting settlement of this case were had in the Hudson County Court House, either in or in proximity to the chambers of the Judge of the Court of Quarter Sessions. I never regarded the payment made in the present instance as having any other effect than that of procuring leniency on the criminal indictment. 10

Cross Examination by Mr. ~~Doherty~~: Stiles

Q. You say the capias was served upon the defendant Sorrentino? A. No; it was returned non est.

Q. The original capias? A. The original capias; yes. 20

Q. The original capias was served on the defendant Sorrentino while he was at the Court House to plead? A. The capias to answer; so I am informed.

Q. And this was on February 7th, 1924, you believe? A. Yes.

Q. Isn't it true, that prior to the trial of this civil case you or your client had offered to settle for the sum of $500? A. It is true that the client had, in ignorance of the extent of his injuries. 30

Q. And isn't it true that later on, and prior to the trial of the case, you had offered to settle the case for $1000? A. I don't recall that; but it is quite probable that I encouraged Judge Sullivan to believe that if he received $1000. that might be regarded as a satisfactory settlement. I answer that, not because of any definite recollection I have of the conversation, but because of my recollection that Judge Sullivan was constantly harping on the poverty of this man. 40

Q. Did you submit any definite offer of settlement prior to the trial of this case, to Judge Sullivan? A. None that I recollect.

Q. You did not appear at Trenton on May 6th, the return day of the rule to show cause, did you? A. No; I had been served with a copy of
10 the rule extending it.

Q. You had been served with a copy of the rule to show cause extending the time? A. Yes.

Q. A notice that application would be made to extend the time? A. Yes; I had knowledge of all of that.

Q. You acknowledged service on this yourself? A. If they were handed to me; I had them, anyhow; I know that they were in existence.

20 Q. At that time? A. Yes.

Q. After the verdict had been rendered in the civil case, didn't Judge Sullivan come to you and ask you then if you would accept $1000. in settlement of this case, and you replied, "No, I would not accept that, but I would accept the sum of $2000? A. I don't recall it.

Q. You say at no time afterwards you offered to settle this case for $2000? A. I don't recall it.

30 Q. You did receive the sum of $2000. in Judge Lazarus's chambers? A. Yes.

Q. And the rule to show cause had been issued at that time? A. The rule to show cause was issued April 23d, the day after the verdict.

Q. And served upon your prior to this? A. Oh, yes; seasonably served on me.

Q. The rule to show cause was served on you prior to this $2000. being turned over to you?
40 A. Yes.

Re-Direct Examination by Mr. Doherty:

A. I would like to add, that the rule to show cause was not only served on me prior to that time, but the rule extending the time to the October Term was also served prior to May 2d. 10

Taken and sworn to before me }
this 13th day of March, 1925. }

Pierre F. Cook,
Supreme Court Commissioner.

State of New Jersey }
County of Hudson. } ss.: 20

Charles Gilman, being first duly sworn according to law, on his oath deposes and says:

Direct Examination by Mr. Doherty:

Q. You are the plaintiff in this case, are you not? A. Yes; I am the fellow that was shot.

Q. Do you remember the occasion when you first appeared in Judge Lazarus's chambers in the Court House? Yes; I can just about recall that. 30

Q. Do you remember who was there? A. I am pretty sure the Judge was there, Judge Lazarus; Judge Sullivan, I think, and Mrs. H. Otto Wittpenn, I think that was her, I am not sure.

Q. In what conversation did you participate? A. What do you mean?

Q. Was anything said to you about Sorrentino giving you money? A. Why, yes, there was. 40

Q. Any amount mentioned? A. It was $500. I said.

Q. $500. you said? A. Yes; but I didn't know I was shot as I was until I told you about it; when I told you, then you said, "You are carrying a bullet alongside of your heart"; then I went home and I told my wife and my wife said, "You are crazy."

10 Q. Never mind about that. At the time when you assented to receive $500. did you know the bullet was nestling right against your heart? A. No, I did not.

Q. That fact had been concealed from you, had it? A. I didn't know it at all.

Q. You were present at the conference which was held in Judge Lazarus's chambers after the civil trial? A. Was that the last?

20 Q. The last. A. Yes; I was there.

Q. Had you been at any conferences between the first one and that last one? A. I don't know, Judge; you got me; it is a long while ago; I can't think of it.

Q. At that time did you hear any talk about you receiving $2000? A. All I can remember, the last thing I heard of it was he was going to have to pay me $2000. or he would be sent to States Prison; that is what I was figuring was

30 on; outside of that, I know I got a verdict of $25,000. I know Judge Lazarus said he has got a States Prison offense staring him in the face if he didn't make good and pay me some of this money; I lost the business I was in; I explained everything to Judge Lazarus, and he said, "You ought to do something for this man Gilman".

Q. Did you explain to Judge Lazarus that you were forced to get out of your business and you

40 were without means at the time? A. I told him I was just broke.

Q. Was there anything said at that conference about $2000. being in full settlement of the $25,-000. verdict?

Mr. Stiles: I object to that as leading.

A. Not to me; no.

Q. Were you present during the whole conversation there? A. Yes, I was there. 10

Cross Examination by Mr. Sullivan:

Q. Mr. Gilman, you were not represented by Judge Doherty at the first conference, were you, in Judge Lazarus's office? A. At the first?

Q. Yes. A. Yes; I was there.

Q. Do you know a man in the Hudson County Court House named William King? A. I do. 20

Q. Did you ever discuss this case with William King? A. Well, I told him about it, and he said he will see if he can get some money for me, see; I didn't know how serious I was shot then.

Q. And did King subsequently return to you and tell you anything about money after that? A. He told me, if I ain't mistaken, he said, "Get as much as you can out of it", or something like that. 30

Q. Did he tell you he had held a conversation with me? A. I can't remember that; that is too far back.

Q. You remember the first time you were in Judge Lazarus's office; you said Judge Lazarus was there, and Mrs. Wittpenn was there? A. Yes.

Q. Who else was there outside of Judge Lazarus, Mrs. Wittpenn and myself? A. I don't know; that was the first time I was there; I 40

didn't look around; I didn't bother to look; I was all upset and nervous, I didn't care.

Q. And at that time didn't Judge Lazarus ask you how much you had spent for medical expenses? A. Yes, he did.

Q. He asked you how much you paid? A. I
10 told him I was at the German Hospital and I had to pay five dollars a day for that, and I had to hire a man to run my business.

Q. Did you not agree at that time, in my presence, to accept $500. in full settlement of any claims you had? A. I didn't know that I said in full settlement——

Q. You had not started your civil action then, had you? A. I said that is what I figured would
20 cover my actual expenses, something like that.

Q. Didn't you agree to accept that money? A. Yes; I would have agreed, but I didn't know what I was talking about; I didn't know I was shot as bad as I was.

Q. You had not consulted Judge Doherty up to that time, had you? A. Well, I told Judge Doherty about it.

Q. Had you engaged him as your lawyer up to that time? A. Yes, sir; but he didn't know any-
30 thing at all about it; I was up to Judge Doherty

Q. How did you know Mr. Sorrentino was going to plead that morning? A. How did I know?

Q. Yes. A. How did I know?

Q. Had you told your lawyer that Mr. Sorrentino was going to plead that morning? A. I couldn't recollect.

Q. You say you had engaged him at that time; is that a fact? Is it so that you had en-
40 gaged him at that time? That is, the day Sorrentino pleaded, had you engaged Mr. Doherty at

that time as your lawyer? A. I can't recollect, the first time I went; Mr. Doherty was my lawyer all the while.

Q. At the time you had the conference in the office with Judge Lazarus, and Mrs. Wittpenn and I were there, had you engaged him that time? A. Yes; Judge Doherty was always my lawyer; he didn't know I was downstairs. 10

Q. Hadn't you told him the case was coming up that morning? A. Not as I know of; no; I think it was Mr. King who told me.

Q. You had been subpoenaed there, had you not; you were there under subpoena, weren't you? A. I guess I was.

Q. Hadn't you gone to your lawyer and told him your case was on on that date? A. No, sir; I don't think I did. 20

Q. You don't think you did? A. I am pretty sure I didn't.

Q. Why didn't you? A. I don't know.

Q. You had gone and engaged him; you were subpoenaed there in court, your case was coming up, and yet you never notified him; is that so? A. Well, Judge Doherty knew about it; I was upstairs and I happened to see him and I told him about it, that I was willing to take $500. and he said, "Do you know what is the matter with you? You got a bullet near to your heart"; and I said, "Well, that is all". 30

Q. I am asking you prior to that date; had you notified Judge Doherty that your case was coming up that morning? A. Well, I can't recollect.

