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Notice of Appeal.
(Filed May 16th, 1928.)

IN CHANCERY OF NEW JERSEY.

Between SIDNEY WESTHEIMER, Complainant, and ALTER GITTLEMAN and JENNIE GITTLEMAN, Defendants.	}	On Bill, &c.,	10
Between ALICE MAY SLATER, Complainant, and ALTER GITTLEMAN, JENNIE GITTLE- MAN and SIDNEY WESTHEIMER, Defendants.	}	Notice of Appeal.	20

The complainant, SIDNEY WESTHEIMER, in the suit instituted by him in this Court against Alter Gittleman, et als, and which said suit was consolidated with the suit instituted by Alice May Slater in this Court, in which he was one of the defendants, hereby appeals from the Final Decree and every part thereof, made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry in this Court in the above entitled cause, to the Court of Errors and Appeals; except that part of said Decree wherein it was decreed that the complainant, Alice May Slater, did not sustain her allegations of fraud and conspiracy in the execution of the mortgage given

Notice of Appeal.

by Alter Gittleman and Jennie Gittleman to the
said complainant, Sidney Westheimer.

Dated, May 14th, 1928.

ISAACS & GUNTHER,
Solicitors for and of Counsel with
Complainant, Sidney Westheimer.

10

I conceive there is a good cause of appeal in the
above stated cause.

LIONEL ISAACS,
Of Counsel with Complainant,
Sidney Westheimer.

20

30

40

Petition of Appeal.

(Filed May 31st, 1928.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

SIDNEY WESTHEIMER,
Complainant-Appellant,

and

ALTER GITTLEMAN and JENNIE
GITTLEMAN,
Defendants-Respondents.On Appeal
from
Chancery.
Petition of
Appeal.

10

TO THE HONORABLE COURT OF ERRORS AND APPEALS,
IN THE LAST RESORT IN ALL CAUSES:

20

The petition of appeal of Sidney Westheimer, re-
spectfully shows:That your petitioner finds himself aggrieved by
the final decree made in the Court of Chancery by
his Honor, Edwin Robert Walker, Chancellor of the
State of New Jersey, bearing date the Eighth day of
May, One Thousand Nine Hundred and Twenty-
eight, in a cause wherein Alter Gittleman, et als,
were defendants and this petitioner was the com-
plainant in this respect; to wit, that the said decree
orders, adjudges, decrees and declares:

30

That a certain bond and mortgage made and exe-
cuted by the said Alter Gittleman and Jennie Gittle-
man to Sidney Westheimer, mentioned and set forth
in the bill of complaint filed in the cause between
Sidney Westheimer and Alter Gittleman, dated the
Fourteenth day of December, One Thousand Nine
Hundred and Twenty-six and recorded on the Fif-
teenth day of December, One Thousand Nine Hun-

40

Petition of Appeal.

dred and Twenty-six, in the Register's Office of the County of Essex in Book N-59 of Mortgages for said County at page 369 to secure the sum of Fifty-eight hundred (\$5800.) Dollars was executed from the said defendants, Alter Gittleman and Jennie Gittleman, through duress and without consideration and being further satisfied that the said transaction is
10 illegal.

That the said complainant, Sidney Westheimer, surrender the said bond and mortgage properly endorsed for cancellation to the said defendants, Alter Gittleman and Jennie Gittleman, within ten days after service upon the said defendants of a true but uncertified copy of the said decree.

And that the said bond and mortgage, heretofore referred to, be cancelled of record and be no longer
20 a lien on the said lands and premises herein described against the said defendants, Alter Gittleman and Jennie Gittleman, or any person claiming by, from, or under them, or either of them, and the said complainant, Sidney Westheimer, and any person claiming by, from, or under him, be debarred and perpetually enjoined from collecting any money upon the said mortgage and upon the bond accompanying the same, for which bond such mortgage is given as collateral security either for principal or for interest or for setting up the same against the premises therein described.
30

That Sidney Westheimer return to Alter Gittleman the sum of Five Hundred (\$500.00) Dollars, with interest to date and to Jennie Gittleman the sum of Fifteen hundred (\$1500.) Dollars, with interest to date exacted from them on account of the mortgage.

And that the bill of complaint filed by Sidney Westheimer for the foreclosure of the said mortgage
40 be and hereby is dismissed.

Petition of Appeal.

And your petitioner humbly appeals from that part of the decree which directs as aforesaid, upon the ground that the same is erroneous for the separate and several reasons hereinafter stated :

(1) That the evidence shows that the bond and mortgage mentioned were voluntarily given and therefore should not be declared void and set aside and that the said mortgage should not be endorsed for cancellation. 10

(2) That the evidence shows that the said bond and mortgage were not induced by pressure put on the parties making them by threats of imprisonment, duress; therefore should not have been declared null or void, ordered set aside and cancellation thereof ordered. 20

(3) That the conclusion of the Court of Chancery that said bond and mortgage were not voluntarily executed by the defendants-respondents, by threats of imprisonment and duress and disbarment was contrary to the evidence in said cause and against the weight of evidence.

(4) That the burden of proof was upon the defendants-respondents to support the allegations contained in the answer to the bill of complaint in said cause and that the evidence adduced in said cause did not meet the requirements of the burden of proof so imposed by law upon them. 30

(5) That the evidence shows that the bond and mortgage above mentioned were the voluntary acts of the defendants-respondents for the purpose of repairing to some extent a wrong done by their son to the complainant-appellant in said cause. 40

Petition of Appeal.

(6) That if the proofs in said cause show that threats of imprisonment, duress and disbarment were made to said defendants-respondents for the purpose of inducing or procuring the execution of the bond and mortgage above described, said bond and mortgage were not in fact executed under pressure or by reason of said threats so that said bond and mortgage should be declared null and void and ordered to be set aside and cancelled.

(7) That even if the execution of said bond and mortgage was induced by the pressure of threats of imprisonment, duress and disbarment, such threats were threats of imprisonment either lawful, or honestly supposed to be lawful, by the person making them, and that such threats do not constitute threats and that the bond and mortgage in question should not be declared to be null or void or ordered to be set aside or cancelled because of such threats.

(8) The defendants-respondents should have received no relief in the Court below because they were guilty of laches in failing to file an answer or to make any defense to the same until the day of hearing in the cause of Alice May Slater, complainant and Alter Gittleman, et als, defendants, which said cause of actions were consolidated by order of the Court below.

(9) The defendants-respondents should have been precluded from interposing the defense of duress per minas at the hearing of the cause by reason of the fact that they failed to file an answer to the bill of complaint and that they did in answering the bill of complaint in the suit instituted by Alice May Slater against them, as by reference to paragraph 10 of that said answer will more particularly appear,

Petition of Appeal.

wherein they alleged that the mortgage and the bond they executed to the complainant-appellant was not secured by fraud but a good and subsisting mortgage and one given for forbearance; and that the said defendants-respondents were therefore estopped in their contention of duress having been on them practiced.

10

(10) Said decree should have ordered, adjudged, decreed and declared that the defendants-respondents had failed to support the allegations contained in said answer to the said bill of complaint and should have ordered, adjudged, and decreed that the said answer to said bill of complaint be dismissed, with costs to the petitioner to be taxed.

Your petitioner therefore prays that the said decree of the said Chancellor may, in the particulars aforesaid, be reversed and set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

20

ISAACS & GUNTHER,
Solicitors of and Counsel with
the Appellant, Sidney Westheimer.

LIONEL ISAACS,
Of Counsel with Appellant.

30

40

Answer to Petition of Appeal.

(Filed June 27, 1928.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Between SIDNEY WESTHEIMER, Complainant-Appellant, and ALTER GITTLEMAN and JENNIE GITTLEMAN, Defendants-Respondents.	} On Appeal } from the } Court of } Chancery. } Answer to } Petition of } Appeal.
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20 The answer of the above named respondents to the petition of appeal says:

20 These respondents not acknowledging all or any of the matters, which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that a final decree was on the Eighth day of May, Nineteen Hundred Twenty-eight, last past, made and entered in the Court of Chancery, in the above entitled cause for the purposes in said petition and as therein set forth; but as to the substance and form of said decree, these

30 respondents beg leave to refer thereto when the same shall be produced. These respondents are advised and believe that the said decree is agreeable to Equity; they pray that the same may be affirmed, with costs to be taxed in favor of these respondents.

Dated, June 26, 1928.

40
 BRAELOW & TEPPER,
 Solicitors for and of
 Counsel with Respondents.

Bill of Complaint.
(Filed June 10th, 1927)

IN CHANCERY OF NEW JERSEY.

To the Hon. EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey.

The complainant, Alice May Slater, of the town of West Orange, county of Essex and State of New Jersey, respectfully shows that: 10

1. On August 22, 1925, the complainant while a passenger in a certain automobile was injured through the collision of said automobile and an automobile owned by the defendant Alter Gittelman and operated by the defendant, his son, Benjamin Gittleman, as the duly authorized agent and servant of Alter Gittleman. 20

2. Suit was instituted by the complainant against the defendants Alter Gittleman and Benjamin Gittleman in the New Jersey Supreme Court, and a summons was issued on October 2, 1925, and the service of the summons and complaint was made on the defendants by consent of Simon S. Gittleman, attorney for said defendants Alter Gittleman and Benjamin Gittleman, dated November 24, 1925, and endorsed by him on a supplemental complaint filed in said cause with the clerk of said Supreme Court. 30

3. Said cause thereafter became at issue and was duly noticed for trial December 17, 1925.

4. On December 14, 1926, the December term of the New Jersey Supreme Court for Essex County, opened at Newark, New Jersey. No one from the office of Palmer & Cooper, attorneys for the com- 40

Bill of Complaint.

10 plainant was in the Court House in Newark on that date. It being the rule and custom that causes not otherwise marked, by consent of counsel, will be marked "Ready" and will appear on the daily trial list of causes in their regular order. On Friday, January 28, 1927, it was noted by Palmer & Cooper that this case was not in the list for the coming week of January 31st although numbers higher than the number of this case were in said list. The clerk, Mr. George Joerschke, advised Palmer & Cooper that the case had been marked on December 14, 1926, being the opening day of said term, "Off for the term" said marking having been done by Simon S. Gittleman. Palmer & Cooper then on January 31, and February 1, 1927, requested said Simon S. Gittleman for a note consent-

20 ing to have this case reinstated on the list. On February 3, 1927, at about eleven A. M., the office of Simon S. Gittleman informed Palmer & Cooper that they would require a notice of motion to have said case reinstated. Such a notice was served on Simon S. Gittleman on the afternoon of February 3rd, returnable before the Hon. William A. Smith at the Court House in Newark, on February 5, 1927, at ten A. M. No one from the office of Simon S. Gittleman appeared before the Court on the return

30 of the said Notice of Motion, and on motion of Palmer & Cooper the case was reinstated.

5. On February 25th and 28th, 1927, said case was tried and resulted in a verdict in favor of the complainant and against the defendants Alter Gittleman and Benjamin Gittleman, for \$3000.00, and a judgment was entered March 4, 1927, in the New Jersey Supreme Court for \$3000.00 and \$48.38 costs as by the record thereof is made to appear.

Bill of Complaint.

6. At the time of the said accident Alter Gittleman and Jennie Gittleman, his wife, owned certain real estate in the city of Newark and State of New Jersey, as tenants by the entirety, and known as 131 Broome Street, and more particularly described as follows:

“Beginning at a point in the westerly line of Broome Street, 161 feet 6 inches from the corner formed by the westerly line of Broome Street and the northerly line of Kinney Street; thence northerly along Broome Street, 20 feet 6 inches; thence westerly parallel with Kinney Street 100 feet; thence southerly and parallel with Broome Street 20 feet 6 inches; thence easterly and parallel with Kinney Street 100 feet to the point or place of beginning.”

10

7. This property was on the date of the said accident and up to December 14, 1926, free and clear of all encumbrance.

20

8. On December 14, 1926, the very day on which the defendant Simon S. Gittleman without the consent of Palmer & Cooper, attorneys for the complainant, had the Supreme Court case marked “Off for the term,” Alter Gittleman and Jennie Gittleman entered into a deed of mortgage to Sidney Westheimer for \$5,800.00 on said premises described in paragraph 6 of this complaint for six months, \$2,000.00 to be paid on January 14, 1927, or the whole amount to be immediately payable and the entire principal sum to be paid on June 14, 1927.

30

9. Said conveyance was fraudulent in that no consideration passed to Alter Gittleman and Jennie

40

Bill of Complaint.

10 Gittleman, and said conveyance was made for the purpose of stripping the said Alter Gittleman of his assets so that he could not pay any judgment this complainant might obtain against him, and said conveyance was fraudulent because Alter Gittleman in making it rendered himself insolvent as to the claim of the complainant and was made without a fair consideration, because in the making of said conveyance the defendant Alter Gittleman knew of the pendency of the suit of the said complainant in the New Jersey Supreme Court, and knew that he had no other assets than his real estate with which he would be able to meet the payment of a judgment when obtained by the complainant.

20 10. On or about December 14, 1926, Simon S. Gittleman received from Sidney Westheimer \$5,800.00, which he alleges was paid to him in cash by Sidney Westheimer with the knowledge and consent of Alter Gittleman and Jennie Gittleman, his father and mother, the mortgage being made to accommodate him and to secure money, which conveyance of money was fraudulent in that Alter Gittleman and Simon S. Gittleman well knew that in paying said money to Simon S. Gittleman, Alter Gittleman became insolvent by virtue of the fact
30 that the then present fair salable value of his assets was less than the amount which would be required to pay his probable liability on his existing debts as they became absolute and mature, and thereby rendered Alter Gittleman insolvent fraudulently as to his creditor Alice May Slater.

40 11. On or about December 14, 1926, Simon S. Gittleman, Alter Gittleman and Jennie Gittleman and Sidney Westheimer conspired together to strip

Bill of Complaint.

Alter Gittleman of his assets so that this complainant could not recover any judgment which she might obtain against Alter Gittleman in her said action then pending as aforesaid.

12. A writ of execution has issued out of the New Jersey Supreme Court against Alter Gittleman on said judgment of the complainant, on June 10, 1927, directed to the Sheriff of Essex County, and by him returned wholly unsatisfied on June 10, 1927. 10

13. The complainant has been and is unable to find any other property of the said Alter Gittleman out of which to satisfy her said judgment, and has exhausted her legal remedy against the said Alter Gittleman.

14. The complainant's said judgment remains and still is wholly unpaid and unsatisfied. 20

The complainant is without adequate remedy in the courts of law, and therefore prays:

1. That Alter Gittleman and Jennie Gittleman, his wife, and Simon S. Gittleman and Sidney Westheimer, who are the defendants to this suit, may this bill of complaint and each statement therein made. 30

2. That the said defendants or some or one of them may be decreed to pay to complainant the full amount due and owing to her on her said judgment, together with interest, costs and execution fees accrued thereon.

3. That the said fraudulent conveyance by the said defendants Alter Gittleman and Jennie Gittle- 40

Bill of Complaint.

man, his wife, to the said Sidney Westheimer may be set aside and held to be fraudulent and declared null and void and of no effect as against complainant's said judgment.

10 4. That the said lands and premises may be sold free and clear and discharged of and from the said fraudulent conveyance under the said writ of execution and the proceedings thereof, and so much thereof as may be necessary to apply on the payment of the complainant's said judgment.

5. That Sidney Westheimer be enjoined from assigning or foreclosing the said fraudulent conveyance until the further order of this court.

20 6. That the said Simon S. Gittleman be enjoined from paying to Alter Gittleman or Jennie Gittleman his wife, all or any part of the money be received as the result of said mortgage, because the said conveyance to him of said money was a fraudulent conveyance.

30 7. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

PALMER & COOPER,
Solicitors for and of
Counsel with Complainant.

Answer of Sidney Westheimer.
(Filed July 5, 1927)

IN CHANCERY OF NEW JERSEY.

Between

ALICE MAY SLATER,
Complainant,

and

SIMON S. GITTLEMAN and SIDNEY
WESTHEIMER, *et als*,
Defendants.

On Bill, &c., 10
Answer.

The defendant, Sidney Westheimer, residing in the City of Philadelphia, in the County of Philadelphia and State of Pennsylvania, answering the Bill of Complaint filed in this cause, says that: 20

1. He has no information sufficient to form a belief as to the allegations and statements contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 and places the complainant upon her proof to prove and establish the same.

2. He admits that part of the allegations contained in paragraph 8 that states that Alter Gittleman and Jennie Gittleman entered into a deed of mortgage to him for \$5800. on said premises described in paragraph 6 of this complaint for six months, \$2000. to be paid on January 14, 1927 or the whole amount to be immediately payable and the entire principal sum to be paid on June 14th, 1927; he has no information sufficient to form a belief as to the other allegations in said paragraph contained and places the complainant upon her proof to prove and establish the same. 30
40

Answer of Sidney Westheimer.

3. He denies each and every allegation contained in paragraph 9 of the Bill of Complaint which affects him.

10 4. He admits that on or about December 14th, 1926, that Simon Gittleman received from him the sum of \$5800. and that the said mortgage was made by Alter Gittleman and Jennie Gittleman, the father and mother of Simon Gittleman, in consideration of the monies due and owing to him from Simon Gittleman, but denies that part of paragraph 10 which states that the conveyance of money was fraudulently obtained and remaining part of the said paragraph.

20 5. He denies each and every allegation contained in paragraph 11.

6. He has no information sufficient to form a belief as to the allegations contained in paragraphs 12, 13 and 14 of the Bill of Complaint and places the complainant upon her proof to prove and establish the same.

30 Wherefore defendant, Sidney Westheimer, prays that this action be dismissed as far as he is affected with costs.

ISAACS & GUNTHER,
Solicitors of and counsel with
defendant, Sidney Westheimer.

A true copy
THOMAS BARBER,
Clerk.

Answer of Simon S. Gittleman.

(Filed August 4, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

Alice May Slater,
Complainant,

and

Alter Gittleman, Jennie Gittleman,
Simon S. Gittleman and
Sidney Westheimer,
Defendants.

On Bill to
Set Aside
Fraudulent
Conveyance
Made Prior
to the
Creation of
a Debt.
Answer.

10

The defendant, Simon S. Gittleman of the City of Newark, County of Essex and State of New Jersey, in answer to the bill of complaint filed herein says: 20

1. He denies that portion of paragraph 4 which refers to the marking of the case referred to therein "off for the term" by this defendant.

2. He denies paragraph 10 of the bill of complaint.

3. He denies paragraph 11 of the bill of complaint. 30

SIMON S. GITTLEMAN,
Attorney *Pro se.*

A true copy:
THOMAS BARBER,
Clerk.

40

Answer of Alter Gittleman.(Filed August 12, ~~1926~~) 1927

IN CHANCERY OF NEW JERSEY.

10	Between <p style="text-align: center;">ALICE MAY SLATER, Complainant,</p> <p style="text-align: center;">and</p> <p style="text-align: center;">ALTER GITTLEMAN, JENNIE GITTLE- MAN, SIMON S. GITTLEMAN and SIDNEY WESTHEIMER, Defendants.</p>	} On Bill. Answer.
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20 The defendant, Alter Gittleman, of the City of Newark, County of Essex and State of New Jersey, answering the bill of complaint of the complainant herein, says that:

1. He admits the facts stated in paragraph "1" as to the collision, but denies that his car was driven and operated by his duly authorized agent or servant.

2. He admits the allegations contained in paragraph "2".

30 3. He has not sufficient knowledge or information to form a belief as to the allegations contained in paragraph "3".

4. He has not sufficient knowledge or information to form a belief as to the allegations contained in paragraph "4".

5. Defendant admits the allegations contained in paragraph "5", although he was not present at the trial.

40

Answer of Alter Gittleman.

6. Defendant admits the allegations contained in paragraph "6".

7. Defendant admits the allegations contained in paragraph "7".

8. Defendant has not sufficient knowledge or information to form a belief as to the alleged action of Simon S. Gittleman in marking the supreme court case "off for the term," but admits entering into a deed of mortgage with one Sidney Westheimer on said premises. 10

9. Defendant denies the allegations contained in paragraph "9".

10. Defendant denies the payment of \$5,800. in cash to Simon S. Gittleman by Sidney Westheimer, in consideration of said mortgage, and denies that said deed of mortgage was made in fraud, said mortgage having been given to secure the re-payment of monies due and owing from Simon S. Gittleman to the said Sidney Westheimer, and also in consideration of forbearance to sue Simon S. Gittleman by the said Sidney Westheimer. 20

11. Defendant denies the allegations contained in paragraph "11". 30

12. Defendant admits execution having been issued against him.

13. Defendant admits that he has no other property or assets out of which to satisfy the said judgment.

14. Defendant admits that said judgment has not been satisfied by him. 40

Answer of Alter Gittleman.

15. On June 10th, 1926, Sidney Westheimer actually loaned and advanced to Simon S. Gittleman, the sum of \$5,800., and that prior to December 14th, 1926, the said Sidney Westheimer threatened to institute suit against the said Simon S. Gittleman, to recover said sum of money, and in order to avoid suit against his son Simon S. Gittleman, and to accommodate him, this defendant, Alter Gittleman
10 agreed and promised at various times before December 14th, 1926, to execute a mortgage on his premises, to secure the re-payment of said sum of money to the defendant Sidney Westheimer. In accordance with his promise, the defendant Alter Gittleman, executed said deed of mortgage on December 14th, 1926, to secure to the defendant Sidney Westheimer, the re-payment of said sum and also upon
20 his promise to forebear bringing suit against the said Simon S. Gittleman, son of the defendant Alter Gittleman. Said deed of mortgage was given and executed in good faith for fair and valuable consideration and without fraudulent intent or collusion on the part of the defendant, Alter Gittleman.

BRAELOW & TEPPER,
Attorneys for defendant,
Alter Gittleman.

30 A True Copy.

THOMAS BARBER,
Clerk.

40

Bill of Complaint.
(Filed August 8th, 1927.)

IN CHANCERY OF NEW JERSEY.

To HIS HONOR, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey.

The complainant, Sidney Westheimer, of the City and County of Philadelphia, and State of Pennsylvania, respectfully shows that: 10

1. On December 14th, 1926, Alter Gittleman and Jennie Gittleman, his wife, being indebted to Sidney Westheimer in the sum of \$5800.00, executed to him a bond of that date to secure that sum, payable by paying the sum of \$2,000. on January 14th, 1927 and the balance on June 14th, 1927, with interest to be computed thereon at the rate of six percent per annum, payable semi-annually. 20

2. To secure payment of the bond said Alter Gittleman and Jennie Gittleman, his wife, executed to the said Sidney Westheimer, a mortgage of even date with the bond; and thereafter conveyed to him in fee the lands hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of the County of Essex, December 15th, 1926, in book N 59 of mortgages for said County, at page 369. 30

3. The mortgaged premises are described as follows:

"ALL that tract or parcel of land and premises, hereinafter particularly described, situate, 40

Bill of Complaint.

lying, and being in the City of Newark in the County of Essex and State of New Jersey.

10 BEGINNING in the Westerly line of Broome Street, at a point One Hundred and Sixty one feet, six inches, from the corner formed by the intersection of the Westerly line of Broome Street, with the Northerly line of Kinney Street, and thence running Northerly along the line of Broome Street twenty feet, six inches, thence Westerly and parallel with Kinney Street, One hundred feet thence Southerly and parallel with Broome Street, twenty feet six inches, thence Easterly and parallel with Kinney Street, One hundred feet to the place of beginning."

20 4. Both bond and mortgage contained agreement that if installment or principal and interest should remain unpaid for thirty (30) days after the same should fall due, then the whole principal sum with all unpaid interest should, at the option of the mortgagee, his representatives, or assigns, become immediately due.

30 5. The mortgage also contains an agreement that the mortgagers, their heirs and assigns, would keep the building on the mortgaged premises insured against loss of damage by fire in a sum not less than the principal sum of the mortgage debt, and would assign the policy of insurance to the mortgagee, his representatives or assigns; and in default of so doing that the mortgagee, his representatives or assigns, should be entitled to effect such insurance and the premiums paid for the same by the mortgagee, or his assigns, with interest at six per cent

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Bill of Complaint.

per annum, should be a lien on said land added to the amount of the mortgage debt and secured by the mortgage.

6. Prior to June 14th, 1927, when the balance due on said mortgage amounted to \$3,800. and became due and payable, the complainant demanded from the said Alter Gittleman and Jennie Gittleman, his wife, the balance due thereon of \$3800., which they refused to pay, and no part thereof has since been paid. 10

7. The said Alter Gittleman and Jennie Gittleman, his wife, failed to keep the buildings on said land insured against loss or damage by fire in any sum, and on June 21, 1927 complainant caused the same to be insured in the Scottish Union and National Insurance Company, in the sum of \$6,000. for one year, and paid the sum of \$109.32 for insurance premium thereon; this sum with interest at the rate of six per cent per annum is a lien on said premises added to the amount of the mortgage debt and secured by complainant's mortgage. 20

8. On June 10th, 1927 a lis pendens was filed in the office of the Register of the County of Essex, #6067, wherein it recites that a bill of complaint has been filed in the Court of Chancery by one Alice May Slater against Alter Gittleman and Jennie Gittleman, *et als*, to enjoin the assigning or foreclosing of a certain mortgage given by Alter Gittleman and Jennie Gittleman, his wife, to Sidney Westheimer for \$5800., made December 14th, 1926, and recorded in book N 59 of mortgages for the County of Essex, at page 369; being the same premises hereinbefore described in this bill of complaint. 30

Bill of Complaint.

