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Petition of Appeal.

New Jersey Court of Errors and Appeals

MATTIA CAPONE and ANTONIO SPINELLO, executors under the last will and testament of Antonio Pessolano,
Complainants-Appellees,

v.

ANGELINA DiBENEDETTO, *et als.*,
Defendants-Appellants.

On Appeal from
the Court of
Chancery.

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*To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:*

The petition of Angelina DiBenedetto, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing dated April 2, 1929, in a certain cause in said Court of Chancery wherein the said Mattia Capone and Antonio Spinello, executors under the last will and testament of Antonio Pessolano, were complainants and the said Angelina DiBenedetto, *et als.* were defendants, in this respect, to wit, that the said decree adjudges that there is due to the complainant Mattia Capone as sole surviving executor under the last will

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Petition of Appeal.

10 and testament of Antonio Pessolano, the deceased mortgagee, the sum of \$12,000.00 as and for principal upon the mortgage mentioned in the bill of complaint and made, executed and delivered by the defendant Angelina DiBenedetto to Antonio Pessolano on August 7, 1922, together with interest thereon at the rate of four and one-fourth per cent. per annum from August 7, 1925, in the sum of \$1,841.66, making a total of \$13,841.66 due to the said complainant for principal and interest upon the said mortgage, and that the counterclaim filed by the defendant Angelina DiBenedetto be dismissed.

20 And petitioner appeals from the said decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that:

1. The Chancellor should have decreed that the said Angelina DiBenedetto, the appellant, was not indebted to the complainant under said mortgage.

2. The Chancellor should have decreed that the said mortgage was void because it was given by said Angelina DiBenedetto and taken by said complainant's testator to compound a felony against the State of New Jersey.

30 3. The Chancellor should have decreed that said mortgage was made and executed by said Angelina DiBenedetto to complainant's testator under duress by complainant's testator of said Angelina DiBenedetto and was therefore void.

40 4. The Chancellor should have decreed that said mortgage was void because of the agreement made by complainant's testator that said defendant Angelina DiBenedetto would never have to pay said mortgage.

Answer to Petition of Appeal.

5. The Chancellor should have decreed that the bill of complaint be dismissed upon the evidence adduced at the hearing and the counterclaim of said Angelina DiBenedetto sustained.

Petitioner therefore prays that the said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper. 10

ARTHUR B. SEYMOUR,
Solicitor for and of Counsel with Appellant.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS. 20

MATTIA CAPONE and ANTONIO SPINELLO, executors under the last will and testament of ANTONIO PESSOLANO,

Complainant-Appellees,

v.

ANGELINA DiBENEDETTO, *et als.*,
Defendants-Appellants.

On Appeal from
the Court of
Chancery.

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By way of answer to the petition of appeal filed by the defendant-appellant, Angelina DiBenedetto, the complainant-appellee says:

The applee not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto nevertheless admits that a final decree was made and entered in the Court of Chancery of New Jersey in the above entitled 40

Bill of Complaint.

cause on April 2, 1929, for the purposes in the said
petition mentioned and as therein set forth but as
to the substance and form of the said decree this
appellee begs leave to refer thereto when the same
shall be produced. Appellee is advised and be-
10 lieves that the said final decree is agreeable to
equity; and the appellee prays that the said final
decree may be affirmed with costs to be taxed in
favor of appellee.

SAMUEL O. OFFEN,
Solicitor for Appellee.

S. H. NELSON,
Of Counsel with Appellee.

"Copy"

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Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

To The Honorable Edwin Robert Walker, Chan-
cellor of the State of New Jersey:

The complainants, Mattio Capone and Antonio
Spinello, executors under the last will and testa-
ment of Antonio Pessolano, respectfully show that:

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1. On August 7, 1922, Angelina DiBenedetto,
widow, being indebted to the complainants' testa-
tor in the sum of \$12,000 executed to him a bond
of that date to secure that sum, payable on August
7, 1923, with interest at the rate of four and one-
quarter per centum payable one-half yearly from
the date of the bond.

40

2. To secure the payment of the bond, said An-
gelina DiBenedetto executed to complainants' tes-
tator a mortgage of even date with the bond; and
thereby conveyed to him in fee, the land herein-

Bill of Complaint.

after described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County in Book C-46 of Mortgages, on pages 556-557. 10

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, County of Essex and State of New Jersey. 20

Beginning at the Southeasterly corner of Essex Avenue and Hurlbut Street; thence Easterly along said Hurlbut Street one hundred and fifty-three feet and eighty-three hundredths of a foot to the land of Dato; thence Southerly along his land thirty feet; thence westerly one hundred and fifty-three feet and sixty hundredths of a foot to a point in the east side of Essex Avenue distant thirty feet southerly from the Beginning; and thence northerly along Essex Avenue thirty feet to the Beginning. 30

4. Both bond and mortgage contain an agreement that if there is any default in the payment of any installment of interest after the same should fall due, then the whole principal sum, with all unpaid interest, should at the option of the mortgagee, his representatives or assigns, become immediately due. 40

Bill of Complaint.