Q. You don't remember? A. To tell you the truth, I don't.

Q. You say you were present at a second hearing, or at a second conference, also in Judge Lazarus's office; is that so, after your civil trial? 40

A. That was when we were all there.

Q. Who was present at that time? A. Judge Lazarus, Judge Sullivan, Judge Doherty, myself, Sorrentino, and a couple of other Italian fellows there, I don't know their names.

10 Q. Was Mrs. Whittpenn there at that conference? A. No, I don't think she was.

Q. Was Mr. Sharpley there; the probation officer? A. Now, to tell you the truth, I don't recollect; I couldn't tell you; I couldn't say whether he was or not.

Q. Was Mr. Hogan there, the Sergeant at Arms of Judge Lazarus's Court? A. I don't know Hogan.

Q. You don't know who was there outside of
20 Judge Doherty, yourself, Sorrentino, Judge Lazarus, and myself? A. That is all I can recollect.

Q. You say that day Judge Lazarus told Sorrentino if he did not pay you $2000. he would send him to States Prison? A. He said he had a jail sentence staring him in the face, something about going to States Prison; that is all I heard, talk about him going to jail.

Q. Judge Lazarus said what? A. If he didn't
30 pay the $2000—isn't that it?

Q. I am asking you. A. That is all I can recollect.

Q. You said Judge Lazarus said, "You will have to pay this man $2000. or I will send you to States Prison; if you don't pay him now I will send you to jail? A. I don't know whether he said he would send him to States Prison or to jail.

Q. But he said he would send him to prison?
40 A. Yes.

Q. Did he send him to prison? A. No, sir.

Q. Were you paid that day? A. No, sir.

Q. Was any money passed that day in the presence of Judge Doherty and you? A. Not while I was there.

Q. Was this man sent over to the County Jail that day? A. That I couldn't tell you.

Q. Did anybody take him out of the room and take him to the County Jail? A. Not as I know of; I couldn't just recollect; it is quite a while ago.

Q. Give us, to the best of your recollection, exactly what Judge Lazarus said about States Prison or the County Jail, to Sorrentino? A. The only thing I can say is, "If you don't pay this fellow something for what you have done to him," he says, "I will have to send you to States Prison"; that is all I can recollect of what he said.

Q. Did he mention any amount? A. Well, I can't say whether he did or not, to tell you the truth.

Q. Were you willing at that time to take $2000. in full settlement of your claims against Sorrentino? A. That was up to my lawyer.

Q. I say, were you willing? A. I don't know whether I was or not, to tell you the truth.

Q. You didn't agree to take $2000. in full settlement of all your claims against Sorrentino? A. If it was up to me, I guess I would have took nothing, the way it looked to me.

Q. You didn't want anything at all? A. Just the way it looked; but I guess I deserved a whole lot more than what I got.

Q. I say, you didn't want any money at all; you wanted this man to go to jail? A. It was im-

New Jersey State Library

material to me; I didn't care what happened at that time.

Q. You didn't care whether you got any money and you didn't care whether he went to jail; is that so? A. I don't know that I can answer that.

10

Q. Why can't you answer it? A. I just can't answer; I can't remember all these different things.

Q. You had no difficulty in recalling when Mr. Doherty questioned you as to what happened; why should you have any difficulty now when I ask you questions about what happened? A. I answered what I remembered; all that I could answer I answered, all that I couldn't, I couldn't.

20

Taken and sworn to before me } this 13th day of March, 1925. }

PIERRE F. COOK,
Supreme Court Commissioner.

Commissioner's Certification.

I, PIERRE F. COOK, a Supreme Court Commis-
30 sioner of the State of New Jersey, do certify that the foregoing depositions were taken before me, in my immediate presence and hearing, by Harry Schirmer, a stenographer selected by me and by me first duly sworn to faithfully and fairly take stenographically and reproduce in typewriting such depositions; and I believe the foregoing transcript, made by the stenographer, sworn as aforesaid, fairly and accurately states
40 the evidence given.

PIERRE F. COOK,
Supreme Court Commissioner.

Exhibit P-1.

(On letter head of Sullivan & Meehan.)

Jersey City, September 3rd, 1924.

Richard Doherty, Esq.,
Trust Co. of N. J. Bldg.,
Jersey City, N. J.

10

Dear Sir:

Received your letter of August 25th, in re *Gilman vs. Sorrentino*. What you state in your letter was not my understanding of the affair. However, if you will kindly mail to me the receipt for the monies paid to you, I will take up the matter of the Satisfaction of Judgment with you at a later date.

20

Yours very truly,

(Signed) LEO S. SULLIVAN.

LSS:MOB

30

40

Exhibit P-2.

October 3, 1924.

Messrs. Sullivan & Meehan,
15 Exchange Place,
Jersey City, N. J.

10

Gilman vs. Sorrentino.

Gentlemen:

I have recently received from you a request for satisfaction of judgment in the above matter, and in accordance with the assurance of my letter to you I have taken up the matter with the plaintiff, explaining to him the prevailing situation and he directs me to inform you that he is not

20

disposed to execute any cancellation of the judgment while a possibility subsists of enforcing the collection of the whole.

I conceive that it is my duty, in the light of what has transpired, to take the proper steps against the surety. This I feel obligated to do and it would appear that your function, if you conceive such a course to be unwarranted, will be to resist such measures when adopted.

Yours very truly,

30

(Signed) Richard Doherty.

RD:PT.

40

Exhibit P-3.

(On letter head of Sullivan & Meehan.)

October 4th, 1924.

Richard Doherty, Esq.
Trust Company of N. J. Bldg. 10
Jersey City, N. J.

Re: *Gilman vs. Sorrentino.*

Dear Sir:

Some time ago I wrote to you requesting a Satisfaction of Judgment in the above-mentioned case. In answer to my letter you wrote and informed me that your client refused to sign a Satisfaction of Judgment, claiming that the money 20 was paid in satisfaction of the criminal offense and not in satisfaction of the civil offense, which you as well as I, know is not a fact.

Subsequently I wrote asking you to mail me a receipt for the two thousand ($2,000) Dollars which I paid to you. As yet I have not received said receipt. I do not think that you will deny that this money was paid, and as a matter of common courtesy, the least you can do is to send 30 me a receipt for the money, so that I may forward same to my client. You know very well that when this money was paid to you it was paid in satisfaction of said judgment, irrespective of what your client may inform you at this time.

Yours very truly,

(Signed) Leo S. Sullivan.

40

Exhibit P-4.

October 6, 1924.

Hon. Leo S. Sullyan,
15 Exhange Place,
Jersey City, N. J.

10

Re: *Gilman vs. Sorrentino.*

Dear Sir:

I have your letter of October 4th in the above matter and am at a loss to understand the petulance of its tone, and the inaccuracy of many of its assertions.

I have never entertained the view that the money that was paid was in satisfaction of any

20

criminal offense, or, indeed, did I ever urge that any payment should be made in that connection. I was not present on the occasion when this subject was first considered by you and Judge Lazarus. You may recall that the propriety of the transaction was submitttd to Gilman in my absence, and that the only concern felt, or which properly should have been felt by you at that time, related to securing the release of Sorrentino on his plea of guilty.

30

You can have no faulty recollection of what Judge Lazarus aspired to. He sought only to have Sorrentino evince a disposition to be just towards Gilman before he should expect any clemency from the court, and your own assurances given to the court were to the effect that Sorrentino at the time commanded no funds in excess of what was paid.

You received no satisfaction of judgment

40

Exhibit P-4.

because you asked for none and had no right to expect that one would be given. There was nothing in the circumstances of the case that would urge Gilman in consideration of what was paid at that time to solicit the court for Sorrentino's freedom, and in addition, present him with $23,-000.00.

10

Gilman did not understand that it was in full satisfaction of the judgment, I did not, and I am satisfied that you did not, in view of not even having requested the formality of a receipt at that time.

If now, in order to have a formal manifestation of the payment you wish Gilman to send you a partial satisfaction, I believe you are entitled to it, and I will have him send it to you if you so indicate.

20

Yours very truly,

(Signed) RICHARD DOHERTY.

RD:PT.

30

40

Exhibit D-1.—Rule to Show Cause.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10

CHARLES GILMAN, *Plaintiff,* *vs.* THOMAS SORRENTINO, *Defendant.*	Action at Law.

On application made within six days after the
20 rendering of the verdict in the above entitled cause, it is, on this 29th day of April, 1924, on motion of Sullivan & Meehan, attorneys for the defendant,

ORDERED, that the plaintiff show cause before this court on the sixth day of May, 1924, at the State House in Trenton, at 11 o'clock A. M. why the verdict in this case should not be set aside and a new trial granted to said defendant.

30 (Signed) WILLARD W. CUTLER,
Judge.

(Endorsed with title of cause.)

Service of a copy of the within Rule to Show Cause is hereby acknowledged, this 2nd day of May, 1924.