9. On June 22nd, 1927 an order was entered in the Court of Chancery in a certain cause wherein Alice May Slater is complainant and Alter Gittleman, Simon S. Gittleman and Sidney Westheimer are defendants, respectively advised by Vice Chancellor Berry and signed by the Chancellor, consented to by Isaacs and Gunther, solicitors of Sidney Westheimer, that the said Sidney Westheimer be restrained from disposing of any monies he may hereafter receive in part or full payment of the mortgage hereinbefore recited, but to pay said monies to his attorney Lionel Isaacs, and by him to be held intact pending final order, and it is also further ordered that since there is no evidence that Sidney Westheimer did conspire with Alter Gittleman or Simon Gittleman in receiving the said mortgage that his pendens now on record concerning the same be removed.

10. On March 4th, 1927, there was entered a judgment in the New Jersey Supreme Court, On Postea, recovered by, and in favor of Alice May Slater, as plaintiff, against Benjamin Gittleman, by Simon Gittleman, his next friend, and Alter (or Alten) Gittleman as defendants, in the sum of, damages \$3,000. and costs in the sum of \$48.38.

Any interest which the said Alice May Slater may have in said lands is subject to the lien of complainant's mortgage.

11. Said Alter Gittleman and Jennie Gittleman, his wife, or one of them, has always been in possession of the mortgaged premises.

12. The whole amount of principal, that is \$3,800. with interest thereon from December 4th, 1926, is due upon complainant's bond and mortgage.

Bill of Complaint.

COMPLAINANT IS WITHOUT ADEQUATE REMEDY IN
THE COURTS OF LAW AND THEREFORE PRAYS:

1. That Alter Gittleman and Jennie Gittleman,
his wife, and the said Alice May Slater, who are
defendants to this suit, may answer this Bill of
Complaint, and each statement therein made.

10

2. That an account may be taken of the amount
due on complainant's mortgage;

3. That the defendants, or one of them, may be
decreed to pay complainant the amount so found
due with interest, and costs, by a short day to be
appointed by this Court;

4. And that in default of such payment, they and
each of them, be barred and foreclosed of all equity
or redemption in said lands; or

20

5. That a decree may be made for the sale of the
mortgaged premises to raise and pay to the com-
plainant the amount so found due on his mortgage,
with interest and costs;

6. That a writ of subpoena may issue command-
ing said defendants to answer this Bill of Complaint
and to abide by such decree as the Court may make
in the premises.

30

ISAACS & GUNTHER,
Solicitors of and Counsel with
the Complainant.

A True Copy.

THOMAS BARBER,
Clerk.

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Answer of Alice May Slater.

(Filed August 25, 1927.)

IN CHANCERY OF NEW JERSEY.

10	Between SIDNEY WESTHEIMER, Complainant, and ALTER GITTLEMAN, <i>et ux et al</i> , Defendants.	}	On Bill, Etc. Answer.
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The defendant, Alice May Slater, of West Orange, in the County of Essex and State of New Jersey, answering the bill of complaint of the complainant herein, says that:

20

1. She denies that Alter Gittleman and Jennie Gittleman were indebted to the complainant Sidney Westheimer on December 14, 1926, in the sum of \$5,800.

2. She admits the making of the mortgage described in paragraph 2.

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3. She admits the allegations of paragraph 3.

4. She admits the allegations of paragraph 4.

5. She has no knowledge or information sufficient to form a belief as to the allegations of paragraph 5.

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6. She has no knowledge or information sufficient to form a belief as to the allegations of paragraph 6.

Answer of Alice May Slater.

7. She has no knowledge or information sufficient to form a belief as to the allegations of paragraph 7.

8. She admits the allegations of paragraph 8.

9. She admits the allegations of paragraph 9.

10. She admits the allegations of paragraph 10.

10

11. She has no knowledge or information sufficient to form a belief as to the allegations of paragraph 11.

12. She denies the allegations of paragraph 12.

13. On August 22, 1925, the complainant while a passenger in a certain automobile was injured through the collision of said automobile and an automobile owned by the defendant Alter Gittleman and operated by the defendant, his son, Benjamin Gittleman, as the duly authorized agent and servant of Alter Gittleman.

20

14. Suit was instituted by the complainant against the defendants Alter Gittleman and Benjamin Gittleman in the New Jersey Supreme Court, and a summons was issued on October 2, 1925, and the service of the summons and complaint was made on the defendants by consent of Simon S. Gittleman, attorney for said defendants Alter Gittleman and Benjamin Gittleman, dated November 24, 1925, and endorsed by him on a supplemental complaint filed in said cause with the clerk of said Supreme Court.

30

15. Said cause thereafter became at issue and was duly noticed for trial December 17, 1925.

40

Answer of Alice May Slater.

16. On December 14, 1926, the December term of the New Jersey Supreme Court for Essex County, opened at Newark, New Jersey. No one from the office of Palmer & Cooper, attorneys for the complainant was in the Court House in Newark on that date. It being the rule and custom that causes not otherwise marked, by consent of counsel, will be

10 marked "Ready" and will appear on the daily trial list of causes in their regular order. On Friday, January 28, 1927, it was noted by Palmer & Cooper that this case was not in the list for the coming week of January 31st, although numbers higher than the number of this case were in said list. The clerk, Mr. George Joerschke, advised Palmer & Cooper that the case had been marked on December 14, 1926, being the opening day of said term, "Off for

20 the term" said marking having been done by Simon S. Gittleman, Palmer & Cooper then on January 31 and February 1, 1927, requested said Simon S. Gittleman for a note consenting to have this case reinstated on the list. On February 3, 1927, at about eleven A. M. the office of Simon S. Gittleman informed Palmer & Cooper that they would require a notice of motion to have said case reinstated. Such a notice was served on Simon S. Gittleman on the afternoon of February 3rd, returnable be-

30 fore the Hon. William A. Smith at the Court House in Newark, on February 5, 1927, at ten A. M. No one from the office of Simon S. Gittleman appeared before the court on the return of the said Notice of Motion, and on motion of Palmer & Cooper the case was reinstated.

17. On February 25 and 28, 1927, said case was tried and resulted in a verdict in favor of the complainant and against the defendants Alter Gittle-

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Answer of Alice May Slater.

man and Benjamin Gittleman, for \$3000.00, and a judgment was entered March 4, 1927, in the New Jersey Supreme Court for \$3000.00 and \$48.38 costs as by the record thereof is made to appear.

18. At the time of the said accident Alter Gittleman and Jennie Gittleman, his wife, owned certain real estate in the city of Newark and State of New Jersey, as tenants by the entirety, and known as 131 Broome Street, and more particularly described as follows: 10

“Beginning at a point in the westerly line of Broome Street, 161 feet 6 inches from the corner formed by the westerly line of Broome Street and the northerly line of Kinney Street; thence northerly along Broome Street, 20 feet 6 inches; thence westerly parallel with Kinney Street 100 feet; thence southerly and parallel with Broome Street 20 feet 6 inches; thence easterly and parallel with Kinney Street 100 feet to the point or place of beginning.” 20

19. This property was on the date of the said accident and up to December 14, 1926, free and clear of all encumbrance.

20. On December 14, 1926, the very day on which the defendant Simon S. Gittleman without the consent of Palmer & Cooper, attorneys for the complainant, had the Supreme Court case marked “Off for the term,” Alter Gittleman and Jennie Gittleman entered into a deed of mortgage to Sidney Westheimer for \$5,800.00 on said premises described in paragraph 6 of this complaint for six months, \$2,000.00 to be paid on January 14, 1927, 30

Answer of Alice May Slater.

or the whole amount to be immediately payable and the entire principal sum to be paid on June 14, 1927.

21. Said conveyance was fraudulent in that no consideration passed to Alter Gittleman and Jennie Gittleman, and said conveyance was made for the purpose of stripping the said Alter Gittleman of his assets so that he could not pay any judgment this complainant might obtain against him, and said conveyance was fraudulent because Alter Gittleman in making it rendered himself insolvent as to the claim of the complainant and was made without a fair consideration, because in the making of said conveyance the defendant Alter Gittleman knew of the pendency of the suit of the said complainant in the New Jersey Supreme Court, and knew that he had no other assets than his real estate with which he would be able to meet the payment of a judgment when obtained by the complainant.

22. On or about December 14, 1926, Simon S. Gittleman received from Sidney Westheimer \$5,800.00, which he alleges was paid to him in cash by Sidney Westheimer with the knowledge and consent of Alter Gittleman and Jennie Gittleman, his father and mother, the mortgage being made to accommodate him and to secure money, which conveyance of money was fraudulent in that Alter Gittleman and Simon S. Gittleman well knew that in paying said money to Simon S. Gittleman, Alter Gittleman became insolvent by virtue of the fact that the then present fair saleable value of his assets was less than the amount which would be required to pay his probable liability on his existing debts as they became absolute and mature, and

Answer of Alice May Slater.

thereby rendered Alter Gittleman insolvent fraudulently as to his creditor Alice May Slater.

23. On or about December 14, 1926, Simon S. Gittleman, Alter Gittleman and Jennie Gittleman and Sidney Westheimer conspired together to strip Alter Gittleman of his assets so that this complainant could not recover any judgment which she might obtain against Alter Gittleman in her said action then pending as aforesaid. 10

24. A writ of execution has issued out of the New Jersey Supreme Court against Alter Gittleman on said judgment of the complainant, on June 10, 1927, directed to the Sheriff of Essex County, and by him returned wholly unsatisfied on June 10, 1927. 20

25. The complainant has been and is unable to find any other property of the said Alter Gittleman out of which to satisfy her said judgment, and has exhausted her legal remedy against the said Alter Gittleman.

26. The complainant's said judgment remains and still is wholly unpaid and unsatisfied. 30

PALMER & COOPER,
Attorneys for Defendant,
Alice May Slater.

A true copy:

THOMAS BARBER,
Clerk.

Withdrawal of Answer.

(Filed by Alice May Slater.)

(Filed Sept. 16, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

10

SIDNEY WESTHEIMER,
Complainant,

and

ALTER GITTLEMAN, *et ux et al*,
Defendants.

On Bill, Etc.
Withdrawal
of Answer.

Palmer & Cooper solicitors for the defendant
Alice May Slater hereby withdraw the answer filed
in the above entitled matter by the said defendant
Alice May Slater.

20

PALMER & COOPER,
Solicitors for Defendant,
Alice May Slater.

A true copy:

THOMAS BARBER,
Clerk.

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**Order Permitting Answer and
Counterclaim.**

(Filed April 24th, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

SIDNEY WESTHEIMER,
Complainant,

and

ALTER GITTLEMAN and JENNIE
GITTLEMAN,
Defendants.

On Bill, Etc.
Order
Permitting
Answer and
Counter-
claim.

10

This matter coming to be heard on application of
Braelow & Tepper, Esqs., by Jacob Hauptman, Esq.,
Solicitors for and of counsel with defendants Alter
Gittleman and Jennie Gittleman, and in the pres-
ence of Lionel Isaacs, Esq., of Isaacs & Gunther,
Esq., Solicitors for and of counsel with complain-
ant Sidney Westheimer, and it appearing that a
bill of foreclosure having been filed by the com-
plainant herein for the foreclosure of a mortgage
given by the defendants to the complainant on lands
described in the said bill of foreclosure, and the
defendants having failed to file an answer and
counterclaim, and the matter having gone to final
decree, and final decree having been issued direct-
ing the sale of the said lands, and the defendants
having petitioned the Court to reopen the final de-
cree to permit said defendants to file an answer as
within time setting forth the defense of duress and
illegality of the said mortgage, and a counterclaim
on behalf of the said defendants against the com-
plainant Sidney Westheimer;

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Answer and Counterclaim of Alter Gittleman and Jennie Gittleman.

(Filed April 24, 1928)

IN CHANCERY OF NEW JERSEY.

Between SIDNEY WESTHEIMER, Complainant, and ALTER GITTLEMAN and JENNIE GITTLEMAN, Defendants.	}	On Bill of Foreclosure. Answer and Counterclaim.	10
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The defendants Alter Gittleman and Jennie Gittleman residing in the City of Newark, County of Essex, State of New Jersey, answering the bill of complaint filed herein, say that: **20**

1. Defendants deny being indebted to Sidney Westheimer in the sum of fifty-eight hundred (\$5800.00) dollars, but admit the remainder of the paragraph.

2. Defendants admit paragraph 2.

3. Defendants admit paragraph 3.

4. Defendants admit paragraph 4. **30**

5. Defendants admit paragraph 5.

6. Defendants admit paragraph 6.

7. Defendants deny paragraph 7.

8. Defendants admit paragraph 8.

9. Defendants have not sufficient information or knowledge to form a belief as to the allegations con-

*Answer and Counterclaim of Alter Gittleman and
Jennie Gittleman.*

tained in paragraph 9, and leave the plaintiff to his proof.

10. Defendants admit paragraph 10.

11. Defendants admit paragraph 11.

10 12. Defendants deny paragraph 12.

FIRST SEPARATE DEFENSE.

1. Defendants say that the said mortgage was procured from the defendants by the complainant through duress on the part of the complainant, in that complainant made threats to the defendants to prosecute their son Simon S. Gittleman for embezzlement; to initiate proceedings for the disbarment of said son, and to make trouble for him unless the parents executed the said mortgage.

20

2. As a result of such threats made by the complainant to defendants, defendants were not acting voluntarily in executing the mortgage and lacked the proper state of mind so as to be able to enter into a legal contract.

3. If it were not for the threats of the complainant, defendants would not have executed the said mortgage.

30

SECOND SEPARATE DEFENSE.

1. The mortgage was based upon an illegal transaction in that, the said son Simon S. Gittleman had taken to his use, and without intent to return, certain moneys entrusted to him by Sidney Westheimer, without the permission of the said Sidney

40

*Answer and Counterclaim of Alter Gittleman and
Jennie Gittleman.*

Westheimer, and the said Sidney Westheimer, with full knowledge of this crime of embezzlement, did bargain and agree with the defendants not to prosecute the son Simon S. Gittleman if they should execute the mortgage.

2. The effect of Sidney Westheimer's bargain was to conceal a criminal offense committed against the state. 10

THIRD SEPARATE DEFENSE.

1. There was no legal consideration for said mortgage.

FOURTH SEPARATE DEFENSE.

1. The mortgage was based on an agreement by Sidney Westheimer not to reveal a breach of trust and criminal offense committed by a member of the bar of this state, whereby the Supreme Court of New Jersey has been deceived into continuing the said Simon S. Gittleman as a member of the bar in good standing. 20

COUNTERCLAIM.

Defendants Alter Gittleman and Jennie Gittleman, by way of counterclaim against complainant Sidney Westheimer, say that: 30

1. While yet under the influence of threats of imprisonment and disbarment to their son Simon S. Gittleman, the sum of \$500.00 was exacted from defendant Alter Gittleman and the sum of \$1500.00 was exacted from defendant Jennie Gittleman on 40

*Answer and Counterclaim of Alter Gittleman and
Jennie Gittleman.*

account of the said mortgage, by the said Sidney Westheimer.

Defendants are without adequate remedy at law, and therefore pray:

10 1. That the said Sidney Westheimer be decreed to return the sum of \$500.00 to defendant Alter Gittleman with interest to date, and the sum of \$1500.00 to defendant Jennie Gittleman, with interest to date.

20 2. That the said mortgage be declared null and void, and that it be decreed that complainant Sidney Westheimer return the said bond and mortgage to the said defendants, duly endorsed for cancellation.

BRAELOW & TEPPER,
Solicitors for and of Counsel
with Defendants.

A true copy.

THOMAS BARBER.
Clerk.

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Consolidating Causes.

(Filed April 24, 1928)

IN CHANCERY OF NEW JERSEY.

Between SIDNEY WESTHEIMER, Complainant, and ALTER GITTLEMAN and JENNIE GITTLEMAN, Defendants.	}	On Bill to Set Aside Fraudulent Mortgage. Consolidat- ing Causes.	19
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Between ALICE MAY SLATER, Complainant, and ALTER GITTLEMAN, JENNIE GITTLE- MAN and SIDNEY WESTHEIMER, Defendants.	}	On Bill of Foreclosure.	
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This matter coming on to be heard on application of Braelow & Tepper, Esqs., through Jacob Hauptman, Esq., of counsel, in the presence of Isaacs & Gunther, Esqs., of counsel with Sidney Westheimer, and Palmer & Cooper, Esqs., of counsel with Alice May Slater; and it appearing that the matters in the above entitled causes involve the same parties and arise out of the same transaction and may conveniently be heard at one hearing;

It is, on this 8th day of February, 1928.

ORDERED, that the two causes of action entitled above be and hereby are consolidated, to be heard at one final hearing and to be disposed of in one decree.

Respectfully advised,

E. R. WALKER,
C.

MAJA LEON BERRY,
V. C.

A true copy.
THOMAS BARBER,
Clerk.

Testimony.

IN CHANCERY OF NEW JERSEY

Between

ALICE MAY SLATER,
Complainant,

and

ALTER GITTLEMAN, JENNIE GITTLE-
MAN, SIMON S. GITTLEMAN and
SIDNEY WESTHEIMER,
Defendants.

10

Transcript of testimony taken in the above en-
titled cause before Hon. Maja Leon Berry, Vice
Chancellor, at the Chancery Chambers, Newark,
New Jersey, on Wednesday, February 8, 1928, at 10
20 A. M.

APPEARANCES:

Messrs. PALMER & COOPER for Complainant.

Messrs. BRAELOW & TEPPER, by Jacob Haupt-
man, Esq., for Defendant Alter Gittleman.Messrs. ISAACS & GUNTHER for Defendant Sid-
ney Westheimer.

30

Court: I will make an order consolidating the
two suits. You may make any answer you think
advisable in the foreclosure suit to protect Alter
Gittleman's interest, and if everybody consents to
it, you may consider that is as amended now, and
that may be perfected later, and I will hear the testi-
mony, and that will dispose of the whole matter.

40

Ralph E. Cooper. Called by Complainant. Direct.

RALPH E. COOPER, sworn for complainant:

DIRECT EXAMINATION BY MR. PALMER:

Q. You are a member of the firm of Palmer & Cooper? A. Yes.

Q. And they were attorneys for Alice May Slater in the suit which she had in the Supreme Court against Alter Gittleman and Benjamin Gittleman? A. Yes. 10

Q. And is this (indicating) a transcript of the pleadings of the Supreme Court in that suit? A. Yes.

Mr. Palmer: I offer this in evidence.
(Marked Exhibit C-1.)

Q. That case found its way into what list of the Supreme Court for trial? A. The December Term of 1926. 20

Q. And the opening day of that term was when? A. December 14, 1926.

Q. What, briefly, is the custom in the Circuit and Supreme Courts of Essex County with regard to cases being marked ready for trial at the opening day of the term? A. All cases are considered ready for trial and so marked automatically, unless by agreement of counsel another marking is made. 30

Q. Did you, or the firm of Palmer & Cooper, have any agreement with Simon Gittleman, who appeared as attorney for Alter and Benjamin Gittleman, that this case of Miss Slater's was not to be marked "Ready" at the opening day of the term? A. There was no such agreement.

Q. When, toward the end of January, 1927, it was found by the office of Palmer & Cooper that the case 40

Ralph E. Cooper. Called by Complainant. Direct.

of Slater vs. Gittleman was not in the week's call with those cases which bore numbers close to it, what, if anything, did you then do? A. I went to the Clerk of the Supreme Court, the Circuit, to George Joerschke, and inquired of him as to why that particular case was not in that week's call. He informed me that Simon Gittleman had been there on the opening day and had had the case marked "Off for the term" on that date.

10 Q. What steps did you then take to have it reinstated to the list? A. I then went to see Judge Smith in his chambers and advised him of the situation, and he said that unless Simon Gittleman would consent to have the case put back upon the list, which he (Judge Smith) was willing to do, I should serve a notice upon him of a motion to reinstate the case.

20 Q. Was Simon Gittleman willing to have it reinstated? A. He would not consent.

Q. And thereupon did you draw and have served on Simon Gittleman the following notice of motion to have that case reinstated in Judge Smith's list? A. Yes, sir.

Mr. Palmer: I offer that in evidence.
(Marked Exhibit C-2.)

30 Q. Did Simon Gittleman appear in court at the time that this motion was heard? A. He did not.

Q. And was the case thereafter reinstated to the list? A. Yes, sir.

Q. It was tried, I believe, on February 25, 1927? A. That is right.

Q. I show you a transcript of the record from the Clerk of the Supreme Court and ask you if that

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Alter Gittleman. Called by Complainant. Direct.

shows the amount of the judgment recovered by Miss Slater? A. Yes, it does.

Q. In the trial? A. Yes.

Mr. Palmer: I offer that transcript of the record of the Supreme Court in evidence.

(Marked Exhibit C-3.)

Q. From the inception of the suit down to its trial who represented Alter and Benjamin Gittleman? A. Simon Gittleman.

10

ALTER GITTLEMAN, sworn for complainant:

DIRECT EXAMINATION BY MR. PALMER:

Q. You are Alter Gittleman? A. Yes.

20

Q. And on December 14, 1926, did you and your wife own some property on Broome Street, in this City? A. Yes.

Q. And on the afternoon of December 14, 1926, you and your wife gave a mortgage and a bond to Mr. Sidney Westheimer for \$5800 on that property, didn't you? A. Yes.

Q. And this is the bond and the mortgage? A. Yes.

30

Mr. Palmer: I offer them in evidence.

(Marked Exhibits C-4 and C-5.)

Q. Mr. Gittleman, also at that time, December 14, 1926, you had some money in a Building and Loan Association here in Newark, didn't you? A. Yes.

40

Alter Gittleman. Called by Complainant. Cross.

Q. More than \$2,000, wasn't it? A. It was about \$1500.

Q. And within about thirty days after the giving of this bond and mortgage to Mr. Westheimer, you paid to Mr. Westheimer \$2,000, didn't you? A. Yes.

10 Q. Which money or a large part of it you took out of the Building and Loan Association? A. Yes.

Q. What, if anything, in the form of money or anything else did you get from Mr. Westheimer when you gave him this bond and mortgage? What did he give you? A. He gave me nothing.

Q. He didn't give you anything? A. It was only to protect my son, he shall not go to jail.

Q. Did he give your wife anything? A. Nothing; he didn't give me nothing.

20 Q. Neither you nor your wife got anything? A. No, except on the checks he signed, that is on account of the mortgage.

Q. And the property which you owned on Broome Street, and on which you gave this bond and mortgage, that was the only property that you owned at that time, wasn't it? A. Yes.

30 Q. And at the time that you gave this bond and mortgage to Mr. Westheimer, there were no other mortgages against that property; it was free and clear, wasn't it? A. No mortgages except about three hundred or four hundred was judgment, because I signed for somebody a note. I endorsed a note for somebody, and after the man wouldn't pay, there was a judgment on the property.

CROSS EXAMINATION BY MR. ISAACS:

40 Q. You gave Mr. Westheimer this bond and mortgage to protect your son so he wouldn't go to jail; isn't that right? A. Yes.

Alter Gittleman. Called by Complainant. Cross.

CROSS EXAMINATION BY MR. HAUPTMAN:

Q. How did you come into contact with Mr. Westheimer; when was the first time you ever saw him? A. It was on a Friday in December, I think it was about the tenth or eleventh of December, 1926. Mr. Brodsky called me.

Q. Who is Mr. Brodsky? A. Mr. Brodsky was at that time Westheimer's lawyer. It was late on Friday he called me up, "Alter Gittleman, I want to see you immediately in my office." 10

Mr. Isaacs: Who said that?

Witness: Nathan Brodsky.

Mr. Isaacs: I object to that.

Court: Did you know he was Mr. Westheimer's attorney?

Witness: No, he was his attorney at the time. 20

A. (Continuing) I told him I couldn't come now, because it is late on Friday, and Saturday; and he said, "No, you must come right way." I went in the office and he told me, "You know, Alter, that your son is in trouble."

Q. What? A. My son, Simon Gittleman, is in trouble. "What kind of trouble?" He start to tell me. He stole the money that Mr. Westheimer—he gave him the authority to raise a mortgage on his property for \$12,000, and \$6,000 he paid off and some more and about \$5500 on his bond and he couldn't raise the money; then I said, "What have you got for me to do?" "All right, I will take out a judgment against him." Westheimer was not at that time in the office. I told him first, "I will see Simon. I don't know nothing about it. He is my son, but he don't tell me nothing." I went home 30

Alter Gittleman. Called by Complainant. Cross.

and I called up for Simon and he came right away. I said, "Simon, what is the matter with you?"

Mr. Hauptman: Never mind what Simon told you.

10 A. (Continuing) Then I told him, "Call right away Westheimer." He didn't know the telephone, so I called up Brodsky, and Brodsky told me the telephone of Westheimer, and Westheimer came in. It was Friday night. Westheimer came in and start to tell me the same story. Then I asked him, "What have I got to do now?" Then he said, "If somebody will pay me the money, I will do nothing, but if nobody will pay, I will prosecute him and I put your son in jail", and mother heard this; a son in jail; she start to cry. I told him "I have no money, 20 I haven't a cent, but my life, I am a poor man. I am just making a living, how can I go and raise you \$5500?" He said "Not \$5500, it is \$5800, because I don't work for three or four weeks on account of this, and I want the \$300, and I don't want to lose the money." We start to talking and my wife start to cry; you know how a mother is, and she told him first, "You know we have a piece of property in Broome Street free and clear; we 30 will give you a mortgage on this property for a long time."

