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PLAINTIFF'S EXHIBITS.

DEFENDANT'S EXHIBITS.

Summons.

Filed December 4, 1928.

The State of New Jersey: To

Grant Building and Loan Association of Newark, New Jersey, a corporation.

(Seal)

You are summoned to answer the annexed complaint of Golden Realty Co., a corporation, in an action at law in the Essex County Circuit Court. And take notice, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

Witness, WORRALL F. MOUNTAIN, ESQUIRE, Judge of the Circuit Court at Newark, this fourth day of December, Nineteen Hundred and Twenty-eight.

JOHN H. SCOTT,
Clerk.

HUGO WOERNER,
Attorney.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

GOLDEN REALTY CO., a corporation, Plaintiff, vs. GRANT BUILDING & LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation, Defendant.	Action at Law. Complaint.

Plaintiff, Golden Realty Co., a corporation of New Jersey, with its principal office in the City of Newark, in the County of Essex, and State of New Jersey, says that:

FIRST COUNT.

1. On March 25, 1925, Aniello Raimondi and Elizabeth Raimondi, his wife, executed to defendant, their bond to secure the sum of $16,000.00, payable twenty-five cents on each of eighty shares of the capital stock of the defendant, standing in their names on the books of the defendant, on Monday of each week, until the said shares should attain the par value of $200.00, together with interest on the sum of $16,000.00 to be computed from the date above mentioned at the rate of six per cent per annum, and payable weekly at the same time as the stock payments hereinbefore mentioned.

2. To secure payment of the said bond, said Aniello Raimondi and Elizabeth Raimondi, his wife, executed to the defendant, a mortgage of

even date with the bond, and thereby conveyed to defendant, 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 said bond. Which mortgage having been first duly acknowledged, was recorded in the Register's Office of Essex County on March 31, 1925, in Book Y 53 of Mortgages, page 159.

3. The mortgaged premises are described as follows:

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

BEGINNING on the South Easterly corner of South Jefferson Street and Madison Street; thence (1) running Southerly thirty-five feet to land of now or formerly Merklin; thence (2) running Easterly along said land one hundred feet; thence (3) running Northerly to Madison Street thirty-five feet; thence (4) running Westerly along Madison Street one hundred feet to South Jefferson Street and the point and place of BEGINNING.

Being the same premises conveyed to Luigi Bruno, single, by deed of even date and about to be recorded.

4. The money secured by the above bond and mortgage was to be used for the erection of a building on the mortgaged premises. The defendant, only advanced the sum of $14,500.00 on the said bond and mortgage, although the said building was entirely finished.

5. On April 1, 1926, Aniello Raimondi and Elizabeth Raimondi, his wife, conveyed said lands

by deed of that date, to Columbia Realty Co., in fee; which deed was on April 3, 1926, recorded in the Register's Office of Essex County, in Book Y 73 of Deeds, page 447.

6. On September 8, 1928, the Columbia Realty Co., conveyed said lands by deed of that date to Luigi Bruno, in fee; which deed was on September 13, 1926, recorded in the Register's Office of Essex County, in Book Y 74 of Deeds, page 496.

7. On September 8, 1926, Luigi Bruno, single, mortgaged said lands to the Columbia Realty Co., for $4,000.00, which mortgage was on September 13, 1926, recorded in the Register's Office of Essex County, in Book H 58 of Mortgages, on page 581.

8. By written assignment, dated Sept. 13, 1926, said Columbia Realty Co., assigned said mortgage, and the bond which it secured, to the plaintiff. Which assignment was recorded in the Register's Office of Essex County, in Book 183 of Assignments of Mortgages, page 539-540.

9. On August 24, 1927, Conrad Deuchler, Sheriff of Essex County, conveyed said lands by deed of that date to the plaintiff by virtue of a sale to it under a writ of fieri facias issued out of the Court of Chancery of New Jersey, in a cause therein pending, wherein the plaintiff was complainant and Sabatina Realty Co., and others, were defendants, for the foreclosure of the last mentioned mortgage. Which deed was on June 20, 1928, recorded in the Register's Office of Essex County.

10. On November 25, 1927, the plaintiff agreed to sell the above-described premises to Thomas Brown, reserving the right to pay off the mortgage of the defendant, and placing a new mortgage on

the land. It did place a new mortgage which was to be a first lien on the said lands and it was compelled to pay off the mortgage of the defendant.

11. The defendant refused to accept payment of its bond and mortgage hereinbefore mentioned, unless the plaintiff paid to defendant, the balance claimed to be due on its said bond and mortgage, calculating the principal sum of the bond and mortgage at the sum of $16,000.00, instead of $14,-500.00, which was the actual sum advanced by it on said bond and mortgage.

12. On June 29, 1928, the plaintiff paid to the defendant the sum of $12,659.20, demanded by it in payment of its said bond and mortgage, and to secure a cancellation thereof. This amount represents the principal of the said bond and mortgage at $16,000 instead of $14,500, and the debits and credits were calculated on that amount, as appears by the statement of the defendant, a copy whereof is hereto attached and made a part hereof, and marked Schedule A.

13. The said payment was made under protest, with a reservation by plaintiff of all its rights against the defendant, and under compulsion.

14. During the time the plaintiff was the owner of said property, it was compelled to pay to defendant interest on the said sum of $1500.00, and also a large amount of arrears of interest on said sum.

15. These payments were made under threat by the defendant to foreclose its said bond and mortgage, and over the protest of the plaintiff and under a reservation of its rights.

16. Plaintiff demands as damages the said sum of $1500. which amount was not due on the defendant's said bond and mortgage, and which defendant compelled the plaintiff to pay to it, together with interest thereon from March 25, 1925, and also the overpayments of interest by plaintiff to defendant, on the sum of $1500.00, while it was the owner of said property, and also the overpayment of interest by plaintiff to defendant on said sum of $1500. which plaintiff paid as arrearages claimed to be due on said bond and mortgage.

SECOND COUNT.

1. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, of the first count of this complaint.

2. On or about May 25, 1925, a fire damaged the building on the said mortgaged premises, and the American Fire Insurance Company paid to the defendant the sum of $3100.00, under a fire insurance policy of the said company, on the said building which was made payable to the defendant as mortgagee.

3. The defendant did not apply the said sum of $3100.00 as a payment on account of its said bond and mortgage.

4. The defendant refused to accept payment of its said bond and mortgage unless the plaintiff paid to the defendant the balance claimed due on its said bond and mortgage, including the said sum of $3100.00.

5. On June 29, 1928, the plaintiff paid to the defendant, the sum of $12,659.20, demanded by it in payment of its said bond and mortgage, and to

secure a cancellation thereof. This amount includes the said sum of $3100.00, which the defendant refused to credit on its said bond and mortgage. This appears from the statement of the defendant of the amount claimed to be due on its said bond and mortgage, a copy of which statement is hereto attached, and made a part hereof, and is marked Schedule A.

6. The said payment was made under protest, with a reservation by plaintiff of all its rights against the defendant, and under compulsion.

7. Plaintiff demands as damages the said sum of $3100.00, which amount was not due on defendant's said bond and mortgage, and which defendant compelled the plaintiff to pay to it, together with interest thereon from May 25, 1925, and also the overpayment of interest by plaintiff to defendant, on said sum of $3100. while it was the owner of the said premises, and also the overpayment of interest by plaintiff to defendant, on said sum of $3100. which plaintiff paid as arrearages claimed to be due on said bond and mortgage.

THIRD COUNT.

1. The plaintiff repeats paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15 of the first count, and paragraphs 2, 3 4, 5 and 6 of the second count of this complaint.

2. That the said sums of $1500.00 and $3100.00 included in the $12,659.20 paid by the plaintiff to the defendant for a cancellation of its bond and mortgage constituted a usurious rate of interest for the defendant, and was made in pursuance of a corrupt and usurious agreement or contract and that by force of the statute in such case made and

provided, the plaintiff has a right to recover back the said sum of $1500.00 and $3100.00 paid as aforesaid, together with interest thereon at the rate of six per cent per annum.

Judgment will be claimed by the plaintiff against the defendant for $5,000.00 on each of the above counts.

HUGO WOERNER,
Attorney of Plaintiff.

"Schedule A"

June 23, 1928.

Statement for Mortgage Cancellation.
Grant B. & L. Association.

On Mortgage of Allen Raimondi and Golden Realty Co., as their interests may appear.
On property No. #124-126 South Jefferson Street, in the City of Orange, State of New Jersey.

Book No. 3171. Series No. 61st. No. of shares 80.

Bond and mortgage.	$16,000.00
Interest due to date.	147.68
Premium.	12.32
On month's interest for current month	80.00
Total debits due.	$16,240.00
Credit by ledger entries	
80 shares 170 weeks $3400.00	
Profits on 80 shares @ $2.26 $180.80	3,580.80
Due	$12,659.20

If paid at meeting of June 25, 1928.

SIGMUND KANENGIESSER,
Secretary.

Amended Answer.

Filed November 24, 1930.

ESSEX COUNTY CIRCUIT COURT.

GOLDEN REALTY CO., a corporation, Plaintiff, vs. GRANT BUILDING & LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation, Defendant.	Action at Law. Amended Answer.

Defendant, a corporation of New Jersey, with its principal office in the City of Newark, Essex County, New Jersey, answering the complaint filed in the above entitled cause says that:

FIRST COUNT.

1. It admits paragraphs 1, 2 and 3 of this count.

2. It admits that part of paragraph 4 which alleges that, the moneys secured by the above bond and mortgage was to be used for the erection of a building on the mortgaged premises, the balance of said paragraph is denied.

3. It has not any knowledge or information sufficient to form a belief as to the contents of paragraphs 5, 6, 7, 8 and 9 of this count.

4. It has not any knowledge or information sufficient to form a belief as to the contents of paragraph 10, excepting that it admits that the

said plaintiff paid off the mortgage of the said defendant.

5. It admits paragraph 11, except that it denies the following, "instead of $14,500, which was the actual sum advanced by it on said bond and mortgage."

6. It admits paragraph 12 of this count.

7. It denies paragraphs 13, 14 and 15 of this count.

SECOND COUNT.

1. It repeats its answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the first count and makes them part of this count.

2. As to paragraph 2 of the second count this defendant alleges that on June 10th, 1925, and not May 25th, 1925, as alleged by plaintiff, a fire damaged the building on said mortgaged premises and the American Eagle Fire Ins. Co., and not the American Fire Ins. Co., as alleged by plaintiff, paid the defendant the sum of $3050 under two fire insurance policies of said company on the said building.

3. It admits paragraph 3 of this count.

4. It admits paragraph 4, excepting that part of said paragraph which reads, "including the said sum of $3100", which this defendant denies.

5. It admits paragraph 5, excepting that part which reads, "this amount includes the said sum of $3100", which this defendant denies.

6. It admits paragraph 6 of this count.

Amended Answer.

THIRD COUNT.

1. It repeats its answers to paragraphs 1, to 15 inclusive of the first count and makes them part of this count.

2. It denies paragraph 2 of this count.

SEPARATE DEFENSE TO FIRST, SECOND AND THIRD COUNTS.

On the twenty-seventh day of March, 1925, the said American Eagle Fire Ins. Co., did issue to said Allen Raimondi a fire insurance policy covering the said mortgaged premises and indemnifying the said Allen Raimondi, the owner of the premises mentioned in plaintiff's complaint, against loss or damage by fire for a period of three years from the date of said policy to an amount not exceeding $3000; loss or damage, if any, payable to said defendant, as first mortgagee, pursuant to the terms of said policy.

On May 20th, 1925, the said American Eagle Fire Ins. Co., did issue to said Allen Raimondi, another fire insurance policy covering the said mortgaged premises and indemnifying the said Allen Raimondi against loss or damage by fire for a period of three years from the date of said policy to an amount not exceeding $13,000; loss or damage, if any, payable to said defendant, as first mortgagee, pursuant to the terms of said policy. Both of said policies had attached thereto a mortgagee clause which provided as follows:

> "Whenever this company shall pay the mortgage (or Trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to

the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or Trustee) the whole principal due or to grow due on the mortgage with interest and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or Trustee) to recover the full amount of its claim."

That on or about June 10th, 1925, said premises were damaged and destroyed by fire and became and was untenantable, uninhabitable and uninsurable. Said fire having been caused by the said Allen Raimondi himself, for which he was indicted and convicted and sentenced to a term in State's Prison, by reason of which the said American Eagle Fire Ins. Co., disclaimed liability to said Allen Raimondi under its said fire insurance policies, but conceded liability to the defendant.

Thereafter and within the time limited by law the said loss was paid by the said American Eagle Fire Ins. Co., to the said defendant, as mortgagee under the terms of said policy of insurance; the amount paid by the said American Eagle Fire Ins. Co., to said defendant being $3050.16 for said fire loss.

On May 10, 1926, said defendant in consideration of the sum of $3050.16, which was the amount of the fire loss above referred to, by an assignment in writing assigned to American Eagle Fire Ins. Co., an undivided interest to the extent of $3050.16 in the bond and mortgage held by this defendant as above mentioned; said undivided interest to bear

interest at the same rate as the principal of said mortgage, and said defendant also agreed by said assignment to pay said American Eagle Fire Ins. Co., its proportion of said interest as and when collected.