(Signed) RICHARD DOHERTY,
Atty. for Plaintiff.

40

Exhibit D-2.—Notice.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

CHARLES GILMAN,
Plaintiff,
vs.
THOMAS SORRENTINO,
Defendant.
Action at Law.

10

To Richard Doherty, Esq.,
Attorney of plaintiff,
921 Bergen Avenue,
Jersey City, N. J.

SIR:

20

TAKE NOTICE that on Tuesday, May 6th, at the State House, Trenton, New Jersey, at 10:30 A. M. we shall apply to the Supreme Court for an Order to continue the Rule to Show Cause why the verdict entered in the above entitled cause should not be set aside and a new trial granted to the defendant, signed by Willard W. Cutler, Judge of the New Jersey Supreme Court, Hudson Circuit, dated the twenty-ninth day of April, 1924, and returnable May 6th, 1924, to Tuesday. the seventh day of October, 1924, on the ground that the return day set in the Rule does not give sufficient time to prepare a State of the Case.

30

Dated, Apr. 30th, 1924.

Respectfully yours,
(Signed) SULLIVAN & MEEHAN,
Attorneys for Defendant.

(Endorsed in cause.)

40

Service of a copy of the within Notice is hereby acknowledged, this 2 day of May, 1924.

RICHARD DOHERTY,
Atty. of plaintiff.

P.

Exhibit D-3.

(On letter head of Sullivan & Meehan.)

August 22nd, 1924.

Richard Doherty, Esq.
921 Bergen Avenue,
10 Jersey City, N. J.

Dear Sir:

Will you be good enough to send me a Satisfaction of Judgment in the case of *Charles Gilman vs. Thomas Sorrentino.*

Yours vrey truly,

(Signed) Leo S. Sullivan.

20 MOB.

Exhibit D-4.

(On letterhead of Richard Doherty.)

August 26, 1924.

30 Messrs. Sullivan & Meehan,
15 Exchange Place,
Jersey City, N. J.

Gillman vs. Sorrentino.

Gentlemen:

I beg to acknowledge your request for Satisfaction of Judgment in the above matter.

The course which has been taken in respect of

40

Exhibit D-4.

this case left me in very strong doubt as to my right to send such discharge from the obligation of the judgment, and accordingly, I found it necessary to confer with Mr. Gilman to discover his attitude toward your request.

On talking the matter over with him I find that he entertains the same view as myself that the payment heretofore made by the defendant was not contemplated as a settlement of the judgment, but merely as a manifestation of the defendant's repentance to justify the leniency exhibited to him by Judge Lazarus.

Mr. Gilman, on these considerations, not only forbids me to take any action in the direction of satisfying the judgment, but on the contrary, feels that I should resort to any measures that are still open to compel a further payment from the defendant, commensurate with the grievous injuries which he still suffers.

I would be thankful if you would let me hear from you what is feasible with respect to the latter proposition.

Yours very truly,

(Signed) Richard Doherty.

RD:PT.

10

20

30

40

Exhibit D-5.

August 22nd, 1924.

Richard Doherty, Esq.,
921 Bergen Avenue,
Jersey City, N. J.

10 Dear Sir:

Will you be good enough to send me a Satisfaction of Judgment in the case of *Charles Gilman vs. Thomas Sorrentino.*

Yours very truly,

MOB

NEW JERSEY SUPREME COURT.

20 **Depositions.**

CHARLES GILMAN, *Plaintiff,* *vs.* THOMAS SORRENTINO, *Defendant.*	Action at Law.

30

Continuation of depositions in the above entitled cause, taken before me, Pierre F. Cook, a Supreme Court Commissioner of the State of New Jersey, at my office, 1 Exchange Place, Jersey City, New Jersey, this seventh day of April, 1925, at four o'clock in the afternoon, pursuant to rule to show cause entered in the above entitled cause, and on notice.

40

APPEARANCES:

RICHARD DOHERTY, Esquire,
Attorney for Plaintiff.
MESSRS. SULLIVAN & MEEHAN,
Attorneys for Defendant.
HARRY A. STILES, Esq. of counsel. 10

State of New Jersey, } ss.:
County of Hudson. }

THOMAS FEMIANO, being first duly sworn according to law, on his oath deposes and says:

DIRECT EXAMINATION BY MR. STILES:

Q. Mr. Femiano where do you live now? A. 541 Jackson Avenue. 20

Q. Jersey City? A. Yes, sir.

Q. You are a brother-in-law of the defendant Sorrentino? A. Yes, sir.

Q. Now, do you remember Thursday, May 1st, last year? A. Yes, sir.

Q. Do you remember being at the Court House on that day? A. Yes, sir.

Q. What time of day was that, about? A. I think it was about noon time. 30

Q. Who was in the chambers with you? A. In the chambers I believe was Judge Doherty, Judge Sullivan, my brother——

Q. Your brother; what is his first name? A. Louis Femiano; and this gentleman here (indicating).

Q. Mr. Gilman. A. And Mr. Tony Hogan.

Q. Tony Hogan? A. Yes.

Q. And yourself? A. Yes. 40

Q. Where was Sorrentino, the defendant, at that time? A. He was in jail.

Q. In jail? A. Yes, sir.

Q. Was there any conversation in the chambers of Judge Lazarus? A. Yes, sir.

Q. Well now, you just tell us what you remem-
10 ber of the conversation that went on? A. My brother-in-law, when he got put in by Judge Lazarus, he sent out for me to settle these things up, he told me to give him $500. to settle with this man, because this man is supposed to get some money, the man that got hurt. Judge Sullivan told me to raise $500. to give it to him because he had to have some money; so we raised $500. Then they don't want the $500. They
20 want $1000.

Q. Now, is this the conversation that went on on that day about the $500. or are you telling me something that happened long before that? A. No; this was before the $500. and the $1000.

Q. I mean what was the conversation had that Thursday in Judge Lazarus' chambers, about money? A. Well, we offered him $1500.

Q. Who offered $1500? A. Me.

Q. Whom did you offer the $1500. to? A. To
30 Judge Doherty.

Q. What did he say? A. He says he don't want $1500. he wants $2000.

Q. Did you have any conversation with him when you offered the $1500. as to what it was for? A. It was to satisfy the judgment and everything.

Q. Well, did you say anything about that? What did you say exactly to him? A. Well
40 Judge Lazarus told me to raise $2000. and clear everything up.

Q. Was that after the offer of $1500. was

made? A. I offered him $1500. and he says he won't take $1500. on account he had the judgment against him.

Q. Did he say how much he wanted? A. He wants $2000. He won't take no less.

Q. Did he say what the $2000. would cover? A. For the judgment; to cover the judgment and everything; just to clean everything up. 10

Q. What did you say then to Judge Lazarus? A. I told Judge Lazarus, I says, "Why, I offered him $1000. before; he says $1500. aint enough; and he says he won't take $1500. on account he had the judgment for $25,000. a judgment against him."

Q. Then what did Judge Lazarus say? A. He advised me to raise $2000. and bring it down and clear everything up. 20

Q. Did he say it would clear everything up? A. Clear everything, it was just to pay the judgment and everything.

Q. The next day, Friday, you did get $2000? A. I got $2000.

Q. And you paid that over to Judge Sullivan? A. Right.

Q. You were not in Judge Lazarus's chambers on Friday, were you? A. No, sir. 30

Q. Where was it you paid the $2000. to Judge Sullivan? A. In the waiting room in the Probation office.

Q. In the probation room? A. In the probation room.

Q. In back of Judge Lazarus's chambers? A. Yes.

Q. How was this money made up that you turned over to Judge Sullivan; what denominations? A. It was a $1000. bill. 40

Q. Yes. A. One $500. and of course it was a few 50's and the rest was 20's.

Cross Examination by Mr. Doherty:

Q. So it was Judge Lazarus who first told you to give Mr. Gilman some money, was it? A. He never told me to give him any money; he told me, you asked me, you won't take $1500. you want $2000.

Q. Go back to the $500. A. Judge Sullivan told me to give $500. at the beginning.

Q. Didn't you say Judge Lazarus called you in and told you to give Gilman $500? A. No $500.

Q. Well, did he tell you to give any amount? A. He told Judge Sullivan the man is supposed to get some money.

Q. Judge Lazarus did? A. Yes; and Judge Sullivan told me, he says the man, he wants $500.

Q. That was before the trial of the civil case; before the judgment? A. Right.

Q. You were willing to give $500. then, were you? A. Yes.

Q. Then later on you were willing to give $1000? A. Right.

Q. Then the judgment was rendered after that? A. The judgment was rendered after that.

Q. Then we met in Judge Lazarus's office about a week after the judgment, didn't we? A. Right.

Q. Then you raised the $1000. to $1500? A. Yes.

Q. And finally this $2000. was paid? A. What did you say?

Q. In the end there was $2000. paid? A. No;

I want to give $1500. to cover everything; the $1500. was for the judgment and everything.