10 5. The mortgage also contains an agreement that the mortgagor, his heirs and assigns, would keep the buildings on the mortgaged premises insured against loss or damage by fire in a sum not less than the principal of the mortgage debt, and would assign the policy of insurance to the mortgagee, his representatives or assigns; and in default of so doing that the mortgagee, his representatives or assigns, should be entitled to effect such insurance, and the premiums paid for the same by the mortgagee, or his assigns, with interest at six per centum, per annum, should be a lien on said land added to the amount of the mortgaged debt and secured by the mortgage.

20 6. On May 24, 1926, said Antonio Pessolano died, leaving a will, wherein he appointed Mattio Capone and Antonio Spinello executors thereof. The will, on June 26, 1926, was admitted to probate by the surrogate of Bristol, Rhode Island and letters testamentary thereon were issued by him to said Mattio Capone and Antonio Spinello.

30 7. On February 25, 1925, Angelo Monica obtained a judgment in the sum of \$2158.68 against the said Angelina Di Benedetto in the Essex County Circuit Court.

Any interest which said Angelo Monica has in said land is subject to the lien of complainants' mortgage.

8. On December 8, 1925, Nicholas A. Norelli obtained a judgment in the sum of \$91.28 against the said Angelina Di Benedetto in the Essex County Circuit Court.

40 Any interest which said Nicholas A. Norelli has in said land is subject to the lien of complainants' mortgage.

Bill of Complaint.

9. On February 7, 1926, one-half year's interest fell due on complainants' bond and mortgage and remained unpaid and still remains unpaid and no part thereof has yet been paid; on August 7, another one-half year's interest fell due which still remains unpaid. Complainant has elected that the whole principal sum with all unpaid interest shall now be due. 10

10. Said Angelina Di Benedetto has always been in possession of the mortgaged premises.

11. The whole amount of principal with interest thereon from August 7, 1925, is due upon complainants' bond and mortgage.

Complainants are without adequate remedy in the courts of law, and therefore pray— 20

1. That Angelina Di Benedetto and the said Angelo Monica and Nicholas A. Norelli who are the defendants to this suit may answer this bill of complaint without oath and each statement therein made;

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

3. That the defendants, or one of them, may be decreed to pay complainants the amount so found due, with interest and costs, by a short day, to be appointed by this court; and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or 30

4. That a decree may be made for the sale of the mortgaged premises to raise, and pay to complainants the amount so found due on his mortgage, with interest and costs; 40

Answer and Counterclaim.

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

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SAMUEL O. OFFEN,
Sol'r with Complainant.

S. H. NELSON,
Of Counsel.

Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

20

Between

MATTIO CAPONE and ANTONIO
SPINELLO,

Complainants,

and

ANGELINA DI BENEDETTO, *et als.*,
Defendants.

} On Bill, &c.

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The defendant, Angelina Di Benedetto, answering says:

1. Defendant denies that on August 7, 1922, she was indebted to complainants' testator as alleged in paragraph 1 of the bill of complaint but admits the execution of the bond referred to in said paragraph.

2. She admits the allegations of paragraph 2 of said bill.

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3. She admits the allegations of paragraph 3 of said bill.

Answer and Counterclaim.

4. She admits the allegations of paragraphs 4 and 5 of said bill.

5. She admits the allegations of paragraph 6 of said bill but denies that the alleged will is the lawful will of said Antonio Pessolano and says that an appeal has been taken by her from the order admitting to probate the said will and said appeal is pending and undetermined in the proper courts of Rhode Island and that the taking of said appeal automatically suspends and stays the said order of the Surrogate of Bristol, Rhode Island, and that while said appeal is pending said complainants have no power to do any act as executors under said letters testamentary and that they have no power to proceed with this suit.

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6. As to the allegations of paragraphs 7 and 8 of said bill, defendant says nothing.

7. Defendant denies the allegations of paragraphs 9 and 11 of said bill but admits paragraph 10.

ANSWER IN LIEU OF PLEA.

By way of answer in lieu of plea defendant says she was induced to execute the said bond and mortgage by the duress of complainants' testator, Antonio Pessolano, and of the complainant (Capone) a nephew by marriage and the agent of complainants' testator, Antonio Pessolano, and that by reason of said duress the said mortgage is void and of no effect.

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Particulars of the duress are as follows:

1. For two years and upwards prior to the execution of the said bond and mortgage complain-

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Answer and Counterclaim.

ants' testator, Antonio Pessolano, a brother of defendant, made his home with defendant at her home in Orange, N. J.; while living with defendant complainants' testator rented a safe deposit box in Orange National Bank safe deposit vaults at Orange, New Jersey, and by agreement between said Antonio Pessolano and the Orange National Bank, both Antonio Pessolano and defendant's son, John Di Benedetto, had joint and separate access to the box; a short time before the execution of said bond and mortgage said Antonio Pessolano wrongfully accused said John Di Benedetto, defendant's son, of stealing from the box \$12,000.00 in U. S. Liberty Bonds and though said John Di Benedetto denied the theft, said Antonio Pessolano persisted in his accusation and threatened that unless the defendant gave him, said Antonio Pessolano, a mortgage on the lands described in the bill of complaint, for the full amount of his alleged loss, \$12,000.00, he would cause the arrest of said John Di Benedetto for the taking of the bonds and would bring disgrace and infamy upon defendant and her family because of the loss of the said bonds; defendant at first refused to execute the said bond and mortgage but she is a widow of the age of seventy years, the mother of two sons and two daughters and has many grandchildren; she and her children and grandchildren have always enjoyed the reputation of being honorable and upright and have enjoyed the respect of their neighbors and the people in general of the community in which they live and under the continued threats of the said Antonio Pessolano and of the complainant Capone that her son John Di Benedetto would be arrested for the taking of the said bonds and defendant and her family disgraced, notwithstanding that said John Di Benedetto had