Q. For what? A. For this money, for the \$5500, he shall not go to the prosecutor against Simon. He was sitting and thinking about it, "All right", he said. Monday morning I got a call from him, he must have cash; he heard that the property is not worth so much money, he must have cash. I told him over the telephone, "How can I raise you cash?" Then my wife said, "I got in the Wee-

Alter Gittleman. Called by Complainant. Cross.

hawken Trust Company \$500 saved up; we will go to the lawyer; I will go in the bank and take out the \$500 and I will give him the \$500 cash."

Q. Go to what lawyer? A. To Brodsky.

Q. For what purpose? A. To make the mortgage.

Q. The papers had not been signed yet? A. No, but the papers were signed, I think, on Monday. I told him we will have \$500 in cash. He was satisfied. We went to the bank in the Weehawken Trust Company; my wife took out the \$500, and we went to Lawyer Brodsky. He say there that the property is not worth so much money; he want at least \$2,000 cash. "By God, where can I raise \$2000? \$500 we got now, \$1500 more. I am a teacher, but I go collecting every week and give my wife the wages. Go ahead." Then we start to talk about my wife has to go to the Building and Loan and savings money, but you must wait a month and give thirty days' notice. She got a certificate in one Building and Loan, I think in the Newark City Hall Building and Loan, and I have a certificate from the Newspapers Working Men's Building & Loan. Then we thought all right until thirty days I paid him, I can raise him the \$1500, but \$1500 you got already, but I want thirty days you shall give me, and I will try to raise the \$1500 more. I took her certificate and my certificate and went in, and I was in the Newark Trust Company and give them the certificate and they gave me the one thousand dollars on the two certificates, and \$500 my wife loaned of someone else, and I think in ten day I brought the check to Mr. Brodsky, to the lawyer, and we paid him off.

Q. You paid him off altogether how much? A. Then about the mortgage making he want \$300 for

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Alter Gittleman. Called by Complainant. Cross.

his wages too. I said, "What do you want of me?"
 "If you don't work, you are lucky. All right, if
 you will go to the Prosecutor, you will have nothing".
 "You are lucky you have this money, but
 if you want the \$300, no." "I don't want it, except
 I must have my money." I was not working
 in that time. Then we made the mortgage for
 10 \$5800, and on this I got two checks what I gave to
 him on account; here are the two checks, one for
 \$500, on December 14, and one for \$1500, December
 24.

Mr. Hauptman: Any objection to offering
 these at this time?

Mr. Isaacs: No.

(Marked Exhibits D-1 and D-2.)

20 Q. You said a little while ago, when you were at
 Mr. Brodsky's office, that Mr. Westheimer said that
 the property wasn't worth the amount of the mort-
 gage? A. Yes.

Q. He wanted some cash? A. Yes.

Q. And you asked him to wait for fifteen days or
 thirty days? A. Yes.

Q. Wait, what for; wait on what? A. Not to go
 to the prosecutor.

30 Q. Did he say he was going to the prosecutor?
 A. Sure; he said, "If I have not the money, I will
 go right away to the prosecutor, and I will put your
 son in jail." You know how a father and mother
 feel, it cost so much money, a poor man, to come a
 son to this; you know how much trouble it is, and
 to put him in jail, and he will be disbarred, and
 everything what we can do.

Q. Did Mr. Westheimer say anything about dis-
 barment? A. Yes, he said disbarment, too.

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Alter Gittleman. Called by Complainant. Cross.

Q. Did you ever get any money from Westheimer? A. Oh, never; I never know Westheimer until this day, and that is all what I see him after the checks.

Q. Or did Mrs. Gittleman, your wife, get any money from Mr. Westheimer? A. I don't know; maybe she did; you can ask Mrs. Gittleman.

Q. As far as you know? A. As far as I know, never. 10

Q. This property on which you gave the mortgage is on Broome Street? A. Yes, 131 Broome Street, my school.

Q. Who owned that property? A. Me and my wife.

Q. Both together? A. Both together.

Mr. Palmer: After you had given Mr. Westheimer the bond and mortgage, and after you took the money from the Building and Loan Association, that left you with nothing? 20

Witness: Nothing.

Mr. Palmer: You didn't have anything?

Witness: Nothing; I was poor, and am now poor.

Q. Did you explain that to Mr. Westheimer at the time you gave that mortgage? 30

Mr. Palmer: I object to that as immaterial.

Court: It may be on the question of the defence to the mortgage. I will hear it.

Q. (Repeated) Did you tell him that that was all you had? A. I told Mr. Westheimer, "I am a poor man; that for twenty-four years I am in the United States here in Newark. I came to the United States and I am here; this is what we saved 40

Alter Gittleman. Called by Complainant. Cross.

up, this piece of property, and this is the only place what I can make a living; I have there my school, and if this property will be sold or taken away from me, I haven't even one place to go to make a dollar a week.

10 Q. Far from that being the fact that you wouldn't have a place to earn a dollar a week, your wife owns a big house down where you live on Johnson Avenue? A. I cannot have the Hebrew there; it is no place for a Hebrew there, because I am here about twenty-two years, I got my Hebrew scholars, but I don't even need to advertise; they come at 131 Broome Street; where is Gittleman the teacher, and they bring the children there.

20 Q. With whose money was that Johnson Avenue property bought? A. With my wife's money, not mine.

Q. Where did she get it?

Court: Is that involved in these proceedings? Let us not take up time with that.

CROSS EXAMINATION BY MR. ISAACS:

Q. You paid \$2,000 on this mortgage, didn't you? A. Yes.

30 Q. Do you remember coming to my office in the early part of November, 1927? A. Yes.

Q. Do you recall the conversation you had with me at my office? A. Yes.

Q. What was it? A. I told you maybe we can settle; you shall protect my son, he shall have no trouble.

Q. What else did you say? A. That is all what I said.

40 Q. Did you say anything to me about an affidavit? A. I told you that Westheimer shall give

Alter Gittleman. Called by Complainant. Cross.

me a letter to Simon that he permitted him to use the money until the settlement of the mortgage.

Q. In other words, you wanted your son cleared of having taken this money? A. I want my son shall have no trouble. If I have trouble, what for is all my trouble; why shall I go and be a poor man when my son will have the trouble?

Q. Did your wife say that Westheimer should go and sign a writing that he let your son, Simon Gittleman, use this money, and that your son didn't steal the money? A. I don't mean this. 10

Q. What did you mean? A. I mean that he shall do anything in his power to clear up my son not to have trouble.

Mr. Hauptman: He means "he should do everything in his power not to make trouble for my son." 20

Witness: That is what I mean.

Q. Did you speak to me about an affidavit I had in my possession? A. I don't talk about affidavits; you told me that Mr. Cooper got an affidavit of Mr. Westheimer, but I don't talk about affidavit; I asked you maybe you can—you are the lawyer of Mr. Westheimer, maybe you can make it right with my son that Mr. Westheimer shall protect my son, because he is only the one who can protect—you shall tell Westheimer, as his lawyer, and to advise him that what is in his power to go and protect my son, then I ask you you shall do it, to do me a favor, and you shall do it and talk with Mr. Westheimer about it. 30

Q. What did I say? A. You said "I don't—"

Mr. Hauptman: I object. 40

Alter Gittleman. Called by Complainant. Cross.

Court: I cannot tell whether it is objectionable or not, in the shape the pleadings are in. I am going to receive it.

A. You said you don't want to do it.

Q. What else did I say to you? A. You said, "because your son is no good; I don't want to do
10 for him no favors."

Q. Did I ask you who your lawyers were? A. No, you don't ask me nothing.

Q. Didn't you tell me that Braelow & Tepper were your lawyers? A. Not at that time when the mortgage was made.

Q. Didn't you tell me that in my office? A. No.

Q. And didn't I tell you that I couldn't do anything; you had better go to Braelow & Tepper? A. You told me nothing; you said you can do nothing.
20 I ask you for a favor to do personally for me, and you refused it. Then I left your office and went home.

Q. When did you make application to the Newspaper Workers Building and Loan for a mortgage on your property?

Mr. Hauptman: I object. This is not his property and has no materiality in this case, and no bearing on it.
30

Court: What bearing has it?

Mr. Isaacs: I should like to show that Braelow and Tepper were Mrs. Gittleman's lawyer in September, 1927.

Mr. Hauptman: That is admitted. He said at the time of the making of the mortgage we were not his lawyers.

Q. They were your lawyers in 1926-1927? A. I
40 think since August or September.

Alter Gittleman. Called by Complainant. Cross.

Q. And I referred you back to them? A. No, you don't tell me nothing about them. I asked you to do me the favor, you talk with Westheimer, and you refused to do it, and said "I will not do this", and I left your office and went. You was very angry at that time and I couldn't talk with you even one word more, because I came in your office, you were excited and I left your office; I see I couldn't do nothing. 19

Q. Didn't you tell me at my office that morning that you were compelled to give this mortgage to Mr. Westheimer? A. How can I make a mortgage? No, that is not my house. No, I don't talk about money at that time.

CROSS EXAMINATION BY MR. HAUPTMAN:

Q. Did you have a lawyer at the time that the mortgage was made by you and your wife to Westheimer? A. I have no lawyer. 20

Q. You were not represented that time at all? A. No.

Q. Mr. Isaacs asked you whether you didn't pay \$2000 on account of that mortgage, and you said, yes. A. Yes.

Q. What money was that; where did you get that money?

Court: He has already explained that. 30

JENNIE GITTLEMAN, sworn for complainant.

DIRECT EXAMINATION BY MR. PALMER:

Q. When you and your husband gave this bond and mortgage to Mr. Westheimer on the Broome Street property, on December 14, 1926, did you get anything back from Mr. Westheimer? A. No.

Q. He didn't give you anything for it? A. No. 40

Mr. Isaacs: No cross examination.

*Jennie Gittleman. Called by Complainant. Cross.
Sidney Westheimer. Called by Complainant. Direct.*

CROSS EXAMINATION BY MR. HAUPTMAN:

Q. Why did you sign the mortgage? A. Because
on account of that trouble; Mr. Brodsky called up
my husband and after came Mr. Westheimer and
he said he will arrest my son, and you know how it
10 is, they say they can take away his license, and I
try my best to do something.

Q. You say that he was going to arrest your son?
A. Yes, he said he will arrest him and go to the
prosecutor.

Q. Is that why you gave the mortgage? A. Yes.

SIDNEY WESTHEIMER, sworn for complainant.

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DIRECT EXAMINATION BY MR. PALMER:

Q. It is correct that the bond and mortgage
which I show you, and which have been marked in
evidence in this case, were given to you in Mr. Brod-
sky's office on December 14, 1926, and signed by
Mr. and Mrs. Gittleman? A. Yes.

Q. And did you give them anything in return for
that bond and mortgage? A. No, sir.

30

Q. Under what circumstances did you come to
get that from them? A. Why, Mr. Gittleman had
—I had a piece of property 630 South Orange Ave-
nue, Newark, and Mr. Gittleman represented—

Q. Which Mr. Gittleman? A. Simon Gittleman
represented a mortgagee—holder of the mortgage, a
second mortgage on there, and came to me and told
me that the man wanted some money. Mr. Patrick
Cummings was the holder of the mortgage and it
40 was an eleven thousand dollar second mortgage,

Sidney Westheimer. Called by Complainant. Direct.

and six thousand dollar first, held by the Richelieu Building and Loan. Mr. Simon Gittleman came to me and said that Mr. Cummings wanted some money, that he could get me a twelve thousand dollar mortgage, pay off the six thousand dollar first, and reduce Mr. Cummings' mortgage, and I agreed, and I understood that Mr. Gittleman had paid off the Richelieu Building and Loan Association, which he didn't; he spent the money for his own purposes. 10

Mr. Isaacs: Was the Christian name Simon?

Court: Simon S. Gittleman, the lawyer?

Witness: Yes.

Q. You say he came to you and told you he could raise a twelve thousand dollar mortgage, which would let you pay six thousand dollars off to Mr. Patrick Cummings? A. Yes. 20

Q. And that he would use the other six thousand dollars to pay off the Richelieu Building and Loan Association? A. Yes.

Q. And thereafter what did you do in order to enable him to do that? A. I agreed.

Q. In addition to agreeing, what did you do; did you sign any mortgage or any papers yourself in his office? A. To make out the twelve thousand dollar mortgage, yes. 30

Q. Where was that done? A. In Mr. Brodsky's office.

Q. About when was that? A. That was June 5, 1926.

Q. Did you yourself ever get your hands on any of that twelve thousand dollars? A. No, sir.

Q. And as a matter of fact, was the Cummings mortgage reduced by six thousand dollars? A. Yes. 40

Sidney Westheimer. Called by Complainant. Direct.

Q. And was the Richelieu Building and Loan paid the six thousand dollars? A. No, sir.

10 Q. When did you first know that that had not been done? A. The secretary of the Building and Loan had notified me about, I believe, three months later, that I had lapsed in the payments, and he also notified me that the insurance on my property in favor of the B. & L. had not been reissued, so I told them that that was paid off by Mr. Simon Gittleman, and they informed me it wasn't.

Q. Then when you found that out, then what did you do? A. I went to Mr. Simon Gittleman and asked him about it, and he told me that he spent the money, and he would get it for me.

Q. Did he get it for you? A. No.

20 Q. How many times did you go to Simon Gittleman's office regarding this matter up until the mortgage of December 14 was given to you by his mother and father? A. During the time I had sold the property, and had made arrangements to sell it, and I went to Mr. Simon Gittleman and I told him that I was selling the property, and he said that he would pay off that six thousand dollar B. & L. mortgage. The way it stood then, there were two first mortgages against that property.

30 Q. What did he do and what did you do? A. Simon Gittleman went to Mr. Brodsky's office and told me that he could get the money, but he didn't.

Q. What finally was done? A. Mr. Brodsky, I believe, got in touch with Mr. Alter Gittleman, the father.

Q. And what conversation from that time on did you have with either Simon or Alter Gittleman? A. Mr. Simon Gittleman came up to get me in his machine and took me to his father's house.

40

Sidney Westheimer. Called by Complainant. Direct.

Q. What was there said among all of you? A. He told me that he owed me the money, but he didn't have it, and his father would help him out.

Q. What was said when you got up in the Gittleman house by all of you? A. That is what was said.

Q. What was the next thing done? A. Then the closing of the selling of the property was to be some time, I believe, in November, and it was postponed until December fourteenth; that was by Mr. Simon Gittleman. 10

Q. What reason did he give for wanting it postponed? A. I don't know; he gave me no reason.

Q. How many times did you demand that Simon Gittleman reduce by six thousand dollars this Richelieu Building and Loan mortgage? A. Ever since I was notified by the B. & L. 20

Q. How many times in all do you think you asked him? A. Quite a number of times.

Q. Then finally this mortgage was given to you by Mr. and Mrs. Gittleman on the Broome Street property, was it? A. Yes.

Q. And what was said by you or Simon or by them pertaining to the giving of this mortgage? A. I was told the mortgage would only be for six months; it was for fifty-eight hundred dollars; that within thirty days he was to pay two thousand dollars, which would reduce it to thirty-eight hundred dollars, and that in six months' time I would get the other thirty-eight hundred dollars. 30

Q. Mr. Westheimer, how was the fifty-eight hundred dollars arrived at, which is mentioned as the consideration in the mortgage? A. I believe that was the difference of what was paid off. I think that was the balance that was owed to the Richelieu; I am not sure. 40

Sidney Westheimer. Called by Complainant. Cross.

Q. Subsequently, was two hundred dollars paid to you by Alter Gittleman? A. Yes.

Q. At the present time there is thirty-eight hundred dollars due you? A. Yes.

CROSS EXAMINATION BY MR. HAUPTMAN:

10 Q. The money that you paid to Simon Gittleman to make a payment on account of that mortgage was done when? A. June 5; it wasn't money that was paid; it was a mortgage that was being changed.

Q. The transaction took place and the money given to Simon Gittleman when? A. June 5, 1926.

Q. And you were informed when that this money had not been paid off to the Building and Loan? A. About three months later.

20 Q. That would be sometime in September? A. Sometime around that time.

Q. Did you immediately get in touch with Simon Gittleman? A. Yes.

Q. And did he immediately convince you that he had used the money for his own purposes? A. He told me at that time that he was to get some papers from the Richelieu Building and Loan, which he didn't have at that time, but that he was going to have.

30 Q. How long did he hold off— A. He sent it— not until the sale of the property, December 14.

Q. How long did he hold off until he confessed to you that he had embezzled this money? A. He told me one day in the office that he had spent it. That was about a month or so ago.

Q. What did he say then? A. That was the time that I had negotiated a sale of my property, but he said, "I will get the money for you."

40 Q. When was that? A. That was around October or November, something like that; November I think it was.

Sidney Westheimer. Called by Complainant. Cross.

Q. You mean from September until November, for two months— A. I have been trying to get the money from him and he has been stalling me.

Q. He hadn't until that time confessed to you that he had embezzled the money? A. No.

Q. Then sometime in November he did actually confess that he had embezzled the money? A. Yes, he told me that he spent it.

10

Q. What did you say to him? A. I told him that I was selling this property and that I couldn't sell it unless that first mortgage was paid, and he told me that he was going to pay it off.

Q. And he didn't pay it? A. No.

Q. Then what happened? A. Then at Mr. Brodsky's office I believe he told me, or it came about, that the conference was arranged with Mr. Alter Gittleman and Mr. Simon Gittleman.

20

Q. At whose suggestion was that conference arranged? A. I believe Mr. Brodsky's.

Q. Mr. Brodsky was your attorney at that time; he was the attorney for the sale of the property? A. Yes.

Q. And did you or Mr. Brodsky say anything to Simon Gittleman about having the money paid to you or you would have him arrested? A. I don't remember that.

Q. Would you say that it wasn't said? A. I think at the time I said that I didn't want to cause any trouble for anybody.

30

Q. What do you mean by that, that you didn't want to cause any trouble for anybody? A. Mr. Simon Gittleman told me that he would pay off that mortgage.

Q. What did you mean when you said that you didn't want to cause any trouble for anybody? A. because he promised to pay off the mortgage.

40

Sidney Westheimer. Called by Complainant. Cross.

Q. You had something in mind when you said to him, "I don't want to cause any trouble for anybody," didn't you? A. Yes.

Q. What did you have in mind? A. He said he would pay off the—

10 Q. You are not answering the question. What did you have in mind when you said to him, "I don't want to cause trouble for anybody"? A. That was to Mr. Brodsky.

Q. Was Mr. Simon Gittleman there at the time? A. He was there at the time.

Q. And what did you have in mind when you said that?

Court: What trouble did you have in mind?

Witness: To save him from going to jail.

20 Q. Did you mention the word "jail"? A. No.

Q. Did you mention the word "prosecutor"? A. That I don't remember.

Q. You might have used that word? A. Yes.

Q. And did you say anything about disbarment? A. I don't remember that.

Q. Might you have said that? A. I don't think so.

30 Q. You are not positive that you didn't say it? A. No.

Q. And after this conference at Mr. Brodsky's office, at which Mr. Simon Gittleman was present, was it then arranged that Mr. Alter Gittleman be brought into the matter? A. Mr. Alter Gittleman had said that he would have that mortgage raised to protect the son.

Q. When had he said that? A. At the office there.

40 Q. To you? A. To me, at Mr. Brodsky's office, and at his own house.

Sidney Westheimer. Called by Complainant. Cross.

Q. When was the first time you saw Alter Gittleman? A. The night that the son took me up there.

Q. Up to his house? A. Yes, sir.

Q. That was the first time you saw him? A. Yes.

Q. And when was it arranged that you were to go to Alter Gittleman's house? A. I believe that Mr. Simon Gittleman had just come up—I didn't know nothing about it; he come up and asked me to go up to his father's house, that his father wanted to talk to me about that mortgage. 10

Q. And then you went immediately? A. Yes, sir, I went with him; he took me in his car.

Q. Who was present? A. Simon Gittleman, Alter Gittleman and Mrs. Gittleman and myself.

Q. What was the conversation at that time? A. Mr. Simon Gittleman told his father that he had used the money. Mr. Alter Gittleman said that he wanted to protect his son from getting into trouble, and that he would make good for the money that his son had used. 20

Q. What arrangements were made then? A. Mr. Alter Gittleman said that he believed he would give me a mortgage on property that he had for fifty-eight hundred dollars; that within a short time, thirty days or so, he would pay two thousand dollars cash, leaving thirty-eight hundred dollars mortgage for six months. 30

Q. This was at Alter Gittleman's house? A. In both places.

Q. All at Mr. Gittleman's suggestion, not yours? A. No, sir.

Q. You cannot be mistaken about that? A. No.

Q. And this money you were supposed to get from Gittleman was to be used in the payment of the closing, wasn't it, on your own property? A. At the closing of clearing up the Richelieu Building and Loan mortgage. 40

Sidney Westheimer. Called by Complainant. Cross.

Q. Will you tell me how you would clear up the Richelieu mortgage with a mortgage you got from Alter Gittleman? A. Well, Mr. Brodsky, I believe, had arranged to—

Q. Do you know. A. I don't remember how much cash was to be taken at that time to close that title.

10 Q. You were after Alter Gittleman to get what you could; to get what you were entitled to, in the best way that you could get it? A. I was after Simon Gittleman.

Q. When you went to Alter Gittleman's house, did you know why you were going? A. At the time I went up to Alter Gittleman's house, I went up— Mr. Gittleman had told me that he would try to clear up the mortgage.

Q. Which one? A. Simon Gittleman.

20 Q. You went there for that purpose? A. Yes.

Q. Was there any conversation at the time you were at the house, in the presence of Simon, Mrs. Gittleman and the Rabbi, in reference to sending Simon to jail? A. I don't remember.

Q. Would you say that there was no such conversation? A. I don't remember that they mentioned sending him to jail.

Q. That was a rather unusual conversation, about sending someone to jail.

30 Mr. Palmer: I object.

Court: Why characterize it?

Mr. Palmer: I object to the whole line of questioning under the theory that it makes no difference what the purpose was.

Court: It may not make any difference to you, but it makes some difference to him. It makes a very material difference.

40 Mr. Palmer: My object is to the fact that it is not duress for a father to give a mortgage for the sake of saving the son from trouble.

Sidney Westheimer. Called by Complainant. Cross.

Court: That is begging the question, isn't it? That is a legal question. That is not a question of fact. Find out what the facts are and then we will apply the law to it.

Q. Was there anything said at the time that you were at Alter Gittleman's house in reference to having Mr. Simon Gittleman disbarred for the embezzlement of this money? A. No, I don't remember anything; I don't remember using the word "disbarment." 10

Q. Tell me what word you used. A. At that time we were talking about settlement, the closing of my property, so I could sell, because there were two mortgages on it, and Mr. Alter Gittleman had said that he would help his son to pay off that six thousand dollar Building and Loan mortgage, and that we were to close title on December 14. 20

Q. You remember whether Mrs. Jennie Gittleman was crying and weeping at the time you were there? A. No, sir.

Q. In hysterics? A. No.

Q. Any excitement? A. No.

Q. Did you ever attempt to sell this fifty-eight hundred dollar mortgage? A. Attempt to sell it?

Q. Discount it. A. No, sir.

Q. You are still in possession of that mortgage, are you? A. Yes. 30

Q. You still say, however, that the money that you were trying to get at that time—the arrangements that you made at that time were for the purpose of enabling you to sell your property on December 14? A. Yes, sir.

Q. But you made no effort to use this mortgage— A. No.

Q. This mortgage, which you got from Gittleman, —in the settlement of that property? A. I believe— 40

Sidney Westheimer. Called by Complainant. Cross.

Q. Did you? You know whether you made any effort. A. I left that in the hands of Mr. Brodsky to take care of.

Q. You are sure that at the time you were at Alter Gittleman's house, there was no conversation relative to the prosecution of Simon Gittleman?

10 Mr. Isaacs: That has been asked several times.

Court: Answer the question.

A. I don't remember anything that we said I would prosecute him.

Q. How long were you there? A. I imagine about twenty minutes or so.

20 Q. The only arrangement made, then, when you were at Alter Gittleman's house, was that he was to give you a mortgage—that he and Mrs. Gittleman were to give you a mortgage on the Broome Street property? A. They were to arrange to clear up that Building and Loan mortgage.

Q. The only arrangement was that you were to get a mortgage for fifty-five hundred dollars? A. Yes.

Q. For how long? A. I believe the mortgage was fifty-eight hundred dollars, for six months.

30 Q. And was there anything said about the terms of the mortgage, while you were at Alter Gittleman's? A. He told me that he would pay two thousand dollars; this happened at Mr. Brodsky's office.

Q. I am talking about at Mr. Gittleman's house, the Rabbi's house. A. At his house I don't believe there was anything said at that time about how it would be taken care of. He told me that he would try to arrange to take care of it.

40 Q. At the time that you went to Mr. Brodsky's office, on the following Monday,—was it? A. I believe it was.

Sidney Westheimer. Called by Complainant. Cross.