Q. You say you offered $1500? A. Yes.

Q. In Judge Lazarus's chambers; and it wasn't accepted? A. To clear everything up.

Q. You said that seven times now; I am coming around to that. The $1500. was not accepted; then the $2000. was accepted, was it? A. What do you mean was accepted; I don't understand that.

10

Q. We took the $2000. A. To clear everything up.

Q. Now, that is eight times you said that. I haven't asked you about that at all. A. Well, I have to tell you the reason why I put up the $2000.

20

Q. We did take the $2000. didn't we? A. I gave Judge Sullivan the $2000.

Q. You gave it to him the next day? A. Right. I gave him the next day.

Q. You say that in Judge Lazarus's chambers there were many people present? A. Yes.

Q. There was a lady there, wasn't there? A. My sister was there.

Q. Your sister was there. You have told us how in Judge Lazarus's chambers you and I were doing all the talking? A. No; you won't talk to me; only I told Judge Lazarus, I says I want to give you $1500. and he answered me; you were right alongside of me; you won't take $1500. you want $2000. to satisfy the judgment.

30

Q. Your brother-in-law, Sorrentino, had no money of his own, did he? A. No; Sorrentino has no money.

Q. He lived in Brooklyn? A. Yes, sir.

40

Q. And he was then in jail? A. What did you say?

Q. He was in jail that day? A. Yes; he was in jail because he couldn't make any settlement.

Q. You told us eight times that this money was to satisfy everything? A. To clear up everything.

Q. Who said that? A. You.

10 Q. You didn't? A. You, and Judge Lazarus, too; Judge Lazarus say that, too.

Q. Judge Lazarus said it? A. You and Judge Lazarus.

Q. Well, who said it first? A. You told me, you says $1500. was not enough, you want $2000. because you got the judgment $25,000.

Q. What else did I say? A. That is all; and Judge Lazarus told me.

20 Q. All that I said to you was $1500. is not enough, we want $2000. we have got the judgment; that is what I said? A. You told me, you says, "I won't take $1500. because we have the judgment for $25,000. against him."

Q. Yes. A. And Judge Lazarus told me to make it $2000. if I can, he says, "You might as well clear everything up."

Q. Judge Lazarus said it? A. What did you say?

30 Q. Judge Lazarus said it would clear everything up; did he? A. I was talking to you, while you told me at that time you had the judgment for $25,000. against him.

Q. Yes. A. So you won't take $1500. you want $2000.

Q. What else did I say? A. After that, when I raise, the $2000. and the next day I gave it to Judge Sullivan.

40 Q. Never mind that. On Thursday, May 1st— A. Yes.

Q. Tell me what else I said? A. I don't remember much.

Q. All I said is what you have sworn to here, is it, that I would not take the $1500. because we got a judgment against him of $25,000. and I wanted $2000. then? A. Right; because we have the judgment against him for $25,000.

Q. And you are sure I said nothing more? A. I don't remember that. 10

Q. Well, what else did you say except to offer the $2000? A. I didn't say anything; Judge Sullivan called me in and he told me to go and see if I could raise the money and to bring it down.

Q. So you said no more than you have testified to, and I said no more than you testified to; is that true? A. Well, I don't remember.

Q. Where did you get the idea that the $2000. was—just listen to this—first, to satisfy the judgment and everything, to cover up the judgment and everything, to cover everything up, to clear everything up; where did you get that idea? A. Well, my reason I put in the $2000. Why I am going to give $1000. again? That is what was the reason for putting in the extra $1000. to cover the judgment and everything. 20

Q. That is your idea? A. That is what you said; you have the $25,000. judgment against him. 30

Q. When did I, or when did anybody say that that $2000. was to satisfy the judgment and everything, to cover up the judgment and everything? A. Well, I said——

Q. To cover everything up; who used those words? A. You says you have a judgment against him for $25,000. and Judge Lazarus says, "Can you raise $2000. to cover everything up." 40

Q. That is what Judge Lazarus said? A. You said, "I got the judgment".

Q. What? A. You said you got the $25,000 judgment against him.

Q. And that is why I wanted the $2000? A. And Judge Lazarus says, "Well, he won't take $1500. because he claims he has $25,000. worth of judgments against him, and he wants $2000."

10 Q. That is all that was said? A. Yes.

Re-Direct Examination by Mr. Stiles:

Q. And Judge Doherty sat at this conversation with Judge Lazarus? A. Positively; it was near the window.

Q. How far away was he from Judge Lazarus at that time? A. Well, just the way we stand

20 now.

Q. About six or eight feet? A. I think so; well, something like that; he was the nearest to Judge Lazarus.

Q. He was the nearest to Judge Lazarus? A. Yes; Judge Doherty was here; Judge Lazarus was here; Judge Sullivan was there, and I was there, my sister was there, my brother was there, (indicating) and Tony Hogan was right by the door, and this gentleman was right on this side of

30 him (indicating).

Taken and sworn to before me)
this 7th day of April, 1925.(

Pierre F. Cook,
Suprome Court Commissioner.

State of New Jersey)
County of Hudson. (ss.:

40

Louis Femiano, being first duly sworn according to law, on his oath deposes and says.

Direct Examination by Mr. Stiles:

Q. Mr. Femiano, you are a brother of the man who was just on the stand? A. Yes, sir. 10

Q. And you are a brother-in-law of Sorrentino, the defendant? A. Yes, sir.

Q. You were present at Judge Lazarus's chambers in Jersey City on May 1st? A. Yes, sir.

Q. Now, will you tell us what you remember of the conversation that went on before Judge Lazarus that day, in the presence of Judge Doherty, Judge Sullivan, your brother and your sister—was it—and all those people present? A.Well, we want to pay $1500. but he was not satisfied. 20

Q. Who was not satisfied with the $1500? A. The lawyer.

Q. You mean Judge Doherty, by the lawyer? A. Judge Doherty.

Q. What did he say to indicate that he was not satisfied with the $1500? A. Then he said he wanted $2000. "to clear the judgment and everything".

Q. Who offered the $1500. in the first place? A. My brother. 30

Q. Your brother who was just on the stand before you? A. Yes.

Q. Then in answer to that offer, what did Judge Doherty say? A. Judge Doherty says, he says he wants to clear up everything it will be $2000.

Q. What do you remember after that? A. I remember my brother gave the money to Leo Sullivan, and Leo Sullivan—— 40

Q. The money was given to Judge Sullivan not that day, but the next day? A. Not that day; the day after; it was on Friday.

Q. Where was Sorrentino at this time? A. He was in jail.

10

Cross Examination by Mr. Doherty:

Q. Who was I talking to when I said I want $2000. to clear the judgment and everything? A. You didn't say you wanted $2000. Judge Lazarus said to give $2000. to clear up everything.

Q. I didn't say it? A. You said $1500. was not enough.

Q. Well, I didn't say that $2000. would clear up the judgment and everything; it was Judge Lazarus said that? A. Judge Lazarus.

20

Re-Direct Examination by Mr. Stiles:

Q. Judge Doherty was present at the time Judge Lazarus made this statement, was he not? A. Who?

Q. Judge Doherty was present in the room when Judge Lazarus made this statement? A. Yes.

30

Taken and sworn to before me
this 7th day of April, 1925.

Pierre F. Cook,
Supreme Court Commissioner.

40

State of New Jersey }
County of Hudson } ss.:

RICHARD DOHERTY, being recalled for further examination, on his oath further deposes and says.

10

DIRECT EXAMINATION BY MR. DOHERTY:

A. I was present in Judge Lazarus's chambers on the occasion mentioned by the Messers. Femiano. I heard Judge Lazarus tell the friends of Sorrentino there, including the Messrs. Femiano, Judge Sullivan and some lady, that the situation in respect of extending clemency to Sorrentino was changed, by reason of the fact that a large judgment had been rendered and that he was obliged to take that into consideration. I am indistinct as to exactly what he said about the effect of the judgment, except that he did mention that it in some degree influenced the situation. He did not say that the $2000. which the plaintiff was willing to accept as a payment at that time would clear up the judgment and everything; I am positive that he did not, because it would have provoked a clash of sentiments between him and me, which did not take place.

20

30

CROSS EXAMINATION BY MR. STILES:

Q. You remember receiving $2000. the next day, do you not? A. Yes.

Q. You remember receiving one $1000. bill, one $500. bill, and smaller denominations? A. I know they were in inconvenient denominations, but it was not a large uncouth roll.

40

Q. You remember receiving one $1000. bill, do you not? A. I have an impression that there was one $1000. bill.

Q. And do you remember taking the $1000. bill in one hand and the other money in the other hand, and saying, "This is for me and the other is for my client"? A. No.