Answer and Counterclaim.

denied and continued to deny that he had taken the bonds, she was coerced and forced into executing the said bond and mortgage as the only way to save her son, herself and her family from the threatened and impending disgrace, infamy and disaster; said bond and mortgage were executed by defendant also upon the condition and agreement between said Antonio Pessolano and defendant and said complainant (Capone) as agent of said Antonio Pessolano, that if she executed said bond and mortgage that collection of it would never be enforced during the lifetime of said Antonio Pessolano, that they would be discharged and cancelled at the death of said Antonio Pessolano; that said Antonio Pessolano had only defendant and another sister as his nearest of kin; that he had made a will in which he named the defendant and said other sister as the only residuary legatees and defendant's son, Joseph Di Benedetto, executor of an estate of approximately \$100,000.00, that said will would stand unchanged at his death and that one-half of his residuary estate would be devised to defendant at his death and that defendant would be given the said bond and mortgage in that way.

2. The said Antonio Pessolano, notwithstanding said agreement, died May 24, 1926, a resident of Bristol, Rhode Island, leaving a paper writing purporting to be his last will and testament in which he devised to defendant the sum of \$12.00; defendant has appealed from the probate of said will and her said appeal is pending and undetermined in the proper courts of Rhode Island.

3. Defendant says that the said paper writing purporting to be the last will and testament of said Antonio Pessolano is void and of no effect; that

Answer and Counterclaim.

at the time of making and executing it he was mentally incompetent to make a will; that the said paper writing was not made and executed according to the laws of the State of Rhode Island; and that it was made and executed, if at all, by said Antonio Pessolano through the fraud and improper and undue and unlawful influence of the said Mattio Capone over and upon the said Antonio Pessolano.

4. Defendant further says that if there is no other will of said Antonio Pessolano in existence than this, defendant is entitled to one-half of the personal estate of said Antonio Pessolano as a deceased intestate, and is entitled to the administration of the said estate.

Defendant therefore prays that she be hence dismissed with her proper costs.

COUNTERCLAIM.

By way of counterclaim against complainants, defendant here repeats all of the allegations of her answer in lieu of plea and makes said allegations a part of this counterclaim.

Defendant is without adequate remedy at law in the premises and prays:

1. That said complainants may answer this counterclaim.

2. That said bond and mortgage be declared void and of no effect.

3. That said complainants be decreed to give up and surrender to defendant the said bond and mortgage for cancellation and that a decree be made cancelling said bond and mortgage.

ARTHUR B. SEYMOUR,
Sol'r and of counsel with defendant.

Replication and Answer to Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between MATTIO CAPONE and ANTONIO SPINELLO, <i>Complainants,</i> and ANGELINA DI BENEDETTO, <i>et als.,</i> <i>Defendants.</i>	}	On Bill, &c.	10
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The complainants, Mattio Capone and Antonia Spinello, by way of replication to defendants' answer, say:

1. The complainants deny paragraph five as set forth in the defendants' answer and join issue thereon. 20

REPLICATION TO ANSWER IN LIEU OF PLEA

1. The complainants deny the allegations as set forth in the un-numbered paragraph in defendants' answer in lieu of plea and also deny paragraphs one, two, three and four and join issue thereon.

ANSWER TO COUNTERCLAIM. 30

As to the counterclaim contained in the said answer complainants say:

1. They repeat the allegations in the replication to the answer in lieu of plea and make them a part hereof.

SAMUEL O. OFFEN,
Solicitor of Complainants.

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Final Decree.

IN CHANCERY OF NEW JERSEY.

Between

10 MATTIA CAPONE and ANTONIO SPINELLO, executors under the last will and testament of Antonio Pessolano,

Complainants,

and

ANGELINA DiBENEDETTO, ANGELO MONICA and NICHOLAS A. NOR-ELLI,

Defendants.

} On Bill, &c.

20

This matter coming on for final hearing on bill, answer, counterclaim and replication, in the presence of Samuel O. Offen, solicitor for complainants (Samuel H. Nelson of Counsel with complainants), and Arthur B. Seymour, solicitor for and of counsel with the defendant, Angelini Di Benedetto, on issue joined between the said parties and the Court having examined the pleadings and having heard the oral testimony of the parties in open Court and

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having heard and considered the arguments presented by counsel for the said parties; and it appearing to the Court that the complainant, Mattia Capone, sole surviving executor under the last will and testament of Antonio Pessolano (the mortgagee), is entitled to the relief prayed for in the bill of complaint and that the defendant, Angelina DiBenedetto, is not entitled to the relief prayed for in her counterclaim; and it further appearing to the Court that the defendant, Angelo Monica, has

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failed to file an answer or notice in lieu of an

Final Decree.