Q. (Continuing)—did you get a settlement certificate and settlement sheet showing how this money was accounted for?

Court: What money?

Mr. Hauptman: I mean this mortgage—the amount that was arrived at in the mortgage.

Witness: The fifty-eight hundred dollars?

Mr. Hauptman: Yes, a settlement sheet.

10

A. No. I didn't have a sheet; I think he just said that he would pay two thousand dollars within thirty days, and thirty-eight hundred dollars would stand.

Q. That was his suggestion? A. Yes. He told me he would pay it off as soon as possible; that he could pay off two thousand dollars within thirty days.

20

Q. Who? A. Mr. Alter Gittleman, and that would leave thirty-eight hundred dollars stand for six months.

Q. Did he say why it would take thirty days to pay it off? A. He said he had some shares in the Building and Loan, and it would take about thirty days to get it.

Q. You didn't want the two thousand dollars all at once? A. I didn't say.

Q. You were satisfied to take a fifty-eight hundred dollar mortgage? A. I was satisfied to get that mortgage cleared up as fast as possible.

30

Q. Do you know how it was that provision was made in the mortgage for a payment in cash to you in thirty days? A. He said he would get two thousand dollars in cash and pay it off within thirty days, and he would leave thirty-eight hundred dollars stand for six months, because he expected to

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Sidney Westheimer. Called by Complainant. Cross.

get another mortgage, B. & L. mortgage, and pay that off.

Q. So that it was at the Rabbi's own suggestion that a clause was put in the mortgage that he was to make a payment in cash within thirty days? A. Yes.

10 Q. Only at his suggestion? A. Yes, it wasn't mine.

Q. From the time that the mortgage was closed in Mr. Brodsky's office—executed in Mr. Brodsky's office, until you received the first cash payment from Mr. Gittleman, Rabbi Gittleman, had you been in touch with them at all? A. I don't believe so.

Q. And were you in touch with him at all from the time that he executed the mortgage until the second payment was made of fifteen hundred dollars? A. In touch with Mr. Alter Gittleman?

20 Q. Yes. A. No.

Q. Were you in touch with Simon Gittleman during that time? A. I don't believe I was.

Q. Where were these two checks paid to you or given to you? A. In Mr. Brodsky's office.

Q. By whom? A. Mr. Brodsky handed them to me.

Q. Was Mr. Gittleman there at the time? A. I believe he was.

30 Q. Do you know how you both happened to be there at the same time? A. I believe he came down and paid it off; he came down and hand me the check.

Q. You had arranged with him to be down there? A. Mr. Brodsky had arranged it.

Q. Hadn't you gotten in touch with the Rabbi and told him that unless these payments were made at

40

Sidney Westheimer. Called by Complainant. Cross.

once, that you would move for the prosecution of his son? A. I didn't get in touch with him at all.

Q. Did you ask Mr. Brodsky to do that for you?

A. No, sir.

Q. Do you know whether Mr. Brodsky did it for you? A. That I am not sure.

Q. You are positive that at no time, either before or after the execution of the mortgage, you never made any threats to Alter Gittleman of having his son prosecuted for the embezzlement of the six thousand dollars? A. I didn't see Alter Gittleman after that time; I didn't make any threat to him. 10

Q. At any time did you ever say to him, from the time that you were up at his house first until he actually made these two payments? A. Did I make any threat to him? No, sir; never did.

Q. You never threatened his son with disbarment in the presence of his father? A. No, sir. 20

Q. Did you know whether Simon Gittleman had actually embezzled the money that you had entrusted to him? A. He said he spent it.

Q. And you knew that was a crime, didn't you? A. Yes.

Q. And you never mentioned—there was never any discussion between Alter Gittleman and yourself as to the crime that had been committed by Simon? A. The only discussion was at the time at his house, when he said that he was going to try to help his son out. 30

Q. Help his son out in what way? A. To pay this mortgage on the B. & L.

Q. At the time that you had this discussion at Alter Gittleman's house with the Rabbi, was the discussion concerning the debt of six thousand dollars owing by Simon Gittleman, or to the embezzlement of six thousand dollars? A. To the embezzlement. 40

Sidney Westheimer. Called by Complainant. Cross.

Q. That was clear. A. Yes.

Q. Everybody understood that? A. Yes.

CROSS EXAMINATION BY MR. ISAACS :

Q. How many days was it after you were at the
Gittleman home that you received this bond and
10 mortgage? A. It might have been a week or more.

Q. Where did you receive this bond and mort-
gage? A. At the office of Mr. Nathan Brodsky.

Q. Who was present at that time? A. Mr. Alter
Gittleman, I believe he was there, and Jennie Gittle-
man. I was there, Mr. Brodsky.

Q. You received on account of this mortgage two
thousand dollars? A. Yes.

Q. And thirty-eight hundred dollars due? A. Yes.

Q. Did you at the time you received this mort-
20 gage know that a certain judgment had been recov-
ered against Alter Gittleman and his son Simon
Gittleman? A. No, sir.

Q. Did you enter into any conspiracy, or did you
take that bond and mortgage in any conspiracy with
Simon Gittleman or Alter Gittleman? A. No, sir.

Court: Did you know suit was pending
against Alter Gittleman by Alice May Slater?

30 Witness: No, sir.

Court: Did you know that she had any claim
against him?

Witness: No, sir; never heard her name until
I believe it was Mr. Cooper came down to where
I worked, in Philadelphia.

Q. When was that? A. That was January or
February, was it, 1927.

Q. Did you make any threats against Simon Git-
40 tleman to Alter Gittleman? A. No.

S. Westheimer. Called by Complainant. Redirect.

REDIRECT EXAMINATION BY MR. PALMER:

Q. Mr. Westheimer, do you remember the name of the person who was to advance the twelve thousand dollars on your property, six thousand dollars of which was to have been paid by Simon Gittleman to Mr. Cummings, to reduce his mortgage, and the other six thousand dollars to be paid to the Riche- 10
lieu Building and Loan? A. Mr. Simon Gittleman had said it was the estate, I believe, of Goldy Schwartz.

Q. He was an architect? A. Yes.

Q. He told you that? A. Yes.

Q. And it was from that estate that he was to get the twelve thousand dollars? A. Yes.

Q. And to that estate you were to give the mort-
gage? A. Yes. 20

Q. After Miss Slater had recovered her judgment in this case and after the time when Mr. Cooper had gone down to Philadelphia, to see you, did Simon Gittleman come down to Philadelphia to see you about anything? A. Yes.

Q. About when was that? A. That was, I think, a month or so later; I am not sure of the time; it was in the summer of 1927; he came down in his machine that day.

Q. And what did he say to you then? Simon 30
Gittleman. A. He wanted me to give him a letter stating that I had loaned him six thousand dollars; which I didn't, and I wouldn't give him no letter.

Q. Did he at that time tell you, or say anything to you, which led you to believe that he knew that you had already given an affidavit to the effect that he had stolen your money? A. He knew that; he said that he read the affidavit that I made out, and he wanted me to give him a letter saying that I had 40
loaned him the money.

S. Westheimer. Called by Complainant. Redirect.

Q. And if you gave him such a letter saying that you had loaned him the money, what was he and his father going to do about the payment of this thirty-eight hundred dollars which he owed you; if you gave him such a letter, what was he and his father going to do then? A. I don't know what they would have done.

10

EXAMINATION BY THE COURT:

Q. What affidavit did you make? A. I made out an affidavit setting forth the time that I had bought property from Patrick Cummings, and that at the time showing where he had come to me in reference to changing the mortgages, and that he was going to pay off the Richelieu Building and Loan Association, which he didn't do.

20

Q. What was the purpose of the affidavit? A. The reason I gave the affidavit was to—was to show how I had presented—how I was connected with the transaction of the sale of the property, the changing of the mortgages.

Q. Why was it necessary to show that? A. Mr. Gittleman had told me that he was going to pay off the mortgage.

30

Q. I understand that, but what was the purpose of making the affidavit of this transaction about Simon Gittleman; what were you going to use the affidavit for? A. To—why, he asked me to give him a letter, and I wouldn't give him a letter.

Q. That was after the affidavit was made. He saw the affidavit to the effect that he had embezzled the money. That is what the effect of it was? A. Yes.

Q. You had made an affidavit charging him with having embezzled this money? A. Yes.

40

Q. And when he found it out, he came over to Philadelphia and asked you to give him a letter to

S. Westheimer. Called by Complainant. Recross.

the effect that you had loaned him the money? A. Yes.

Q. Why did you make the affidavit; what were you going to use it for? A. It was also in connection at that time, I was told that—in reference to Miss Slater's case.

Mr. Isaacs: I can answer that question. 10

Court: I want an answer as to why he made that affidavit.

A. (Continuing) I was told I was a part conspirator to defraud Miss Slater out of some money, and I knew nothing about it.

Q. When was the affidavit made? A. I believe a short time after Mr. Cooper came down to Philadelphia.

Q. After the mortgage was given? A. Oh, yes. 20

Mr. Isaacs: This is a complaint against a member of the bar, and whenever clients come to my office and make complaints, I have it reduced to affidavit form, and that was made.

Court: The only thing I was interested in was finding out whether the affidavit was made as a base of criminal complaint.

Mr. Isaacs: It was made for my own personal files. 30

RE-CROSS EXAMINATION BY MR. HAUPTMAN:

Q. Before whom was this affidavit taken? A. Mr. Isaacs.

Q. That was after Mr. Cooper came down and saw you? A. Yes.

Q. And Mr. Cooper had made a statement to the effect that you were being charged in a conspiracy, and that is why you made the affidavit? A. Yes. 40

Joseph I. Conlon. Called by Complainant. Direct.

Q. You went back and told Mr. Isaacs that after Mr. Cooper had told you? A. I gave Mr. Isaacs all the papers I had.

Q. That is why you made the affidavit? A. Mr. Cooper served me with the papers.

10

JOSEPH I. CONLON, sworn for complainant:

DIRECT EXAMINATION BY MR. COOPER:

Q. You are secretary of the Richelieu Building and Loan Association, are you not? A. I am.

Q. Can you tell us how the property of Mr. Sidney Westheimer stood on the books of your association, we will say back in June and July, 1926?

20 A. In June it was about two months in arrears, and it went on to August; we notified Mr. Westheimer that he was in arrears, and in my minutes here I have— this is October 1926: "The secretary read a letter from Mr. Sidney Westheimer, with reference to a loan of \$6,000, which should have been paid off to the Richelieu Building and Loan Association through Mr. Gittleman, attorney. As the loan was not paid off, the secretary was instructed to get in touch with Mr. Westheimer and
30 notify him to that effect." The next morning I called Mr. Westheimer up and told him that, and I also called at Mr. Gittleman's office—

Q. Simon Gittleman, the lawyer? A. Yes, and he gave me his personal check for \$389.40, in payment of monthly dues and paying the whole loan up to date. That was Mr. Simon Gittleman's check. Then it went on, we didn't bother any more about the matter, because we had a mortgage on
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Joseph I. Conlon. Called by Complainant. Direct.

the property, but it was Mr. Gittleman's personal check that paid off that arrearage. At that time, which was on December 15, the loan was finally paid off.

Q. Do you know in what way? A. No, I don't know by what check, but the bond and mortgage amounted to \$6,000, and interest and fees \$61.50, and dues, and profit from that \$571.74, so that the total check to the Building and Loan was \$5489.76, and that wiped out the loan as far as the Building and Loan was concerned. 10

Q. That was made on December 15, 1926? A. Yes.

Court: Who gave you the money?

Witness: That I cannot say. It was handled through Mr. Brodsky's office. I don't know just by whom the check was drawn, but we were paid. 20

Mr. Isaacs: I offer in evidence, by consent, letters from Braelow & Tepper, addressed to Isaacs & Gunther, bearing date September 13, 1927; September 16, 1927; September 21, 1927; October 10, 1927; October 27, 1927; November 25, 1927, and January 12, of this year.

Will you also consent to the offer of the assignment of the final decree to Jennie Gittleman? 30

Mr. Hauptman: Yes.

Mr. Isaacs: Consent substituting ourselves as solicitors to Braelow & Tepper.

And insurance policy, upon receipt of which we were to receive the full amount due us.

I also offer in evidence the final decree.

Court: My understanding is that the final decree is to be opened in order to permit the 40

Joseph I. Conlon. Called by Complainant. Direct.

defendants, Alter Gittleman and Jennie Gittleman, to interpose this defense of duress, and that the pleadings are to be amended accordingly, and the whole matter disposed of in this suit?

Mr. Isaacs: That is perfectly agreeable to me.

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(Marked Exhibits D-3 to D-14.)

Court: Let it appear on the record that the affidavit to which reference was made during the examination of Mr. Westheimer, was executed on June 18, 1927, six months after the mortgage and just prior to the institution of this chancery proceeding.

20

Mr. Isaacs: I never saw the answer in this case from Braelow & Tepper. The Tenth paragraph:

30

“Defendant denies the payment of \$5,800 in cash to Simon S. Gittleman by Sidney Westheimer, in consideration of said mortgage, and denies that said deed of mortgage was made in fraud, said mortgage having been given to secure the repayment of monies due and owing from Simon S. Gittleman to the said Sidney Westheimer, and also in consideration of forbearance to sue Simon S. Gittleman by the said Sidney Westheimer.”

The Court: Why doesn't that bind you as to the question of duress?

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Mr. Hauptman: I don't think it does. This is merely an answer to the allegation of complaint. It merely answers the allegation of fraud and conspiracy to deprive himself of what property he has, so he cannot pay and meet the obligation of the judgment against

Joseph I. Conlon. Called by Complainant. Direct.

him, but this does not exclude any other defense. There is no allegation here that there was any fraud or conspiracy on the part of Westheimer and Alter Gittleman to deprive Gittleman of his property so he cannot pay this judgment.

Court: I will not dispose of this matter now. I will reserve decision on it. **10**

There are two points involved.

The first one is, of course, whether or not the mortgage is void as to this judgment creditor; and the second, is whether the mortgage is void because of duress. In either event, the result will inure to the benefit of the complainant here. I mean in the event that the mortgage is declared void for either reason, it will inure to the benefit of the complainant here. **20**

You may submit a memorandum on that. It is a matter which involves the integrity of a member of the New Jersey Bar. The record will have to be written up, and will be presented to the Supreme Court for such action as may be necessary.

I think, perhaps, we may save time, by not actually opening the decree in the foreclosure suit until I have determined this question of the validity of the parties as to Alter Gittleman and his wife, because if I don't set it aside as to them, then the decree may be permitted to stand so far as they are concerned. **30**

Exhibit C-1.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	<p style="text-align: center;">ALICE MAY SLATER, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">ALTER GITTELMAN and BENJAMIN GITTLEMAN, Defendants.</p>	} Transcript of Pleadings for Trial.
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Summons issued Oct. 2, 1925.

20 PALMER & COOPER,
Attorneys for Plaintiff.

SIMON S. GITTLEMAN,
Attorney for Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT.

The plaintiff, Alice May Slater, residing at No. 24 Rudgehurst Road, West Orange, New Jersey, says that:

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FIRST COUNT.

1. On August 22nd, 1925, at about 11:15 P. M. she was a passenger in a certain Ford Roadster automobile.

2. Said Automobile was then and there being driven in a northerly direction along Valley Road approaching Park Avenue in West Orange, Essex
40 County, New Jersey.

3. Park Avenue and Valley Road are public highways in the State of New Jersey.

4. At said time the defendant Alter Gittleman, owned a certain Hudson automobile, bearing registration number 32882 for New Jersey.

5. At said time the said automobile of Alter Gittleman was being operated by his son, Benjamin Gittleman, as the duly authorized agent and servant of the defendant, Alter Gittleman. 10

6. Defendant, Alter Gittleman, by his agent and servant, was then and there operating said automobile in a southerly direction along Valley Road approaching Park Avenue.

7. Upon reaching the junction of Valley Road and Park Avenue, the defendant by his agent and servant negligently and carelessly turned to the left, so as to proceed into Park Avenue, and then and there collided with the automobile in which plaintiff was a passenger. 20

8. The defendant, Alter Gittleman, by his agent and servant, was negligent in that he changed his course without giving any visible or audible signal of his intention so to do. He operated his automobile at a dangerous, illegal and excessive rate of speed. He made no reasonable observation of others lawfully upon the highway. 30

9. As a result of the negligence of defendant, Alter Gittleman, plaintiff became, is, and will be sick, sore, lame and disordered, and permanently scarred, and endured great pain, suffering and shock, and will in the future become, is, and will be rendered nervous, and she was cut and bruised about her legs, ankle and throat, and is perman- 40

ently injured, and she sustained internal injuries, and she was confined to her home and bed for a long period of time, and was, is, and will be deprived of earnings and profits she otherwise would have made and earned; her clothing was damaged, and she was obliged, and still is, and will in the future be obliged to expend large sums of money for doctor and medicines in endeavoring to cure herself of her said injuries.

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WHEREFORE, plaintiff demands of the defendant, Alter Gittleman, the sum of Ten thousand (\$10,000) dollars, together with costs of this suit.

SECOND COUNT.

1. Plaintiff realleges, repeats and makes part hereof paragraphs Nos. 1, 2, 3 and 4 of the first count.

20

2. At said time said automobile was being operated by the defendant, Benjamin Gittleman.

3. The defendant, Benjamin Gittleman, was then and there operating said automobile in a southerly direction along Valley Road approaching Park Avenue.

30

4. Upon reaching the junction of Valley Road and Park Avenue, the defendant, Benjamin Gittleman, negligently and carelessly turned left so as to proceed easterly into Park Avenue, and then and there collided with the automobile in which plaintiff was a passenger.

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5. The defendant, Benjamin Gittleman, was negligent in that he changed his course without giving any visible or audible signal of his intention so to do. He operated his automobile at a danger-

ous, illegal and excessive rate of speed. He made no reasonable observation of others upon the highway.

6. As a result of the negligence of the defendant, Benjamin Gittleman, plaintiff became, is, and will be sick, sore lame and disordered, and permanently scarred and endured great pain, suffering and shock, and will in the future become, is, and will be rendered nervous, and she was cut and bruised about her legs, ankle and throat, and is permanently injured, and she sustained internal injuries, and she was confined to her home and bed for a long period of time, and was, is and will be deprived of earnings and profits she otherwise would have made and earned; her clothing was damaged, and she was obliged, and still is, and will in the future be obliged to expend large sums of money for doctor and medicines in endeavoring to cure herself of her said injuries.

WHEREFORE, plaintiff demands damages of defendant Benjamin Gittleman, in the sum of Ten thousand (\$10,000.) dollars, together with costs of suit.

PALMER & COOPER,
Attorneys of Plaintiff.

Filed Nov. 28, 1925.

ANSWER TO AMENDED AND SUPPLEMENTAL
COMPLAINT.

The defendant, Alter Gittleman, residing in the City of Newark, County of Essex, and State of New Jersey, in answer to the First Count of the Amended and Supplemental Complaint filed herein says that:

1. He has no knowledge or information sufficient to form a belief as to the contents of paragraph one (1) of the first count.

2. He has no knowledge or information sufficient to form a belief as to the contents of paragraph two (2) of the first count.

3. Defendant admits paragraph three (3) of the first count.

10 4. Defendant admits paragraph (4) of the first count.

5. Defendant denies paragraph five (5) of the first count and therefore puts the plaintiff upon his proof.

6. Defendant denies paragraph six (6) of the first count and therefore puts the plaintiff upon his proof.

20 7. He denies paragraph seven (7) of the first count.

8. He denies paragraph eight (8) of the first count.

9. He has no knowledge or information sufficient to form a belief as to the contents of paragraph nine (9) of the first count.

30 Defendant Benjamin Gittleman residing in the City of Newark, County of Essex, and State of New Jersey, in answer to the amended and supplemental complaint filed herein says that:

1. He admits paragraph one (1) of the second count.

2. He admits paragraph two (2) of the second count.

40 3. He admits paragraph three (3) of the second count.

4. He denies paragraph four (4) of the second count.

5. He denies paragraph five (5) of the second count.

6. He has no knowledge or information sufficient to form a belief as to the contents of paragraph six (6) of the second count and therefore puts the plaintiff upon her proof.

10

SIMON S. GITTLEMAN,
Attorney for Defendants.

Filed Dec. 10, 1925.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

20

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this twenty-eighth day of September, A. D. nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

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Exhibit C-2.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

ALICE MAY SLATER,
Plaintiff,

vs.

ALTER GITTLEMAN and BENJAMIN
GITTLEMAN,
Defendants.

Action
at Law.
Notice of
Motion.

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To SIMON S. GITTLEMAN, Esq.,
Attorney of Defendants,
1060 Broad Street,
Newark, N. J.

SIR:

30

TAKE NOTICE that on Saturday, February 5th, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, we will move before the Honorable William A. Smith, at his Court Room at the Court House, in Newark, New Jersey, to reinstate the above entitled case, which is No. 342 in the list of cases for the December term, the same having been erroneously marked off on the opening of said term.

Dated, Newark, N. J., February 3, 1927.

PALMER & COOPER,
Attorneys of Plaintiff.

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Exhibit C-3.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">ALICE MAY SLATER, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">BENJAMIN GITTLEMAN, by SIMON GITTLEMAN, his next friend and ALTER (or Alten) GITTLEMAN, Defendants.</p>	}	<p>Action at Law. On Postea.</p>	10
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PALMER & COOPER,
Attorneys.

Judgment entered this fourth day of
 \$3000.00 March, A. D. nineteen hundred and
 48.38 twenty-seven in favor of plaintiff and
 ————— against the defendants for the sum of 20
 \$3048.38 three thousand dollars damages and
 forty-eight dollars and thirty-eight cents
 R. to S. C. costs.

WM. S. GUMMERE,
C. J.

I, EDWARD J. KELLEHER, Clerk of the Supreme
 Court of the State of New Jersey, do certify that the
 foregoing is a true copy of the Judgment entered 30
 in above stated cause which said Judgment is re-
 corded in this office in Vol. 23 of Judgments, page
 173.

IN TESTIMONY WHEREOF I have set my
 hand and the seal of said Court at Tren-
 ton, this second day of February, A. D.
 nineteen hundred and twenty-eight.

EDWARD J. KELLEHER,
Clerk. 40

Exhibit C-4.

KNOW ALL MEN BY THESE PRESENTS, THAT Alter Gittleman and Jennie Gittleman, his wife, of the City of Newark, County of Essex and State of New Jersey, are held and firmly bound unto Sidney Westheimer, of the City of Newark, County of Essex and State of New Jersey, in the sum of Eleven thousand six hundred dollars (\$11,600.) lawful money of the United States of America to be paid to the said Sidney Westheimer, his heirs, executors, administrators or assigns: To which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our Seal and Dated the Fourteenth day of December One Thousand Nine Hundred Twenty-six.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the above bounden Alter Gittleman and Jennie Gittleman, his wife, their heirs, executors or administrators, shall well and truly pay or cause to be paid, unto the above named Sidney Westheimer, his heirs, executors, administrators or assigns, the just and full sum of Fifty eight hundred dollars, to be paid as follows: (\$2000) Two thousand dollars on or before the 14th day of January 1927 and (\$3800) Thirty-eight hundred dollars on or before the 14th day of June 1927 with interest at 6% from the 14th day of December 1926, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

AND IT IS HEREBY EXPRESSLY AGREED, That should any default be made in the payment of the said interest or installment or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable, and

should the said interest or installment remain unpaid and in arrear for the space of no days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of no then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Fifty eight hundred dollars with all arrearage of interest thereon, shall, at the option of the said Sidney Westheimer or his legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary notwithstanding. 10

Signed, Sealed and Delivered }
in the presence of }
ALTER GITTLEMAN (L. S.) 20
(JENNIE GITTLEMAN in Jewish) (L. S.)

N. H. BRODSKY.

BOND.

Alter Gittleman and Jennie Gittleman, his wife
to
Sidney Westheimer
Dated December 14th, 1926. 30
Amount \$5800.00

Between:

SIDNEY WESTHEIMER,
Complainant,
and
ALTER GITTLEMAN and JENNIE GITTLEMAN,
his wife, *et ano*,
Defendants.

Presented to me and marked by me Exhibit C-1, 40
PAUL F. CULLUM,
Master.

Exhibit C-5.

THIS INDENTURE, made the Fourteenth day of December, in the year of Our Lord One Thousand Nine Hundred and Twenty-six.

Between

10 ALTER GITTLEMAN and JENNIE GITTLEMAN, his wife, of the City of Newark, in the County of Essex and State of New Jersey, of the First Part:

And

SIDNEY WESTHEIMER, of the City of Newark, in the County of Essex and State of New Jersey, of the Second Part:

20 WHEREAS, the said Alter Gittleman and Jennie Gittleman are justly indebted to the said party of the second part, in the sum of Fifty-eight hundred dollars, lawful money of the United States of America, secured to be paid by a certain bond or obligation, bearing even date with these presents, in the penal sum of Eleven thousand six hundred dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Fifty-eight hundred dollars lawful money as aforesaid, to the said party
30 of the second part, his executors, administrators or assigns, on the 14th day of June, which will be in the year One Thousand Nine Hundred and Twenty-seven and interest thereon, to be computed from the 14th day of December, One Thousand Nine Hundred and Twenty-six, at and after the rate 6 per cent, per annum, and to be paid semi-annually.