10

Q. You do not? A. No; it does not sound at all plausible.

Q. Have you this present action for the recovery upon the scire facias on a fifty per cent basis? A. No.

Q. You have it upon a contingent basis? A. No.

20

Taken and sworn to before me)
this 7th day of April, 1925.(

PIERRE F. COOK,
Supreme Court Commissioner.

State of New Jersey) ss.:
County of Hudson (

30

LEO F. SULLIVAN, being recalled for further examination, on his oath further deposes and says.

DIRECT EXAMINATION BY MR. SULLIVAN:

A. The day this settlement was made in Judge Lazarus's office it was made with the distinct understanding by Judge Lazarus and Judge Doherty, I am positive, that the $2000. was given in full settlement of the judgment; that was the understanding of Judge Doherty, and the under-

40

standing of Judge Lazarus, and my understanding. And I also distinctly remember the payment of the $2000. There was one $1000. bill and the rest in smaller denominations. As I gave it to Judge Doherty in Judge Lazarus's office, when I gave it to him, he took the $1000. bill and put it in his right hand pocket and he said "That is for me", and the other he put in his left hand pocket and he said, "That is for my client". 10

Cross Examination by Mr. Doherty:

Q. Your first interest in this case was as police magistrate, wasn't it? A. No, it was not.

Q. Wasn't Sorrentino arraigned before you? A. He was. 20

Q. And you committed him? A. I did; held him for the Grand Jury.

Q. And on the same day you busied yourself to defend him? A. I did not.

Q. Do you deny, Judge, that you were active in getting bail for him the day after you committed him? A. I did.

Q. But you did get him out on bail eventually? A. I did not.

Q. Weren't you representing him in the criminal proceeding? A. I was. 30

Q. And he was bailed? A. He was not.

Q. Do you mean to say he was left in jail? A. No; he was paroled.

Q. In your custody? A. No; in the custody of the Probation Officer.

Q. On your application? A. On my application.

Q. Do you recall any expressions relative to the acceptance of the $2000. in full settlement 40

beyond what you have already testified to? A. I have recollections of at different times speaking to you on various amounts.

Q. I am speaking of the time when the $2000 payment was determined upon? A. I have a recollection of discussing with Judge Lazarus and yourself, the three of us in there discussing it, and this Tony Hogan may have been in there, too.

10

Q. Before the settlement? A. Before the settlement, yes.

Q. And before the day of sentence? A. Before the day of sentence.

Q. Now, coming down to the day of sentence —— A. Yes.

20

Q. Do you recall any expressions relative to the payment of the $2000. except what you have testified to? A. No; I can't remember the exact words.

Taken and sworn to before me) this 7th day of April, 1925.)

PIERRE F. COOK,
Supreme Court Commissioner.

30

40

Commissioner's Certificate.

To the Chief Justice of the Supreme Court of New Jersey.

I, Pierre F. Cook, a Supreme Court Commissioner of the State of New Jersey, do certify that the foregoing depositions were taken in my immediate presence and hearing by Harry Schirmer, a stenographer selected by me and sworn; and I believe the foregoing transcript, made by the stenographer selected by me and sworn as aforesaid, fairly and accurately states the testimony given.

10

Pierre F. Cook,
Supreme Court Commissioner.

20

30

40

Opinion.

NEW JERSEY SUPREME COURT.

CHARLES GILMAN,
Plaintiff,
vs.
THOMAS SORRENTINO,
Defendant.

10

On Rule to Show Cause why Judgment should not be ordered satisfied.

20

SULLIVAN & MEEHAN,
For the Rule.
RICHARD DOHERTY,
Contra.

ARGUED BY CONSENT BEFORE MINTURN, J:

After the defendant had pleaded non vult in the Hudson Sessions, to an indictment for atrocious assault and battery, he undertook to settle a judgment against him in this action, for damages for the sum of $25,000. growing out of the same assault. A rule to show cause had been granted to vacate the judgment. The sentence to be imposed in the criminal prosecution was suspended by Judge Lazarus, now deceased, until the civil action had been tried. When judgment was rendered in that action the Attorney for the defendant undertook to settle the same with the plaintiff's Attorney. Various sums ranging from $500. to $2,000. were offered in

30

40

settlement, but the plaintiff's Attorney rejected them all. Finally in the presence of Judge Lazarus, it was agreed between the respective Attorneys that $2,000. would be paid to the plaintiff's Attorney, and Judge Lazarus doubtless considering the payment of that sum the equivalent of the imposition of a legal penalty, suspended sentence in the criminal case. As a result proceedings upon the rule to show cause in the civil cause were discontinued. The agreed sum of $2000. was borrowed by defendant, he himself being penniless, from a friend who paid it with the understanding that it was to be accepted as a settlement of the judgment, and a satisfaction of the criminal conviction. The money was thereafter paid by one of defendant's Attorneys to the Attorney for the plaintiff, who he says accepted it in full settlement of the judgment. No receipt or satisfaction was taken for the payment of the money, and thereafter Judge Lazarus died thus complicating the situation. 10 20

The present application is presented upon a rule to show cause why the civil judgment should not be satisfied by order of the court. The testimony taken under the rule is of a conflicting character, the Attorneys for the plaintiff insisting that the sum paid was upon account, and the Attorneys for the defendant insisting that it was in final settlement not only of the judgment in the civil suit, but also was accepted by Judge Lazarus as the equivalent of a penalty in the criminal conviction, in pursuance of which he suspended operation of the sentence of one year in the County Penitentiary. 30

A number of witnesses, who were present before Judge Lazarus when the proposition of set- 40

tlement for $2,000. as is alleged was made, testify that it was made in settlement of the civil judgment, and that conclusion seems to be substantiated by the fact that the sentence in the criminal prosecution was suspended by Judge Lazarus. No sufficient reason is apparent why
10 the court of Sessions should adopt such action, except upon the theory that the payment of the money being satisfactory to the parties as a settlement inter sese was sufficient to operate as a monetary penalty in punishment of the defendant in the conviction.

Nor is any logical reason apparent why a third party would supply the fund in question, except upon the understanding that the occurence
20 before Judge Lazarus, where he was present, convinced him that the defendant would be released from further prosecution both upon the criminal conviction, and under a capias in the civil suit. Such is my conclusion from the testimony, and from the circumstances surrounding the transaction.

The legal question presented is whether the acceptance of a lesser sum than the face of the
30 judgment, in the absence of a release or satisfaction piece, can operate by agreement of the parties to legally discharge the judgment. Ordinarily the rule is to the contrary. *Decker vs. Smith*, 88 L. 630. But there are equitable circumstances which a court frequently invokes to lessen the rigor of the legal rule. Such a situation was presented in *Roberts vs. Banse*, 78 L. 57, where it was laid down by Mr. Justice Garrison, speaking for this court that "If the debtor in addition to
40 the payment of a part of the debt, as an agreed satisfaction of the whole does at the request of

his creditor some substantial thing of detriment to his interests that he was not bound to do upon the mutual understanding that it was an additional consideration for the creditor's promise to accept the less for the larger sum, legal effect may be given to such compact, if the debtor has fully performed his part thereof to his detriment." In that case the debtor ceased to prosecute his appeal upon payment of the lesser sum. Here the defendant ceased the prosecution of his rule to show cause to review the large verdict against him. He also being without means, induced a third party to come to his relief, and supply the necessary funds to satisfy the requirements of the agreement. In both respects he changed his legal and financial status to his detriment, and under the adjudication cited, legal effect should be given to his action.

The defendant therefore is entitled to a rule directing that the judgment be satisfied of record.

10 20 30 40

4J

New Jersey Court of Errors and Appeals

10

CHARLES GILMAN, *Plaintiff-Appellant,* *vs.* THOMAS SORRENTINO *Defendant-Apellee.*	On Appeal From Supreme Court.

20

BRIEF FOR APPELLANT.

This is an appeal from an order made by Mr. Justice Minturn for the court, directing the satisfaction of record of a Supreme Court judgment for $25,000 entered in favor of the plaintiff. The contention of the defendant is that a payment of $2,000 was made under the circumstances which entitled him to a satisfaction of the entire judgment. The contention of the plaintiff is that is was a partial payment, on account, suggested by a judge of the Sessions Court as a prerequisite to clemency, and that there was not before the justice below a scintilla of evidence to sustain his finding of a mutual understanding to satisfy the greater sum by the less.

30

40

Facts.