That after the occurrence of said fire as aforesaid, it became and was necessary for the said defendant to restore the building so destroyed and damaged by fire, in order to keep up the security, and in so doing said defendant was required to lay out and expend the sum of $3000, all of which was done with the knowledge of the said Allen Raimondi, who consented thereto and accepted the same in payment of the balance of $1500 due him from the Grant Building & Loan Assn., under his mortgage loan, so that as a result of the said expenditure of $1500 as aforesaid, the full amount of the $16,000 borrowed by the said Allen Raimondi from this defendant was paid, and that while the said money so expended by this defendant was paid to it by the said American Eagle Fire Ins. Co., the said Fire Ins. Co., claimed said sum so paid to this defendant as a result of an assignment to it by this defendant in conformity with the subrogation clause contained in said fire insurance policies, and that when the said Allen Raimondi conveyed said property to the Columbia Realty Co., on April 1st, 1926, said conveyance was made subject to a mortgage of $16,000 held by this defendant.

After the payment by the said American Eagle Fire Ins. Co. to this defendant of the amount due under said policies of insurance, said defendant with the money received from said American Eagle Fire Ins. Co., restored said building so damaged by fire as aforesaid, for the purpose of keeping up the

security given by said mortgage, and that no part of said sum of $3050.16 remained after said defendant completed and paid for the repairs on said building.

That the said mortgage held by the said defendant was a building and loan mortgage, payable in accordance with the usual terms of building and loan mortgages, and that said mortgage was not due at the time said insurance money was paid to the said defendant nor at the time the assignment of said mortgage was made by the said defendant to said American Eagle Fire Ins. Co., all dues and payments under said building and loan mortgage having been paid in accordance with the terms of said mortgage.

NOTICE.

Take Notice that at the trial of the above-entitled cause we shall move to strike out the first, second and third counts of the complaint, on the ground that they do not set up a legal cause of action against the defendant.

KALISCH & KALISCH,
Attorneys of Defendant.

Reply.

Filed November 28, 1930.

ESSEX COUNTY CIRCUIT COURT.

GOLDEN REALTY COMPANY, a corporation, Plaintiff, vs. GRANT BUILDING & LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation, Defendant.	Action at Law. Reply to Amended Answer.

Plaintiff has not any knowledge or information sufficient to form a belief as to the truth of the allegations of the "Separate Defense to the First, Second and Third Counts," except that it admits that the mortgaged premises were insured, that there was a fire and that the defendant, as mortgagee, received $3,050.16 from the fire insurance company on account of damage to the building on said mortgaged premises by fire.

HUGO WOERNER,
Attorney of Plaintiff.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

48194

GOLDEN REALTY COMPANY, Plaintiff,	Action at Law.
vs.	Tried without a Jury.
GRANT BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., Defendant.	Judgment entered July 17, 1931.

Damage	$1,774.50
Costs	78.63
Total	$1,853.13

HUGO WOERNER, Atty. of Plaintiff.

This action was tried before Judge Nelson Y. Dungan, without a jury, at the Essex Circuit Court on July 17, 1931.

The cause having been heard and submitted, the Court order judgment in favor of the plaintiff, Golden Realty Company and against the defendant, Grant Building and Loan Association of Newark, N. J., for the sum of One Thousand Seven Hundred Seventy-four Dollars and fifty cents ($1,774.50) damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One Thousand Seven Hundred Seventy-four dollars and fifty cents ($1,774.50) damage and Seventy-eight dollars and sixty-three cents, making in the whole the sum of One Thousand Eight Hundred Fifty-two dollars and thirteen cents.

Judgment Signed and Entered July 17, 1931.

WM. S. GUMMERE,
C. J.

Book 114, page 379 C. C. judgments.

Decision.

Filed July 17, 1931.

ESSEX COUNTY CIRCUIT COURT.

GOLDEN REALTY COMPANY, a corporation, Plaintiff, vs. GRANT BUILDING & LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation, Defendant.	Action at Law. Decision.

HUGO WOERNER, Attorney of Plaintiff.
KALISCH & KALISCH (HARRY KALISCH) Attorneys of Defendant.

DUNGAN, *C. C. J.*

This case was submitted on agreed facts, and admissions and proofs submitted to the Court, without a jury.

Golden Realty Company, the plaintiff in this case, became the owner, by deed of Conrad Deuchler, Sheriff of Essex County, dated August 24, 1927, in proceedings to foreclose a second mortgage thereon, of certain property in that county, on which the defendant held a first building and loan mortgage for $16,000.00, upon which it had advanced to a prior owner the sum of only $14,500.00, which amount, or the balance due thereon, plaintiff tendered to the defendant, who refused to accept it, and demanded of the plaintiff an accounting and payment on the basis of $16,000.00,

which, after crediting thereon the amount of payments upon 80 shares of Building Loan stock and the profit, left $12,659.20, which amount the defendant demanded and the plaintiff paid under protest, and brought this suit to recover the excess payment of $1,500.00 and interest from June 29, 1928, the date of such payment.

The second and third counts of the plaintiff's complaint, seeking to recover over $3,000.00 for amounts received by the defendant from an insurance company, as the result of a fire loss, are abandoned.

The defendant claims, however, that because of the damage by fire to the property, and the repair and replacement of that property by the defendant, at a cost to it of about $3,000.00, the effect has been that the defendant has actually advanced upon the mortgage and the mortgaged property, a sum in excess of $16,000.00; but it is a complete answer, as far as this plaintiff is concerned, to say that the money for practically the entire cost of such repairs and replacements was furnished by the insurance company.

Simply stated, this case involves nothing more than the very familiar principle that "Whatever may be the debt or consideration recited in a mortgage, when it is given to secure future advances", as in this case, "the mortgagee can recover the amount he has actually advanced under it, *but no more*".

4 C. J., p. 465 par. 366 (2).

If the mortgagee advance only part of the sum contemplated by the mortgage, it is a valid security for so much as he does advance and for so much only. Therefore, when the defendant required from the plaintiff the payment of $1,500.00 more

than it had advanced upon the mortgage, that was an illegal requirement.

The defendant claims that this was a voluntary payment on the part of the plaintiff, and as such, its repayment cannot be required; but it is an admitted fact that the payment was made under protest, and under the insistment by the plaintiff that it was not due and owing. Under such circumstances, recovery was approved by the Supreme Court in *Berger* v. *Bonnell Motor Car Co.,* reported in 4 Misc. Rep. p. 589. The defendant should not be permitted to retain, at the expense of the plaintiff, $1,500.00 to which it is not justly entitled.

Judgment will therefore be given in favor of the plaintiff and against the defendant for $1,500.00, with interest from June 29th, 1928, to this date (July 17th, 1931) $274.50, amounting altogether to $1,774.50.

NELSON Y. DUNGAN,
Circuit Court Judge.

Notice of Appeal.

Filed July 28, 1931.

ESSEX COUNTY CIRCUIT COURT.

GOLDEN REALTY COMPANY, a corporation, Plaintiff, vs. GRANT BUILDING & LOAN ASSOCIATION, a corporation, Defendant.	Notice of Appeal.

To HUGO WOERNER, ESQ.,
Attorney of Plaintiff.

Sir:

Take Notice that the defendant appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in the above entitled cause in this Court, in favor of the plaintiff and against the defendant, on July 17, 1931.

KALISCH & KALISCH,
Attorneys of Defendant.

(Service acknowledged July 27, 1931).

Grounds of Appeal.

Filed July 28, 1931.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GOLDEN REALTY COMPANY, a corporation, Plaintiff-Appellee, vs. GRANT BUILDING & LOAN ASSOCIATION, a corporation, Defendant-Appellant.	Action at Law. On Appeal from the Essex County Circuit Court. Grounds of Appeal.

To HUGO WOERNER, ESQ.,
Attorney of Plaintiff-Appellee.

Sir:

Take Notice that the following is the ground of appeal which the defendant-appellant assigns and will urge why the judgment rendered against the defendant-appellant in the above entitled cause should be reversed, set aside and for nothing holden.

That the Court erred in giving judgment in favor of the plaintiff-appellee and against the defendant-appellant.

KALISCH & KALISCH,
Attorneys of Defendant-Appellant.

(Service acknowledged July 27, 1931).

Testimony.

ESSEX COUNTY CIRCUIT COURT.

Friday, May 1, 1931.

GOLDEN REALTY CO., a corporation, Plaintiff, vs. GRANT BUILDING & LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a corporation, Defendant.	Action at Law.

Before—HON. NELSON Y. DUNGAN, *J.*, (without a jury).

For plaintiff appears: HUGO WOERNER;
For defendant appear: KALISCH & KALISCH, (by HARRY KALISCH).

(Argument by Mr. Woerner).

The Court: You bring suit for the sum of $1,500?

Mr. Woerner: Yes.

(Argument by Mr. Kalisch).

Mr. Woerner: In the case of the Golden Realty Company against the Grant Building & Loan Association, I would like to introduce a certified copy of a deed from Aniello Raimondi to the Columbia Realty Company, dated April 1, 1926, recorded April 3, 1926, in Book V 73 of Deeds for Essex County, on pages 447, 448.

(Document referred to received in evidence and marked Exhibit PG-1).

Mr. Woerner: I offer in evidence a deed from the Columbia Realty Company to Luigi Bruno, dated September 8, 1926, recorded September 13, 1926, in Book Y 74 of Deeds for Essex County, on pages 496, 498.

(Document referred to received in evidence and marked Exhibit PG-2).

Mr. Woerner: I offer in evidence the original bond and mortgage made by Luigi Bruno to the Columbia Realty Company, dated September 8, 1926, to secure the sum of $4,000, being a purchase money mortgage. The mortgage was registered on September 13, 1926, in Book H 58 of Mortgages for Essex County, on page 581.

(Bond referred to received in evidence and marked Exhibit PG-3).

(Mortgage referred to received in evidence and marked Exhibit PG-4).

Mr. Woerner: I offer in evidence the original assignment of mortgage from the Columbia Realty Company to the Golden Realty Company, the plaintiff, dated September 13, 1926, recorded December 29, 1926, in Book 183 of Assignments of Mortgages for Essex County, on pages 539, 540.

The Court: That is the Bruno mortgage?

Mr. Woerner: Yes.

Mr. Kalisch: That is the second mortgage of $4,000.

Mr. Woerner: That is correct.

(Document referred to received in evidence and marked Exhibit PG-5).

Mr. Woerner: I offer in evidence the original deed from Conrad Deuchler, Sheriff, to Golden Realty Company, dated August 24, 1927, and recorded June 20, 1928, in Book N 78 of Deeds for Essex County, on pages 176, 178.

The Court: Foreclosing the $4,000 mortgage?

Mr. Woerner: Correct.

(Document referred to received in evidence and marked Exhibit PG-6).

Mr. Woerner: For the purpose of the record, will you stipulate, Mr. Kalisch, that only $14,500 was advanced on this $16,000 mortgage?

Mr. Kalisch: We will put it that way—that you received, that Mr. Raimondi received, $14,500.

The Court: That name, I see in the Vice-Chancellor proceeding, is "Rosmondi."

Mr. Kalisch: That is an error. It is "Rai."

Mr. Woerner: That is the case of the Golden Realty Company. We rest.

Mr. Kalisch: You will admit, I assume, that a fire occurred?

Mr. Woerner: Yes.

Mr. Kalisch: And produced by Mr. Raimondi, and that—

The Court: When did the fire occur?

Mr. Woerner: That is what I wanted to find out. I have got here on or about May 5, 1925. You allege it on June 10, 1925.

Mr. Kalisch: June 10, 1925; that is right.

Mr. Woerner: I will admit that.

Mr. Kalisch: The fire caused by Mr. Raimondi, for which he was indicted, convicted and served two years in prison; and that the Grant Building & Loan repaired and restored the property.

The Court: The Grant Building & Loan re-

ceived $3,000 from the insurance?

Mr. Kalisch: They not being liable to the owner —and used the same to repair and restore the premises.

Mr. Woerner: That is admitted.

Mr. Kalisch: Then I want to offer in evidence the decree of the Court of Chancery.

Mr. Woerner: I object. That is immaterial.

The Court: Where is the original bond and mortgage to the building? Do you think that is desirable?

Mr. Woerner: That is admitted in the pleadings. That is admitted in the answer. All the other facts were admitted; the bond and mortgage is admitted; the construction loan is admitted; it is admitted that the plaintiff was compelled to pay off the mortgage—all the other facts are admitted in the pleadings.

Mr. Kalisch: I want to offer in evidence the decree in this case of Raimondi, written by Vice-Chancellor Backes.

Mr. Woerner: I object on the ground that it is immaterial. I think the decision will be sufficient to guide your Honor as to the law, that we were not a party to that suit and it cannot affect us.

Mr. Kalisch: It will affect you if my theory is correct.

The Court: I will admit it, but, of course, I cannot consider it. Since this is without a jury, I will do like they do in the Court of Chancery: I will take it under advisement. If I think it is relevant to the case, I shall so indicate; and if it is not why then I shall not take it into consideration at all. You desire an exception to that ruling, I suppose (addressing Mr. Woerner)?

Mr. Woerner: No. It is immaterial.

Mr. Kalisch: I haven't got the decree, but I will send it up to you.

(Document referred to considered marked in evidence as Exhibit D-1).

Mr. Woerner: That is all, except for the argument.

The Court: Have both of you briefs?

Mr. Woerner: Not for submission. I have a sort of an outline. I was prepared to argue it orally.

The Court: Of course, if I am able to decide the question immediately, I won't need them; but, if not, I will probably ask both of you to submit briefs. With the work being continuous here, we cannot just sit up in our rooms nights and Sundays, and decide a case like this.

Mr. Woerner: I will be glad to submit a brief.

Mr. Kalisch: And I will submit a brief.