40 AND IT IS THEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest or installment of principal or of any part

thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter either of them remain unpaid and in arrear for the space of sixty then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Fifty-eight hundred dollars with all arrearage of interest thereon, shall, at the option of the said party of the second part, or his legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

It is expressly understood and agreed that the parties of the first part will pay the sum of Two Thousand Dollars (\$2000) on the principal of this mortgage due the said party of the second part on or before the 14th day of January 1927. Anything to the contrary herein notwithstanding, and on failure to pay the said sum of Two thousand Dollars within the time aforesaid the whole amount of this mortgage shall immediately become due and payable.

NOW, THIS INDENTURE WITNESSETH, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with interest

thereon according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to heirs and assigns forever.

“ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying, and being in the City of Newark, in the County of Essex and State of New Jersey.

Beginning in the Westerly line of Broome Street, at a point One Hundred and Sixty-one feet, six inches, from the corner formed by the intersection of the Westerly line of Broome Street, with the Northerly line of Kinney Street, and thence running Northerly along the line of Broome Street twenty feet, six inches, thence Westerly and parallel with Kinney Street, One Hundred feet thence Southerly and parallel with Broome Street, twenty feet six inches, thence Easterly and parallel with Kinney Street, One Hundred feet to the place of beginning.

Being the same premises conveyed to the said parties of the first part by deed dated June 19th, 1907 and recorded in the Essex County Register's Office in Book I 42 of deeds for said County on pages 258-259.”

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; AND ALSO all the estate,

right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same and every part and parcel thereof, with the appurtenances. TO HAVE AND TO HOLD, the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever.

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PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors, or administrators shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void. AND THE SAID ALTER GITTLEMAN and JENNIE GITTLEMAN, his wife, for themselves, their heirs, executors and administrators, do covenant and agree to pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

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AND IT IS ALSO AGREED, by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire, by insurers, and in an amount approved by the said party of the second part, his executors, administrators or assigns and assign the policy and certificates thereof to the

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said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien, on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of 6% per cent, per annum, from the time of payment of such premium or premiums.

- 10 And the said party of the first part, their heirs, executors and administrators, do covenant and grant to and with the said party of the second part, his heirs and assigns, that the said party of the first part, their heirs and assigns, shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon or on the moneys to secure payment of which this mortgage is made for so much of the taxes assessed against
- 20 said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

IN WITNESS WHEREOF, the said party of the first part have hereto set their hand and seal the day and year first above written.

Signed ALTER GITTLEMAN (L. S.)

JENNIE GITTLEMAN (L. S.)

- 30 Signed, Sealed and Deliv- }
 ered in the presence of }
 N. H. BRODSKY.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX, } ss.:

BE IT REMEMBERED, That on this Fourteenth day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, a Master in Chancery of New Jersey, personally appeared, Alter Gittleman and Jennie Gittleman, his wife, who, I am satisfied, are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: And the said Jennie Gittleman, wife as aforesaid, being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

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Signed NATHAN H. BRODSKY,
 A. M. C. C. of New Jersey.

Received in the Register's office of the County of Essex, N. J. on the 15th day of December A. D., 1926, at 1:59 o'clock, in the afternoon, and Recorded in Book N59 of Mortgages for said County, on pages 369-370.

HOWARD S. DODD,
 Register.

30

Between
 SIDNEY WESTHEIMER,
 Complainant,
 and
 ALTER GITTLEMAN and JENNIE
 GITTLEMAN, his wife, *et ano*,
 Defendants.

Presented to me and marked by me
 Exhibit C-2.

40

PAUL F. CULLUM,
 Master.

Exhibit D-1.

No..... Newark, N. J. Dec. 14, 1926.

NEWARK TRUST COMPANY

PAY TO THE ORDER OF SEDNEY WESTHEIMER..\$500.00
FIVE HUNDRED 00/100DOLLARS

10

A. GITTLEMAN

Endorsed: "Installment of prin-
cipal on mtg. of \$5800.

SEDNEY WESTHEIMER
S. N. WESTHEIMER

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Exhibit D-2.

No. 820 Newark, N. J. Dec. 24, 1926.

NEWARK TRUST COMPANY

Pay to the order of SEDNEY WESTHEIMER..\$1500.00
FIFTEEN HUNDRED 00/100.....DOLLARS

Newark Trust Co. \$1500. and 00 Cts.

30

A. GITTLEMAN

Endorsed: "Additional \$1500. on
Mtg. of \$5800.00. Balance now
due \$3800.

SEDNEY WESTHEIMER
S. N. WESTHEIMER
DAVID SAMUEL

40

Exhibit D-3.

BRAELOW & TEPPER
 Counsellors at Law
 Industrial Office Building
 1060 Broad St., Newark, N. J.

Sept. 13th, 1927.

Isaacs and Gunther, Esqs., 10
 National Bank of North Hudson Bldg.,
 Union City, N. J.

Gentlemen:

Replying to your letter of September 6th, beg to
 state that the Newspaper Workers' Building and
 Loan Association of Newark has granted a loan to
 Mrs. Gittleman on property owned by her on John-
 son Avenue, Newark. The title to said property is 20
 now being examined, and if you will forward to us
 a statement of the mortgage held by your client,
 together with insurance premium and costs and
 counsel fee, we will arrange to see that same is
 taken care of at the time of the closing of the trans-
 action.

Yours very truly,

BRAELOW & TEPPER 30
 By JULES E. TEPPER

JET:SB

Exhibit D-4.

BRAELOW & TEPPER
Counsellors at Law
Industrial Office Building
1060 Broad St., Newark, N. J.

September 16, 1927.

- 10 Isaacs and Gunther, Esqs.,
National Bank of No. Hudson Bldg.,
Union City, N. J.

Gentlemen:

- 20 Mr. Alter Gittleman requests us to inform you
that a mortgage loan has been granted to him by the
Newspaper Workers Building & Loan Association,
and that as quickly as the title can be examined
and the transaction consummated, the mortgage
held by your client on property #131 Broome St.
will be paid, together with costs and counsel fee to
date. He also requests us to ask you to proceed no
further with the foreclosure proceedings.

Yours very truly,

BRAELOW & TEPPER
By SARAH G. VOGEL

- 30 JET:SFR

Exhibit D-5.

BRAELOW & TEPPER
 Counsellors at Law
 Industrial Office Building
 1060 Broad St. Newark, N. J.

September 21, 1927.

Isaacs & Gunther, Esqs., 10
 National Bank of No. Hudson Bldg.,
 Union City, N. J.

Re: Westheimer.

Attention of Lionel Isaacs, Esq.

Dear Mr. Isaacs:

We thank you for your letter of September 14th, 20
 relative to the above matter. As soon as the exam-
 ination of title on behalf of the Newspaper Workers
 Building & Loan Association has been completed,
 we shall arrange to pay your clients' mortgage, to-
 gether with interest and costs.

Yours very truly,

BRAELOW & TEPPER
 By Jules E. Tepper 30

JET:SFR

Exhibit D-6.

BRAELOW & TEPPER
 Counsellors at Law
 Industrial Office Building
 1060 Broad St. Newark, N. J.

10 Isaacs & Gunther, Esqs., Oct.
 Nat'l. Bank of N. Hudson Bldg., 10th,
 Union City, New Jersey. 1927.

In re: Westheimer—vs. Gittleman

Gentlemen:

We beg to acknowledge receipt of your letter of October 7th.

20 Please be advised that a mortgage loan has been granted to Mr. Gittleman, to take care of your mortgage by a building and loan association represented by us.

I expect to have definite word as to payment within two or three days. Will you be good enough to hold up this matter until that time?

In the future, will you kindly refer to Mr. Hauptman, of this office, in reference to this mater?

Very truly yours,

30

JH:LW

BRAELOW & TEPPER

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Exhibit D-7.

BRAELOW & TEPPER
 Counsellors at Law
 Industrial Office Building
 1060 Broad St. Newark, N. J.

October 27, 1927.

Isaacs & Gunther, Esqs., 10
 National Bank of No. Hudson Bldg.,
 Union City, N. J.

Attention of Mr. Lionel Isaacs.

Dear Mr. Isaacs:

Your letter of October 20th addressed to Mr. Joseph C. Braelow, has been handed to me due to the fact that I am handling this matter. 20

I regret exceedingly if Mr. Gunther conveyed the impression to you that we were of the opinion that you did not extend the proper courtesy to this office.

Not being familiar with the facts the writer personally was at a loss to understand what harm could come of withholding action for a short time.

We do not represent Mr. Simon Gittleman, the attorney, but are only interested in Mr. Alter Gittleman, his father, who is made a party defendant in the action to set aside the mortgage made to your client. 30

I feel certain that you have extended every courtesy within your power to this office and trust that the pleasant feeling existing heretofore, particularly between Mr. Braelow and yourself, is continued.

Respectfully yours,

Signed "Julius E. Tepper.

JET:SFR.

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Exhibit D-8.

BRAELOW & TEPPER
Counsellors at Law
Industrial Office Building
1060 Broad St. Newark, N. J.

Isaacs & Gunther, Esqs.,
Nat'l. Bank of No. Hudson Bldg.,
10 Union City, New Jersey. Nov.
25th
1927.

In re: Westheimer-vs-Gittleman

Attention Mr. Isaacs.

Dear Mr. Isaacs:

This matter has been finally brought to a point
where we shall be in a position to close all angles
of it on Tuesday of next week.

20 I shall communicate with you on that day.
Thanking you for your courtesy,
I am,

Yours very truly,

BRAELOW & TEPPER
By: J. Hauptman.

JH:LW

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Exhibit D-9.

BRAELOW & TEPPER
 Counsellors at Law
 Industrial Office Building
 1060 Broad St. Newark, N. J.

January 12, 1928.

Messrs. Isaacs & Gunther, 10
 147 Summit Avenue,
 Union City, N. J.

Attention Mr. Isaacs.

Gentlemen:

In accordance with our conversation, I am re-
 turning the following papers to you:

Consent—in the matter of Sidney Westheimer 20
 and Alter Gittleman and Jennie Gittleman,
 his wife In Chancery.

Consent—in the matter of Sidney Westheimer,
 and Alter Gittleman and Jennie Gittleman,
 his wife In Chancery.

Assignment of Final Decree—in the matter of
 Sidney Westheimer and Alter Gittleman and
 Jennie Gittleman, his wife,—In Chancery.

Mortgage—Alter Gittleman and Jennie his 30
 wife to Sidney Westheimer, dated December
 14, 1926 and recorded in Book N-59 pages
 369-370, on December 15, 1926, covering
 premises on Broome Street, Newark, N. J.

Bond—Alter Gittleman and Jennie Gittleman
 to Sidney Westheimer—dated December 14,
 1926.

Policy—Scottish Union and National Ins. Co.
covering property 131 Broome Street, New-
ark. \$6,000. No. 8162805.

I am sorry that I have not been able to consum-
mate the matter in accordance with our wishes. I
have suggested to Mr. Gittleman that he communi-
cate with you directly.

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Very truly yours,

JH:L

Signed "Jacob Hauptman

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Exhibit D-10.

IN CHANCERY OF NEW JERSEY.

Between

SIDNEY WESTHEIMER,
Complainant,

and

ALTER GITTLEMAN and JENNIE
GITTLEMAN, his wife, *et ano*,
Defendants.On Bill, &c.,
Assignment
of Final
Decree.

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THIS INDENTURE, made this ninth day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-seven, between Sidney Westheimer of the City of Philadelphia, in the County of Philadelphia and State of Pennsylvania, party of the first part and Jennie Gittleman, of the City of Newark, in the County of Essex and State of New Jersey.

20

WHEREAS, the said Party of the first part on the 28th day of September, 1927 recovered a Final Decree in the Court of Chancery of New Jersey on bill in foreclosure between the said Sidney Westheimer, complainant and Alter Gittleman and Jennie Gittleman, his wife, *et ano*, defendants which said proceedings are recorded in Docket 65 of the Office of the Clerk of the Court of Chancery at page 119 for the sum of \$4088.34, together with lawful interest from September 24th, 1927 together with costs taxed at \$170.49 and interest from October 13th, 1927, as by the record thereof will appear.

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NOW THIS INDENTURE WITNESSETH, That the said Party of the first part, the complainant in the aforesaid Chancery proceedings, in consideration of the sum of One Dollar and other valuable consideration to him paid by the party of the second part, the receipt whereof is hereby acknowledged, has sold and

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by these presents does assign, transfer and set over unto the said party of the second part, her executors, administrators and assigns the said Final Decree, and all sum and sums of money that may be had by means whereof, or on any proceedings to be had thereon. And I, the said party of the first part, do hereby constitute and appoint the said party of the second part and her executors, administrators and assigns, my true and lawful attorney, irrevocable, with power of substitution and revocation, for the use and at the proper cost and charge of the said party of the second part, to ask, demand and receive and to sue out executions, and to take all lawful ways for the recovery of the money due or to become due on the said final decree; and on payment to acknowledge satisfaction or discharge the same. And attorney, one or more, under him for the purpose aforesaid, to make and substitute, and at pleasure, to revoke; hereby ratifying and confirming all that my said attorney or substitute shall lawfully do in the premises. And the said party of the first part does hereby covenant that there is now due on the said final decree the sum of \$4088.34, together with lawful interest thereon, to be computed from September 24, 1927 and with the costs as taxed and that he, the said party of the first part, will not collect or receive the same or any part thereof, nor release or discharge the said Final Decree, but will own and allow all lawful proceedings therein, the said party of the first part saving the party of the first part harmless of and from any cost in the premises.

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IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

SIDNEY M. WESTHEIMER (L. S.)

Signed, Sealed and Delivered }
 in the presence of }
 40 LIONEL ISAACS.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

BE IT REMEMBERED, that on this 9th day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-seven, before me, a Master in Chancery of New Jersey, personally appeared Sidney Westheimer, who, I am satisfied is the Assignor in the within Assignment of Final Decree therein; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed. 10

LIONEL ISAACS,
Master in Chancery of New Jersey.

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Exhibit D-11.

IN CHANCERY OF NEW JERSEY.

Between
SIDNEY WESTHEIMER,
Complainant,
and
10 ALTER GITTLEMAN and JENNIE
GITTLEMAN, his wife, *et ano*,
Defendants.

On Bill, &c.,
Consent.

We hereby consent to the Substitution of Braelow & Tepper, Esquires, as solicitors of record of the above named complainant.

20 Dated, November 9th, 1927.

ISAACS & GUNTHER,
Solicitors of Complainant.

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Exhibit D-12.

IN CHANCERY OF NEW JERSEY.

Between <p style="text-align: center;">SIDNEY WESTHEIMER, Complainant,</p> <p style="text-align: center;">and</p> <p style="text-align: center;">ALTER GITTLEMAN and JENNIE GITTLEMAN, his wife, <i>et ano</i>, Defendants.</p>	}	65/119 On Bill, &c. Final Decree.	10
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This cause being opened to the Court by Isaacs & Gunther, solicitors of the complainant and the complainant's bill having heretofore been taken as confessed against the defendants, Alter Gittleman and Jennie Gittleman, his wife, and Alice May Slater; whereupon and upon reading a report on file made by Paul F. Cullum, one of the Masters of this Court, bearing date the 24th day of September, 1927 whereby it appears that there is due to the complainant for principal and interest on his mortgage the sum of \$3977.33 and for insurance premium the sum of \$111.01, together with the costs of this suit and for that purpose sale shall be made of:

"ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING in the Westerly line of Broome Street, at a point One Hundred and Sixty-one feet, six inches, from the corner formed by the intersection of the Westerly line of Broome Street, with the Northerly line of Kinney Street, and thence running Northerly along the

line of Broome Street twenty feet, six inches, thence Westerly and parallel with Kinney Street, One Hundred feet thence Southerly and parallel with Broome Street, twenty feet six inches, thence Easterly and parallel with Kinney Street, One Hundred feet to the place of the beginning;"

10 and no cause appearing or being shown to the contrary;

20 It is, on this 28th day of September, 1927, ORDERED, ADJUDGED and DECREED that the said report and all the matters and things therein contained do stand ratified and confirmed and that the party of the said mortgaged premises, herein above described, be sold, as aforesaid, to raise and satisfy the money due to the said complainant, that is to say to pay and satisfy unto the complainant the sum of \$4088.34, together with lawful interest thereon to be computed from the 24th day of September, 1927, being the date of the Master's report, with the complainant's cost to be taxed, including a counsel fee of \$81.00 which is hereby allowed to the said complainant; and that a Writ of Fieri Facias issued for that purpose out of this Court, directed to the Sheriff of the County of Essex, commanding him to make sale according to law of the part of the said mortgaged premises herein above described and that out of the

30 money arising from said sale he pay to the complainant, or his solicitors, his said debt, interest and costs, and that in case more money shall be raised by said sale than shall be sufficient to answer such several payments that such surplus be brought into Court to abide the further order of this Court, unless previously disposed of by this Court and that the Sheriff make return, without delay, of his proceedings by virtue of said writ.

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And it is further ORDERED, ADJUDGED and DECREED that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid, by virtue of this decree.

E. R. WALKER,
C.

A True Copy, 10
THOMAS BARBER,
Clerk.

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Conclusions.

(Filed January 11, 1928)

IN CHANCERY OF NEW JERSEY.

10 Between
 ALICE MAY SLATER,
 Complainant,
 and
 ALTER GITTLEMAN, *et als*,
 Defendants. } On Bill, &c.,
 On Final
 Hearing.

20 Between
 SIDNEY WESTHEIMER,
 Complainant,
 and
 ALTER GITTLEMAN, *et als*,
 Defendants. } On Bill, etc.
 On Final
 Hearing.

ISAACS & GUNTHER, for Complainant, Sidney Westheimer.

PALMER & COOPER, for complainant Alice May Slater.

BRAELOW & TEPPEL, for Defendants Gittleman.

30 BERRY, V. C.

40 These two suits were consolidated at the final hearing. The first is by a judgment creditor and seeks to set aside a mortgage as in fraud of creditors. The second, to foreclose that mortgage. Answers filed by the mortgagors set up the defense that the mortgage was obtained by duress, but deny that it was given with intent to defraud. If the mortgage is void for any reason a decree to that effect would inure to the benefit of the judgment creditor. At the conclusion of the final hearing I announced that

Conclusions.

the allegations of fraud and conspiracy in the making of the mortgage had not been sustained but that the defense of duress had, in my judgment, been made out and that I would advise a decree accordingly. From this decree an appeal has been taken, for which reason these conclusions are written.

Simon S. Gittleman, a member of the Bar of this State, embezzled the sum of \$6000. from Sidney Westheimer, a client. To prevent Westheimer from carrying out his threat to jail Gittleman on the charge of embezzlement, and to disbar him, the defendants Alter Gittleman and Jennie Gittleman, parents of Simon, executed the mortgage in question. Westheimer threatened to jail Simon if the mortgage was not executed, but agreed not to prosecute in the event that it was. There is no question in my mind that at the time of the execution of the mortgage the mortgagors were acting under such oppression of the threats of the mortgagee as to prevent their acting of their own free will and that they acted rather at the will of the mortgagee. The parents of this defaulting son are Hebrews of high standing in their community. The father is a Rabbi and very popular as a teacher of Hebrew. Both were painfully shocked at the news of their son's wrongdoing. It is undisputed that at the conference which resulted in the giving of this mortgage, the mother, who was a tenant by the entirety of the mortgaged premises, was in tears and weepingly consented to the execution of the mortgage in order to save her son from imprisonment and disgrace. I believe that the distress of the parent's minds was such that they could not realize what they were doing and that there was probably nothing in their power that they would not have done had it been

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Conclusions.

demanded of them at that time as the price of their son's freedom.

10 It is contended that threats of imprisonment of a son for a crime which he has committed resulting in the procurement of the mortgage from the parents, as here, is not such duress as will void that mortgage; that while such threats directed against the mortgagor, might invalidate the mortgage, yet the doctrine does not extend to a case where the threats were against the child of the mortgagor.

20 But in *Ball v. Ward*, 76 N. J. Eq. 8 (affirmed 79 N. J. Eq. 170) it was held that it does. It has been well said that "parental love will usually prompt a father or mother to make great sacrifice for a son or daughter, particularly so when such child is threatened with impending danger. In order to avoid the shame and disgrace which the trial of an offspring, charged with the commission of a crime, will necessarily entail, his father and mother will ordinarily impoverish themselves to avoid an indictment or conviction." *Baldwin v. Savage* (Oregon) 159 Pacific Rep. 181. And that "No more powerful and constraining force can be brought to bear upon a man to overcome his will, and extort from him an obligation, than threats of great injury to his child." *Meech v. Lee*, 82 Mich. 288, 46 N. W. Rep. 398.

40 It is further contended that where a crime has in fact been committed and the threat is of lawful arrest or imprisonment for that crime, such a threat is not duress regardless of its effect upon the mind of the parent. The Court of Errors and Appeals in *Ball v. Ward*, supra, said: "The question whether or not a conveyance made by a parent to prevent the imprisonment of a child who has in fact been guilty of a criminal offense may afterward be set aside at

Conclusions.

the option of the parents, is one upon which judicial views are not in harmony", and declined to pass upon that question as it was not presented under the facts of that case.

But while the point discussed may not have been there involved it seems to me that the reasoning of Vice-Chancellor Emery is sound and supported by respectable authority. While there is undoubtedly a conflict of opinion on this question, his is said to be the better view.

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9 R. C. L. p. 719, Title "Duress, Section 9
Notes 26 L. R. A. 48; 20 L. R. A. (N. S.)
486; 42 L. R. A. (N. S.) 329;

Williamson Company v. Ackerman, 77
Kansas 502 20 L. R. A. (N. S.) 484;

Anderson v. Kelly (Oklahoma) 156 Pac.
1167;

20

Colcough v. Bank (Georgia) 103 S. E. 489;
Portland Cattle Co. v. Featherly (Mon-
tana) 241 Pac. 322, at p. 325.

In my judgment, the question is not one of the guilt or innocence of the accused, but of the unlawful subjection of the will of the actor to that of the accuser.

Decided Feb. 9, 1928.

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Opinion filed June 11, 1928.

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Final Decree.
(Filed May 8th, 1928.)

IN CHANCERY OF NEW JERSEY

10	Between SIDNEY WESTHEIMER, Complainant, and ALTER GITTLEMAN and JENNIE GITTLEMAN, Defendants.	On Bill, Etc. Final Decree.
20	Between ALICE MAY SLATER, Complainant, and ALTER GITTLEMAN, JENNIE GITTLE- MAN and SIDNEY WESTHEIMER, Defendants.	On Bill, etc. Final Decree.

30 The cause between Alice May Slater and Alter Gittleman, Jennie Gittleman and Sidney Westheimer, coming on to be heard in the presence of Isaacs & Gunther, Esqs., by Lionel Isaacs, Esq., Solicitors for and of counsel with Sidney Westheimer; and Palmer & Cooper, Esqs., by John W. Palmer, Esq., Solicitors for and of counsel with Alice May Slater; and Braelow & Tepper, Esqs., by Jacob Hauptman, Esq., Solicitors for and of counsel with Alter Gittleman and Jennie Gittleman, and the Court having ordered the aforementioned cause and the cause between Sidney Westheimer and Alter Gittleman and Jennie Gittleman, to be consolidated, and the Court having made an order permitting Alter Gittleman and Jennie Gittleman to file an answer and counterclaim in the cause of Sidney

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Final Decree.

Westheimer against them, and the said answer and counterclaim having been filed, and the said causes having been consolidated, and the Court having read and considered the pleadings and having taken testimony orally and in open court, and having heard and considered the arguments of counsel thereon, and being satisfied that the complainant Alice May Slater has not sustained her allegations of fraud and conspiracy in the execution of the mortgage given by Alter Gittleman and Jennie Gittleman to Sidney Westheimer, and the Court being further satisfied that a certain bond and mortgage made and executed by the said Alter Gittleman and Jennie Gittleman to Sidney Westheimer mentioned and set forth in the bill of complaint filed in the cause between Sidney Westheimer and Alter Gittleman and Jennie Gittleman, dated the 14th day of December, 1926, and recorded on the 15th day of December, 1926, in the Register's Office of the County of Essex in Book N 59 of Mortgages for said County, on page 369 to secure the sum of fifty-eight hundred (\$5800.00) dollars was exacted from the said defendants, Alter Gittleman and Jennie Gittleman, through duress and without consideration, and being further satisfied that the said transaction is illegal;

It is, on this 8th day of May, 1928,

ORDERED, ADJUDGED and DECREED, that the said complainant, Sidney Westheimer, surrender the said bond and mortgage properly endorsed for cancellation to said defendants, Alter Gittleman and Jennie Gittleman, within ten days after the service upon said defendants of a true but uncertified copy of this decree.

It is further ORDERED, ADJUDGED and DECREED, that the said bond and mortgage hereinbefore referred to, be cancelled of record and be no longer a lien on the

Final Decree.

10 said lands and premises therein described against the said defendants, Alter Gittleman and Jennie Gittleman, or any persons claiming by, from, or under them, or either of them, and the said complainant, Sidney Westheimer, and any persons claiming by, from, or under him, be debarred and perpetually enjoined from collecting any money upon the said mortgage and upon the bond accompanying the same, for which bond such mortgage is given as collateral security either from principal or for interest or for setting up the same against the premises therein described.