answer or any other pleadings in this cause; and it further appearing that the defendant, Nicholas A. Norelli, has filed a notice in lieu of an answer wherein he alleges that he does not dispute the priority of the complainant's mortgage, but desires to have his judgment encumbrance reported upon; and it further appearing that the sum of \$91.28 is due and owing to the defendant, Nicholas A. Norelli, upon his judgment encumbrance, which is a lien second in priority to the lien of the complainant's mortgage upon the lands and premises mentioned in the bill of complaint, together with lawful interest thereon from December 8, 1925, in the sum of \$19.50, making a total of \$110.78, which amount and priority of lien the solicitor for the defendant, Angelina DiBenedetto, has admitted; it is thereupon on this second day of April, 1929,

ORDERED, ADJUDGED AND DECREED that there is due to the complainant, Mattia Capone, as sole surviving executor under the last will and testament of Antonio Pessolano, the deceased mortgagee, the sum of \$12,000 as and for principal upon the mortgage mentioned in the bill of complaint and made, executed and delivered to the defendant, Angelina Di Benedetto, to Antonio Pessolano, on August 7, 1922, together with interest thereon at the rate of four and one-fourth per cent. per annum from August 7, 1925, in the sum of \$1,841.66, making a total of \$13,841.66 due to the said complainant for principal and interest upon the said mortgage, which is a first lien upon the lands and premises described in the bill of complaint, and it is further

ORDERED, ADJUDGED AND DECREED that the counter-

Final Decree.

claim filed by the defendant, Angelina DiBenedetto, be and the same is hereby dismissed, and it is further

10 ORDERED, ADJUDGED AND DECREED that the complainant's bill of complaint be and the same is hereby taken as confessed against the defendants, Nicholas A. Norelli and Angelo Monica, and it is further

20 ORDERED, ADJUDGED AND DECREED that there is due to the defendant, Nicholas A. Norelli, upon his judgment encumbrance, the sum of \$91.28, together with lawful interest thereon from December 8, 1925, in the sum of \$19.50, making a total of \$110.78, which is a second lien upon the lands and premises described in the bill of complaint, and it is further

30 ORDERED, ADJUDGED and DECREED that the lands and premises described in the bill of complaint be sold to raise and satisfy the moneys due to the complainant and to the said defendant, Nicholas A. Norelli, respectively, that is to say, to pay and satisfy unto the complainant in the first place the sum of \$13,841.66 on the mortgage mentioned in the bill of complaint, together with interest thereon at the rate of four and one-fourth per cent. per annum, to be computed from the 18th day of March, 1929, with taxed costs, including a counsel fee of \$300.00 which is hereby allowed to the complainant, and to pay and satisfy unto the defendant, Nicholas A. Norelli, in the second place, the sum of \$110.78, together with lawful interest thereon to be computed from the 18th day of March, 1929, and taxed costs; and that a writ of *feri facias*
40 issue for that purpose out of this Court directed to the Sheriff of Essex County, commanding him

Final Decree.

to make sale according to law of the lands and premises described in the bill of complaint and that out of the money arising from the said sale to pay to complainant, or his solicitor, his said debt, interest, counsel fee and costs, and to the defendant, Nicholas A. Norelli, or his solicitor, his said debt, interest and costs; and that in case more money shall be raised from said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court to abide the further order of this Court, unless otherwise previously disposed of by this Court, and that the Sheriff make return without delay of this proceeding by virtue of the said writ, and it is further

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

E. R. WALKER,
C.

Respectfully Advised:

MAJA LEON BERRY,
V.-C. 30

I consent to the entry of the above decree.

JEROME ALPER,
Solicitor for and of Counsel with
defendant, Nicholas A. Norelli.

Transcript of Testimony.

IN CHANCERY OF NEW JERSEY.

10
 Between
 MATTIO CAPONE and ANTONIO
 SPINELLO,
Complainants,
 and
 ANGELINA DI BENEDETTO, *et als.,*
Defendants.

20
 Transcript of testimony taken before Hon. Maja
 Leon Berry, Vice-Chancellor of the State of New
 Jersey, at his chambers in the Industrial Building,
 Newark, New Jersey, on Monday, March 18th, 1929,
 at 10 A. M.

APPEARANCES:

ARTHUR B. SEYMOUR, Esq., representing
 the Complainant.

SAMUEL H. NELSON, Esq., and SAMUEL O.
 OFFEN, representing the Defendant.

30
 Mr. Nelson: In view of the fact that the answer
 admits the bond and mortgage, I now offer the
 bond and mortgage on behalf of the complainant,
 the bond being dated August 7th, 1922, made by
 Angelina DiBenedetto, widow, the defendant in
 this cause, to Antonio Pesselano, the amount being
 \$12,000, and a mortgage of even date made by the
 same Angelina DiBenedetto and the same Antonio
 Pesselano to secure the amount due on the bond
 as therein set forth.

(Marked Exhibit C-1 and Exhibit C-2.)

40
 I also offer the letters testamentary showing that
 this complainant is also asked to institute this
 suit.

(Marked Exhibit C-3.)