At midnight, January 31st, 1924, the defendant discharged a pistol on a public street in Jersey City, injuring the plaintiff, a passing pedestrian, so that a bullet permanently lodged in contact with his heart. He was arrested at
10 once and shortly after indicted for atrocious assault. He was a resident of Brooklyn, and upon his appearance to plead to the indictment, February 7, 1924, he was arrested upon a capias ad respondendum issued in the present action brought by the plaintiff, and was released upon a $4,000 recognizance. He pleaded non-vult and the matter of sentence was continued until the following week. Even at that early stage,
20 the attitude of the Sessions' Judge was that the defendant should make some pecuniary amends to the plaintiff before expecting judicial leniency. The plaintiff was sent for and having been kept in ignorance of his physical peril resulting from the position of the bullet, stated that he would be satisfied then to accept $500. When enlightened as to the real nature of his injury, he recanted on this offer.

The criminal proceedings were held in abey-
30 ance until the determination of the civil suit which on April 22, 1924 resulted in a verdict for $25,000. The trial judge allowed a rule to show cause returnable at the May term. The Sessions' Judge being informed of the outcome of the civil suit required the defendant to appear a week after the verdict. On May 1st, the day set for sentence, the respective attorneys, the plaintiff and two brothers-in-law of the de-
40 fendant had a conference in the chambers of the judge, as the result of which the sentenc-

ing was deferred to give the defendant an opportunity to pay the plaintiff $2,000 and the defendant was committed to jail in the interim. The defendant being without funds, one of the brothers-in-law came to his aid and on the following day, May 2nd, supplied the defendant's attorney, Mr. Sullivan, with $2,000 which the latter delivered forthwith to the plaintiff's attorney taking therefor no receipt. When information of the payment was communicated to the judge, the defendant was arraigned and sentenced to one year but its operation suspended. On the same day (May 2nd) Mr. Sullivan's partner, Mr. Meehan, applied for, and obtained, an amendment of the rule to show cause extending its return to the October term. 10

The matter rested until August 22nd, when defendant's attorney wrote to the plaintiff's attorney and requested a satisfaction of judgment. (Exhibit D-3 page 44). The plaintiff's attorney replied that neither he nor the plaintiff regarded the payment as a full satisfaction, and intimated a purpose to pursue the defendant for a further payment. (Exhibit D-4 page 44). September 3rd, 1924, defendant's attorney again wrote requesting a receipt for the money paid, and promising to take up the matter of the satisfaction of the judgment at a later date. (Exhibit P-1 page 37). Answering this the plaintiff's attorney reiterated that the judgment would not be cancelled while a possibility remained of enforcing the payment of the whole, and threatened at the proper time to take steps to collect from the surety. (Exhibit P-2 page 38). The following day the defendant's attorney again wrote requesting a receipt and chiding the plaintiff's attorney with knowing that the money was paid in satisfaction of the judgment, irrespective of what the plaintiff might have understood. (Ex- 20 30 40

hibit P-3 page 39). The correspondence ended with a letter from plaintiff's attorney to the defendant's October 6th, repudiating the latter's suggestion and emphasizing that the money was paid only to negotiate judicial mercy on the criminal sentence.

The rule to show cause was not prosecuted, nor even filed, because the defendant's attorney
10 informed his partner, who had charge of it, that the case had been settled for $2,000 before the order amending the rule was made. The abandonment of the rule was not communicated to the plaintiff, and the argument not being moved at the October term, plaintiff gave notice of motion to vacate it at the January term, and it was then discharged. Thereupon a ca. sa. was issued upon which was endorsed a credit
20 for the $2,000 paid. Being returned non-est a scire facias was issued against defendant and the surety. This was returned nihil as to defendant but served upon the surety who filed an answer. The plaintiff gave notice of motion to strike out the latter at the March 1925 term, but three days before the opening of court the defendant appeared before Mr. Justice Minturn and upon a petition averring that the $2,000 was paid in full satisfaction, the
30 rule to show cause was granted which brings up the present matter. Under it testimony was taken upon which the justice below made the order appealed from.

40

I.

There was no testimony whatever to justify the cancellation of the judgment.

The full scope of the proof produced before court below was as folows:

LEO SULLIVAN, the defendant's attorney, testified that prior to the commencement of the action he offered $500 in settlement of the claim; a counter offer of $1,000 was made and rejected. After the verdict Mr. Meehan, his partner, obtained a rule to show cause. After the judgment he offered $1,000 in settlement and the plaintiff's attorney told him he would take $2,000 in view of the size of the verdict. He paid the $2,000 which he got from Mr. Famiano, a brother-in-law of the defendant. When he offered it to the plaintiff's attorney he said "I have the $2,000 which you agreed to accept in this case." He gave it to plaintiff's attorney and that is as far as he can remember the conversation. The $2,000 was paid in satisfaction of judgment. The rule to show cause was never prosecuted. There was no agreement when he paid the money about handing a satisfaction piece. He communicated with plaintiff's attorney by letter dated August 26th. The rule to show cause was obtained by Mr. Meehan, his partner.

(Testimony pp. 8-11.)

The CROSS EXAMINATION brought forth:

He represented defendant in both civil and criminal cases, advised him to plead non-vult which he did on January 17th. The verdict was rendered in the latter part of April, and in regular course the defendant was before Judge Lazarus for sentence. He was concerned

10

20

30

40

in having Judge Lazarus extend clemency to him, and to that end he and the judge had conferences in the latter's chambers. The plaintiff's attorney was not present at all the conferences, and the first conference was held when such attorney was not in the case; at that conference the plaintiff was present and the judge's attitude then was that the defendant should pay Mr. Gilman something by way of exhibiting a spirit of justice toward Gilman on account of injury, in order to obtain leniency from the court. At that first conference, the one at which the plaintiff was present and from which his attorney was absent, the judge so expressed his attitude. The matter of money was talked of and $400 was mentioned. An offer of $500 was made by the defendant's attorney direct to the plaintiff; it was acceptable by the plaintiff but his attorney afterwards said it was inadequate. Witness does not recall that an explanation was made that the plaintiff had a bullet nestling against his heart, that he knew nothing of it because the doctor advised that he be not apprised of it, and that was why he was willing to take the $500. In the exchanges between witness and the plaintiff's attorney, the former sought to make it clear that the defendant himself had no money, but does not recall whether he based his appeal for a settlement on the ground that he would borrow the money from somebody. The sentence of Sorrentino was deferred until after the civil trial sometime but witness does not know when the gathering was in Judge Lazarus' chambers. Judge Lazarus was not a party to the payment of the money to plaintiff's attorney and did not suggest that the money should be paid. Witness did not hear Judge Lazarus tell Sorrentino

that the maximum penalty was seven years and that he stood ready to give him severe punishment if he did not do something to expiate the damage that he had inflicted on Gilman; but did recall the circumstance of the matter being laid over by Judge Lazarus until he heard from the plaintiff's attorney that the money had been paid. Does not recall how long it was laid over, but in the meantime the money had been borrowed from Famiano, a brother-in-law of the defendant, and delivered to plaintiff's attorney before sentence was imposed. It was witness's understanding that it was in satisfaction of the judgment and that it was not borrowed for payment to the plaintiff to conciliate Judge Lazarus. Sorrentino had no money, was poverty stricken, the money was borowed from his brother-in-law who had retained the witness in the case, yet the $2,000 was paid to save the defendant from going to jail on a civil capias and not to save him from going to jail on the indictment. The defendant had not been warned by the judge that he would go to jail on the indictment if he did not pay the money.

Witness did not get a satisfaction of judgment, nor a receipt. He asked for the latter in letters dated September 3rd and October 4th, which were produced. August 22nd, he sent a letter requesting a satisfaction of judgment and on September 3rd sent another asking for a receipt, but up to August 22nd he had asked for nothing. He is not sure, and does not know, whether at the time the money was delivered he asked for a receipt. Does not remember that a receipt was offered to him at the time which he refused to take, and does not recall giving two reasons why he did not want a receipt.

The rule to show cause was extended to the

October term on account of the shortness of time, and the inactivity of the witness as to the whole matter from the time the money was paid until August 22nd is explained by the fact that his clients came and asked him for a satisfaction of judgment at that time, and it was acting upon that spur that he wrote the letter.
10 In reply to the letter of the plaintiff's attorney of October 3rd, witness wrote the letter of October 4th and in rejoinder received the letter of October 6th. The letter of August 22nd was not written because the time was approaching to perfect the rule to show cause, rather than that witness was urged to do it by the request for a satisfaction from his clients. The rule had been abandoned at that time. It had been obtained after the witness made the settlement,
20 his partner, Mr. Meehan, got it. Witness asked him why he did that, that the case had been settled, Mr. Meehan inquired "What shall I do?" So a notation was made "Settled for $2,000 May 2nd." Nothing was done intra coram in the way of abandoning the rule, nothing was filed, the rule was never prosecuted. Notice was served of a motion to dismiss the rule at the January 1925 term but the witness never
30 appeared in response to it.