20 It is further ORDERED, ADJUDGED and DECREED, that Sidney Westheimer return to Alter Gittleman the sum of five hundred (\$500.00) dollars, with interest to date, and to Jennie Gittleman the sum of one thousand five hundred (\$1,500.00) dollars, with interest to date, exacted from them on account of the mortgage.

It is further ORDERED, ADJUDGED and DECREED, that the bill of complaint filed by Alice May Slater be and hereby is dismissed.

It is further ORDERED, ADJUDGED and DECREED, that the bill of complaint filed by Sidney Westheimer for the foreclosure of the said mortgage be and hereby is dismissed.

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A true copy,
E. R. WALKER,
Ch.

Respectfully advised,
MAJA LEON BERRY,
V. C.

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We consent to the entering of this final decree, but reserve the privilege of arguing against the amount of counsel fees awarded the Solicitors for Alter Gittleman and Jennie Gittleman.

PALMER & COOPER,
Solicitors for Alice May Slater.

New Jersey Court of Errors and Appeals

Between

ALICE MAY SLATER,
Complainant,

and

ALTER GITTLEMAN, *et ano.*,
Defendants.

On Bill, etc.

SIDNEY WESTHEIMER,
Complainant-Appellant,

and

ALTER GITTLEMAN, *et ano.*,
Defendants-Respondents.

On Bill, etc.

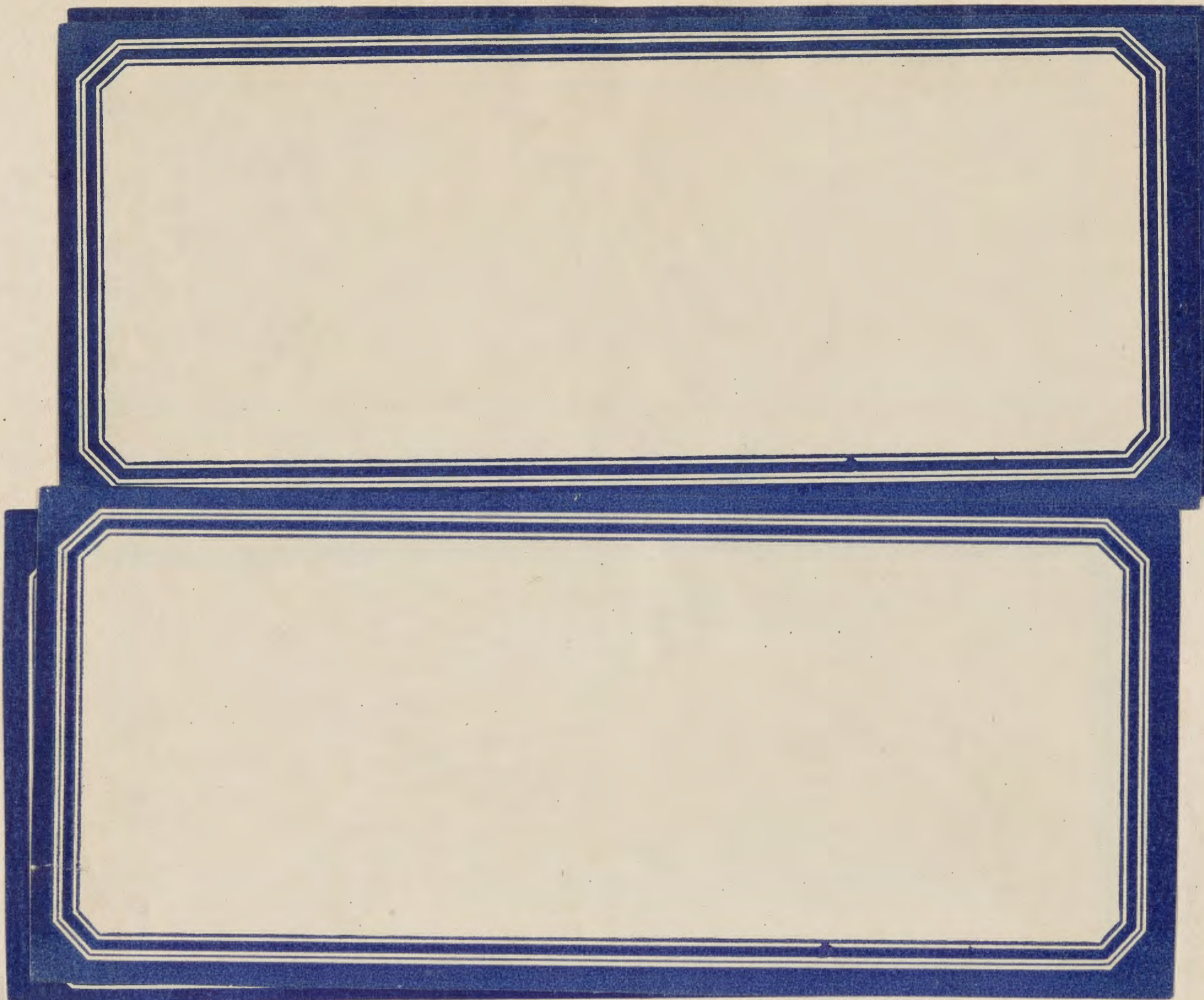
On Appeal from
the Court of
Chancery.

Brief for Defendants-Respondents, Alter Gittleman and Jennie Gittleman.

Statement.

Vice-Chancellor BERRY in his final decree (State of Case, pp. 113, lines 28-30) stated that he was "further satisfied that the said transaction is illegal," and in his conclusions found that the crime of embezzlement had been proved and further that "Westheimer threatened to jail Simon if the mortgage was not executed, but agreed not to prosecute in the event that it was" (State of Case, p. 109, lines 10-20).





POINT ONE.

The doctrine of laches is not applicable to this case.



The argument of the appellant under his first point, in substance is, that though the bond and mortgage in the main case were executed because of duress, nevertheless, the defendants should be barred from relief in the Court of Chancery because of supposed laches. There is nothing in the argument or in the state of the case that shows

that the defendants had knowledge of their rights in the circumstances; on the contrary, the evidence shows, and even the appellant's argument allows the inference, that the duress at the time of the execution of the agreement continued so as to be a potent factor in suppressing the assertion of any rights that existed (State of Case, p. 50, lines 30-40; p. 51, lines 1-38).

The dual aspect of the mortgage involved in this transaction as having been executed under duress and also as being illegal gives rise to the application of the rule that the doctrine of laches has no application to illegal instruments.

Colby v. Title Insurance & Trust Company
(Cal. 1911), 117 Pac. 913;
35 L. R. A. (N. S.), page 813, at 819.

In the *Colby* case just cited, the Court said in reaching its decision on the very point involved:

"But the doctrine of estoppel by conduct or by laches, or even ratification, has no application to a contract or instrument which is void because it violates an express mandate of the law or doctrine of public policy. Such a contract has no existence whatever. It has no legal entity for any purpose, and neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against ascertaining its invalidity. * * * It is clear, therefore, under the authorities, that the necessity for a finding upon the issue of illegality of consideration was not rendered unnecessary or immaterial by the finding of estoppel and laches which the court did make, as the principle of estoppel has no application to agreements which are void as contravening public policy. The dominant issue under the pleadings in this case, was whether the instruments were executed for an illegal consideration. If it was found that they were, plaintiff would have

been entitled absolutely to a decree awarding her the full relief prayed for. Other independent issues as to duress, menace or undue influence and the affirmative plea of estoppel and laches interposed by defendants could only become important if this issue was found against her."

The question of illegality and duress in the execution of the instrument is of necessity a question to be determined before the question of laches can arise, for otherwise the conduct of a party to an instrument could legalize what otherwise would be illegal and contrary to public policy.

Furthermore, there is nothing in the state of the case to show, that the defendants had knowledge of their rights to set aside the instrument prior to their action in setting up the defenses. The inference is strong that they either had no knowledge of their rights or else if they had knowledge of their rights, the duress continued so as to prevent voluntary action in asserting them (State of Case, p. 50, lines 30-40; p. 51, lines 1-38). Consequently, the doctrine of laches would be inapplicable for

"a person can not be deprived of his remedy in equity on the ground of laches unless it appears that he had knowledge of his rights. As one cannot acquiesce in the performance of an act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting always, that his want of knowledge is not the result of his own culpable negligence."

4 *Pomeroy's Equity Jurisprudence* (4th Ed.), page 3434, Par. 1447.

Assuming for the sake of argument that the doctrine of laches may be considered in a situation like the instant case, nevertheless, it is not ap-

plicable nor does it create a bar in this case because there is neither in the state of the case nor the argument of the appellant, evidence or assertions of disadvantages to him from the delay because of loss of evidence, change of title, intervention of equities or other causes.

The true doctrine concerning laches is concisely and accurately stated in the following language:

“laches in legal significance is not merely delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights he takes no steps to enforce them until the condition of the other party, has in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right.”

4 *Pomeroy's Equity Jurisprudence* (4th Ed.), page 3417, Par. 1442;

Hall v. Otterson (1894), 52 N. J. Eq. 522.

POINT TWO.

The defendants, Alter Gittleman and Jennie Gittleman, are not estopped from asserting or interposing the defense of duress.

It is difficult to grasp the substance of the appellant's argument under his second point. If the argument is that the defendants, by filing an answer in a prior suit, failed to set up duress and consequently made a *quasi* admission, it amounts to no more than saying that they are involved in a self-contradiction. Such an admission made in a prior pleading is merely an item of evidence, available against the party on the same theory on

which a self-contradiction is available against a witness. The effect is not conclusive.

5 *Wigmore on Evidence* (2 Edition), page 604, par. 2588.

However, if the force of appellant's argument is that by force of the prior pleading, there is in effect a conclusive pleading, or what is otherwise known as a solemn or judicial admission, in that the fact alleged is so taken for granted that the alleging party is not allowed to disprove it, it is submitted, if such be conclusive upon the party making it, it is always and properly in the discretion of the Trial Court to relieve from the consequence.

5 *Wigmore on Evidence* (2 Edition), page 605, par. 2590.

1918, BAKER, J., in *Larson, Jr., Co. v. Wrigley, Jr., Co.*, 7th C. C. A., 253 Fed. 941 (unfair competition by imitation of trade-label; each party claimed priority, and also asserted damage by confusion to customers): "In support of the counterclaim, no proof was made of actual confusion. Counsel, however, contend that an inference to that effect may be drawn from Larson's testimony that after 'Doublemint' appeared his sales of 'Wintermint' materially decreased. True, but a falling off in business may result from fair as well as from unfair competition. *Insistence comes to be centered on the proposition that the Trial Court was not at liberty to determine the question of actual or probable confusion from a comparison of the packages and from the lack of direct testimony, but was bound to take that issue as settled by Wrigley's averments and admissions in court; and counsel cite many cases as supportive of their contention.*

"*Undoubtedly a litigant has no cause for complaint if the Court accepts his solemn and*

sworn admissions in pleadings and testimony as true. But we must reject the contention that his adversary has the right to compel the Court to do so. Otherwise a Court could be forced by parties to decide moot, feigned, and collusive cases, or a Chancellor might be made to proceed with an equitable accounting between partners who had stolen the property they brought into court. But the present case on the counterclaim is not moot, nor feigned, nor collusive, and it presents a question of Larson's legitimate property rights."

5 Wigmore on Evidence (2 Edition), page 606, par. 2590.

The fact that defendant^{Alton Bittleman} failed to set up the duress and illegality at the time of filing the Slater answer is indicative of the continuance of the duress. It must be presumed from the situation that the defendant^{Alton Bittleman} failed to disclose facts to counsel^{Bradlow & Jackson} at the time. There is no evidence either way in the state of the case. The facts clearly show an arrangement to suppress a threatened prosecution and to prevent the disclosure of an offense by a member of the bar of this State. Were the facts disclosed at the time, it was the duty of counsel^{Bradlow & Jackson} to immediately report the offenses to the Supreme Court or the Bar Association of this State. It must be presumed that counsel^{Bradlow & Jackson} performed its duty in this regard and that the failure on their part to make a report was due to their ignorance of the true state of affairs at the time the Slater answer was filed.

Furthermore, if the reason for the non-disclosure of facts to counsel at that time was the continuance of the duress, can it be said that a party still under duress is later estopped for failing to act while under duress, as a voluntary person would act?

On the other hand, assuming that at the time of filing the Slater answer duress did not exist. The answer filed in the case was not sworn to. There is nothing in the state of the case to show that the defendants had read or acquiesced in the filing of the answer. Counsel filing the answer at that time were employed to represent the defendants only in the *Slater* case. It was not until September, 1927, that the firm of Braelow & Tepper were substituted as solicitors of record in the case of *Sidney Westheimer v. Alter and Jennie Gittleman* with the consent of solicitors for appellants (see State of Case, p. 104; also, p. 52, lines 23-40) :

“As to the effect of the statements in the bill filed in the former suit by the association, see 1 Greenl. Ev. par. 278, where that learned author regards the admissions made in a bill in chancery as very feeble evidence so far as they may be taken as the suggestion of counsel. In *Doe v. Sybourn*, 7 Temn R. 2, Lord KENYON, C. J., said: ‘A bill in chancery is never admitted in evidence further than to show that such a bill did exist, and that certain facts were in dispute between the parties, in order to let in the answers or depositions of the witnesses.’ In *Boileau v. Rutlin*, 2 Exch. 665, S. C. 12 Jur. 899, the law is stated thus: ‘A bill in chancery is not evidence against the party in whose name it is filed, unless his privity to it is shown. Where that privity is established, the bill is admissible to prove the fact that such a suit was instituted, and what the subject of it was; but it is not evidence by way of admission, against the party by whom it was filed, of the truth of the facts alleged or stated in it.’ If this be the correct practice in ordinary cases, then surely it will apply in cases like the present, where the bill offered in evidence was filed by the counsel of a corporation.”

See, also,

Sweet v. Tuttle, 14 N. Y. 465, 470;

Vanneman v. Swedesboro L. & B. Ass'n,
7 Atl. 676, at 679, 42 N. J. Eq. 263;

Schneider v. Schmidt (Chancery, 1913),
88 Atl. 179, at 182, 82 N. J. Eq. 81, 84
N. J. Eq. 18.

Furthermore, the pleading is not binding because it is an immaterial and inconsequential pleading in the case. The two actions were consolidated at the time of trial. As a logical antecedent to any decision in the Slater action, the question of whether or not the mortgage between Westheimer and respondents was valid had to be considered. The determination of that question holding that the mortgage was invalid because executed through duress and because illegal and against public policy, made the mortgage void, and left Alice May Slater an adequate remedy at law, inasmuch as it gave sufficient security to satisfy her judgment. As a consequence any answer filed in the Slater action did not have to be considered as it was not involved in the actual issue nor was it properly binding on the parties or the Court. The Vice-Chancellor having determined that the mortgage was void it automatically disposed of Alice May Slater's action. It is submitted that in a situation such as this, where a pleading is inconsequential and immaterial, it should not be made the basis for any estoppel.

It is further submitted that the question of estoppel by record cannot be availed of for the first time on appeal. The defense should have been properly pleaded or a request for leave to plead that should have been made at the time of trial. It is the fault of appellant's solicitor that he never saw the answer. (See State of Case, p.

74, lines 18-20). Furthermore, there is nothing in the appellant's argument or in the state of the case to show that appellant relied on the pleading to his detriment.

POINT THREE.

The defense of duress when sustained precludes the doctrine of forbearance.

The substance of appellant's argument under his third point is that, if there is a valid consideration for a contract, it logically precludes questioning the voluntary nature of the contractual relation. The fallacy of the argument is apparent.

It is elementary that a contract is a resultant relation from the voluntary acts of persons, characterized as offer and acceptance plus a legally valid consideration. The fact that the consideration is legally valid does not conclusively establish the voluntary nature of the offer and acceptance—a result which would follow from appellant's argument.

However, the testimony of the appellant shows that the consideration, in fact, was not forbearance to sue the son, but a promise not to prosecute or press disbarment. The appellant on cross examination testified:

“Q. At the time that you had this discussion at Rabbi Gittleman's house with the Rabbi, was the discussion concerning the debt of \$6,000 owing by Simon Gittleman, or to the embezzlement of \$6,000? A. To the embezzlement.

“Q. That was clear? A. Yes.

“Q. Everybody understood that? A. Yes” (State of Case, p. 67, lines 35-40; p. 68, lines 3-4).

Assuming that the consideration was valid, nevertheless, the illegal aspect of the transaction and its purpose to suppress the investigation of a criminal offense would be so linked with it as to void the entire transaction.

17 *A. L. R.*, at pages 326, 330;
13 *Corpus Juris*, 449;
2 *Paige on Contract*, Sec. 919.

POINT FOUR.

The learned dictum in the case of *Ball v. Ward*, 76 N. J. Eq. 8 (affirmed 79 N. J. Eq. 170), is sound and dispositive of this case.

Threats of criminal prosecution, of a son, for the appropriation of money, even if the imprisonment be lawful, when made to a parent in order to exact from the parent a contract of payment or security, and which deprive the parent of the freedom and power of deliberation necessary for transactions of this description, constitutes such duress as to invalidate the transaction at the option of the parent.

The case of *Ball v. Ward* (1909), 76 N. J. Eq. 8, states that even though the threats to the parent were of lawful imprisonment of the son, the threats would nevertheless constitute duress when made to the parent and in fact subjecting the will of the parent to that of the threatener.

Chief Justice GUMMERE in *Ball v. Ball* (E. & A. 1911), 79 N. J. Eq. 170, affirming the lower Court's decision limited the decision by pointing out that:

“The question whether a conveyance made by a parent to prevent the imprisonment of a child who has in fact been guilty of a criminal offense, may afterward be set aside at the option of the parent, is one upon which judicial views are not in harmony. It is not

presented under the facts as found by the Vice-Chancellor, and any expression of view upon the question by this court would consequently be obiter. For this reason we neither assent to nor dissent from what was said by the learned Vice-Chancellor on this point."

This seems to be the latest word in this State on the question of whether a threat of lawful imprisonment of a son made to the parent can constitute duress.

There is an express finding by Vice-Chancellor BERRY in his conclusions (State of Case, p. 109, lines 10-12) that Simon Gittleman embezzled the sum of \$6,000 from Sidney Westheimer, a client. The Vice-Chancellor adopts the learned dictum of *Ball v. Ward* as his decision in the case. It is submitted that the dictum in *Ball v. Ward* is dispositive of the question of duress involved in the present case, and should be adopted by this honorable Court.

However, as the Vice-Chancellor said in *Bayley v. Williams*, 12 Jur. N. S., page 236, at page 237, "*It is not the province of the court of equity to decide whether crimes or misdemeanors have been committed.*" If this honorable Court accepts this view especially in a case like the present one, where, although the commission of the crime is alleged, but where the accused is not before the Court, and where there is nothing in the record to show that Simon Gittleman had been indicted for embezzlement or found guilty in the criminal courts on that charge, then the actual decision of *Ball v. Ward* controls the present case.

Ball v. Ward, supra;

Travis v. Unkart, 99 Atl. 320, 89 N. J. L. 571.

But if the finding of Vice-Chancellor BERRY is proper for the purposes of this case then it is

submitted, that whether or not the threats to make a lawful arrest constitute duress as to the person who is the wrong-doer, that as to a parent in no way liable for the crime or debt, such threats are not privileged and do constitute duress, especially when the creditor thus for his private benefit succeeds in preying on normal parental reactions where a child is involved. It is submitted that the nature of such threats is immaterial if in fact they coerce the parent to involuntary action.

Ball v. Ward (1909) 76 N. J. Eq. 8; affirmed in *Ball v. Ball* (E. & A. 1911), 81 Atl. 724; 79 N. J. Eq. 170, 37 L. R. A. (N. S.) 539;

Comprehensive Note in 17 Amer. Law Reports at page 341;

Travis v. Unkart (E. & A. 1911), 99 Atl. 320, 89 N. J. L. 571;

Williams v. Bayley, L. R. 1 H. L. 200 (1866), 35 L. J. Ch. 717, 12 Jur. N. S. 875, 14 L. T. N. S. 802, 6 Eng. Rul. Cas. 455;

Nebraska Central B. & L. Ass'n. of Lincoln v. McCandless (Neb. 1909), 120 N. W. 134;

9 R. C. L., page 719, Title "Duress," Section 9;

Notes 26 L. R. A. 48; 20 L. R. A. (N. S.) 486; 42 L. R. A. (N. S.) 329;

Williamson Company v. Ackerman, 77 Kansas 502, 20 L. R. A. (N. S.) 484;

Anderson v. Kelly (Oklahoma), 156 Pac. 1167;

Colcough v. Bank (Georgia), 103 S. E. 489;

Portland Cattle Loan Co. v. Featherly (Montana), 241 Pac. 322, at page 325;

Lomerson v. Johnston (Ch. 1888), 44 N. J. E. 93; affirmed (E. & A. 1890), 47 N. J. E. 312;

10 *Columbia Law Rev.* 164.

In all the above citations, the typical situation was one, as in the instant one, where a parent or wife either because of express or implied threats to prosecute or imprison the son conveyed property to the creditor induced by such threats. In all the cases cited it was held that the conveyances should be voided because of duress even though the threats were of lawful imprisonment.

The cases all adopt as a basis for decision the reaction of the parent to the threat and the parent's state of mind at the time of making the conveyance, and regard as solely operative the subjective reaction of the parent to the threat.

The test used is "whether the conveyances were the result of such pressure by threats of the immediate arrest on the criminal charge as to overcome the free will of the grantor in giving their consent to make the deeds and afterwards executing them" (*Ball v. Ward, supra*).

The reading of the cases in this State shows that the knowledge of whether the threats were lawful or not, does not appear or is known to the parent, until after the instruments are executed; neither is it known prior to or at the time when the conveyance is made. It only appears as a basis for voiding the instrument, discovered subsequently to the time of the duress as set forth in the test used above and hence must be immaterial in determining the existence of duress. So far as the parent is concerned, whether or not the threat is of lawful imprisonment is not even present in the factual situation or presented to them at the time that the duress takes place. The reaction of the parent in every one of the cases shows that the execution of the instrument was entirely due to an impression that the arrest was warranted. It is submitted that the sole operative factor is the involuntary action of the parents and

whether or not the threats are of lawful arrest as to the son, their nature is immaterial in finding duress as to the parents.

Furthermore, if threats of lawful imprisonment of a son when made to the parent do not constitute duress, we have this situation: prior to the application of this assumed rule, there must be a finding that a crime has been committed (*Travis v. Unkart, supra*); if then the assumed rule is applied, it results in holding that a contract entered into by a parent, induced by threats of lawful arrest of a son, and impliedly containing a promise by the creditor not to prosecute, is entered into voluntarily and free from duress. The result then is to give a contract to suppress the instigation of a prosecution for what has already been found to have been a crime for the purpose of applying the assumed rule. This must of necessity void the entire transaction by force of the implication in the case of *Columbian Lodge v. Manning* (Ch. 1897), 57 N. J. E. 338; affirmed 45 Atl. 1092, which is to the effect that the defense of illegality is made out when no prosecution is pending, by alleging the actual commission of the crime and proving the commission of said crime.

In the instant case, the defense of illegality was pleaded (pp. 36 and 37, State of Case, lines 35-40, and 1-12) and as already noted, an express finding of embezzlement was made by the Court.

The following quotations are illustrative of the better considered views on the point.

“In *Williamson-Ralsell-Frazie Co. v. Ackerman*, 77 Kan. (1908) 502, 94 P. 807, 20 LRANS 484, where a note and mortgage was set aside on the ground of duress, it is held: ‘if the threats of the arrest and prosecution of the son operated to deprive the father of his free will power and to constrain the execution of the mortgage, the actual guilt or innocence of

the son upon the charge of embezzlement was not a material question in determining whether there was duress, and in charging the jury upon that defense it was not essential that the court should give a complete definition of the offense of embezzlement."

Quoted in *Anderson v. Kelly* (Okla. 1916), 156 P. 1167.

"If the fears or affections of a father for his son are wrought upon by threats of a criminal prosecution of the son, and the father is thereby induced and coerced, against his will, to execute his promissory note, and a security deed to the land in order to prevent such threatened prosecution, there is duress as to the father, even though the threatened prosecution be for a crime which has been committed by the son; and such instruments are void and may be cancelled in a proper proceeding as the instance of the maker."

Colcough v. Bank of Penfield (Ga. 1920), 103 S. E. 489.

"The nature of the threat is not so material as is the state of mind produced in the victims; hence, if in executing the mortgage each of the mortgagors was impelled by the fear alone that the husband and father would be imprisoned, it is altogether immaterial whether he was guilty of the offense charged or of any offense, for there was then absent the indispensable element—consent given freely."

Portland Cattle Loan Co. v. Featherly, (Montana 1925), 241 P. 322, at 325.

The Court in *Baldwin Co. v. Savage* (Ore. 1916), 159 Pac. 181, very properly said:

"Parental love will usually prompt a father or mother to make great sacrifices for a son or

daughter particularly so when such child is threatened with impending danger. In order to avoid the shame and disgrace which the trial of an offspring, charged with the commission of a crime, will necessarily entail, his father and mother will ordinarily impoverish themselves to avoid an indictment or a conviction. Threats, when based upon admitted facts which would render a parent subject to a criminal prosecution and judgment therein, will not usually affect him so much as when a similar charge is preferred against his son or daughter; when, however, such threats are made to a parent against his offspring the menaces will generally produce such apprehensions of evil as to overthrow reason and judgment and to induce the making of a contract whereby the father or mother is ready to make any surrender of right or property to avert the calamity and protect the child. The court in *Meech v. Lee*, 82 Mich. 288, 46 N. W. 398, discussing this subject, says: "No more powerful and constraining force can be brought to bear upon a man to overcome his will and extort from him an obligation, than threats of great injury to his child. Both upon reason and upon the weight of the authorities we are of the opinion that a parent may void his obligation by duress to his child."