The Court: Well, then, are we ready for the argument, or have I had the arguments?

Mr. Woerner: I will be very brief. (Argument).

The Court: Is there any stipulation as to just what the transaction was, when you went to pay the mortgage? I understood you in your opening to say that you tendered the amount due upon the mortgage, less $1,500, which the defendant refused to receive, and required payment of the full amount, including the $1,500.

Mr. Woerner: That appears in the pleading, by admission.

The Court: That is in the pleading and is admitted?

Mr. Woerner: Yes.

(Argument concluded).

The Court: I may not be able to decide this case right away. I will hear the other side.

Mr. Kalisch: I wonder if Mr. Magrino wants to speak? His is a separate case by itself, and we will have to get some stipulation as to facts first.

(Argument.)

The Court: I think in this case I will ask you to submit briefs, and it will be perfectly proper for you to put, shortly, in the briefs, whatever your claim is. I do not mean make a lot of argument, such as has been made here, but just shortly, what you claim is the situation, and referring to the cases which you think hold your views.

Mr. Woerner: One week.

Mr. Kalisch: All right. And you will send me your brief?

Mr. Woerner: Yes.

Exhibit PG-1.

Aniello Raimondi Et Ux
to
Columbia Realty Co.

This Indenture, Made the 1st day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-six between Aniello Raimondi & Alisa Raimondi, his wife, of the City of Orange in the County of Essex and State of New Jersey, of the first part, and Columbia Realty Company, a body corporate of the State of New Jersey party of the second part, Witnesseth, That the said party of the first part, for and in consideration of One Dollar and other good and valuable consideration lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, its successors and assigns, forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Orange in the County of Essex and State of New Jersey.

Beginning at the intersection of the easterly line of Jefferson Street with the Southerly line of Madison Street; thence (1) running along the said southerly side of Madison Street south fifty-four degrees fifty-two minutes east one hundred feet to the northwesterly corner of land conveyed

Exhibit PG-1

by George Spottiswood and wife to Anne Flaherty by deed dated September 22, 1891; thence (2) along her land south twenty-five degrees twenty minutes west thirty-five feet; thence (3) north fifty-four degrees forty minutes west one hundred feet to the said Jefferson Street; thence (4) along the easterly side thereof north thirty-five degrees twenty minutes east thirty-five feet to the place of Beginning. Being the same premises conveyed to the parties of the first part by John Randall and wife by deed dated March 15, 1911 and recorded in Book Z 48, page 41 and by Benjamin J. McFarland, Jr., by deed dated May 10, 1915 and recorded in Book B 56 of Deeds, page 453. The above described premises are conveyed expressly subject to a first mortgage now held by the Grant Building & Loan Association in the original sum of $16,000.00.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining: Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof. To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the proper use, benefit and behoof of the said party of the second part, its successors and assigns forever; and the said Aniello Raimondi & Alisa Raimondi, his wife do for themselves, their heirs, executors and administrators, covenant and agree to and with the said party of the second part, its successors and assigns, that they the said Aniello Rai-

mondi & Alisa Raimondi, his wife, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances, thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever; And Also that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid; And Also that Aniello Raimondi Alisa Raimondi, his wife, will Warrant, secure, and forever defend the said land and premises unto the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Aniello Raimondi (Seal)
Alisa
her
Elizabeth X Raimondi (Seal)
mark

Signed, Sealed and Delivered
in the presence of
E. W. Mascia.

Exhibit PG-1

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

Be it Remembered, That on this first day of April in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, An Attorney at Law of the State of New Jersey, personally appeared Aniello Raimondi & Alisa Raimondi, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument, 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 Alisa Raimondi, wife as aforesaid being by me privately examined, separate and apart from her said husband, further 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.

EGIDIO W. MASCIA,
An Attorney at Law of N. J.

Received in the office April 3rd, A. D., 1926 at 10:33 A. M. No. 68.

Exhibit PG-1

OFFICE OF

REGISTER OF DEEDS AND MORTGAGES

ESSEX COUNTY, NEW JERSEY.

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

I, George Stickel, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by Aniello Raimondi et ux to Columbia Realty Co., and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book V 73 of Deeds for said County on pages 447-448.

In Testimony Whereof, I have hereunto set my hand and official seal this 5th day of March, A. D., 1931.

(Seal)

GEORGE STICKEL,
Register of Deeds and Mortgages.

Exhibit PG-2.

Columbia Realty Co.,
to
Luigi Bruno.

This Indenture, Made the Eighth day of September in the year of our Lord One Thousand Nine Hundred and Twenty-six Between Columbia Realty Company, a corporation of the State of New Jersey, having its business office in the City of Newark, in the County of Essex in said State of New Jersey, party of the First Part; And Luigi

Exhibit PG-2.

Bruno of the Town of West Orange in the County of Essex and State of New Jersey, party of the Second Part; Witnesseth, That the said party of the First Part, for and in consideration of One Dollar and other good and Valuable Consideration, lawful money of the United States of America, to the Corporation aforesaid well and truly paid by the said party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the First Part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, remised, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, remise, release, enfeoff, convey and confirm to the said party of the Second Part, and to his heirs and assigns forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Orange, in the County of Essex and State of New Jersey.

Beginning on the southeasterly corner of South Jefferson Street and Madison Street; thence (1) running southerly thirty-five feet to land of now or formerly Merklin; thence (2) running easterly along said land one hundred feet; thence (3) running northerly to Madison Street thirty-five feet; thence (4) running westerly along Madison Street one hundred feet to South Jefferson Street and the point and place of Beginning. Being the same premises conveyed to the party of the first part by deed recorded—This conveyance is made expressly subject to a mortgage in the nominal sum of $16,000 held by the Grant Building & Loan Association.

Exhibit PG-2.

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, or to the above described premises, and every part and parcel thereof, with the appurtenances. To Have and to Hold, all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the Second Part, his heirs and assigns, to his own proper use, benefit and behoof forever. And the said Columbia Realty Company, for itself, its successors or assigns does covenant, grant and agree, to and with the said party of the Second Part, for himself, his heirs and assigns, that the said Columbia Realty Company, at the time of the sealing and delivery of these presents, was lawfully seized, in its own right of a good, absolute, and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; And that the said party of the Second Part, his heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the First Part, its successors or assigns, or of any other person or

persons lawfully claiming or to claim the same. And that the same now are free, clear, discharged and unemcumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever. And Also, that the said party of the First Part, and its successors or assigns, and all and every other person or persons, whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for it or them, shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the Second Part, his heirs and assigns, make, do and execute, or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyance and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the Second Part, his heirs and assigns forever, as by the said party of the Second Part, his heirs or assigns, or counsel learned in the law, shall be reasonably advised or required. And the said Columbia Realty Company, its successors or assigns, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the Second Part, his heirs and assigns, against the said party of the First Part, and its successors or assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, Shall and Will Warrant, and by these presents Forever Defend.

In Witness Whereof, the said party of the First

Exhibit PG-2.

Part hath caused its Corporate Seal to be hereto affixed and attested by its Secretary and these presents to be signed by its President the day and year first above written.

Columbia Realty Company, by
FRANK CALABRESE,
President.

Signed, Sealed and Delivered
in the presence of
Attest:
SAM MONISTERE,
Secretary.
(Columbia Realty Company Corporate Seal, 1925, New Jersey.)

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

Be it Remembered, That on this Eighth day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-six, personally appeared Sam Monistere, who being by me duly sworn doth depose and make proof to my satisfaction that he is the Secretary of, and well knows the Corporate Seal of Columbia Realty Company, the Grantor named in the foregoing Deed, that the seal thereto affixed is the proper Corporate Seal of the said Corporation, and that the same was so affixed thereto, and the said Deed signed and delivered by Frank Calabrese who was at the date and execution thereof, President of said Corporation, in the presence of said Deponent, as the voluntary act and deed of the said Corporation, and

Exhibit PG-2.

that the said Deponent thereupon signed the same as subscribing witness.

Sam Monistere.

Sworn to and subscribed before me, the 8th day of Sept., 1926.

EGIDIO W. MASCIA,
An Atty. at Law of New Jersey.

Received in the office September 13th, A. D., 1926 at 2:27 P. M. No. 53.

OFFICE OF

REGISTER OF DEEDS AND MORTGAGES

ESSEX COUNTY, NEW JERSEY.

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

I. George Stickel, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by Columbia Realty Co., to Luigi Bruno, and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book Y-74 of Deeds for said County on pages 496-498.

In Testimony Whereof, I have hereunto set my hand and official seal this 5th day of March, A. D. 1931.

(Seal)

GEORGE STICKEL,
Register of Deeds and Mortgages.

Exhibit PG-3.

This Indenture, made the eighth day of September in the year of our Lord, One Thousand Nine Hundred and Twenty-six, Between Luigi Bruno, single, of the Town of West Orange, in the County of Essex and State of New Jersey, party of the First Part; and Columbia Realty Company a corporation of the State of New Jersey, party of the Second Part;

Whereas, the said party of the First Part is justly indebted to Columbia Realty Company, the said party of the Second Part, in the sum of Four Thousand 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 Eight Thousand Dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Four Thousand Dollars, lawful money as aforesaid, to the said party of the Second Part, its successors or assigns, on the Eighth day of September, which will be in the year One Thousand Nine Hundred and Twenty-eight and interest thereon, to be computed from the 8th day of September, 1926 at and after the rate of six per cent. per annum and to be paid semi-annually.

And it is thereby expressly Agreed, that should any default be made in the payment of the said interest, 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; or should the said party of the First Part, his heirs, executors, administrators or successors in title to said premises fail

to keep the building or buildings now or hereafter located thereon insured against loss or damage by fire and assign the policy or policies for such insurance to the said party of the Second Part, its successors or assigns, and such insurance be effected and premium or premiums therefor paid by the said party of the Second Part, its successors or assigns, pursuant to the agreement contained in this mortgage; and should the said interest, or any part thereof, remain unpaid and in arrear for a period of thirty 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 a period of sixty days; or said insurance premium or premiums so paid by the said party of the Second Part, its successors or assigns, remain unpaid for a period of thirty days after demand therefor by the said party of the Second Part, its successors or assigns, upon the said party of the First Part, his heirs, executors, administrators or successors in title; 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 Four Thousand Dollars or so much thereof as shall then remain unpaid, with all arrearage of interest thereon, shall at the option of the said party of the Second Part, its successors or assigns, 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.

Exhibit PG-3.

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 him 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, has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm, unto the said party of the Second Part, and to its successors and assigns forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Orange in the County of Essex and State of New Jersey.

Beginning on the southeasterly corner of South Jefferson Street and Madison Street; thence (1) running southerly thirty-five feet to land of now or formerly Merklin; thence (2) running easterly along said land one hundred feet; thence (3) running northerly to Madison Street thirty-five feet; thence (4) running westerly along Madison Street one hundred feet to South Jefferson Street and the point and place of Beginning.

Being the same premises conveyed to the party of the first part by deed of even date and about to be recorded.

This mortgage is given as a purchase money mortgage and to be paid as follows:

Three Hundred Dollars, with interest after six months from the date thereof, Six-6-Hundred Dollars and interest after one year from the date

Exhibit PG-3.

thereof; Three Hundred Dollars, and interest after eighteen months from the date thereof and the balance with interest at the end of two years.

This mortgage is made only subject to a first mortgage in the nominal sum of $16,000.00 held by the Grand Building and Loan Association.

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, its successors and assigns, to its own proper use, benefit and behoof forever.

Provided Always, and these presents are upon this express condition, that if the said party of the First Part, his heirs, executors, administrators or successors in title, shall well and truly pay unto the said party of the Second Part, its successors or assigns, the said sum of money mentioned in the condition of 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, then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said Luigi Bruno, for himself, his heirs, executors, administrators and successors in title, does covenant and agree to pay unto the said party

Exhibit PG-3.

of the Second Part, its successors or assigns, the said sum of money and interest, as mentioned above and expressed in the condition of the said bond.

And it is Agreed that the said party of the First Part, his heirs, executors, administrators or successors in title to said mortgaged premises, shall and will keep the building or buildings now or hereafter located thereon insured against loss or damage by fire in some safe and responsible insurance company or companies, for a sum not less than Four Thousand Dollars, and assign the policy or policies therefor to the said party of the Second Part, its successors or assigns as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the Second Part, its successors or assigns, to effect such insurance, and the premium or 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, and payable by the said party of the First Part, his heirs, executors, administrators or successors in title, on demand of the said party of the Second Part, its successors or assigns, with legal interest.

And it is Also Agreed that neither the said mortgagor, heirs, executors, administrators or successors in title to said mortgaged premises, shall be entitled to any credit on the interest payable on this mortgage for the taxes which may be levied on said mortgaged premises or for any part of such taxes.

In Witness Whereof, the said party of the First

Exhibit PG-3.

Part, has hereunto set his hand and seal the day and year first above written.

LUIGI BRUNO. (L.S.)

Signed, Sealed and Delivered
in the Presence of
E. W. Mascia.

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

Be it Remembered, That on this eighth day of September, in the year One Thousand Nine Hundred and Twenty-six, before me the subscriber, an Attorney-at-Law of New Jersey, personally appeared Luigi Bruno, single, who, I am satisfied, is the mortgagor named in and who executed the within mortgage, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed.

EGIDIO W. MASCIA,
An Attorney-at-Law of N. J.

Endorsed—Mortgage—Luigi Bruno, single to Columbia Realty Company—Dated September 8th, 1926.