The money was paid in cash. Witness does not recall rejecting a receipt that was offered at the time and stating as his reasons first, that it was not Sorrentino's money but Famiano's, and second, that all he sought for was for the plaintiff's attorney to tell Judge Lazarus that payment was made; the judge was told and he sentenced Sorrentino to the County Penitentiary for one year and supended the sentence.
40 Sorrentino lives in Brooklyn. A scire facias was issued on the recognizance served on the bondsman and there was a nihil as to Sorrentino.

Witness supposes that it is still pending.

(Testimony, pp. 11-20.)

THOMAS F. MEEHAN, law partner of previous witness, testified that after judgment was secured in the case he applied for a rule to show cause. The verdict was for $5,000 compensatory damages and $20,000 punitive damages. He thought verdict was excessive and after conference with Mr. Sullivan applied for rule which was granted and signed by Judge Cutler. The end of the term was approaching and in order to get the record printed, they had to have more time and he served a notice of application for an extension to carry the matter over to the next term of court. Was not present when the money was paid by Mr. Sullivan, his partner; met the latter on the day that the money was turned over and conversed with him. Consequent upon the conversation they abandoned the prosecution of the rule to show cause. His information was that the case had been settled for $2,000 so the stenographer was instructed and endorsed on the file "Case settled May 22nd, $2,000." The rule to show cause was not filed because the case was settled. The proceedings were abandoned on the information that he received from his partner that the latter and the plaintiff's attorney had gotten together on the matter and settled the case for $2,000, The notation on the folder is in the handwriting of the stenographer. The civil case was in charge of Judge Sullivan prior to the trial. Witness had no knowledge of the offers of settlement prior to the trial.

(Testimony pp. 20-22.)

10 20 30 40

CROSS EXAMINATION:

Nothing was done in a formal way to abandon the rule to show cause. It was never prosecuted. Knew that defendant had been arrested on a civil capias, did nothing at all to procure an exoneretur for the bail, which he had heard was $4,000.

10 (Testimony pp. 22-23.)

THOMAS FAMIANO, a brother-in-law of the defendant, and the man who loaned him the money, testified that he was at the Court House Thursday, May 1st about noon and was in the chambers of Judge Lazarus when plaintiff's attorney, defendant's attorney, his brother, the plaintiff and Tony Hogan were also present. The defendant at that time was in jail. When the defendant was put in by Judge Lazarus, he
20 sent out for the witness to settle things up and told him to give the plaintiff $500. Judge Sullivan (plaintiff's attorney) told him to raise $500 to give to him because he had to have some money. So they raised $500. The plaintiff wanted $1,000. On that Thursday in Judge Lazarus' chambers he offered plaintiff's attorney $1500 but he wanted $2,000. It was to "satisfy the judgment and everything." Judge Lazarus
30 told me to raise $2,000 and "clear up everything." I offered him $1500 and he says he won't take $1500 on account he had the judgment against him. He wants $2,000 for the judgment, "to cover the judgment and everything; just to clear everything up." He told Judge Lazarus "Why I offered him a thousand dollars before, he says $1500 ain't enough and he says he won't take $1500 on account he had
40 the judgment for $25,000;" Judge Lazarus advised him to raise $2,000 and bring it down and "clear up everything." He said it would

"clear everything; just to pay the judgment and everything". The next day, Friday, I got $2,000 and paid it over to Judge Sullivan, in the waiting room in the Probation Office in back of Judge Lazarus' chambers.

(Testimony pp. 47-50.)

CROSS EXAMINATION:

10

Judge Lazarus told Judge Sullivan that the man is supposed to get some money; that was before the trial of the civil case. Witness was willing to give $500 then and later $1,000. After the judgment he raised the offer to $1500 which he wanted to give to "cover everything". The $1500 was for the "judgment and everything", and he offered the $1500 "to clear everything up". He gave the $2,000 on the day following the conference in Judge Lazarus' chambers. In the chambers the paintiff's attorney would not talk to the witness and the latter told only Judge Lazarus that he wanted to give $1500 and it was Judge Lazarus who answered him. All that the plaintiff's attorney said was that $1500 was not enough and he wanted $2,000 because he got the judgment for $25,000. That is all that he said. He says "I won't take $1500 because we have the judgment for $25,000 against him," and Judge Lazarus told me to make it $2,000 if I can. He says, "You might as well clear everything up." *All that the plaintiff's attorney said was that he would not take the $1500 because he got a judgment against it of $25,000 and wanted $2,000 then. I don't remember that he said anything more and I did not say anything else except to offer the $2,000.* Judge Sullivan called me in and told me to go and see if I could raise the money and bring it down. I don't remem-

20

30

40

ber that he said any more at the time than what I have testified to. I got the idea that the $2,000 was to satisfy the judgment and everything because I put in the $2,000. My reason for putting in the extra thousand dollars was to cover "the judgment and everything." *It was Judge Lazarus who used the words "cover everything up." The plaintiff's*
10 *attorney said he had a judgment for $25,000 and Judge Lazarus said "Can you raise $2,000 to cover everything up".* Judge Lazarus also said "Well, he won't take $1500 because he claims he has $25,000." *That is all that was said.*

(Testimony pp. 50-54.)

Louis Famiano, a brother of preceding witness, testified that he was in Judge Lazarus'
20 chambers on May 1st; that the plaintiff's lawyer was not satisfied with $1500 and said he wanted $2,000 "to clear up the judgment and everything." My brother offered the $1500 in the first place and Judge Doherty says he wants to "clear up everything" it will be $2,000.

(Testimony p. 55.)

Cross Examination:

30 *The plaintiff's attorney did not say he wanted $2,000. Judge Lazarus said to me $2,000 to clear up everything.* The plaintiff's attorney said $1500 was not enough. It was Judge Lazarus who said that $2,000 would clear up the judgment and everything.

(Testimony p. 55.)

40

LEO F. SULLIVAN, recalled;

Stated that on the day the settlement was made with the distinct understanding by Judge Lazarus, the plaintiff's attorney and himself, that the $2,000 was given in full settlement of the judgment.

Witness cannot remember any expressions relative to the payment of $2,000 except such as he has testified to. 10

(Testimony pp. 59.)

The testimony offered in support of the rule is thus set out in extenso in order that it may be perceived—

1. That not one word emanated from the plaintiff or his attorney to encourage the expectation that the lesser sum would satisfy the whole judgment debt; 20

2. That the offers of settlement proceeded exclusively from the defendant;

3. That the $2,000 ultimately paid was directed by the Sessions' Judge in connection with the performance of his own judicial functions;

4. That it was loaned by the third party to the defendant and not paid by him to the plaintiff;

5. That there was not and could not be any mutualit yof understanding that the whole judgment was satisfied; 30

6. That the abandonment of the rule to show cause, was not only unsolicited by the plaintiff, but unknown to him;

7. That steps were actually taken in furtherance of its prosecution the day after the alleged settlement.

The plaintiff and his attorney both testified that they heard Judge Lazarus tell the defendant that in order to receive lenient treatment on his plea it would be necessary for him to 40

exhibit a spirit of justice towards the plaintiff, and that he would be drastically punished unless he made some substantial payment immediately to relieve the distress of the plaintiff.

The plaintiff's attorney testified "I heard the judge refer in terms to the verdict that had been rendered and say that the verdict furnished to him a sort of admonition as to how the case
10 should be handled; he further told Sorrentino that the maximum sentence authorized by the law was seven years and, in consideration of that and the magnitude of the verdict, he felt that Sorrentino should make some substantial payment to Gilman to relieve his distress so far as Sorrentino was able."

(Testimony p. 25 ll. 1-20.)

20 The plaintiff testified "The last thing I heard of it he was going to have to pay me $2,000 or he would be sent to State Prison; that is what I was figuring on; outside of that I know I got a verdict for $25,000. I know Judge Lazarus said he's got a State Prison offence staring him in the face if he don't make good and pay me some of this money; I lost the business I was in; I explained everything to Judge Lazarus and he said "You ought to do something for this
30 man, Gilman." I told him I was just broke. There was nothing said to me at that conference about $2,000 being in full settlement of the $25,000 verdict, and I was present during the whole conference."

40

II.

The circumstances of the payment did not evince an accord and satisfaction.

Dechert vs. George W. Smith & Co., 88 N. J. L. 930 constitutes a veritable grammar of the law of accord and satisfaction. It holds that in the case of a liquidated or certain debt, the payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be (a) no release under seal or (b) no new consideration. It being conceded in the present case that there was no release, the inquiry is confined to the question of whether there was a new consideration. The court below recognized this exigency and, referring to *Roberts vs. Banse* 78 N. J. L. 57, appropriated to the facts of the present case the ruling there laid down.