POINT FIVE.

The doctrine of *pari delicto* and *particeps criminis* has no application to this case, and *Alter* and *Jennie Gittleman* should not be precluded from recovering on their counter-claim.

The finding was made by Vice-Chancellor that the transaction involved in this case was an illegal one. It was also found that the crime of embezzlement had been committed. Whether the illegality of the transaction was due to the at-

tempted suppression of a transaction not yet pending, or whether it was illegal because it was a scheme to deceive the Supreme Court of this State into allowing Simon Gittleman to continue as a member of the bar of this State is not clear. However, in addition to the illegality, it was found that the defendants Alter and Jennie Gittleman did not execute the instruments or enter into the agreement as voluntary persons. It is therefore submitted that the instant case is not within the general rule of *pari delicto*.

Not only was it found that the agreement had not been entered into voluntarily, but in addition, the decree of the Vice-Chancellor impliedly finds that there was no ratification in this case by the payment on account of the mortgage. The evidence shows that these payments were promised at the time of the threats and were made while the defendants were still under the influence of the original fear, and while this was still effectually present they cannot be said to have acted as free and voluntary individuals so as to ratify (State of Case, p. 66, lines 24-40, p. 67, lines 1-8, p. 47, lines 9-38, p. 48, lines 24-40).

Avakian v. Avakian, 60 E. 89, 60 A. 521;
9 *Ruling Case Law*, page 725, Section 15.

“The court was right in holding the mortgage was tainted with duress. It is now said, even conceding the mortgage was obtained by duress, it was ratified after the duress had passed by making payments on it and by attempting to have it discounted. The conclusion we reach from the record is that the wife and family did all that was done in the expectation and belief that it was necessary to be done to save Mr. Bentley from being imprisoned as the result of his criminal act. What was done after the mortgage was given

was in the same line as the giving of the mortgage, prompted by the same motive, expecting to bring about the same result."

Bentley v. Robson (Mich. 1898), 76 N. W. 146;

Baldwin Co. v. Savage (Ore. 1916), 159 P. 81;

Colcough v. Bank of Penfield (Ga. 1920), 103 S. E. 489;

Portland Cattle Loan Co. v. Featherly (Montana 1925), 241 P. 322.

In the case of *Colby v. Title Insurance & Trust Co.* (1911), 117 Pac. 913, 35 L. R. A. (N. S.), page 813 at 817, the Court says:

"It is true that, as a general rule, equity will not aid one party or another to an illegal transaction where they stand in *pari delicto*, but will leave them just where it finds them, to settle these questions without the aid of the court. This rule is universally recognized, and a few of the many authorities announcing it are Pom. Eq. Jur., 3d ed., pp. 659, 667, 1703; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Ager v. Duncan*, 50 Cal. 325; *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395; *Chateau v. Singla*, 114 Cal. 91, 33 L. R. A. 750, 55 Am. St. Rep. 63, 45 Pac. 1015, cited by respondent. *But this rule only applies where the parties are in pari delicto; where the illegal transaction is entered into voluntarily, and the turpitude of the parties is mutual. Where, in the cases cited, the rule has been applied, it will be found that both parties entered into the illegal contract or transaction there under consideration voluntarily, were equally culpable, and relief was refused on that account. Where, however, the party seeking relief is not a free moral agent, and his consent to the illegal transaction is obtained through duress, menace, or undue influence, he is not regarded as in pari delicto with the person ob-*

taining his consent by the employment of such means, and will not be precluded from invoking affirmative relief in equity to set aside contracts or instruments so executed, or to defeat an attempted enforcement of them against him. This qualification to the general rule is as universally recognized as the general rule itself."

And Pomeroy says:

"Lastly, when the contract is illegal, so that both parties are to some extent involved in the illegality,—in some degree affected with the unlawful taint,—but are not in *pari delicto*,—that is, both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy,—a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce the contract itself, or if this be impossible, by permitting him to recover the amount justly due, by means of an appropriate action not directly based upon the contract. *Such an inequality of condition exists so that relief may be given to the more innocent party, in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, if considered by themselves alone, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from*

fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into."

2 *Pomeroy's Equity Jurisprudence* (4th edition), pages 2000-2001, par. 942;

17 A. L. R. 326;

Crossley v. Moore, 40 N. J. L. 28;

Keener, Quasi Contracts, Vol. 1, p. 415;

Shipman v. Furness (1881), 69 Ala. 555;

American Mutual Life Ins. Co. v. Bertram (1904), 163 Ind. 51;

7 *Cornell Law Quart.* 77;

Woodward, Quasi Contracts, Chap. 8, sec. 139;

1 *Story Equity Juris.*, sec. 300;

Silsbee v. Weber, 171 Mass. 378.

It is submitted, that ~~it~~^{DENY THE RESPONDENTS A RECOVERY ON} would be inequitable to ~~their counterclaim, because they had involuntarily~~ their counterclaim because they had involuntarily and under coercion made payments to the appellant. It would be a reward to the real culprit, the one who acted voluntarily, for his effective, but illegal barter.

A survey of the testimony given in this case clearly shows that the instruments were executed under duress. It is to be noted that the testimony of the defendants Rabbi Alter and Jennie Gittleman was that of disinterested parties, for the outcome of the litigation from a mere material standpoint did not insure to their benefit, since a decree either way would inure only to the benefit of Alice May Slater and Sidney Westheimer.

The testimony shows that the Rabbi, after being told by Mr. Brodsky, on a Friday, that his son Simon had stolen the money, called his son and

A. (Continuing.) Then I told him, "Call right away Westheimer." He didn't know the telephone, so I called up Brodsky, and Brodsky told me the telephone of Westheimer, and Westheimer came in. It was Friday night. Westheimer came in and start to tell me the same story. Then I asked him, "What have I got to do now?" Then he said, "If somebody will pay me the money, I will do nothing, but if nobody will pay, I will prosecute him and I put your son in jail," and mother heard this; a son in jail; she start to cry. I told him "I have no money, I haven't a cent, but my life, I am a poor man. I am just making a living, how can I go out and raise you \$5500?" He said "Not \$5500, it is \$5800, because I don't work for three or four weeks on account of this, and I want the \$300, and I don't want to lose the money." We start to talking and my wife start to cry; you know how a mother is, and she told him first, "You know we have a piece of property in Broome Street free and clear; we will give you a mortgage on this property for a long time."

Q. For what? A. For this money, for the \$5500, he shall not go to the prosecutor against Simon. He was sitting and thinking about it, "All right," he said. Monday morning I got a call from him, he must have cash; he heard that the property is not worth so much money, he must have cash. I told him over the telephone, "How can I raise you cash?" Then my wife said, "I got in the Weehawken Trust Company \$500 saved up; we will go to the lawyer; I will go in the bank and take out the \$500 and I will give him the \$500 cash."

Q. Go to what lawyer? A. To Brodsky.

Q. For what purpose? A. To make the mortgage.

Q. The papers had not been signed yet? A. No, but the papers were signed, I think, on

Monday. I told him we will have \$500 in cash. He was satisfied. We went to the bank in the Weehawken Trust Company; my wife took out the \$500, and we went to Lawyer Brodsky. He say there that the property is not worth so much money; he want at least \$2,000 cash. "By God, where can I raise \$2,000? \$500 we got now, \$1,500 more. I am a teacher, but I go collecting every week and give my wife the wages. Go ahead." Then we start to talk about my wife has to go to the Building and Loan and savings money, but you must wait a month and give thirty days' notice. She got a certificate in one Building and Loan, I think in the Newark City Hall Building and Loan, and I have a certificate from the Newspaper Working Men's Building & Loan. Then we thought all right until thirty days I paid him, I can raise him the \$1500 but \$1500 you got already, but I want thirty days you shall give me, and I will try to raise the \$1500 more. I took her certificate and my certificate and went in, and I was in the Newark Trust Company and give them the certificate and they gave me the one thousand dollars on the two certificates, and \$500 my wife loaned of someone else, and I think in ten day I brought the check to Mr. Brodsky, to the lawyer, and we paid him off (State of Case, p. 46, lines 9-28; p. 47, lines 3-39).

At this meeting that Friday night at the Rabbi's house, the Rabbi, his wife Jennie, Sidney Westheimer and Simon were present. The implication of what took place at the house at that time is rather evident from the haste in which the promise to execute a mortgage was made to Westheimer and Westheimer, on cross examination, testified:

Q. At the time that you had this discussion at Rabbi Gittleman's house with the Rabbi, was the discussion concerning the debt of \$6,000 owing by Simon Gittleman, or to the embezzlement of \$6,000? A. To the embezzlement.

Q. That was clear? A. Yes.

Q. Everybody understood that? A. Yes (State of Case, p. 67, fols. 35-40; p. 68, fols. 3-4).

And at Mr. Brodsky's office, where the subsequent meeting took place, the following Monday, to execute the mortgage, the testimony shows:

Q. Then what happened? A. Then at Mr. Brodsky's office I believe he told me, or it came about, that the conference was arranged with Mr. Alter Gittleman and Mr. Simon Gittleman.

Q. At whose suggestion was that conference arranged? A. I believe Mr. Brodsky's.

Q. Mr. Brodsky was your attorney at that time; he was the attorney for the sale of the property? A. Yes.

Q. And did you or Mr. Brodsky say anything to Simon Gittleman about having the money paid to you or you would have him arrested? A. I don't remember that.

Q. Would you say that it wasn't said? A. I think at the time I said that I didn't want to cause any trouble for anybody.

Q. What do you mean by that, that you didn't want to cause any trouble for anybody? A. Mr. Simon Gittleman told me that he would pay off that mortgage.

Q. What did you mean when you said that you didn't want to cause any trouble for anybody? A. Because he promised to pay off the mortgage.

Q. You had something in mind when you said to him, "I don't want to cause any trouble for anybody," didn't you? A. Yes.

Q. What did you have in mind? A. He said he would pay off the—

Q. You are not answering the question. What did you have in mind when you said to him, "I don't want to cause trouble for anybody"? A. That was to Mr. Brodsky.

Q. Was Mr. Simon Gittleman there at the time? A. He was there at the time.

Q. And what did you have in mind when you said that?

The Court: What trouble did you have in mind?

The Witness: To save him from going to jail.

Q. Did you mention the word "jail"? A. No.

Q. Did you mention the word "prosecutor"? A. That I don't remember.

Q. You might have used that word? A. Yes.

Q. And did you say anything about disbarment? A. I don't remember that.

Q. Might you have said that? A. I don't think so.

Q. You are not positive that you didn't say it? A. No (State of Case, p. 59, lines 16-39; p. 60, lines 3-39).

Rabbi Gittleman's testimony, as to what took place immediately preceding the execution of the mortgage shows:

Q. He wanted some cash? A. Yes.

Q. And you asked him to wait for fifteen days or thirty days? A. Yes.

Q. Wait, what for; wait on what? A. Not to go to the prosecutor.

Q. Did he say he was going to the prosecutor? A. Sure; he said, "If I have not the money, I will go right away to the prosecutor, and I will put your son in jail." You know how a father and mother feel, it cost so much money, a poor man, to come a son to this; you know how much trouble it is, and to put him in jail, and he will be disbarred, and everything what we can do.

Q. Did Mr. Westheimer say anything about disbarment? A. Yes, he said disbarment, too (State of Case, p. 48, lines 24-40).

Cross examination by Mr. Isaacs:

Q. You gave Mr. Westheimer this bond and mortgage to protect your son so he wouldn't

go to jail; isn't that right? A. Yes (State of Case, p. 44, lines 35-40).

Jennie Gittleman's testimony is as follows:

Cross examination by Mr. Hauptman:

Q. Why did you sign the mortgage? A. Because on account of that trouble; Mr. Brodsky called up my husband and after came Mr. Westheimer and he said he will arrest my son, and you know how it is, they say they can take away his license, and I try my best to do something.

Q. You say that he was going to arrest your son? A. Yes, he said he will arrest him and go to the prosecutor.

Q. Is that why you gave the mortgage? A. Yes (State of Case, p. 54, lines 4-15).

It is not necessary that there be an express threat to imprison or prosecute the son to accomplish the duress, nor need there be an express understanding that if the security for the debt is given there will be no prosecution. Threats of criminal prosecution may rest in implication.

Ball v. Ward, supra;

Williams v. Bayley, supra;

Portland Cattle Loan Co. v. Featherly, supra;

Neb. Central Building & Loan Ass'n of Lincoln v. McCandless, supra.

It is rather significant that the promise to execute the mortgage was made the very day that Rabbi Gittleman was notified by Mr. Brodsky that Simon had stolen the money and was made as soon as Westheimer called at the rabbi's house and made the threats. It is further significant that the mortgage was immediately executed the Monday following the Friday night of the first conference, and that at that time Rabbi Gittleman

and Jennie Gittleman were not represented by counsel.

Cross examination by Mr. Hauptman:

Q. Did you have a lawyer at the time that the mortgage was made by you and your wife to Westheimer? A. I have no lawyer.

Q. You were not represented that time at all? A. No (State of Case, p. 53, lines 18-24).

Furthermore, the absence of statements, agreements or examination as to the exact amount of the debt which the conveyances were supposed to pay and the lack of any arrangement at the time or any credit on the debts; in fact, an acquiescence in the execution of the \$5,800 mortgage when only \$5,489.76 was actually due thereon, is evidentiary of the respondents' state of mind (State of Case, p. 73, lines 7-15; and also p. 46, lines 20-26).

It is highly significant that Mr. Brodsky, the lawyer, who was present at the execution of the instruments and who was involved in negotiating the transaction, wasn't called by appellant to testify in support of appellant's contention.

As was said in the case of *Ball v. Ward*:

"The concurrence of these undisputed facts evidences that for some reason a transfer was agreed on, which was to be immediate, and which left indefinite and unadjusted matters which ordinarily would have been agreed on had the transaction been a mere voluntary conveyance by the complainants for the purpose of paying part of their son's debts. The cumulative force of these undisputed facts is strongly corroborative of the complainant's direct evidence of undue pressure by the use of threats."

A careful reading of the evasive manner in which Sidney Westheimer gave his testimony and

the apparent inconsistencies in his reasons for wanting a mortgage (State of Case, p. 61, lines 36-40 and p. 63, lines 30-38), are further corroborative of the express finding of Vice-Chancellor BERRY that

“to prevent Westheimer from carrying out his threat to jail Gittleman on the charge of embezzlement, and to disbar him, the defendants Alter Gittleman and Jennie Gittleman, parents of Simon, executed the mortgage in question. Westheimer threatened to jail Simon if the mortgage were not executed, but agreed not to prosecute in the event that it was. There is no question in my mind that at the time of the execution of the mortgage, the mortgagors were acting under such oppression of the threats of the mortgagee as to prevent their acting of their own free will, and that they acted rather at the will of the mortgagee
* * * It is undisputed that at the conference which resulted in the giving of this mortgage, the mother, who was a tenant by the entirety of the mortgaged premises, was in tears and weepingly consented to the execution of the mortgage in order to save her son from imprisonment and disgrace. I believe that the distress of the parents' minds was such that they could not realize what they were doing, and that there was probably nothing in their power that they would not have done had it been demanded of them at that time as the price of their son's freedom” (State of Case, p. 109, lines 12-40; p. 110, lines 1-2).

POINT SIX.

The authorities cited by appellant do not support his argument.

The criticism of appellant's citations is made in the order in which they are used in his brief.

POINT ONE.

The case of *McCartin v. Traphagen*, 43 N. J. Eq. 323 at page 338, from which appellant has paraphrased Lord Camden's statement is not applicable. The Court, in applying the doctrine of laches, says in the next paragraph to the one cited:

"He who delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what seems to be justice to him is not injustice to his adversary, should be denied all relief. * * *"

Here there was injury to the party asserting laches due to death of witnesses and the elapse of fifteen years. There was no disadvantage to appellant from the delay, if any, in the case on review. The citation of 4 Pomeroy's Eq. Jur. (4th ed.) paragraph 3419 should start at page 3418:

"Laches, in legal significance is not mere delay, but delay that works a disadvantage to another. * * *"

The note in 35 A. L. R. 866 cites one New Jersey case, *Bodine v. Morgan*, 37 N. J. Eq. 426. This case is not in point, for there was no fraud or duress established. The Court found that the father had voluntarily given a mortgage to complainants to secure them for losses sustained by them through the acts of the father and his son—and that threats not followed by coercion do not constitute duress.

POINT TWO.

The case of *McGee v. Smith*, 16 N. J. Eq. 462, is not in point since in this case there was a reliance upon the truth of statements made in an answer filed in a foreclosure action by the purchaser at the sale of the premises. The Court re-

refused to consider the answer a mistake *to the disadvantage* of the one who relied upon it.

The case of *Lippincott v. Ridgway*, 11 N. J. Eq. 526, in its actual decision is not in point. It involves only incidentally the question of an allegation in a bill as to the amount of the principal of a trust fund and an admission by the trustee of the amount. The complainant sought to show it to be more, but it was not allowed, because "it would be a surprise on the defendant * * *." Nevertheless, the Court decreed that the trustee was liable for the "accrued interest" the complainant sought as part of the principal.

The case of *Schenck v. Schenck*, 10 N. J. L. 276, merely holds that a general demurrer admits the allegations of the prior pleading as true. It is not in point.

The case of *Lee v. Heath*, 61 N. J. L. 250, is not in point. It merely holds that a bill of particulars is admissible as evidencing admissions to be considered by the jury along with the other evidence.

The case of *Parrot v. Nugent*, 91 N. J. L. 302, follows the *Lee v. Heath* case, and extends its doctrine so that if plaintiff puts the defendant's bill of particulars in evidence, the bill of particulars *per se* is not proof for defendant of the facts contained therein.

The case of *Craft v. Schlag*, 61 N. J. Eq. 567, merely shows an answer to be evidentiary as an admission. The case does not hold it to be conclusive on the court.

It is to be noted that none of the cases support the precise question raised in the case on review: whether an answer filed by defendant A in a prior action between complainant C and defendants A and B can be used by the defendant B in a subsequent action by B against A as a solemn ex-

clusive judicial admission so binding on the court as to prevent the Court entertaining an answer by A in this subsequent suit, which is inconsistent with A's prior answer.

POINT THREE.

The only case cited as authority for the precise point of argument under this point is *Saxton v. Landis*, 16 N. J. L. 302. Appellant has been misled by a hasty reading of a headnote. The case holds a common pleas judgment defective in form and that the evidence in the case didn't support the declaration. The words "forbear to prosecute" in appellant's excerpt mean forbear to sue and are merely an excerpt from the declaration in the case.

POINT FOUR.

The case of *Bodine v. Morgan*, 37 N. J. Eq. 426, has already been criticized under Point One, *supra*.

The case of *Smillie v. Titus*, 32 N. J. Eq. 51, is distinguishable on the facts, for in this case the mortgage was given by the confessed criminal and offered and executed by him voluntarily.

The case of *Sickles v. Carson*, 26 N. J. Eq. 440, is not in point. It decides that a single man, who is in lawful arrest under a *bona fide* regular proceeding in bastardy on the examination of a single woman and who chooses as a means of avoiding the legitimate consequences of the proceeding, to marry her, cannot set up the arrest as duress *per se* in attempting to annul the marriage.

The case of *Union Exchange National Bank of New York v. Joseph*, 231 N. Y. 250, 17 A. L. R. 323, is not in point so far as the appellant's fourth point is concerned,—but has some bearing on appellant's fifth point. The note that follows the

case in 17 A. L. R. at page 326 explains the case as being peculiar to New York, saying:

“Contracts for the suppression of criminal prosecutions being unlawful, the courts will not lend aid to carry them out, but in general, will leave the parties where they have placed themselves; as, being in *pari delicto*, *potior est conditio possidentis*. Where, however, the contract is made under circumstances of duress, oppression, or undue influence, most of the courts will permit recovery of money paid on such contracts, or even will cancel the obligations or conveyances made. This appears to be mainly upon the theory that where there is duress, oppression or undue influence, the parties are not in *pari delicto*, but it is also based to some extent upon public policy, which would prevent the extortioner and oppressor from retaining the results of his wrongful act.

“There are, however, some courts, notably those of New York, which hold where the contract compounds a felony, duress will not alter the fact that the parties are in *pari delicto*, and that therefore no amount of duress will justify relief.”

New York does not follow the general rule.

Moreover, a mere reading of the opinion in 231 N. Y. 250, is not sufficient for an understanding of the precise point involved in the case. The opinion must be read with the opinion of the lower Court which it affirms. (See *Union Exchange National Bank v. Joseph*, 185 N. Y. S. 403.)

A careful reading of the two opinions shows that the only point actually decided by the Court of Appeals of New York is that money paid voluntarily on an illegal contract cannot be recovered. The question of duress was not material as shown by Judge GREENBAUM'S opinion in the Appellate Division (185 N. Y. S., at 406):

"It therefore seems to me that we may not ignore the opinion of the Court of Appeals in *Solinger v. Earle*, *supra* (82 N. Y. 393) in which it expresses the law of this state, that a brother-in-law is not in a position to avail himself of the plea of duress upon the state of facts which are set forth in the counterclaim.

"Moreover, in my opinion, the plea of duress, which has been made available to third parties who are of necessity directly and mediately personally affected by the distress of the debtor in consequence of their intimate and close relationship to him, and of the reciprocal obligations and duties, whether legal or moral, subsisting between them, should be strictly confined to a near blood relationship. To make it available to a brother-in-law, who is only indirectly interested in the debtor by reason of the fact that his sister is directly affected by her husband's calamities, is straining the rule beyond reasonable limitations."

See note criticizing case in 7 *Cornell Law Quart.* 77.

POINT FIVE.

The case of *Jourdan v. Burstow*, 76 N. J. Eq. 55, affirmed 78 N. J. Eq. 597, does not involve duress plus an illegal transaction, and is a case where the criminal sought to recover the property. The case is not in point—and the Court, in distinguishing *Williams v. Bayley*, cited in this brief, impliedly suggests a different decision where "the person asking relief was not the wrongdoer under a legal and moral obligation to make restitution but a third person, who had, without any consideration moving to himself, and under an influence that was characterized as undue, undertaken the burden of the demand."

The case of *Worcester v. Easton*, 11 Mass. 377, limits itself to a case of illegality where no duress is present.

It is, therefore, respectfully submitted that the final decree of the Court of Chancery entered in this cause be affirmed.

BRAELOW & TEPPER,
Solicitors for and of Counsel with
Defendants-Respondents.

61 OCT. 7. 1928

New Jersey Court of Errors and Appeals

Between

ALICE MAY SLATER,
Complainant,

and

ALTER GITTLEMAN, *et ano*,
Defendants.

On Bill, &c.

SIDNEY WESTHEIMER,
Complainant-Appellant,

and

ALTER GITTLEMAN, *et ano*,
Defendants-Appellees.

On Bill, &c.
On Appeal
from the
Court of
Chancery of
New Jersey.

**BRIEF FOR
COMPLAINANT-APPELLANT.**

Statement of Facts.

On December 14, 1926 Alter Gittleman and Jennie Gittleman, his wife, executed a bond and mortgage covering premises owned by them in the City of Newark, Essex County, New Jersey, in the sum of \$5800.00, due and payable on June 14, 1927, with interest at six per cent, payable semi-annually; there was a provision in the said bond and mortgage that \$2000.00 was to be paid on account of the principal sum prior to January 14, 1927. The said sum of \$2000.00 was paid in accordance with the terms of

the said bond and mortgage prior to January 14, 1927.

On June 10, 1927, four days prior to the due date for the payment of the balance due on said mortgage, namely, \$3800.00, one, Alice May Slater, instituted suit in the Court of Chancery as complainant against the said Alter Gittleman, Jennie Gittleman, Simon S. Gittleman and Sidney Westheimer, as defendants, she alleging that as a judgment creditor the bond and mortgage executed by the said Alter Gittleman and Jennie Gittleman, his wife, to the said Sidney Westheimer should be set aside as in fraud of creditors and she did further allege that there existed both fraud and conspiracy on the part of the said Gittlemans and Westheimer, (State of Case, pp. 9 to 15).

When the bond and mortgage, executed as aforesaid, became due on June 14th, 1927 the said Alter Gittleman and Jennie Gittleman, his wife, did not pay the balance of the principal sum of \$3800.00 due thereon and finally, after numerous promises made by them to take care of the obligation, and upon their failure to do so, foreclosure proceedings were instituted against the said Alter Gittleman and Jennie Gittleman, his wife, (the mortgagors) and Alice May Slater (the judgment creditor), as defendants, by Sidney Westheimer, as complainant. This suit was instituted on August 8th, 1927. (State of Case, p. 21). No answer was made to said suit by the Gittlemans, nor did they take any steps to defend the same. An answer was filed by the defendant, Alice May Slater, but was subsequently withdrawn, and on September 28, 1927 a final decree was recovered in the said foreclosure action.