Received in the Register's Office of the County of Essex, N. J., on the 13th day of September, A. D., 1926, at 2:28 o'clock in the afternoon, and registered in Book H-58 of Mortgages for said County on page 581.

Howard S. Dodd,
Register.

Exhibit PG-4.

Know all Men by these Presents That Luigi Bruno, single, of the Town of West Orange, County of Essex and State of New Jersey, party of the first part, is Held and firmly bound unto Columbia Realty Company, a corporation of the State of New Jersey in the penal sum of Eight Thousand Dollars lawful money of the United States of America, to be paid to the said Columbia Realty Company its successors or assigns; For which Payment well and truly to be made, he binds himself, his heirs, executors and administrators, jointly, severally, and firmly by the presents. Sealed with his seal. Dated the eighth day of September, One Thousand Nine Hundred and Twenty-six.

The Condition of the above obligation is such that if the above bounden his heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named Columbia Realty Company, its successors or assigns, the just and full sum of Four Thousand Dollars on the eighth day of September which will be in the year One Thousand Nine Hundred and Twenty-eight, and the interest thereon, to be computed from September 8th, 1926, at and after the rate of six per cent. per annum, and to be paid semi-annually.

It is understood and agreed that the party of the first part agrees to pay the mortgage accompanying this bond in the following way:

Three Hundred Dollars, together with interest after six months from the date thereof; Six Hundred Dollars and interest after one year from the date thereof; Three Hundred Dollars and interest after eighteen months from the date thereof; and the balance with interest at the end of two years, without any fraud or other delay, then the

Exhibit PG-4.

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 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 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, or any or either of them, remain unpaid and in arear for the space of sixty days 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 Four Thousand Dollars with all arrearage of interest thereon, shall, at the option of the said Columbia Realty Company or its 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 thereof in anywise notwithstanding.

LUIGI BRUNO, (L.S.)

Signed, Sealed and Delivered
in the presence of
E. W. Mascia.

Endorsed—Bond—Lugi Bruno, single, to Columbia Realty Company—Amount, $4000.00; Date, September 8th, 1926; Due, September 8th, 1928; Interest Payable, semi-annually.

Exhibit PG-5.

Know all Men by these Presents: That Columbia Realty Company, a Corporation of New Jersey, party of the first part; in consideration of the sum of One Dollar and other good and valuable consideration lawful money of the United States of America, to it in hand paid by Golden Realty Company, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and setover, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the second part, its successors or assigns a certain Indenture of Mortgage bearing date the eighth day of September, One Thousand Nine Hundred and Twenty-six, made by Luigi Bruno on lands in the City of Orange, to secure the payment of the sum of Four Thousand ($4,000.00) Dollars, which mortgage is recorded in the Register's office of the County of Essex, in Book H-58 of Mortgages, page 581.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold, the same unto the said party of the second part, its successors or assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned; And it does hereby make, constitute, and appoint the said party of the second part; its true and lawful attorney, irrevocable, in its name, or otherwise, but at its proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interests; and in case of payment, to discharge the same as fully as it might or could do if these presents were not made. And it does hereby covenant, promise

Exhibit PG-5.

and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Four Thousand ($4,000.00) Dollars with interest from Sept. 8th, 1926.

In Witness Whereof, the said party of the first part have caused its common seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the Thirteenth day of September, 1926.

COLUMBIA REALTY COMPANY,
Frank Calabrese,
President.

Signed, Sealed and Delivered
in the presence of

(Seal)

Attest:
Sam Monistero,
Secretary.

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

Be it Remembered, That on this 14th day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me the subscriber, personally appeared Sam Monistero who being by me duly sworn on his oath, says that he is the Secretary of the Columbia Realty Company, the grantor named in the within Instrument; that Frank Calabrese is the President of said Corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act

and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

SAM MONISTERO.

Sworn and subscribed before me,
at Newark, N. J., the date aforesaid.
Egidio W. Mascia,
An Atty. at Law
of New Jersey.

Endorsed—Assignment of Mortgage—Columbia Realty Company to Golden Realty Company Dated, September 13th, 1926.

Received in the Register's Office of the County of Essex, N. J., on the 29th day of December, A. D., 1926, at 10:24 o'clock, in the forenoon, and Recorded in Book 183 of Assignments of Mortgages for said County, on pages 539-540.

HOWARD S. DODD,
Register.

Exhibit PG-6.

To all Persons to whom these Presents shall come, or whom they may concern:

I, Conrad Deuchler, Sheriff of the County of Essex, in the State of New Jersey, send Greeting:

Whereas, on the Twentieth day of June, in the year of our Lord, nineteen hundred and Twenty-Seven, a certain writ of Firi Facias was issued out of the Court of Chancery of the State of New Jersey, directed and delivered to me, Conrad Deuchler, then and still being Sheriff of the said County of Essex, and which said writ is in the words or to the effect following—That Is To Say:

Exhibit PG-6.

New Jersey to wit: The State of New Jersey to the Sheriff of the County of Essex:

Greetings:

Whereas, on the second day of June, in the year of our Lord nineteen hundred and twenty-seven, by a certain decree made in our Court of Chancery before our Chancellor at Trenton, in a certain cause therein depending, wherein the Golden Realty Co., a corporation, is Complainant, and Sabatina Realty Co., a corporation, Luigi Bruno and Morris Schechter, Trustee, are Defendants, it was ordered, adjudged and decreed that certain mortgaged premises with the appurtenances in the bill of complaint in the said cause particularly set forth and described—be sold, that is to say, All that certain tract or parcel of land and premises situate, lying and being in the City of Orange, County of Essex and State of New Jersey:

Beginning on the Southeasterly corner of South Jefferson Street and Madison Street; thence running Southerly thirty-five feet to land of now or formerly Merklin; thence running Easterly along said land one hundred feet; thence running Northerly to Madison Street thirty-five feet; thence running Westerly along Madison Street one hundred feet to South Jefferson Street and the point and place of Beginning.

Together with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereto, and also all the estate, right, title, interest, use, property, claim and demand of the said Defendants, of, in, to and out of the same, be sold to pay and satisfy in the first place,

unto the Complainant, on its mortgage bearing date September 8th, 1926, the sum of Four Thousand One hundred seventy-four dollars and twenty cents ($4,174.20) for principal and interest together with lawful interest thereon from the 27th day of May, 1927, until the same be paid and satisfied, and also the costs of the said Complainant; and in the second place unto the defendant, Morris Schecter, Trustee, on his mortgage bearing date January 31st, 1927, the sum of Six thousand One hundred forty-seven ($6,147.) dollars together with lawful interest thereon from the 27th day of May, 1927, until the same be paid and satisfied, and also the costs of the said Defendant, Morris Schechter, Trustee; and for that purpose a writ of Fieri Facias should issue, directed to the Sheriff of the County of Essex, commanding him to make sale as aforesaid, and that the surplus money arising from such sale, if any there be, should be brought into the said Court, suject to the further order of the said Court, as by the said decree remaining as of record, in our said Court of Chancery, at Trenton, doth and may more fully appear.

And Whereas, the costs of the said complainant, on its mortgage dated September 8th, 1926, have been duly taxed at One hundred seventy-nine dollars and forty cents.

And Whereas, the costs of the said Defendant, Morris Schechter, Trustee, on his mortgage dated January 31st, 1927, have been duly taxed at nine dollars and six cents.

Therefore, you are hereby commanded, that you cause to be made of the premises aforesaid by selling the same, for the purpose the said sum of Four-thousand one hundred seventy-four dollars and twenty cents, ($4,174.20), together with lawful in-

terest thereon as aforesaid, and also the sum of costs with lawful interest thereon from the date of the Master's Report and also the said sum of Six thousand One hundred and forty-seven ($6,147.00) dollars together with lawful interest thereon from the date of said Master's Report; and that you have those moneys before our said Chancellor, in our Court of Chancery, aforesaid, at Trenton, on the Nineteenth day of September next, to render to the said complainant, or to its solicitors, and to the Defendant, Morris Schechter, Trustee, and also the surplus money, if any there be, to abide the further order of our said Court, according to the decree aforesaid. And you are to make return at the time and place aforesaid, by certificate, under your hand, of the manner in which you shall have executed this our writ, together with this writ.

Witness, Edwin Robert Walker, Esquire, our Chancellor, at Trenton aforesaid, the Twentieth day of June, in the year of our Lord, one thousand nine hundred and twenty-seven.

THOMAS BARBER,
Clerk.

M. J. QUIGLEY,
Solicitor.

As by the record of the said writ of Fieri Facias in the office of the Clerk of the said Court of Chancery, in Book S-11 of Executions, page 109 &c., may more fully appear, And Whereas I, the said Conrad Deuchler, as such sheriff as aforesaid, did, in due form of law, advertise the said lot of land and premises to be sold under and by virtue of the said writ of Fieri Facias, at public vendue, to be held at the Court House in the City of Newark,

Exhibit PG-6.

on Tuesday, the Ninth day of August, A. D., nineteen hundred and twenty-seven, at two o'clock in the afternoon of that day. By public advertisements signed by myself, and set up at five or more public places in the said County of Essex, one of which was in the City where said real estate is situated, of the time and place appointed for such sale, for at least three weeks preceding the time appointed for said sale, and publishing the same in the "Newark Ledger" and the "Daily Courier," two of the newspapers printed and published in the said County, where the lands above described are situated, the same being designated for the publication of the laws of this State, and circulating in the neighborhood of said real estate, for at least once a week during four consecutive calendar weeks, the last publication within seven days next preceding the time so appointed for selling the same, one of which said newspapers to wit: "Newark Ledger" is printed and published at Newark, the County seat of said County, at which time and place I did accordingly offer and expose the said lot of land and premises for sale at public vendue under and by virtue of the said writ of Fieri Facias. And thereupon Golden Realty Co., of the City of Newark, of the County of Essex and State of New Jersey, did bid for the same the sum of One Thousand Dollars, ($1000.00); and no other person bidding as much, I did then and there, openly and publicly, in due form of law, between the hours of twelve and five in the afternoon, strike off and sell the said lot of land and premises for the sum of One Thousand Dollars, ($1000.00), to the said Golden Realty Co., it being then and there the highest bidder for the same, and the said sale having been confirmed by an order of the said

Exhibit PG-6.

Court of Chancery, dated Twenty-fourth day of August, A. D., nineteen hundred and Twenty-seven.

Now, Therefore, Know Ye, That I the said Conrad Deuchler, as such Sheriff as aforesaid, under and virtue of the said writ of Fieri Facias, and in execution of the power and trust in me reposed, and also for, and in consideration of the said sum of One Thousand Dollars, ($1000.00), to me in hand paid, the receipt whereof I do hereby acknowledge, and therefrom acquit, exonerate and forever discharge the said Golden Realty Co., its successors and assigns, have granted, bargained, sold, assigned, transferred and conveyed, and by these presents do grant, bargain, sell, assign, transfer and convey, unto the said Golden Realty Co., its successors and assigns all and singular, the said lot of lands and premises, with the appurtenances, privileges, and hereditaments thereto belonging or in any way appertaining: To Have and Hold the same unto the said Golden Realty Co., its successors and assigns, to its and their only proper use, benefit and behoof forever, in as full, ample and beneficial a manner as by virtue of the said writ of ficial a manner as by virtue of the said writ of Fieri Facias I may, can or ought to convey the same.

And I, the said Conrad Deuchler, for myself, my heirs, executors and administrators, do hereby covenant, promise and agree to and with the said Golden Realty Co., its successors and assigns, that I have not, as such Sheriff as aforesaid, done or caused, suffered or procured to be done, any act, matter or thing, whereby the estate hereby intended to be conveyed in and to the said lot of land and premises, with the appurtenances, is, may or can

be changed, charged, encumbered, or defeated in any matter whatever.

In Witness Whereof, I, the said Conrad Deuchler, as such Sheriff as aforesaid, have hereunto set my hand and seal this Twenty-fourth day of August, in the year of our Lord, nineteen hundred and Twenty-seven.

CONRAD DEUCHLER, (L.S.)
Sheriff.

Signed, Sealed and Delivered
in the presence of
Peter N. Van Duzen.

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

I, Conrad Deuchler, Sheriff of the County aforesaid, do solemnly swear that the land and real estate described in this deed, made by me to Golden Realty Co., of the City of Newark, of the County of Essex and State of New Jersey, was by me sold by virtue of a good and subsisting execution, as is therein recited, that the money ordered to be made has not been, to my knowledge or belief, paid or satisfied, that the time and place of sale of the said land and real estate was by me duly advertised, as required by law, and that the same was cried off and sold to a bonafide purchaser for the best price that could be obtained.

CONRAD DEUCHLER,
Sheriff.

Sworn before me, one of the Masters in Chancery of the State of New Jersey, on this First day of September in the year of our Lord nineteen hundred and twenty-seven, and I having examined the Deed above mentioned, do approve the same and

order it to be recorded as a good and sufficient conveyance of the land and real estate therein described.

PETER N. VAN DUZEN,
Master in Chancery of New Jersey.

Endorsed—Deed—Conrad Deuchler, Sheriff, to Golden Realty Co.

Received in the Register's Office of the County of Essex, N. J., on the 20th day of June, A. D., at 10:20 A. M., 1928, and recorded in book N-78 of Deeds for said County, page 176-178.

HOWARD S. DODD,
Register.

Consideration, $1000.00; Dated, August 24, 1927.

Exhibit D-1.

IN CHANCERY OF NEW JERSEY.

Between
AMERICAN EAGLE FIRE INSURANCE COMPANY,
Complainant,
and
GRANT BUILDING & LOAN ASSOCIATION,
Defendant.