J. Fred Berstecher, direct.

As to the letters testamentary, one other defense is set up, an appeal has been taken. This man died a resident of Rhode Island and that decree sustains the decree admitting the will to probate. I am not prepared to substantiate that as a matter of law, but Mr. Kenauer who represents the Estate is here in court. I would like to produce Mr. Kenauer. Mr. Kenauer, is that the state of the law in your state? 10

Mr. Kenauer: No, the appeal does not sustain the right to collect assets. It sustains the other rights but not the right to collect assets.

The Court: It has powers of administration so far as the collection of assets are concerned?

Mr. Kenauer: Yes, that is unlimited, its duty to collect them rather than their right being suspended. 20

Mr. Nelson: I offer in evidence, exemplified copies of letters testamentary, indicating that Mattio Capone, one of the complainants in this cause is an executor properly qualified.

The Court: Do I understand the amount claimed in the bill is the correct one, if anything is due?

Mr. Seymour: Yes.

Mr. Nelson: We rest. 30

The Court: You may proceed with the defense.

J. FRED BERSTECHEER, a witness for defendant, being duly sworn, according to law, on his oath deposes and says:

Direct examination by Mr. Seymour:

Q. What is your full name? A. J. Fred. Berstecher.

Q. Are you a member of the Bar of this State? 40

A. I am.

J. Fred Berstecher, direct.

Q. Are you a member of the firm of Howe & Davis? A. I am.

Q. Were you a member of the firm on August 7, 1922? A. I was connected with the firm. I don't know whether I was a member at that time or not.

10 Q. What part of the business or practice of Howe & Davis—who are counsellors at law, I understand? A. Yes.

Q. What part of their business did you have charge of? A. The title work.

Q. Did you do all of the title work that went through their office? A. Practically all of it.

Q. You took the acknowledgment to the mortgage in question in this case, did you? A. I did.

20 Q. Do you recall anything about that, Mr. Berstecher? A. I recall that I was not familiar with the circumstances involving the mortgage. Judge Davis, my recollection is, brought Mrs. Di Benedetto into my office and asked me to have this mortgage signed and I undertook to explain it to Mrs. Di Benedetto but apparently she couldn't understand me, so I called Mr. Giordano, whose office was just across the way and he came in and interpreted the mortgage and I notice he signed as a subscribing witness to it.

30 Q. Then did you take her signature—witness her signature and take her acknowledgment? A. I did.

Q. Did any money pass through your hands in this transaction? A. No, it did not.

Q. Have you examined the records and files in the office, including all of the records and files in your office to ascertain— A. Our examination included our ledger where any money that went through, would have been noted.

40 Q. Can you find any entry of any money passing

J. Fred Berstecher, cross.

in this transaction? A. I find no entry of any money having passed through.

Q. Have you also examined your books to ascertain whether or not the services of Howe and Davis were charged to Mrs. Di Benedetto in this transaction? A. I have.

10

Q. Was there any such charge? A. I can find none.

Cross examination by Mr. Nelson:

Q. When did Judge Davis die? A. On December 31, 1926.

Q. Prior to the time that you actually became interested in the details of this transaction, with whom in your office did the mortgagor have any dealings concerning this matter? A. Judge Davis.

20

Q. You don't know the conversations that took place between Judge Davis and this mortgagor? A. No.

Q. Nothing happened in your presence to indicate that this mortgage was being given under duress? A. Nothing.

Q. Did the mortgagor tell you anything about the transaction involving this mortgage? A. The mortgagor, as I recall, couldn't speak English at all.

30

Q. Before you took the acknowledgment did you explain the contents of this mortgage to the mortgagor? A. I attempted to and found that I wasn't very successful, so Mr. Giordano did.

Q. You called Mr. Giordano in? A. Yes.

Q. What language did Mr. Giordano speak to her, do you know? A. Italian.

Q. What happened between Giordano and the mortgagor prior to the time that you took the acknowledgment? A. They conversed back and

40

J. Fred Berstecher, cross.

forth in Italian. I didn't know what they were talking about.

10 Q. How much time was consumed during this conversation between Mr. Giordano and the mortgagor? A. I don't recall. There was nothing unusual about it.

Q. And in the presence of the mortgagor what, if anything, did Mr. Giordano tell you, prior to the time that you certified to the acknowledgment? A. I don't recall that.

Q. Did he tell you that she was satisfied to sign the mortgage? A. No.

Q. Did he tell you that she was not satisfied to sign the mortgage? A. No.

20 Q. Isn't it a fact that he told you that she was satisfied to execute that mortgage, and on the strength of that representation you took her acknowledgment? A. I don't recall.

30 Mr. Seymour: I object. It appears that the defendant Angelina Di Benedetto cannot speak English, and Giordano's conversation with this witness must have been in English, and anything that he did say in English wouldn't bind Mrs. Di Benedetto. He wasn't her attorney.

40 The Court: He was called in to interview her and asked to explain the nature of the transaction to her, and what he told to this man who took the acknowledgment would certainly have some bearing. I will receive it, because it certainly does not appear to me that Giordano would have told the officer who was taking the acknowledgment that the mortgagor was satisfied unless she was.

J. Fred Berstecher, cross.

Q. (Last question repeated.) A. Yes, I wouldn't have done it otherwise.

Q. You were not at all suspicious of the fact that she was not making this mortgage of her own free will, were you? A. No.