Prior to the entry of the final decree, on September 28, 1927, up to the time of the final hearing in the Court of Chancery, in the suit instituted by Alice May Slater, on Wednesday, February 8, 1928, the

solicitors of the said Alter Gittleman and Jennie Gittleman, the defendants in the suit instituted by Sidney Westheimer, prevailed upon the solicitors representing Sidney Westheimer to proceed no further with the foreclosure proceedings, that as soon as the Building and Loan had made and completed its search upon the mortgage loan by it granted to the Gittlemans that Sidney Westheimer's mortgage would be paid in full and to send all the necessary papers to them, including an assignment of the said final decree obtained in the said foreclosure proceedings. (See Exhibits D-3 to D-12.) All negotiations for the payment of the Westheimer mortgage by the Gittlemans extended to January 12, 1928, within a month prior to the final hearing in the Slater suit.

Issue had been joined in the suit instituted by Alice May Slater against Alter Gittleman and Jennie Gittleman his wife, Simon S. Gittleman and Sidney Westheimer, all defendants answered, except Simon S. Gittleman, and defended the suit. As to the answers filed on behalf of Alter Gittleman and Jennie Gittleman, we will more fully and with greater particularity discuss in our argument following.

Before the hearing of the cause the learned Vice-Chancellor, in the Court below, the solicitors for Alter Gittleman and Jennie Gittleman, raised the defense that the mortgage under foreclosure was obtained by duress practiced upon the said Alter Gittleman and Jennie Gittleman, his wife and that the final decree obtained in said foreclosure suit should be reopened so as to give the Gittlemans the right to interpose an answer. In order to facilitate matters the Court advised counsel representing the respective parties that it would make an order consolidating the suits and then at the conclusion of hearing dispose of both matters.

Counsel for the complainant, Sidney Westheimer, had no notice of any such application as made.

The final hearing in the Slater suit proceeded and at the conclusion the Court found that she had not established her allegations of fraud and conspiracy in the making of the bond and mortgage, aforesaid, that is, the mortgage made by Alter Gittleman and Jennie Gittleman to Sidney Westheimer but that the defense of duress had been made out and accordingly advised a decree. The solicitors of the said Alter Gittleman and Jennie Gittleman, his wife, the defendants in the Westheimer suit filed an answer and counterclaim to said suit over two months after the cause had been determined, on April 24, 1928, of which counsel for the complainant, Sidney Westheimer, had no notice until they received copies of all pleadings in the cause in order to complete this state of the case.

Alice May Slater does not appeal from the decision of the Court below.

The points upon which the complainant, Sidney Westheimer, relies to reverse the judgment and decision rendered against him, in the Court below and in favor of the defendants, Alter Gittleman and Jennie Gittleman, his wife, are as follows:

- (1) That the said defendants were guilty of laches.
- (2) That the said defendants are estopped from asserting or interposing the defense of duress as is evident by the answer filed by them in the Slater suit.
- (3) That the doctrine of forbearance precludes the defense of duress.
- (4) That the case of *Ball vs. Ward*, 79 N. J. Eq. 170 had no application to the case.

(5) Assuming that the giving of the bond and mortgage was an illegal transaction of the defendants, Alter Gittleman and Jennie Gittleman, being *particeps criminus* and in *pari delicto*, should be precluded from recovering on their counterclaim.

ARGUMENT.

POINT I.

The defendants, Alter Gittleman and Jennie Gittleman, should have received no relief in the Court of Chancery because they were guilty of laches.

The fundamental maxim "Equity aids the vigilant and not those who slumber on their rights" should *per se* be dispositive of the matter in dispute.

If Alter Gittleman and Jennie Gittleman were "in vinculis" as the result of the alleged duress of Sidney Westheimer on December 14th, 1926, when they executed the bond and mortgage *sub judice*, why did they wait for many months thereafter to invoke the aid of a Court of Equity? Why did they allow the proceedings for the foreclosure of the said mortgage go to a final decree uncontested? Why did they not file an answer and counterclaim to the suit for the foreclosure of the mortgage and set up the defense of duress, etc.? Why did they first file an answer to the Slater suit, alleging that the mortgage was executed voluntarily and for a good and legal consideration?

If one but reads the answer of Alter Gittleman, with particular reference to paragraphs 10 and 15 thereof (state of the case, pp. 19 and 20), he must say as Chancellor Pennington said, speaking in the case of *Ross vs. Elizabethtown*, 2 N. J. Eq. 422:

"The Court will refuse its aid to a party who remains silent when duty, candor and fair dealing require him to speak out."

They, the said defendants, then had the aid of independent legal advice.

Alter Gittleman, a Rabbi, a student and a teacher, an educated man of character and force, of personalty and determination waited from December 14th, 1926, until February 8th, 1928, to raise the defense of duress and illegality. Meanwhile, he confirmed and ratified the execution of the bond and mortgage by making a payment aggregating the sum of \$2000.00. Does this bespeak the conduct of a man under the influence of threats?

Assuming for the sake of argument that the element of duress existed when the bond and mortgage were executed, what should be the policy of a Court of Equity when the victim of duress awaits for almost two years to assert his rights? A Court of Equity has always refused its aid to stale demands when the party has slept upon his rights and acquiesced for a great length of time. Nothing should call forth the activity of a Court of Equity, but conscience, good faith and reasonable diligence. Where these are wanting the Court is passive and does nothing.

McCartin vs. Traphagen, 43 N. J. Eq. 323
at page 338, 2 Story's Eq. Jur., Para.
1520 and notes;

4 Pomeroy's Eq. Jur. (4th Ed.), pages
3419, *et seq.*

If delay ever were fatal where a remedy is sought, in equity, it should be fatal in this case to Alter Gittleman and Jennie Gittleman.

At no time from December 14th, 1926, until the date of the final hearing in the *Slater* case, on Feb-

ruary 8th, 1928, did they dispute or attack the validity of the bond and mortgage, nor did they file an answer to the foreclosure proceedings or take any active step in regard to the same, by way of invoking the aid of Equity. Their pleadings (state of the case, pars. 10 and 15, p. 19, fols. 10-30 and p. 20, fols. 1-30) and the correspondence and letters of their solicitors (state of the case, Exhs. D-3 to D-13, both inc., pp. 93 to 108), are strangely silent as to the defense of duress from the date of the bond and mortgage, for almost a period of two years. And then after final decree had been entered in the foreclosure proceedings, and after giving every assurance that the decree would be satisfied, lo and behold, for the first time within a period of two years the defense of duress is raised without giving notice to the solicitors of the said Sidney Westheimer and is raised at the time of the Slater hearing.

We submit for the consideration of the Court that

“one entitled to repudiate a contract on the ground of duress, should, like one who attempts to repudiate a contract on the ground of fraud, act promptly. Silence, delay, acquiescence, or the retention of the fruits of the agreement for any considerable length of time, constitute a complete and irrevocable ratification of the transaction.”

35 A. L. R. Annotation, page 866 at page 868 and the citations therein set forth.

POINT II.

The defendants, Alter Gittleman and Jennie Gittleman, are estopped from asserting or interposing the defense of duress as is evident by the answer filed by them in the Slater suit.

Lord Coke defined the doctrine of estoppel as follows:

‘It is so called “because a man’s owne act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.”

However, this statement does not mean that the truth is precluded from alleging the truth, as truth, but because what he now assumes to be true is something inconsistent with his former position. The purpose of estoppel is to prevent inconsistency and fraud resulting in injustice.

There are various classes of estoppel, and the two classes that we think are applicable as affecting the case at hand, is estoppel by record and estoppel by laches. Defining the former the learned Lord Coke, at page 260 A Coke Inst. states:

“The rolls, being the records or memorials of the judges of the Courts of Record, impose on them such uncontrollable credit and verity as they admit no averment, plea, or proof to the contrary.”

The defendants, Alter Gittleman and Jennie Gittleman, in the suit instituted against them by Alice May Slater, for conspiracy in the making and executing the bond and mortgage, now under consideration, to Sidney Westheimer, and answering the bill of complaint in that suit, paragraphs 10 and 15,

(state of the case, p. 19, fols. 10-30; p. 20, fols. 1-30) stated that: Paragraph 10:

“Defendant denies the payment of \$5800. in cash to Simon S. Gittleman by Sidney Westheimer, in consideration of said mortgage, and denies that said deed of mortgage was made in fraud, said mortgage having been given to secure the re-payment of money due and owing from Simon S. Gittleman to the said Sidney Westheimer and also in consideration of forbearance to sue Simon S. Gittleman by the said Sidney Westheimer.”

And paragraph 15:

“On June 10th, 1926, Sidney Westheimer actually loaned and advanced to Simon S. Gittleman, the sum of \$5800. and that prior to December 14th, 1926, the said Sidney Westheimer threatened to institute suit against the said Simon S. Gittleman, and to accommodate him, this defendant, Alter Gittleman, agreed and promised at various times before December 14th, 1926 to execute a mortgage on his premises, to secure the re-payment of said sum of money to the defendant, Sidney Westheimer. In accordance with his promise, the defendant, Alter Gittleman, executed said deed of mortgage on December 14th, 1926 to secure to the defendant, Sidney Westheimer, the re-payment of said sum and also upon his promise to forbear, bringing suit against the said Simon S. Gittleman, son of the defendant, Alter Gittleman. Said deed of mortgage was given and executed in good faith for fair and valuable consideration and without fraudulent intent or collusion on the part of the defendant, Alter Gittleman.”

This answer of Alter Gittleman was filed on August 12th, 1927 (state of the case, pp. 18, 19 and 20) and he did not avail himself of the defense of duress in the execution and making of the said bond

and mortgage until the final hearing of the Slater cause, which was held on February 8th, 1928.

Reading the above answer, together with the letters and correspondence, Exhibits D-3 to D-13, both inclusive (state of the case, pp. 93-108), we can, we believe, arrive at but one conclusion, namely, that the said defendants, Alter Gittleman and Jennie Gittleman, are and were precluded from interposing the defense of duress in the execution and making of the said bond and mortgage, to Sidney Westheimer, the complainant in the foreclosure proceedings by him instituted in which a final decree was rendered.

It is a general rule that parties are bound by and estopped to controvert, allegations or admissions, in their own pleadings, nor can a party in subsequent pleadings contradict allegations or admissions in his original pleadings.

McGee v. Smith, 16 N. J. Eq. 462;

Lippincott v. Ridgway, 11 N. J. Eq. 526;

Schenck v. Schenck, 11 N. J. L. 276;

Lee v. Heath, 61 N. J. L. 250;

Parrot v. Nugent, 91 N. J. L. 302;

Craft v. Schlag, 61 N. J. Eq. 567.

POINT III.

That the doctrine of forbearance precludes the defense of duress.

Williston on Contracts, Vol. 1, Sec. 135,
page 294, *et seq.*

In the answer filed by Alter Gittleman, referred to heretofore, in the Slater suit, he has without qualification answered:

“Said mortgage having been given to secure the re-payment of moneys due and owing from

Simon S. Gittleman to the said Sidney Westheimer, and also in consideration of forbearance to sue Simon S. Gittleman by the said Sidney Westheimer" (Case, p. 20, fol. 120).

How can the said Alter Gittleman claim that duress had been practiced on him in view of this answer?

The consideration for the execution of the bond and mortgage was the forbearance by the mortgagee, Sidney Westheimer to sue the son of the mortgagors, Alter Gittleman and Jennie Gittleman.

To substantiate our contention in this regard, we cite for the approval of this court the following decision:

"A charge 'for that V being indebted to the plaintiff, in consideration that he would forbear to prosecute said V, the defendant promised to pay V's said debt' is good." *Saxton v. Landis*, 16 N. J. L. 302.

"It is well settled that an agreement for forbearance to sue a valid claim against another, is a good consideration. * * * The text books need only be referred to for that doctrine."

1 Parsons on Contracts 367;

1 Parsons on Bills 198;

1 Story on Contracts, Sec. 435;

Hockenburg ads. Meyers, 34 N. J. L. 346
at page 348.

POINT IV.

The case of *Ball v. Ward*, 76 N. J. Eq. 8 (affirmed 79 N. J. Eq. 170), has no application to the case at hand.

In the case of *Ball v. Ward*, 76 N. J. Eq. 8 (Affirmed 79 N. J. Eq. 170) a conveyance was made by parents to a creditor of their son under pressure of a threat to have the son criminally prosecuted. The conveyance was made in the honest belief by the parents that the son had subjected himself to such a prosecution although the contrary was the fact. It was held by this Court that the conveyance so obtained was void, for duress exercised upon the grantors by the grantee.

In the case at bar the learned Vice-Chancellor, in the Court below, based his conclusion on the *Ball v. Ward* case, *supra*, which we maintain is not applicable here and can readily be distinguished.

In the case *sub judice* the defendants, Alter Gittleman and Jennie Gittleman, were not deprived of the freedom and power of deliberation necessary to validate the transaction as in the *Ball* case.

For a period of two years, almost, they had the right to set the mortgage aside.

Chancellor Runyon, speaking for the Court, in the case of *Bodine vs. Morgan*, 37 N. J. Eq. 426, wherein a father, and son, while in complainant's employ, appropriated to their own use a large number of store orders and goods and upon detection and under what the defendants claim was duress, the father gave complainant the mortgage on his land for the amounts so abstracted. Held,

"That there was no proof of coercion; that threats of a lawful arrest did not constitute duress, and that the fact of the father continu-

ing to work for complainants, at intervals, for nearly five years after the mortgage had been given, and that he made no objections to its validity until after the foreclosure had been instituted, were significant indications that the giving of the mortgage was voluntary."

When we consider the payment of \$2000. on account of the bond and mortgage by both Alter Gittleman and Jennie Gittleman, when we consider the correspondence and the pleadings heretofore referred to, will not this learned Court take all the facts into consideration and arrive at the conclusion that there was no duress practiced upon the said Alter Gittleman and Jennie Gittleman?

Let us review and analyze briefly the testimony in the case *sub judice*, Alter Gittleman, is a very willing witness, he is not illiterate, he is a man that can grasp a situation readily; in order to impress the Court that he was a victim of circumstances compelled to execute the bond and mortgage under threats of duress did not answer questions as propounded, but volunteered his own answers thereto as follows:

"Question. He didn't give you anything?"

"Answer. It was only to protect my son, he shall not go to jail."

"Question. Did he give your wife anything?"

"Answer. Nothing; he didn't give me nothing" (State of the Case, p. 44, fols. 10-20).

"Question. You paid off altogether how much?" (State of the Case, p. 47, fol. 40).

"Answer. Then about the mortgage making he want \$300. for his wages too. I said, 'What do you want of me?' 'If you don't work, you are lucky. All right, if you will go to the Prosecutor, you will have nothing.' 'You are lucky you have this money, but if you want the \$300, no.' 'I don't want it, except I must have my money.' I was not working in that time.

Then we made the mortgage for \$5800, and on this I got two checks what I gave to him on account; here are the two checks, one for \$500, on December 14, and one for \$1500, December 24" (State of the Case, p. 48, fols. 1-20).

Cross Examination by Mr. Isaacs of the said Alter Gittleman disclosed the following:

"Question. Do you remember coming to my office in the early part of November, 1927?"

"Answer. Yes."

"Question. Do you recall the conversation you had with me at my office?"

"Answer. Yes."

"Question. What was it?"

"Answer. I told you maybe we can settle; you shall protect my son, he shall have no trouble."

"Question. What else did you say?"

"Answer. That is all what I said."

"Question. Did you say anything to me about an affidavit?" (State of the Case, p. 50, fols. 30-40).

"Answer. I told you that Westheimer shall give me a letter to Simon that he permitted him to use the money until the settlement of the mortgage."

"Question. In other words, you wanted your son cleared of having taken this money?"

"Answer. I want my son shall have no trouble. If I have trouble, what for is all my trouble; why shall I go and be a poor man when my son will have the trouble."

"Question. Did your wife say that Westheimer should go and sign a writing that he let your son, Simon Gittleman, use this money, and that your son didn't steal the money?"

"Answer. I don't mean this."

"Question. What do you mean?"

"Answer. I mean that he shall do anything in his power to clear up my son not to have trouble" (State of the Case, p. 51, fols. 1-20).

Jennie Gittleman testified that she signed the mortgage because of the trouble as follows:

"Question. Why did you sign the mortgage?"

"Answer. Because on account of that trouble; Mr. Brodsky called up my husband and after came Mr. Westheimer and he said he will arrest my son, and you know how it is, they say they can take away his license, and I try my best to do something."

"Question. You say he was going to arrest your son?"

"Answer. Yes, he said he will arrest him and go to the prosecutor."

"Question. Is that why you gave the mortgage?"

"Answer. Yes" (State of the Case, p. 54, fols. 1-20).

The burden of proof in proving and establishing duress, we believe has not been sustained by the defendants, Alter Gittleman and Jennie Gittelman. They are parties in interest. In examining closely the testimony of the complainant, Sidney Westheimer, you will find that he denies that he threatened their son, with disbarment, or making a complaint against him to the prosecutor, or putting him in jail.

From the testimony above, it will be noted that when Alter Gittleman called at the office of the attorney of Sidney Westheimer, which was in the month of November, 1927, almost after the final decree had been entered in the foreclosure suit, he made no mention of threats as alleged as made by the said Sidney Westheimer and the first inclination that we had or intimation of the same was the day of the final hearing in the Slater matter on February 8th, 1928.

There were here no circumstances of a harassed and oppressed victim led into an agreement with-

out the aid of independent legal advice, such as in the case of *Ward v. Ball, supra*; they enjoyed the legal advice of their attorneys, who were in a position to take suitable action for their protection.

The bond and mortgage executed by Alter Gittleman and Jennie Gittleman were executed ten days after the alleged threats, which threats were denied by the complainant, Sidney Westheimer, affording the Gittlemans ample time to consider, meditate and cogitate and also giving them the opportunity of obtaining free and independent advice.

In the *Ball vs. Ward* case the question of whether a conveyance made by a parent to prevent the imprisonment of a child who has in fact been guilty of a criminal offense may afterwards be set aside at the option of the parent is one upon which Judicial views are not in harmony. This question not being presented under the facts found by the Vice-Chancellor in that case in the Court below, was not decided by the Appellate Court in *Ball v. Ball*, 79 N. J. Eq. 170.

There is no doubt that Simon S. Gittleman was guilty of embezzlement as in the conclusions of Vice-Chancellor Berry (State of the Case, p. 109, fols. 10-20), he states that:

“Simon S. Gittleman, a member of the Bar of this State, embezzled the sum of \$6000. from Sidney Westheimer, a client.”

The authorities in this State, we believe, concur with us in the contention that the doctrine of duress cannot be interposed here, where there is no doubt and it is not the subject of controversy that Simon S. Gittleman did embezzle the sum of \$6000.

See the case of *Smille vs. Titus*, 32 N. J. Eq. page 51, together with footnotes containing citations at pages 54 and 55, especially the case of *Lyon vs. Waldo*, 36 Mich. 345, wherein the Court held:

“On a foreclosure by the wife, the Court was equally divided on the point whether the mortgage was absolutely void, or only voidable and so ratified by the husband’s payments as to be enforceable.”

Similarly in the cases of:

Dixon vs. Dixon, 22 N. J. Eq. 91;

Sickles vs. Carson, 26 N. J. Eq. 440.

It is elementary law that a contract secured by duress is not void, but voidable. We maintain that the bond and mortgage executed by Alter Gittleman and Jennie Gittleman. were not in fact executed under pressure, or by reason of threats as is clearly evident by the answer filed by Alter Gittleman in the *Slater* suit, wherein it states that:

“Alter Gittleman agreed and promised at various times, before December 14th, 1926 to execute a mortgage on his premises, etc” (State of Case, p. 20, fols. 10-20).

This clearly of itself exhibits the fact that both Alter Gittleman and Jennie Gittleman voluntarily executed the bond and mortgage without the use of pressure or threats.

We believe that the case of *Union Exchange National Bank of New York vs. Joseph*, reported in 231 N. Y. 250, 17 A. L. R. 323, is dispositive of the case at bar. See the citations therein mentioned and the annotations therewith. In the above case the reasons of the learned Mr. Justice Cardozo is on all fours with our situation and follows the doctrine of the Courts of Massachusetts.

POINT V.

Assuming that the Court below was correct in decreeing that the giving of the bond and mortgage was an illegal transaction, the defendants, Alter Gittleman and Jennie Gittleman, being *particeps criminis* and *in pari delicto*, should be precluded from recovering on their counterclaim.

The learned Vice-Chancellor Stevens in

Jourdan v. Burstow, et al., 76 N. J. Eq. 55,
affirmed, 78 N. J. Eq. 597.

in deciding that where property is conveyed in satisfaction of an embezzlement, which has been committed, in consideration of a promise not to prosecute before the time, *such property cannot be recovered back*, remarked:

“Such an agreement is plainly illegal, and its performance could not be compelled. *But if actually performed* the grantor suing to recover back his property stands in the same situation that the grantee would have stood in had he sued on the agreement. He is ‘*in pari delicto*’ and the maxim is, ‘*in pari delicto, potior est conditio possidentis*’. In the note to *Collins v. Blantern*, 1 S. M. Lead. Cas. (6th Am. Ed.), at page 507, the rule is thus stated: ‘The law will in general leave all who share in the guilt of an illegal or immoral transaction where it finds them and will neither lend its aid to enforce the contract while executory nor to rescind it and recover back the consideration when executed. The maxim ‘*nemo allegans suam turpitudinem audiendus*’ applies in such cases with full force.’”

The case of *Haynes v. Rudd*, 102 N. Y. 372, is very much in point. The Court said:

“Whether the parties stood in *pari delicto* depends upon the fact whether the evidence proved that the note in question was given for compounding a felony. If the testimony established that such was the case, then both parties must be regarded as equally in fault, and the court will not lend its aid to either in enforcing a contract of such a character because it is illegal and void. While fraud, duress and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist and cannot be enforced where the consideration of the contract, thus made, arises entirely upon or is in any way affected by the compounding of a felony. * * * Within the rule already laid down, if the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal, and should not be upheld. In such a case the contract was vicious and corrupt, and in violation of law as much, as if compounding a felony had been the entire consideration. The element of illegality constituted a part of the contract, thus vitiating the whole, and it could not be rejected because duress, undue influence or threats were also blended with it.”

As it was said in *Solinger v. Earle*, 82 N. Y. 393, at page 397, the principle permeating all these cases is this:

“If the defendants here were plaintiffs seeking to enforce the note it is clear that they could not recover. * * * The illegality of the consideration upon well-settled principles

would be a good defense. The plaintiff, although he was cognizant of the fraud, and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts, on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, according to the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note, protects the defendants in resisting an action to recover back the money paid upon it."

And at page 399, the Court cites Lord Kenyon to the effect that:

"There is no case where money has been actually paid by one of two parties to the other upon an illegal contract both being *particeps criminis*, an action has been maintained to recover it back."

Add to the foregoing citation, the remarks of Justice Cardozo, preeminent judicial authority, when he states in the case of *Union Exchange National Bank v. Joseph*, 231 N. Y. 250; 17 A. L. R. 323:

"We think the defendant, if a victim of duress, was at the same time a wrongdoer, when he stifled a charge of crime. In such circumstances the law will leave the parties where it finds them."

And again we might quote words from the lips of the learned justice in application to the case at bar:

"Nothing in the defendant's counterclaim suggests this mitigation of his offense. Noth-

ing is here set forth to rebut the presumption of an accusation honestly conceived and genuinely maintained. The law does not tolerate the bargain which stifled it for pay."

The doctrine, as laid down by the "Great Innovator", Lord Mansfield, is simply this:

"If, then, the composition of a felony or of a larceny is an illegal consideration of any promise or obligation for money, the party claiming under such instrument cannot enforce it in a court of justice, nor can the other party, if he has paid it, recover it back again."

Worcester v. Easton, 11 Mass. 377.

That the doctrine of *par delictum* is applied as against a third person is set forth by Vice-Chancellor Stevens in *Jourdan v. Burstow*, *supra*.

From the foregoing eminent authorities, as our premises, the following *dilemma* presents itself: Either the contract whereby Alter Gittleman and Jennie Gittleman gave the bond and mortgage to the appellant was a legal transaction or an illegal transaction. If the contract was legal, the Court below erred, when it decreed: (State of Case, p. 113, fols. 20-30) "that the said transaction is illegal" and a reversal upon that portion of the decree should be had. On the other hand, if the transaction was illegal as the Court decreed, then it was guilty of reversible error in further decreeing (State of Case, p. 114, fols. 10-30):

"that Sidney Westheimer return to Alter Gittleman the sum of Five hundred (\$500.00) dollars, with interest to date, and to Jennie Gittleman, the sum of One thousand five hundred (\$1500.00) dollars with interest to date, exacted from them on account of the mortgage"

For surely, if the transaction was illegal and Alter Gittleman and Jennie Gittleman were parties

to the illegal bargain, *particeps criminis* and *in pari delicto*, they were not entitled to aid from a court of justice, they would not be entitled to prevail on their counterclaim and recover back moneys paid by them in furtherance of their wrongful transaction. In all events, whether this court rules that the transaction was legal or illegal, we contend that the Court below committed reversible error.

We respectfully submit that the decree of the Court of Chancery should be reversed for the reasons above stated.

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LIONEL ISAACS,
On the Brief and of Counsel.