Opinion.

A mortgagee, who has been paid a fire loss under a standard mortgage clause in a policy, holds the mortgage security *pro tanto* in trust for the insurance company under its right of subrogation and if he relinquishes the security he is liable for misappropriation of trust assets.

For complainant, ARTHUR T. VANDERBILT, ESQ.
For defendant, MESSRS. KALISCH & KALISCH.

BACKES, Vice Chancellor:

The defendant held a $16,000 building and loan mortgage on the property of one Rosmondi. The complainant, an insurance company, insured Rosmondi against loss by fire, primarily payable to the defendant as mortgagee; the policies contained the standard mortgage clause. Rosmondi set fire to the building in 1925, and the fire insurance company, denying liability to him, paid the loss, $3,050.16, to the mortgagee; and the insurance company claiming to be subrogated *pro tanto* to the mortgage security, the mortgagee assigned to it an undivided interest in the mortgage to the extent of

$3,050.16; the proportional interest on the mortgage debt accruing thereafter was to be paid over to the insurance company as the mortgagee collected it. The assignment was not recorded. The instrument is, in effect, a declaration in writing of the insurance company's rights by operation of law; the apparent outright assignment of an undivided interest being modified by the recitals which limited it to the right of subrogation; and that is admitted by the pleadings. At that time $15,020. was due on the mortgage, which was reduced by subsequent owners to $12,659.20, in installment payments, and on June 19, 1928 the balance was paid and the mortgage cancelled. The complainant's subrogated interest and right by assignment was altogether ignored. The bill is for an accounting.

Motion was made to dismiss the bill for want of jurisdiction, because of an adequate remedy at law, and was denied for the reason that the proceeds of the mortgage with which the defendant was charged, the amount whereof was unknown to the complainant, were held in trust. Monmouth County Fire Ins. Co. v. Hutchinson, 21 N. J. E. 107; Camden Fire Ins. Asso. v. Prezioso, 93 N. J. E. 318.

The defense set up in the answer is that the mortgagee used the insurance money to restore the fire damaged building, thereby re-establishing the mortgage security and that thus restored, the mortgaged premises were not sufficient security for and were not worth the amount of the then mortgage debt, $15,020, plus $3,050.16, laid out in repairing the building, and hence the complainant suffered no injury by the surrender of the mortgage. The building was new at the time of the fire; it cost $20,000 and the land was worth $2200 and in its

proof of loss the defendant estimated the value of the insured premises at $22,000; but we are not concerned with the value of the security as of that time. The question is what was the worth of the security when the defendant surrendered the mortgage? The defendant says $16,860 and at the hearing its real estate expert testified that was the fair market value of the mortgaged premises when the mortgage was surrendered in 1928 for $12,659.20. Over $4,000 of the security was relinquished; more than enough to pay the complainant's claim of $3,050.16 and interest thereon approximately $1,000.

The defendant's explanation is, as stated by counsel, that it did not understand that its outlay for restoring the building could be tacked on to the mortgage. Could it reasonably have supposed that the indemnity paid to it by the insurance company was to benefit the fire bug? The excuse is hard to believe, but if true, the defendant's gross ignorance of its rights and of its obligations to the complainant furnishes no justification. Whatever may have been its notion of the law, the fact that the defendant had assigned a part of the mortgage and that for a year before it gave up the mortgage, the complainant repeatedly demanded an accounting, must have excited some sense of responsibility to the complainant, and whatever may have been its motive, the fact remains that the defendant wilfully sacrificed the complainant's security and the suspicion will not down that it was not insensible of perpetrating a fraud on the complainant. The loss must fall on the defendant. It must account to the complainant.

The cause was tried on the theory of misappropriation of trust securities. The bill will be amended accordingly.

New Jersey Court of Errors and Appeals

GOLDEN REALTY COMPANY, a corporation, Plaintiff-Appellee, vs. GRANT BUILDING & LOAN ASSOCIATION, a corporation, Defendant-Appellant.	Action at Law. On Appeal from Essex County Circuit Court.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

Statement of Facts.

In 1925, the defendant-appellant (hereinafter referred to as the Association) granted to one Raimondi a construction loan of $16,000.00, secured by a bond and mortgage by him executed to the Association. Of this sum, for reasons which do not appear in the record, only $14,500. was actually advanced. Several months subsequently, but in the same calendar year, Raimondi set fire to the building, which was security for the loan, and for this act of arson, he was indicted, convicted, and sentenced to the State Prison. As this act of vandalism left the structure in a dilapidated, altogether ruinous condition, it became imperative for the Association, so as to protect its interest, to restore the building to a habitable and insurable state; and for this purpose it expended the sum of $3050.16 in labor and materials. The property had been insured, and the Association, under

the mortgagee clause of the policy, was indemnified by the insurance carrier. Because the carrier disclaimed liability to the mortgagor, Raimondi, the Association in compliance with the conditions of the policy, assigned to the insurer, by way of subrogation, an undivided interest, to the extent of the indemnification, in the mortgage. Through several mediate conveyances, the plaintiff-appellee, (hereinafter referred to as the Realty Co.) became owner of the premises in 1927 (State of Case, Exhibit PG-6, p. 48), and in 1928, it paid to the Association money due, taking the mortgage as being for $16,000, and had the mortgage cancelled. On March 24, 1931, the insurance carrier received judgment against the Association for the sum of money with which it had previously indemnified the Association's loss by reason of the fire. (For the opinion of the Vice Chancellor, *vide,* State of Case, Exhibit D-1, p. 56. The decree is reported in *American Eagle Fire Ins. Co.* v. *Grant B. & L. Association,* 9 N. J. Adv. Rep. 83). The court of Chancery held that the Association should have tacked on to the mortgage maintained by it, the additional sum of $3050.16, (State of Case, p. 58, lines 17-20); thus, in effect, although *arguendo,* holding that the Association should not have cancelled the mortgage unless or until it had received from the Realty Co. the sum of $19,050.16. The Realty Co. however, brought suit to recover $1500.00, maintaining that it should have paid only $14,500. in order to secure a cancellation of the mortgage. From the judgment entered in favor of the Realty Co. for the sum of $1500.00, the Association brings this appeal.

Certain other facts should be noted: 1. The association admits that the Realty Co. paid the additional $1500.00 under protest. 2. Neither the pleadings nor the testimony disclose that at

the time the Realty Co. applied for the cancellation and tendered payment, the loan money was due or that the Association threatened, or had the right to proceed to, foreclosure. The Realty Co. desired to have the mortgage cancelled for reasons known only to itself. 3. The conveyance from Raimondi to the Columbia Realty Co. (State of Case, Exhibit PG-1, p. 28, at p. 29, lines 18-21) was made expressly subject to the $16,000.00 mortgage. 4. The deed from Columbia Realty Co. to Luigi Bruno (State of Case Ex. PG-2, p. 32, at p. 33, lines 27-40) was again made expressly subject to the $16,000. mortgage held by the Association. 5. The mortgage from Bruno to the Columbia Realty Co. (State of Case, Ex. PG-3, p. 38, at p. 41, lines 6-9) for $4,000.00, was made, similarly, subject to the Association's mortgage of $16,000.00. It was to this junior mortgage that the Realty Co. became assignee on Sept. 13, 1926, (State of Case Ex. PG-5, p. 46), and on the foreclosure of which, and sheriff's sale, it became owner of the property on August 24, 1927 (State of Case, Exhibit PG-6, p. 48).

LAW & ARGUMENT.

I.

The payment was voluntary: hence it is not recoverable.

1. The law in our State on the subject of recovery of payments voluntarily made cannot be stated simply and unqualifiedly. A study of the cases will, however, disclose that the Realty Co. cannot, by even the most liberal construction, be held to come within the meaning and intent of the law of any case which did permit recovery of payments.

But a word first on the element of protest. It is well settled that protest alone does not form the basis for recovery of payments made, that it does not relieve the payment of the character of having been made voluntarily. *Turner* vs. *Barber,* 66 N. J. L. 496; *Koewing* v. *West Orange,* 89 N. J. L. 539. The only effect of the protest in the case at bar is to show *conclusively that the payment was not made under a mistake of fact. Patterson* v. *Cox,* 25 Ind. 261.

A leading case in our State on the subject of recovery of payments is *Camden* v. *Green,* 54 N. J. L. 591, decided by this venerable Court. In that case the Court formulated two rules, one general and one specifically relative to the facts of that case. At p. 593, the Court said, that it is a "general principle that where a party without mistake of fact, or fraud, duress or extortion, voluntarily pays money on a demand which is not enforcible against him, he cannot recover it back."

In *Koewing* v. *West Orange,* cited supra, the

Court of Errors and Appeals, per Walker, C., at p. 541, said that:

> "In *Camden* v. *Green,* 54 N. J. L. 591, it was held to be a general principle that if a person without a mistake of facts or in the absence of fraud, duress or coercion, pays money on a demand which is not enforcible against him, the payment is deemed a voluntary one and cannot be recalled."

We shall continue our discussion of cases on this point but it should be noted at the outset that although most of the cases reported and cited herein involve suits to recover from municipalities or other state agencies payments made, the courts of our State have not limited the application of the rule to parties of any particular character. The Court of last resort in all cases has at least on two occasions said that the principle is a general one.

In *Koewing* v. *West Orange,* cited supra, the Court at p. 542 (italics supplied), said:

> "Mrs. Koewing avers that she was coerced into making the payment she seeks to recover, through threats by the town authorities that unless she paid the sum demanded her right to redeem would be forever barred, that is, foreclosed. *It has been held that the collection of money secured by mortgage through threats of foreclosure does not amount to duress.*"

The present Chief Justice in the case of *Whitall Tatum Co.* v. *Vineland,* 102 N. J. L. 28 at p. 31, has said that: "It is entirely settled in this state that money paid under such circumstances (voluntarily), although in excess of the amount legally due, cannot be recalled."

In the case of *Bellisfield* v. *Holcombe,* 102 N. J. E. 20, Walker, *C,* in a Court of Chancery case similarly held that voluntary payments cannot be recovered.

In *Schaedel* v. *Liberty Trust Co.* 99 N. J. L. 380, the Court of Errors and Appeals, at p. 384, per Walker, *C,* said:

> "It is a general principle that if a person without mistake of fact or in the absence of fraud, duress, or coercion pays money on a demand which is not enforcible against him, the payment is deemed a voluntary one and cannot be recalled."

In the case of *N. J. Brick Co.* v. *Krantz Co.* 94 N. J. L. 255, the Court of Errors and Appeals, held that irrespective of the validity of a vendee's agreement to pay excess over the contract price which he made in order to insure delivery, the vendee could not subsequently recover such payment made after delivery, such payment being voluntary.

In *Loesser Mfg. Co.* v. *Schmid,* 100 N. J. L. 123, the defendant in his counter-claim set up facts showing that he had executed notes for which he received no consideration and at maturity paid those notes. The Court of Errors and Appeals held that this was a voluntary payment and so could not be made the basis for a counter-claim or for an original cause of action.

In *McCrory Stores Corp.* v. *Braunstein,* 99 N. J. L. 166, a tenant threatened with a demand for rent claimed by the tenant to be in excess of that contracted for in the lease, and being confronted with legal proceedings instituted to enforce such demand, paid the amount demanded and later brought an action at law to recover the excess payment. The Court of Errors and Appeals held that

the payment was voluntary and was not recoverable. Per Parker, *J*, the Court said:

> "In the case at bar the landlord's claim was either legal or illegal; if legal, plaintiffs were, of course, bound to pay it. If illegal they were entitled to resist it in a judicial proceeding. The nub of the case from a practical standpoint probably was that plaintiff feared the result of an adverse decision in a tenancy proceeding, where the right of review is so restricted as it is under our statute."

The learned trial judge in his opinion (State of Case, p. 19, lines 11-14) cites only the case of *Berger* v. *Bonnell Motor Car Co.* 4 Misc. p. 589, as authority to the contrary. This case was decided by the Supreme Court and it is the only case we know of in our State that allows recovery under the circumstances of that case. (*Title Guarantee and Trust Co.* v. *Goeller,* 93 N. J. E. p. 612, was decided under a statute). The Justices who adjudicates the Berger case, cite no New Jersey authority and only *Clough* v. *Boston, Maine Ry. Co.,* 90 Atl. 863, a New Hampshire case. In that case payments had been made by plaintiff to a common carrier in excess of what the carrier might legally have charged; the Court allowed recovery in an action for money had and received.

Now a number of things may be said about this *Berger* v. *Bonnell Motor Car Co.* case and the authority which the court cites out of the New Hampshire reports.

In the first place the opinion may be hazarded that the case is contrary to the earlier case of *Turner* v. *Barber,* 66 N. J. L. 496, (cited *supra* as authority for another proposition). This too is a Supreme Court case. The facts therein briefly are these: An owner of a wharf at which a scow had

been unloaded libeled the scow in the admiralty courts for the amount of the wharfage; the owner of the scow, without contesting the claim paid it to the proctor of the libelant and then brought his action and recovered it from the libelant. It was found that the plaintiff did not owe the wharfage, and the Court held that in the absence of fraud or extortion the money paid in the admiralty suit was paid voluntarily and not under duress of goods, and so could not be recovered.

The fact that in the earlier case payment was made under process in a judicial proceeding while in the later case it was made to release the goods from duress exercised by a civilian not acting under color of a judicial proceeding is an immaterial difference. *Koewing* v. *West Orange,* supra; *Camden* v. *Green,* supra; *Whitall-Tatum Co.* v. *Vineland,* supra.