Q. As a matter of fact wasn't your office prepared to pay this mortgage off in November, 1926? A. No, we were not. We thought we were.

10

Q. I show you a letter purporting to have been signed by Howe and Davis to Samuel O. Offen, the solicitor for the complainant in this case, and ask you if you know whether that letter was, in fact, sent by your office? A. Yes, it is signed by Edward L. Davis.

Q. That is his hand-writing and he was at that time a member of your firm. A. Yes.

20

Mr. Nelson: I offer this letter in evidence, for identification.

(Marked Exhibit C-5 for identification.)

Q. What have you to say with reference to your office paying this mortgage off? A. In November, 1926, Mr. Joe Di Benedetto had made an application on behalf of his mother to the Orange Natl. Bank for a \$16,000 loan. The application was granted and the papers were turned over to me, and I took my search, ran it down, and found a mortgage of \$10,000.—mortgage of \$12,000., and at the time I assumed that the \$12,000. was a renewal of the \$10,000. mortgage. That was the impression I got because I didn't think that they would apply for a \$16,000. loan when there was a \$12,000. mortgage against the property, and it was then, I think, that there was some talk with Mr. Offen about it, and I remember going down to the Cashier or Vice President of the Orange National Bank with Mr.

30

40

J. Fred Berstecher, direct.

Di Benedetto, and Mr. Di Benedetto said that this \$12,000. mortgage could be taken care of, but the loan never went through.

Q. Who did your office represent in that transaction? A. We represented Mrs. Di Benedetto.

10 Q. And do you remember this letter being sent by your office to Mr. Offen in connection with this matter? A. No. That is, from our office. It was signed by Edward L. Davis.

Q. You recognize Mr. Davis' signature? A. I do.

Mr. Nelson: I offer this for identification.
(Marked Exhibit C-6 for identification.)

Q. Why wasn't this mortgage paid off, the mortgage of \$12,000. which is a separate matter of this
20 suit? A. There wasn't enough money to pay it.

Further direct examination by Mr. Seymour:

Q. You say you made a search to ascertain what mortgages were against this property? A. Yes.

Q. And found a \$10,000. mortgage? A. Yes.

Q. Who held that?

30 Mr. Seymour: It is admitted by both sides that complainant's testator also holds a first mortgage of \$10,000. on this property which existed at the time the \$12,000. mortgage was given, the mortgage in question, and which is still open of record and unpaid.

Mr. Nelson: Yes.

The Court: It has no relation to this one.

Mr. Nelson: No relation.

Q. That is the reason you assumed that the \$12,-
000. was a renewal— A. Renewal of the \$10,000.

40 Q. Because it was the same name? A. Yes.

Angelina Di Benedetto, direct.

MRS. ANGELINA DI BENEDETTO, a witness sworn for defendant and examined through interpreter. (Ralph Giordano, sworn as interpreter).

Direct examination by Mr. Seymour:

Q. Where do you live? A. Essex Avenue, Orange, New Jersey. 10

Q. How long have you lived there? A. Many years, about 30 years.

Q. Are you a sister of Antonio Pesselano? A. Yes, he is my brother.

Q. Did he, at one time, live with you? A. He lived with me two years, more than two years, then he came back for five or six months, and then he went back to his nephew.

Q. What two years was it that he lived with you? A. I don't remember. 20

Q. Where did he live before he lived with you? A. In Brooklyn.

Q. And it was after his brother in Brooklyn died that he came to live with you? A. After his brother died he came to me.

Q. When did the brother die? A. Who remembers that, I don't remember anything.

Q. Do you remember signing this bond and mortgage of \$12,000, for your brother? A. I remember I found myself balled up and I signed something. 30

Q. Did you sign a mortgage for \$12,000 for your brother? A. I signed, but I didn't know what it was. They came to my house, and convinced me.

Mr. Nelson: I object to any transaction or conversation with the testator under Section No. 4 of the Evidence Act. I don't want to prevent this witness from testifying to 40

Angelina Di Benedetto, direct.

10 anything that is competent, but I am afraid that some of the answers that she may give to the last question may relate to transactions and conversations with the testator, and I would like to have the interpreter here to answer the question. I understand the question can be answered "yes" or "no."

The Court: Read the question.

Q. Did you sign a mortgage for \$12,000 for your brother?

The Court: This question can be answered "yes" or "no."

A. Yes.

20 Q. Do you know Mattio Capone? A. Yes, he married my niece.

Q. And before you signed this mortgage for \$12,000, did Mattio Capone come to your house about it? A. Yes, they both came to my house and convinced me, they said that the numbers of the bonds—(interrupted).

Mr. Nelson: I object to that.

The Court: Objection sustained.

30 Q. Who was with Mattio Capone? A. My brother.

Q. What did Mattio Capone say to you in the presence of your brother?

40 Mr. Nelson: I object to that. The Act provides that any transactions or conversations had with the deceased—Mr. Capone is the complainant in this suit as an executor. He is not being sued and he personally isn't suing, and if any conversation was had with Capone in the presence of the testator, the

Angelina Di Benedetto, direct.

testator is bound only because Capone is joined, but the transaction is nevertheless with the testator.