10

20

There was no similitude between the circumstances of the Roberts case and those of the case sub judice. In the former, Roberts obtained a judgment against Banse for slander. After judgment and before an appeal was taken the plaintiff went to the office of defendant and stated that he wanted to settle the case out of court. The payment of the amount agreed was made in the presence of two witnesses specially called in to hear the payee express his satisfaction with the settlement. The defendant's attorney was then notified that the suit was settled and the appeal dropped, and so the matter rested for a period of several years, during which the defendant's right to review was gone by lapse of time. Execution was then issued upon the judgment.

30

40

The view that the judgment should be cancelled was attained upon the indication that there was an additional consideration which became effective because of the other qualifying circumstances of the case. The syllabus sets out the prerequisite circumstances under which an additional consideration in conjunction with the payment of a less sum will satisfy an entire debt. Those indispensable curcumstances are many and exacting. In addition to the payment of the less sum it is required

1. That the creditor request the debtor to do something in addition.

2. That such additional act be not only a thing which he is not already bound to do but must be substantial in its nature and operate to the detriment of the creditor.

3. There must be a mutual understanding that the thing thus done is an additional consideration for the creditor's promise to accept the less for the larger sum.

4. The debtor must fully perform his part therof to his detriment.

All that is set up by the present defendant by way of an additional consideration is that he first borrowed from his brother-in-law the $2,000 and which he obligated himself to repay to the lender, and second, that one of his attorneys abandoned the rule to show cause which he had continued to prosecute even after the settlement, upon learning from his partner that the case had been settled. Neither course of action was suggested by the plaintiff; the plaintiff did not assent to the satisfaction of the judgment, and no suggestion to that effect was made by the defendant to which the plaintiff might have given such assent.

Referring to the original testimony of Judge Sullivan, his is found to state merely that the

money was delivered "with the understanding that it was in satisfaction of the judgment." Beyond this bare statement expressing his own condition of mind he does not touch the question of the circumstances of mutuality (p. 15, l. 5).

Thomas Famiano, after a repetitious jingle that the $2,000 was to "cover the judgment and everything" eventually settled down to the statement that Judge Lazarus and no one else suggested to him that he raise $2,000 and cover everything up (page 52 ll. 25-35; page 53 ll. 35-40; page 54 ll. 5-10). He is coroborated by his brother who imputed the same language verbatim to Judge Lazarus, (page 56 l. 15), while he is contradicted by Mr. Sullivan who states that Judge Lazarus did not suggest at all that the money be paid (page 11 l. 18), and is contradicted by the plaintiff, (page 30 l. 25; page 34 l. 35; page 35 l. 20), and by the plaintiff's attorney, (page 25 ll. 1-25; page 57 ll. 10-30), both of whom testified that Judge Lazarus made it clear that the money to be paid before the criminal sentence was to exhibit a spirit of justice that would be rewarded by judicial clemency in disposing of the indictment

III.

There was no new contract upon new consideration.

That the payment of less than the amount of a liquidated claim does not discharge the whole, and this, although there is a definite agreement by the creditor and a receipt given, is elementary. The agreement is nudum pactum unless there is something agreed to be done beneficial to the creditor or detrimental to the debtor.

Chambers vs. Niagara Fire Ins. Co. 58 N. J. L. 216.

Daniels vs. Hatch 21 N. J. L. 391.

Line vs. Nelson 38 N. J. L. 358.

Watts vs. Frenche 19 N. J. Eq. 407.

Murphy vs. Kastner 50 N. J. Eq. 214.

Eckert vs. Wallace 75 N. J. L. 171.

10 *Gussow vs. Betheson* 76 N. J. L. 209.

Where the debt is disputed or unliquidated and the payment is less than the amonut claimed the mutual concessions of the parties are sufficient consideration, and the payment discharges the whole.

Castelli vs. Jereissati 80 N. J. L. 295.

In the present case the outstanding features are that the debt was solemnly liquidated by 20 a judgment; that the less sum that was paid was urged upon the plaintiff, in part by the defendant and in part by the Sessions' Judge; that it was paid by the defendant's attorney and not by a stranger; that its acceptance was beneficial to the defendant in keeping him out of jail and was not beneficial to the plaintiff who had a $4,000 recognizance to which he might resort, and that there was an utter silence between the parties as to the rule to show 30 cause being subsequently abandoned.

The opinion in *Robert vs. Banse* supra, is only illustrative of a form in which a new agreement may be made upon a new consideration.

As to the mutuality of understanding, the failure of the plaintiff's attorney to mention the formal execution of a warrant to satisfy the judgment during the negotiations and at

40

the time of the payment; his rejection of the receipt that was offered him at the latter transaction; his failure to give notice that the rule to show cause was abandoned or to take steps to procure its discharge, are disputive of a purpose to satisfy the judgment. The course of the plaintiff's attorney on the other hand, in demanding payment of the balance just as soon as he learned that the plaintiff expected a satisfaction; his activities to obtain the vacation of the rule and his issue of a ca. sa. with the $2,000 endorsed as a partial payment, are impressive as to the plaintiff's understanding that there was no accord and satisfaction. 10

IV.

When the finding of fact below is without support from the proofs in the case, such finding will be reversed on review. 20

Weger vs. Delran 61 N. J. L. 224.
Brewster vs. Banta 66 N. J. L. 367.

V.

A judgment will not be satisfied without clear proof. 30

So far as the opinion in *Robert vs. Banse* discloses there was no dispute as to the plaintiff actively negotiating and requesting the settlement of the judgment and inducing the defendant to forego his right to a review, and the ruling involved the application of plain legal principles to a fully established state of facts. 40

In *Hankinson vs. Hummer* 12 N. J. L. 64, it was held that satisfaction of a judgment will

not be ordered unless proof of payment thereof is full and satisfactory, and established with clearness and certainty. In this case Chief Justice Ewing said "Upon the whole, these affidavits are just sufficient to throw a dubious light over the transaction to make one solicitous to penetrate the 'palpable obscure' in order to ascertain whether the proceedings on the part of the Sheriff which has been stayed by the present inquiry, may do justice to John Hummer, but they are by no means sufficient to authorize us now to interfere farther in his behalf." The same standard of proof was adopted in

D & L Railroad Co. vs. Blair 28 N. J. L. 139.

VI.

A judgment will not be ordered satisfied to validate an erroneous conclusion of law drawn by the judgment creditor from transactions subsequent to the judgment.

Coulter vs. Kaighn 30 N. J. L. 98.

VII.

The action of the Supreme Court did not proceed upon any finding as to an agreement between the plaintiff and defendant.

The opinion (page 63 l. 30) sets out "The testimony taken under the rule is of a conflicting character, the attorneys for the plaintiff in-

sisting the sum was paid upon account, and the attorneys for the defendant insisting that it was in final settlement not only of the judgment in the civil suit, but was accepted by Judge Lazarus as the equivalent of a penalty in the criminal conviction."

The difficulties presented to the justice by the conflict of proof were resolved through his own argument that the Sessions' Judge acted upon the theory that the payment of the money was satisfactory to the parties as a settlement inter sese (page 64 l. 10); and upon the further argument that thethird party who loaned the money to the defendant would not have done so except upon his own understanding that the occurrence before Judge Lazarus convinced *him* that the defendant would be released from further prosecution both upon the criminal conviction and under a capias in the civil suit. The justice continues, "Such is my conclusion from the testimony and the circumstances surrounding the tansactions."

It is respectfully urged that neither the understanding of the Sessions' Judge, the defendant's attorney or the defendant's lender furnishes any substitute for a definite mutual understanding between the plaintiff and defendant. The circumstances of the defendant borrowing money from his brother-in-law did not change his financial status, there being no proof that the transaction was different from an ordinary

10

20

30

40

loan which he was legally obliged to repay.

There is no proof that the lender paid, or was requested to pay, the money direct to the plaintiff, so as to constitute a novation or special consideration for the acceptance of the less sum.

By the abandonment of the rule to show cause the defendant did not change his legal
10
status to his detriment. The rule had already been granted; he received from the plaintiff no hint that its prosecution might be dispensed with; he received no satisfaction or release to encourage the belief that the lien of the judgment was raised. On the contrary by securing an extension of its return the day after the alleged settlement (and on the very day that the money was paid), he encouraged the plaintiff to be-
20
lieve that the rule was to be prosecuted, and put the plaintiff to the inconvenience and expense of having it discharged.

The misunderstanding of his attorneys respecting their course of professional duty or their baseless confidence that the plaintiff would satisfy the judgment upon a casual demand made four months later, should be imputed to the defendant, and not visited upon the plaintiff at a cost of $23,000.
30

It is submitted that the order of the Supreme Court cancelling the judgment should be reversed.

RICHARD DOHERTY,
Attorney of and of Cousel
with Plaintiff.

40