Also it is to be noted that the New Hampshire case is one of a special category of cases in which the courts invariably allow recovery. In 21 *R. C. L.* p. 157, there is a special section treating of "Excessive Charges by Common Carriers." Our court could have cited the New Jersey case of *McGregor* v. *Erie Ry. Co.,* 35 N. J. L. 89, which reports an excellent opinion by the late Bedle, *J.* In this case the court allowed recovery of additional unlawful charges on freight carried by the railway company. On p. 112, the Justice said:

> "It is undoubtedly a general rule of law that money voluntarily paid with a full knowledge of the facts, even if for an unjust claim, and even if paid under protest simply, cannot be recovered back * * * *In ordinary cases between individuals where a person has no power to enforce an unjust claim but by legal remedies, and another pays it, even under protest, he cannot recover it.* Both par-

> ties are on an equal footing. But where they are not on an equal footing and money is paid, not by compulsion of law, but by compulsion of the circumstances, as where it is paid to relieve goods from illegal restraint which could not otherwise be obtained, or to compel the performance of a duty by others in order to enjoy or obtain a right, there it may be recovered back. Of this latter kind may be moneys paid under color of tolls or charges on turnpikes or railroads."

Vide also 6 Cyc. 498, and note 18 L. R. A., N. S., 124.

Even if the *Berger* case be considered a correct adjudication and as evidencing a justified departure from the rule which obtained until the case was decided and had been established by the rulings of a court of higher jurisdiction, or an extension of the class of exceptions to the rule, it clearly is inapplicable to the instant case; *for the facts are altogether dissimilar*: *There was no coercion in the case at bar, no duress of realty, no restraint of possession of property, or detention of person, or threat of seizure or forfeiture.*

2. If it be kept in mind what constitutes duress in legal contemplation, it will be clear that the payment was voluntary. Duress, as a consideration of authorities shows, is that degree of constraint or danger, either actually inflicted, or threatened and impending, sufficient to overcome the mind and will of a person of ordinary firmness. *Brown* v. *Pierce,* 74 U. S. 214; *Baker* v. *Morton,* 79 U. S. 157; *French* v. *Shoemaker,* 81 U. S. 332; 1 Chitty, Cont. 11th Am. ed., 269; 2 Greenleaf, Evid. sec. 301, 302; 1 Wharton, Cont., pref. IV; 1 Story, *Equity,* sec. 239.

This case comes fairly within the meaning of the italicized portion of the following passage from the opinion of the Chief Justice in the leading case of *De La Cues Fa* v. *Ins. Co. of No. America,* Pa., 9 L. R. A. 671:

> "If a demand is illegal, and the party can save himself and his property in no other way, he may pay under protest and recover it back. *But if other means are open to him* by which he may prevent the sale of his property; *if a day in court is accorded to him, - he must resort to such means* * * * * *There was nothing but the denial of a right, and a declared intention not to recognize a right is not duress.* It is true, the denial of the right placed the plaintiff in a dilemma * * * But if we adopt the principle that whenever a man is placed in a position in which the law is doubtful, and he is compelled to choose between two paths, in other words to decide between conflicting views of the law, he is to be considered as under duress, we shall certainly multiply litigation, even if no other end is accomplished * * * * *There was not duress of person or goods; there was simply the denial of a right.*" (Italics supplied).

3. The cases are legion in which under similar circumstances, or such as are even more unfavorable to the payee than in the case at bar, it was held that the payment was not made under the duress of real property. The case of *Koewing* v. *West Orange,* has already been cited and quoted. In *Vick* v. *Shinn,* 49 Ark. 70, 4 S. W. 60, it was held that the bare threat by the mortgagee to enforce the payment of a sum in excess of the amount due on the mortgage debt by taking the property from the mortgagor's possession and selling it under the power of sale, was not sufficient to create

a duress of goods so as to sustain an action for the recovery of the excessive amount paid by the mortgagor.

In *Savannah Savings Bank* v. *Logan,* 99 Ga. 291, 25 S. E. 692, it was held that the fact that the holder of a note, payable in installments secured by a mortgage, threatened foreclosure if the installments past due were not paid, and at the same time refused to cancel the mortgage unless the entire debt, including installments not due, was paid, did not amount to duress, nor render involuntary, a payment by the debtor of the whole debt, even though such payment was made for the purpose of having the mortgage cancelled, and notwithstanding that, by reason of anticipating the maturity of the note, the sum paid included an amount for interest in excess of the legal interest for the time the note was actually outstanding.

The case of *Haigh* v. *U. S. Bldg. Land & Loan Ass'n.,* 19 W. Va. 792, held that where one, under mistake of law, but with full knowledge of the facts, pays more than is due on a mortgage, he cannot recover back the excess, and the fact that the payment was made under a mistake of law, but with full knowledge of the facts, negatives the idea that it was involuntary in a legal sense.

In *Shuck* v. *Interstate B. & L. Ass'n.,* 63 S. C. 134, 51 S. E. 28, it was held that the mere threat to foreclose a mortgage unless a sum in excess of that due were paid did not constitute duress which would entitle the mortgagor to recover back the amount so paid. The opinion of the Supreme Court states that at the time the threat was made, it was not in defendant's power to foreclose the mortgage in any other way than in court.

It was held in *Rodgers* v. *Wittenmegh,* 88 Cal. 553, 26 P. 369, that an over-payment upon a real estate mortgage was not shown to have been made under duress so as to support an action for its recovery.

In *Vereycken* v. *Vanden Brooks,* 102 Mich. 119, 60 N. W. 687, it was held that where a mortgagor, upon being served with a subpoena in a chancery foreclosure suit, paid an excessive amount demanded by the mortgagee, the payment was not compulsory and could not be recovered back upon the ground of duress.

In *Wessel* v. *Johnston Land & Mortgage Company,* 3 N. D. 160, 54 N. W. 922, it was held that a party in possession of real property, who with full knowledge of the facts, paid a sum necessary to redeem real estate from a foreclosure sale by advertisement after the lien of the mortgage had been fully satisfied and destroyed, was not entitled to recover back the sum so paid, upon the ground of duress, notwithstanding that the payment was made to prevent the execution of a deed which would have created an apparent cloud upon the title.

In *Mariposa Co.* v. *Bowman,* Fed. Cas. No. 9, 089, it was held that one in possession of real property, who without any demand therefor, paid a sum not legally due, in order to prevent the creation of a cloud on title by the execution of a deed under a mortgage foreclosure, was not entitled to recover back the amount so paid upon the ground of duress.

The Court in *Patterson* v. *Cox,* 25 Ind. 261, held that the payment, under protest, of a sum in excess of the amount legally due, in order to redeem the

property from a foreclosure sale, could not be recovered back upon the ground of duress.

In *Hess* v. *Cohen,* 20 Misc. 333, 45 N. Y. Supp. 934, the mortgagor, when the mortgage was about to be foreclosed, arranged for a loan from a third party upon an assignment of the moregage and the mortgagee refused to assign until the mortgagor paid the amount of the premium for a policy of title insurance on the premises, which had been lent to the mortgagor by the mortgagee's husband; the mortgagor paid, but the court refused to allow recovery on the ground of payment under duress. See also *Williams* v. *Rutherford Realty Co.,* 144 N. Y. Supp. 357; *Scheer-Ginsberg Realty, etc. Co.* v. *Devin,* 76 Misc. 201, 134 N. Y. Supp. 505; and *Smith* v. *Hunter,* 171 Ill. App. 35.

II.

The Realty Company shows no damage suffered.

There is no disclosure anywhere that when the Realty Company became owner of the property it had knowledge that only $14,500 and not $16,000 had been advanced on the loan. This is made especially patent by advertence to the deeds and mortgage, marked as exhibits, which establish that the property was bought expressly subject to a $16,000. mortgage. Furthermore, even if it should be admitted that it had full knowledge, it none the less was extremely negligent. The usual course followed by a purchaser where the mortgage is held by a Building & Loan Association is to have the account between the mortgagee and the borrower stated, and to get an estoppel certifi-

cate from the association. This is done invariably, otherwise the purchaser acts on rumors and vagaries. If as against the original mortgagor the mortgagee may set up a $16,000 loan what estops the mortgagee from setting up as much against a subsequent purchaser from the borrower in the absence of transactions between the purchaser and mortgagee giving rise to an estoppel against the latter in some form? The mortgage was made in 1925, plaintiff became owner in 1927; within a period of over two years any number of rights may accrue to a mortgagee as against mortgagor. Should they all be lost although the mortgagee has done nothing which would have estopped him? The situation and law presented in 41 C. J. 465 should be considered.

> "So where a mortgage secures future advancements to a specified amount within a limited time, and the full amount is loaned and paid, further loans within the time limited are covered by the mortgage."

The recent case of *Calverley* v. *Ventnor B. & L. Ass'n.* 107 N. J. E. 214, 151 Atl. Rep. 609, is of importance in this connection. In that case the Building and Loan mortgage was nominally in the sum of $10,000. and at a sheriff's sale it was sold subject to this mortgage. The question presented on trial was whether the purchaser is obligated to satisfy the mortgage in full, notwithstanding, as appeared from the proof, that it was reduced to a considerably less figure by payments on account made by the mortgagor before the execution sale. Vice Chancellor Ingersoll, who heard the case, held that he was not, and that his whole obligation was to pay the amount actually due upon the mortgage at the time of the sheriff's sale. On appeal, the decree entered in conformity with this conclus-

ion was reversed by a unanimous Court. The Chief Justice in the opinion written for the Court said:

> "If property worth $55,000. is put up for sale by the sheriff under an execution, and he announces that he is selling it subject to a mortgage of $50,000. although two-thirds of the mortgage debt had theretofore been paid, the purchaser bids it in for $5,000. subject to the amount of that mortgage lien, it would be grossly inequitable to permit him to retain title to the property by the payment of his bid and of the moneys still remaining due upon the mortgage, notwithstanding his contract. * * *"

This case is to be distinguished from *First Italian B. & L. Ass'n.* v. *DiNiscia,* 79 N. J. E. 46, aff'd. 78 N. J. E. 299, which held that a mortgage is in effect only for the sum of money actually advanced; for that was a case between the original parties to the loan, mortgagor and mortgagee. *Vide* also the recent case of *Krause* v. *Hartung,* 155 Atl. Rep. 621 (N. J. Chanc.), to the effect that the holder of a junior mortgage, taken expressly subject to the amount of a prior mortgage, cannot dispute the amount of the prior mortgage.

It may be noted that the record does not include a Finding of the Facts in Issue for the reason that the general finding in favor of the plaintiff is deemed to be a finding in its favor of all the material allegations put in issue (Rule 114 of Supreme Court).

CONCLUSION.

It is respectfully submitted, for the reasons stated, that judgment in the case should be reversed.

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New Jersey Court of Errors and Appeals

GOLDEN REALTY COMPANY, a corporation,
Plaintiff-Appellee,

vs.

GRANT BUILDING & LOAN ASSN., a corporation,
Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF.

We deem it advisable in this reply brief to advert and dispose of only one question raised by counsel for plaintiff-appellee in his brief. In Point I of his brief he makes the contention that there is no legal error presented for review, citing the Practice Act of 1912 and cases decided in 1913-1914. He seems to be unaware of the legislative amendment of the 1912 Act: P. L. 1916, p. 109, which provides that:

> "Where causes are submitted to the court to be heard without a jury, any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court."

The question of the constitutionality of this amendment was raised in 1919, in the case of *Pannonia B. & L. Asso.* v. *West Side Trust Co.*, 93 N. J. L. 377, decided by the Court of Errors and Appeals, in a learned opinion by the Chancellor for the court, it was said:

> "The act of 1916 is an amendment to Section 25 of the Practice Act (1912), the pertinent part of which amendment provides

that when causes are submitted to the court to be heard without a jury, any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court.

Counsel for respondent argues that this statute is more than a regulation of procedure and is legislative interference with judicial power, and, for that reason, unconstitutional. This is fallacious. In Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647 (at p. 652), this court cited the Supreme Court case of Reilly *v.* Second District Court of Newark, *Id.* 541, to the effect that a law was constitutional which merely effects a change of procedure and does not involve a prerogative of a constitutional court. * * *

As defeated litigants have always had a right of review on questions of law by the laying of a proper foundation in the trial court at the time of adverse rulings, it is clearly competent for the legislature to postpone the time in which that foundation may be laid, and to permit of the filing of objections after the findings of the judge in causes where juries are waived and the issues of law and fact are submitted to him for determination."

Shortly following this decision there was an appeal to this Court from the Hudson County Circuit Court in the case of *Hayes* v. *Hoboken,* 93 N. J. L. 432, and this Court referred on page 435 with approval to its decision in the Pannonia case.

Again in *Smith* v. *Cruse,* 101 N. J. L. 82, the Chancellor in his opinion for the unanimous Court of Errors and Appeals, considered the fact of the 1916 act. Said the learned Chancellor:

"It is not necessary for a party to request the court, in cases where a jury is waived,

to make specific findings of law or fact, or law and fact. It is sufficient if he claims judgment in his favor upon testimony adduced upon the trial. And the court, sitting without a jury, cannot enter judgment for either party without finding in favor of that party. A judgment presupposes a finding of facts in favor of the successful party, even if such finding be not expressed in terms, and also presupposes that, in the opinion of the judge, that party is entitled to the judgment by law arising upon the facts.