The Court: The objection is overruled. The purpose of the Act is to prevent the testimony by one party to the transaction which cannot be denied by the other party who is now deceased. This testimony calls for a recital of a conversation of a party who is still living and I assume is here. 10

Mr. Nelson: Yes.

The Court: I will permit the question.

A. He didn't tell me anything. They did it themselves. They mixed things up.

Q. Tell us what Mattio Capone had to do with the making of this mortgage. 20

Mr. Nelson: I object to that unless the testator was present.

The Court: I think it will be assumed that is what Mr. Seymour means, at that time.

Mr. Seymour: Yes.

The Court: If you confine your question to that time, that is all right. 30

Q. Mrs. DiBenedetto do you remember a trip your brother took to Italy? A. Yes.

Q. After he came back from Italy did he say anything to you about bonds?

Mr. Nelson: I object to that.

The Court: It appears from your own statement that your defense is that it was a result of a charge of theft of these bonds I presume that you refer to, that this mortgage was executed. 40

Angelina Di Benedetto, direct.

Mr. Seymour: Yes.

The Court: That is a conversation which is pertinent to this transaction, and which under Section 4 of the Evidence Act ought to be excluded.

10 Q. After your brother came back from Italy where did he go to live? A. He was at my house for a while, then he went to Mattio Capone.

Q. Where was that? A. I don't know. You have to ask him. I don't know where he lives.

Q. After he went to Mattio Capone did he come down to see you with Mattio Capone? A. Yes.

Q. Did Mattio Capone talk with you in the presence of your brother about any stolen bonds? A. He said it mostly, Capone.

20

The Court: The answer is "yes."

Q. What did Capone say in the presence of your brother about these stolen bonds? A. "You come and sign the mortgage because the money is always yours, you will never lose your home, the money is always yours. Then I see you (meaning me), and that is how I signed the mortgage. Otherwise I would never have signed it.

30

Q. Did Mattio Capone say anything to you in the presence of your brother about any stolen Liberty Bonds? A. He said that the bonds were stolen. I don't know. I don't know what they were talking about.

Q. Did he say who stole the bonds? A. No, he said, "sign the mortgage."

Q. Tell us what else Mattio Capone said. A. He said "you sign the mortgage because you will never lose this money, it is always yours."

40

Q. Was there any accusation made by Capone,

Angelina Di Benedetto, cross—direct.

as to her son John stealing the bonds? A. I didn't hear very well and I didn't know just what they were saying. I am very deaf. They made me sign like a stupid.

Cross examination by Mr. Nelson:

Q. What money were you to get for making this mortgage? A. She don't understand. 10

The Court: She didn't say she was to get any money.

Mr. Seymour: May I ask another question.

Further direct examination by Mr. Seymour:

Q. Did you receive any money when you signed this mortgage? A. No, he gave me nothing. 20

Q. Why did you sign it? A. Well, I saw you (meaning me). I knew that you were a friend and I signed it. I thought it was alright.

Q. Why did you sign a mortgage for \$12,000 on your property if you were not to receive \$12,000. Why did you do it? A. They made me sign; what could I do. I am a poor old deaf woman. I don't know anything of these things.

Q. What do you mean by "they"? A. Mattio Capone; my brother. It was those two. 30

Q. Did Mattio Capone explain to you in the presence of your brother, why he wanted to give a \$12,000 mortgage on this property? A. About Liberty Bonds. I don't know anything about Liberty Bonds. It was because of Liberty Bonds.

Q. What did Mattio Capone say in the presence of your brother about Liberty Bonds? A. Well, it was about Liberty Bonds. They had the keys. I don't know even what they look like. I don't know anything about it. 40

Angelina Di Benedetto, cross.

Q. Who had the keys? A. My brother had one and John had the other. My brother had one and my son John had one. They were doing the opening of the box. I don't know if they both had the keys or who had them.

10 Q. What keys does she refer to? A. Keys. I don't know what keys they are. I only know the keys of my house.

Q. What did Capone say about keys and the box of Liberty Bonds, and your son John? A. I don't know. I didn't hear anything. I didn't even know what they were saying. I couldn't hear.

Further cross examination by Mr. Nelson:

20 Q. After Pesselano got this mortgage where did he live? A. He went away. He coaxed me and he left.

Q. Did he ever live with you after that, at your home? A. Oh, no, he didn't come any more. He never came any more.

Q. You were very friendly with him at the time this mortgage was made? A. Yes. I had two mortgages, one of \$10,000 on the house and then they made me sign the other one, after this \$12,000 mortgage was signed.

30 Q. Isn't it a fact that Mr. Pesselano went back to your house to have dinner there? A. No. We parted out on Main Street.

Q. Didn't you have dinner with Mr. Pesselano before the mortgage was signed? A. Yes.

Q. After this mortgage was signed did you ever see Mr. Pesselano personally? A. I never saw him again. It was always at his home.

40 Q. Did you pay interest on this mortgage for \$12,000 to Mr. Pesselano?

Angelina Di Benedetto, cross.

The Court: That is admitted isn't it.

Mr. Seymour: Yes.

Q. Did you send this letter to Mr. Pesselano after this mortgage was signed? A. I don't know, letters. I don't know how to read. What letter is this? 10

Q. Show her the signature on that? A. I signed by a cross. I don't know how to write.

Mr. Seymour: What is that in relation to?