In the case at bar it does not appear that either side made any request for findings. But the judge of the District Court, in the state of the case settled and signed by him said, 'I find the facts to be as follows:' and then goes on and specifically finds the facts upon which he rests his judgment. Now, the amendment to the Practice act (Pamph. L. 1916, p. 109) provides that when cases are submitted to the court to be heard without a jury, any error made by the court in giving final judgment shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court. There is no requirement that the defeated party must have preferred a request for a finding of law or fact, or law and fact, and except to an adverse finding, in order to secure a review of the judgment; but appeal is given to him, as matter of right although he did not submit the grounds of objection to the trial judge. But this refers only to errors residing in the final judgment, and not to any occurring in the proceedings on the trial.

The reason for this statute is obvious, and is fully explained in our opinion in Pannonia Building & Loan Association *v.* West Side Trust Co., 93 N. J. L. 377, 381, wherein we held that this act of 1916 permits a review of any errors of law residing in the findings of the trial judge, provided such errors shall

> be specified in grounds of appeal filed and served. Errors were so specified in this case, and, though the record does not show they were served, counsel for the respondent argues the cause without any suggestion that they were not served; therefore, it is to be presumed that they were. See, also, Peterson *v.* Sovereign Camp, &c., 97 *Id.* 497, 500."

The practice of the circuit courts (which is governed by the Practice Act) applies to District Courts, except otherwise provided. See Dist. Court Act (Comp. Stat., p. 1977, par. 68).

In *Lambert* v. *Cahill,* 2 N. J. Misc. Rep. 826-827, 828, Justices of the Supreme Court in their Per Curiam said:

> "In this case we find no record of a request for finding, or motion for a judgment in favor of the plaintiff, and under the law, as it existed prior to the act of 1916, chapter 62, the appellant would be without remedy in this court, but this act provides that where cases are submitted to the court to be heard without a jury, any error made by the court in giving final judgment in the case shall be subject to change, modification or reversal, without the grounds or objection, having been specifically submitted to the court."

Defendant-appellant's view is that there is no question of fact presented for review, but only an unmixed question of law. The learned Circuit Court Judge in his opinion (S. C., p. 19, ll. 3-14) stated that he concluded from the fact that the payment was made under protest that it was, therefore, not made voluntarily. There are no other facts in the case, than this one of protest, on which he found or could have founded his conclusion. But the cases cited by counsel for the defendant-appellant in their brief clearly hold that protest alone will not relieve the payment of the character of having been made voluntarily.

The only effect of the protest in the case at bar is to show conclusively that the payment was not made unwittingly or under a mistaken notion of law or fact. *Turner* v. *Barber,* 66 N. J. L. 496; *Koewing* v. *W. O.,* 89 N. J. L. 539; *Patterson* v. *Cox,* 25 Ind. 261.

The Koewing Case also held that, "it has been held that the collection of money secured by a mortgage through threats of foreclosure does not amount to duress."

In view of these and other cases cited and treated of in our moving brief, the trial judge was under a *legal duty to conclude as a matter of law that the payment* was voluntary; and this error is assigned by defendant-appellant in his ground of appeal (S. C., p. 21) and is the only one that there is submitted for review.

KALISCH & KALISCH,
Attorneys of Defendant-Appellant.

HARRY KALISCH,
On the Brief.

New Jersey Court of Errors and Appeals

GOLDEN REALTY COMPANY, a corporation, Plaintiff-Appellee,	Action at Law.
vs.	On Appeal from Essex County Circuit Court.
GRANT BUILDING & LOAN ASSOCIATION, a corporation, Defendant-Appellant.	

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE.

Statement of Facts.

This is a suit to recover the sum of $1,500. which the defendant compelled the plaintiff to pay in order to secure the cancellation of defendant's mortgage, and which sum was not due thereon.

On March 25, 1925, one Aniello Raimondi and Elizabeth Raimondi, his wife, who were the owners of the premises described in the complaint, executed a mortgage to defendant on said premises to secure a bond for the sum of $16,000.00. It was a construction mortgage—the money secured thereby being advanced as the building progressed. The defendant advanced only $14,500, on its said bond and mortgage. The plaintiff became the owner of the mortgaged premises by mesne conveyances and it desired to pay off the defendant's mortgage which was not then due. The defendant refused to accept payment of its said mortgage unless the

plaintiff paid it an amount calculated on the principal of the mortgage as $16,000 instead of $14,500. The defendant paid this amount demanded under protest.

There was a fire in the house on said premises while Raimondi and his wife were the owners caused by Mr. Raimondi. The American Eagle Fire Insurance Co., paid the defendant the sum of $3,050.16 under policy which it had issued against fire on the said premises. The defendant used said moneys to repair the building. It assigned an interest of $3,050.16 in its mortgage to the insurance company by written assignment. The insurance company filed a bill in equity against the defendant and recovered on the theory of an accounting for a breach of trust by the defendant in misappropriating the assigned sum of $3,050.16.

This case was tried by the Hon. Nelson Y. Dungan, a judge of the Essex County Circuit Court, sitting without a jury. In his opinion he found that the plaintiff overpaid the defendant the sum of $1500: that the payment was not voluntary; and he gave judgment to the plaintiff against the defendant for said sum with interest from the day of payment. From this judgment the defendant files the present appeal to this court.

The plaintiff has set up its own statement of facts because it is dissatisfied with the one contained in defendant's brief for these reasons: there is no proof that the fire "left the structure in a dilapidated, altogether ruinous condition, it became imperative for the association, so as to protect its interest, to restore the building to a habitable and insurable state: that the court of Chancery, in the case of American Eagle Fire Insur-

ance Co., vs. Grant B. & L. Ass'n., (9 N. J. Adv. Rep. 83), did not hold that the defendant should have tacked on its mortgage the said sum of $3,050.16 and demand payment on its mortgage the sum of $19,050.16; and that the mesne conveyances and mortgage were not made subject to the $16,000 mortgage as will be pointed out in the argument in this brief.

The plaintiff will discuss the points of law and facts under the following heads:

1. There is legal error presented for review.
2. Payment not voluntary.
3. Payment was made under duress.
4. The money paid was not due to the defendant.
5. Plaintiff did not take title subject to a mortgage of $16,000.00.

Note: I have not briefed the effect of the payment by the insurance company to the defendant as I cannot see how it effects our rights or what it has to do with the case under review.

POINT I.

There is no legal error presented for review.

This court will not review findings of fact in the court below beyond ascertaining that there was evidence to support them.

Larned v. MacCarthy, 85 N. J. L. 589.

The findings of a trial court upon a blended question of law and fact will not be reviewed in in an appellate court.

Larned v. MacCarthy, *supra.*
Webster v. Board of Chosen Freeholders, 86 N. J. L. 256.

A record of pleadings, trial and judgment below containing no error in the strict record, and no ruling of the trial court on matter of law excepted to, presents no case for reversal.

The practice act of 1912 and rules in pursuance thereof, have made no change in the fundamental rules for review of actions at law, as in error, there must be some ruling in the court below, that it must be adverse to the appellant, and that the trial court must through the instrumentality of a formal challenge to that ruling, have an opportunity to reconsider or modify or change it.

Webster v. Board of Chosen Freeholders, *supra.*

The cases above cited are all appeals from judgments rendered by a court in a trial without a jury and are dispositive of the appeal in the present case. The situation in this appeal is exactly

the same as in the case of Webster vs. Board of Chosen Freeholders, *supra,* and the following remarks of this court in that case apply with full force to the present appeal.

There is "no ruling or determination of the trial court that was excepted to, or otherwise challenged at the time in such a way as to support an appeal." "There is not only no challenge of any ruling on a matter of law, but no such ruling made or asked for except so far as in the rendering of judgment for the plaintiff below, which turned on questions of fact as well as of law."

"The bareness of the case as regards any challenged ruling of law is brought into strong relief by a perusal of" the one ground of appeal—"that the court erred in giving judgment in favor of the plaintiff-appellee and against the defendant-appellant." This is not a proper ground of appeal in this case.

Lapayowker v. Sevitvky, 102 N. J. L. 164.

These cases were decided after the adoption of S. C. R. 114.

Whether a payment is voluntary or not ~~and~~ each case must be determined largely on its own facts. The determination of that fact is for the jury.

Jones v. Sherwood Distilling Co.,132 A. 278 (Md.).

POINT 2.

Payment not voluntary.

It is a well settled rule that where a person without mistake of fact, or fraud, duress, or extortion, voluntarily pays money on a demand which is not enforcible against him, he cannot recoverit back.

Camden v. Green, 54 N. J. L. 591.

As contradistinguished from voluntary payments, it is equally settled that payments coerced under duress or unlawful compulsion may be recovered back.

48 C. J. 741, sec. 293, and authorities hereinafter cited.

This class of obligations is recognized and enforced by means of general assumpsit and the history of that action shows that it is "equitable in character, liberal in form and greatly favored by the courts as a remedy." 5 C. J. 1381. See also 2 R. C. L. p. 749, sec. 8.

No action could be brought at common law, until the suitor had first obtained from the chancellor the proper writ Each action had its own form of writ. If there was no writ in existence to cover the right, there was no remedy. No such writ existed prior to the Statute of Westminister II, passed in 1285, for the recovery of money involuntarily paid and the right to sue for the recovery of such a payment existed only since that time. Chitty on Pleading Vol. 1, pp. *94, Sims v. Sims, 79 N. J. L. 577, 580, 2 R. C. L. p. 743. sec. 3.

"The action for money had and received, in its spirits and objects, has been correctly likened to a bill in equity, and it may in general be maintained

whenever the evidence shows that the defendant has received or obtained possession of money belonging to the plaintiff which in equity and good conscience he ought to refund to him. It lies only for money which, *ex aequo bono,* the defendant ought to refund, or for money obtained through imposition, express or implied, or for extortion, or oppression, or an undue advantage taken of the plaintiff's situation. In short, the gist of this kind of action is that the defendant upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

E. D. Clough & Co. v. Boston & Maine R. R., 77, N. H. 292; 2 R. C. L. p. 745, sec. 5.

McGregor v. Erie Railway Co., 35 N. J. L. 89, at page 112.

The one outstanding fact remains that the defendant has $1500 of the money of the plaintiff which does not belong to it. In my opinion it is plain stealing to keep money that belongs to another. It is certainly just and equitable that the defendant return this money to the plaintiff. It should do so in equity and good conscience.

A great deal of the confusion arises from the efforts of the common law courts to mold the act of general assumpsit within rigid limits either through fear that juries would construe what was equity and good conscience too liberally or to secure uniformity in the application of the law.

Whatever ambiquity exists in the law in other situations it seems to be well settled that money paid to prevent the unlawful taking or detention of real and personal property may be recovered.

21 R. C. L. 161, sec. 186 and 21 R. C. L. p. 150, sec. 175.
Jones vs Sherwood Distilling Co., *supra.*

When the holder of a mortgage, upon payment of it extorts more than is actually due, and the debtor in order to obtain a speedy discharge or to prevent foreclosure, pays the amount demanded, he may recover the overpayment as money received by the defendant to his use.

Jones on Mortgages, Vol 1, section 903. (6th ed.).
21 R. C. L. pp. 150, section 175.
Keener on Quasi Contracts, pp. 426 and 427.

In Astley v. Reynolds, 2 Str. 915, which may perhaps be called the leading case on the subject, the plaintiff who had pawned plate to the defendant, was allowed to recover money unlawfully demanded of the plaintiff as a condition of allowing him to redeem. Said the courts: "We think also this is a payment by compulsion; the plaintiff might have such an immediate want of his goods that the action of trover would not do his business; where the rule *volenti non fit injuria* is applied it must be where the party had the freedom of exercising his will, which this man had not; we must take it he paid the money, relying on his legal remedy to get in back again."

~~There~~ Thus it is held in Hills v. Street, 5 Bing. 37 that the plaintiff who paid to the defendant a sum of money to prevent a wrongful removal and sale of his goods under a distraint, could recover the money so paid.

Likewise in Hooper v. Mayor, etc., 56 L. J. 457, it was held that the plaintiff who paid harbor duties to the defendant in excess of what was due, to

prevent a wrongful taking of his goods for the duties so charged, could recover the money so paid.

Money paid in excess of contract price for repairs of automobile in order to secure possession of it is not voluntary and may be recovered back.

> Berger v. Bonnell Motor Car Co., 4 M. 589; 133 A. 778.

In Wakefield v. Newton, 6 Q. B. 276, the defendant, a mortgagee, having refused to return to the plaintiff, the mortgagor, the title deeds of the mortgaged premises, unless he was paid an amount to which he was not entitled, was held compelled to return to the plaintiff the amount so paid.

In Close v. Phipps, 7 M. & G. 586, it was held that the defendant, who demanded as a condition of allowing the plaintiff to redeem mortgaged premises a payment not due, and threatened to sell the property if his demand was not complied with, should refund to the plaintiff the money so paid.

On the same principle, it is held that money paid to a carrier who refused to deliver goods, except on condition of receiving a payment, to which he is not entitled, can be recovered by the party making the payment. Ashmole v. Wainright, 2 Q. B. 837.

On the same principle, money paid to obtain from the defendant bonds or stock which the defendant refused to deliver except on payment of a sum which he was not entitled, can be recovered as paid under compulsion. Scholey v. Mumford, 60 N. Y. 498.

On the same principle, if one's enjoyment of his real estate is interfered with by the assertion of a claim creating a cloud upon title, he can though not deprived of his possession, pay the demand made upon him and recover the money so paid as paid under equitable duress. Thus, it is held in Joannin v. Ogilvie, 49 Minn. 564; 56 N. W. 217, that the plaintiff, who was compelled, in order to

obtain a loan, to pay an unfounded claim of lien, could recover the money so paid. Keener on Quasi-Contract, pp. 428-429.

In Kilpatrick v. Germania Life Ins. Co., 183 N. Y. 163; 75 N. E. 1124, 111 A. S. R. 722, it was held that one who negotiates a new loan to take up an existing mortgage on real estate on which foreclosure proceedings have been begun, and where he is required, under protest, to pay an illegal bonus to secure a discharge of the mortgage, acts under duress in so doing, and is entitled to recover the amount so paid.

The reason for the rule that a voluntary payment cannot be recovered back is given by this court in the case of Schaedel v. Liberty Trust Co., 99 N. J. L. 380, as follows: "that the party paying had an opportunity to dispute the claim, and having waived it of his own volition, it is impolitic to permit him to overhaul the transaction by an aggressive action. The doctrine is intended to be repressive of litigation." See also N. J. Brick Co. v. Krantz, 94 N. J. L. 255, and McCrory Stores Corp v. Braunstein, 99 N. J. L. 166

"The real and ultimate fact to be determined in every case is whether or not the party really had a choice, the determination of that question is for the jury."

21 R. C. L. 146, sec. 170.
Jones v. Sherwood Distilling Co., 132 A. 278 (Md).

In the case under review the plaintiff had no opportunity to dispute the validity of the claim made by the defendant. The mortgage was a building and loan mortgage which was payable in monthly installments of principle and interest and matures when the shares which secure it are worth the face amount of the mortgage. It is not payable before

maturity. The plaintiff could not file a bill to redeem or take any other proceedings to compel the plaintiff to accept payment of its mortgage, nor was there any suit pending to enforce it. All that the plaintiff could do was to comply with the unlawful demand of overpayment of $1500 and pay it to the defendant and then bring its suit to recover it back.

The attorney of the defendant in his brief says (Brief p. 5), "We shall continue our discussion of cases on this point but it should be noted at the outset that although most of the cases reported and cited herein involve suits to recover from municipalities or other state agencies, payments made". This statement is true and that is just the reason they do not apply. Payments made to a municipality or state constitutes an exception to the rule that money paid under compulsion may be recovered.

In most jurisdictions the rule prevails in the absence of statute that the payment of an illegal tax with full knowledge of the facts and without fraud, duress or extortion is a voluntary payment although made under protest.

21 R. C. L. p. 144, sec. 168.

In Camden v. Green, 54 N. J. L. 591, this court said: "The ~~policy~~ of permitting contestible demands, made on behalf of municipalities by their boards and agents, to be acquiesced in and paid, without a final relinquishment of the right to contest the same, is pointed out by the Chief Justice in Davenport vs. City of Elizabeth, 12 Vr. (41 N. J. L.) 362, and should bar suits like those in the present case." In Davenport v. Elizabeth, Chief Justice Beasley after stating the rules and the reasons for it says, "I repeat that the true doctrine is that the intendment that such a payment is voluntary is not dependent on collateral circumstances

but is presumptive *juris et de jure* from the very act itself."

The case of Turner v. Barber, 66 N. J. L. 496, was decided upon the principle that money paid under legal process is a judicial proceeding with full knowledge of the facts and is, in the absence of fraud or duress not recoverable. The cases of Bellisfield v. Holcombe, 102 N. J. L. 20, Schaedel v. Liberty Trust Co., *supra,* and N. J. Brick Co. v. Krantz, *supra,* and Loesser Mfg. Co. v. Schmid, 100 N. J. L. 123 are all cases of monies paid on contracts and McCrory Stores Corp. v. Braunstein, *supra,* is a case of money paid under apprehension or threat of legal proceedings. They are all well recognized exceptions to the rule that compulsory payments can be recovered. None of them involve money paid to prevent the detention or taking of property.

This eliminates as authorities all the New Jersey cases cited by the defendant in Point 1 of its brief.

The overpayment to the defendant was made under protest.

The sole object of a protest in these cases is that it is evidence of plaintiff's state of mind. It gives notice that he intends to claim his right of repayment."

> E. D. Clough & Co. v. Boston & Maine R. R., 77 N. H. 222, 90 A. 863, 876.

"If there is doubt as to whether the payment was voluntary, the protest may be taken into account in determining that question."

> Koewing v. Town of West Orange, 89 N. J. L. 539.

The defense of voluntary payment was not pleaded by the defendant.

POINT 3.

Payment was made under duress.

The definition of duress contended for by the defendant is the rule in ordinary common law actions but does not apply to the action for money had and received which is equitable in nature.

While the unlawful taking or detention of another's property does not constitute legal duress, and would not therefore, constitute a defense at law in the absence of equitable defenses in an action on contract (Skeate v. Beale, 11 A. & E. 983), yet money paid to prevent such taking or detention can be recovered in the count for money had and received as paid under compulsion.

Keener on Quasi-Contracts, p. 426.

"Note 2. This seeming anomaly in our law, where on the same facts money paid can be recovered, while one who has made a contract has no defense thereto and must perform the same, is a striking illustration not only of the difference between legal and equitable principles, but also of the importance of keeping the distinction between law and equity clearly in mind. The decision that in a court of law a defendant who contracted for a consideration to pay money to prevent the wrongful taking or detention of his goods had no defense to the contract, was perfectly sound, for the reason that such acts did not constitute duress at law, and a common law court had no jurisdiction over a mere equity existing in favor of the defendant. Nor was this decision inconsistent with the ruling that money paid in the same circumstances could be recovered in the count for money had and received. In the count for money had and received

the court dealt confessedly with equitable principles, and the simple question was whether the circumstances were such that equitably the defendant should restore to the plaintiff that which he had received. When, however, a plaintiff sought to recover on a contract, the sole question before the court was whether the facts pleaded by the defendant constituted duress at law."

Keener on Quasi-Contracts, page 426.

"Having no right to the bonus it (defendant) still insisted on the payment thereof before it would do its legal duty. The plaintiff in view of the way business is done in giving a new mortgage to pay off the old one, could not wait to make a tender and take legal action, and he was not obliged to. He could submit to the exaction, and pay the bonus, and sue to recover it back, because such payment is not voluntary. In effect the defendant held plaintiff's property in its grasp through its lien thereon, and would not surrender it until the lawful exaction was complied with. The payment was made to free the property from duress as much as if it had been a chattel and the defendant had it in his possession under a pledge, refusing to part with it unless the bonus was paid. Under these circumstances, the compulsion was illegal, unjust and oppressive, and the plaintiff having submitted under protest, had the right to recover under the authorities. The refusal of the defendant to accept the mortgage debt and interest, unless the bonus was paid, placed the plaintiff in a position where he was compelled to submit to the exaction in order to receive a satisfaction of the defendant's mortgage and secure the ~~mortgage~~ money on the new loan which would protect him in the emergency."

Kilpatrick v. Germania Life Ins. Co., *supra.*

"In Tupler v. N. Y., 125 N. Y. 617, 26 N. E. 721, Judge Peckham states: "The very words used to describe an involuntary payment imports a payment made against the will of the person who pays. It implies that there is some fact or circumstance which overcomes the will and imposes a necessity of payment in order to escape further ills. In Scholey v. Munnford, 60 N. Y. 498, Judge Repallo remarks (p. 501): "To constitute a voluntary payment the party paying must have had the freedom of exercising his will. When he acts under any species of compulsion the payment is not voluntary. In Bates v. N. Y. Ins. Co., 3 Johns. Cas. 238, Justice Thompson states (p. 239) "The equitable extension of this kind of action (money had and received), has of late been so liberal that it will lie to recover ~~receive~~ money obtained from anyone by extortion, imposition, oppression, or taking an undue advantage of his position. In the present case there was at least an undue advantage taken of the plaintiff's situation * * * The money being inequitably demanded of him, he must be presumed to have paid it, relying on his legal remedy to recover it back. In Buckley v. N. Y., 30 App. Div. 463, 465; 52 N. Y. Supp. 452-454, Justice Barrett, states: "There is no ironclad rule which confines an involuntary payment to cases of duress of person or restraint of goods. Money compulsorily paid to prevent an injury to one's property rights comes within the same principle. Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287." This case was affirmed without opinion in 159 N. Y. 558, 54 N. E. 1089. Also refers to Adams v. Irving Nat. Bank, 116 N. Y. 606, 6 L. R. A. 491, 15 Am. St.

447, 23 N. E. 7 which says that money paid under practical compulsion could be recovered.

Kilpatrick vs. Germania Life Ins. Co., *supra.*

In Ford v. Holden, 9 N. H. 143, the defendant, a selectman declined to put defendant's name on the check list unless he paid his taxes for the year preceding that in which he sought the right to vote, which tax had been abated. The suit was brought for the recovery of the tax. The court said, "He did not part with his money voluntarily. It was not, indeed, extorted from him literally by duress of person or property, but it was by withholding from him his right. It would be strange indeed, if the party from whom the money was thus extorted could have no remedy at law to have it back."

In E. D. Clough Co. v. Boston & Maine R. R. *supra,* it was said: "and it has long been held that in an action for money had and received, a recovery may be had for coercion which would not amount to duress necessary to the avoidance of a contract."

POINT 4.

The money paid was not due to the defendant.

"The amount due on a mortgage given to secure future advances is the amount actually advanced by the mortgagee."

First Italian B. & L. Ass'n. v. Di Niscia,
79 N. J. Eq. 46, Aff. 78 N. J. E. 299.

"But on the assumption that Mrs. DiNiscia is right in asserting that the company (B. & L. Ass'n.) violated the agreement to lend her the the money, she does not show she has a defense to the foreclosure. The contract as expressed in the minutes of April, 1907 was to pay gradually as the work progressed. It does not follow that because of a default by the Association in making partial payments, the defendants can rescind *in toto* and refuse to pay anything. The defendant might indeed recover damages for the breach of a contract to lend money, but the recovery would be on the normal principle of compensation, and the association would still be entitled to have the money actually lent repaid to it, in accordance with the terms and conditions of its bond and mortgage."

In this case the B. & L. Ass'n., had granted a construction loan of $6,000. to be paid out as the building progressed. It paid about $4900. It refused to pay out any more money.

"Where a mortgage is given to secure future advances by the mortgagee, and he stipulates that he will advance to a certain amount, and he makes advances, but not to the stipulated amount, he may enforce his claim for repayment by foreclosure for any amount he may have advanced."

Baldwin v. Flagg, 36 N. J. Eq. 48, at page 59; reversed on other ground (gaming contract), 38 N. J. E. 219.

That was a case where a mortgage was given to secure the amount due on a stockbroker's account with defendant, of about $7,000. in which the complainant agreed to advance $4,000. to secure future trading which he did not do. The mortgage was for $11,000. One of the defenses was that the suit was prematurely brought because the complainant refused to make advances to the amount stated. This contention was disposed of by the court contrary to the defendant's claim under the above quotation.

Whatever may be the debt or consideration recited in the mortgage when it is given to secure future advances, the mortgagee can recover the amount he has actually advanced under it, but no more. 41 C. J. 465, sec. 366.

It is, of course, obvious that on the enforcement of a mortgage given to secure advances the amount for which judgment should be rendered is the amount of the advances made, with interest from the day of payment, and not the amount stated in the mortgage, and parol evidence is admissible to show the amount actually advanced. 19 R. C. L. 394, sec. 168.

If the mortgagee advances only part of the sum contemplated in the mortgage, it is a valid security for so much as he does advance, and for so much only.

If the mortgagee fails or refuses to make any advances according to his agreement, and retains possession of the land under an absolute deed intended as a mortgage, the mortgagor cannot recover the amount of the promised advances. He can recover such special damages as have resulted

from the mortgagee's refusal to make the advances, but in case no special damages are shown, the mortgagor can recover only nominal damages.

Jones on Mortgages (6th Ed.) p. 319-320, Sec. 378.

POINT 5.

Plaintiff did not take title subject to a mortgage of $16,000.

The defendant claims the plaintiff did not suffer any damages because it says that in the mesne conveyance the premises were made subject to the full amount of the defendant's mortgage, in the sum of $16,000.

To this proposition there are several answers. In the first place, it is not borne out by the facts. In the deed from Raimondi to Columbia Realty Co., (Exhibit P. G. 1) it is made subject to defendant's mortgage "in the original sum of $16,000."; in the deed from Columbia Realty Co. to Luigi Bruno (Exhibit P. G. 2), and in the mortgage from Luigi Bruno to the Columbia Realty Co., (Exhibit P. G. 3) the instruments are made subject to defendant's mortgage "in the nominal sum of $16,000." This is the ordinary way in which recitals are made in conveyances subject to Building & Loan mortgages, the amount due on which is constantly varying because of payments being made on account of the principal thereof. The assignment of mortgage from the Columbia Realty Co., to plaintiff (Exhibit P. G. 5), and the Sheriff's Deed to them on the foreclosure of said mortgage (Exhibit P. G. 6), of course, contain no recital whatever as to plaintiff's mortgage.

Furthermore, the plaintiff did not get title by deed from owner of the property. It purchased at a foreclosure sale by the Sheriff and took subject only to the amount actually due on the prior encumbrances.

Even if the contention of the defendant were sound, that would be a matter between the various grantors and grantees, and not between plaintiff and defendant. See Freedman v. Zuckerman. 104 N.J.E. 322.

This claim is not made in the pleadings.

We respectfully submit that for the reasons and on the authorities herein advanced and cited the judgment below should be affirmed.

HUGO WOERNER,
Attorney of Plaintiff-Appellee.

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