The Witness: I don't know how to sign my name.

Q. Did you tell your daughter to write any letters to Mr. Pesselano about this mortgage, after it was made? A. I don't know. 20

Q. Have you a daughter by the name of Angelina? A. I have a granddaughter.

Q. Do you remember signing a petition in a court in Rhode Island concerning this matter? A. I don't know. I don't know anything.

Q. Don't you remember signing a petition before Martha Weber, a notary public? A. No, I didn't sign anything. I only have one case, that is about Mike Monoca.

Q. Didn't you contest the will of Pesselano in Rhode Island? A. They sent me a paper from there about 90 days after the will in Orange was made by Cosine. 30

Q. Do you remember signing a paper in a case in Rhode Island? A. I didn't sign in any place.

Q. Do you remember signing a paper like this in Mr. Seymour's office? A. Yes, in Orange, I did.

Q. Before you signed that paper was it read to you? A. I don't remember.

Q. Do you mean to say you signed a paper without having it read to you first. 40

Angelina Di Benedetto, cross.

Mr. Seymour: I admit she signed that paper. It is a petition of appeal in the will contest in Rhode Island.

10 Q. Do you remember saying in the paper, the following: "And on many occasions said Antonio Pesselano expressed his affection for your petitioner and assured her that in the event of his decease, ample provision would be made for her, and in his lifetime had loaned to your petitioner \$10,000 at 5% interest and \$12,000 at 4% interest." A. He assured me he would leave my share the same as he would leave to the other sister.

The Court: That isn't the question. The question is, "Did she make that statement?"

20 The Witness: That is the way they told me, that is the way I said it, but he assured me that that money would always be mine. I don't remember what I had for dinner last night.

Q. Isn't it a fact that you did get \$12,000 in Liberty Bonds for this mortgage from Pesselano, the mortgagee? A. Give me \$12,000 Liberty Bonds? Are you crazy? I don't know what Liberty Bonds are. I don't even know what ten dollar bills are.

30 Q. Why did you say in this petition that you got \$12,000 for this mortgage? A. I never said that, never. I never received anything.

Mr. Nelson: I offer this exemplified copy of the petition in that case for identification at this time.

(Marked Exhibit C-7 for Identification.)

40 Q. Have you a granddaughter by the name of Angelina, living with you? A. Yes. What do you want her for.

Angelina Di Benedetto, cross.

Q. Did you ever tell her to write any letters for you to Antonio Pesselano? A. Joe wrote when I received interest.

Q. Were these any of the letters that you told Angelina to send to Mr. Pesselano in this matter.

The Court: She didn't say she told the granddaughter. 10

Q. Were these any of the letters that you sent to Pesselano? A. I don't know who sent it. I don't know anything about letters. I don't know how to write.

Q. Were you on very friendly terms with Antonio Pesselano until he died? A. Yes, I went there when he died.

Q. You went to his funeral? A. I couldn't go to the funeral because my daughter had given birth and I asked them to let me know when the body would arrive in Brooklyn where he was buried, and they didn't do it and when I got there he had already been buried. 20

Q. At the time you made this mortgage you were expecting to receive money from Mr. Pesselano upon his death? A. Yes, I expected that I wouldn't lose my money, that I would get it when he died.

Q. What money would you get other than the mortgage? A. Whatever he would give me, I would say. 30

Q. You testified in the case in Rhode Island, involving the will of your deceased brother, did you not? A. Yes, I brought Mr. Cosine up too.

Q. Didn't you testify in that case in Rhode Island, that you authorized your granddaughter, Angelina, to send certain letters to Mr. Pesselano? A. No. I didn't bother.

Q. Do you remember being asked in that case 40

Mary Josephine Cooper, direct.

in Rhode Island, which involved the validity of your brother's will, the following question: "Did you have your daughter write letters for you"? A. I don't remember. I am deaf, and I don't remember.

10 Q. Don't you remember answering "Yes, sir, my daughter."

The Court: She has already said she doesn't remember. From the fact that this woman is so hard of hearing, and she is difficult to interpret, I don't think anything which she said there or here makes much difference.

20 MISS MARY JOSEPHINE COOPER, a witness called on behalf of the defendant, being duly sworn according to law on her oath says:

Direct examination by Mr. Seymour:

Q. Where do you reside, Miss Cooper? A. 426 Central Avenue, Orange.

Q. Where are you employed? A. Orange National Bank, Safe Deposit Department.

30 Q. How long have you been employed there? A. Eight years.

Q. Did you know Antonio Pesselano? A. Yes.

D. Did he have a safe deposit box in your bank? A. Yes.

Q. Have you the record card of it? A. Yes.

Q. Will you produce it? A. (Producing same.)

Q. You have another card there, have you? A. That is the deputy card, signed by John Di Benedetto.

40 Q. And still another? A. This is the record card, for sending out bills. That doesn't have any bearing on it.

Mary Josephine Cooper, direct.

Mr. Seymour: I offer this in evidence.

Mr. Nelson: No objection.

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

Q. Did you see Antonio Pesselano sign that? A. No, I didn't. I didn't rent Antonio Pesselano the box.

10

Mr. Seymour: Will you admit that that is Mr. Pesselano's signature?

Mr. Nelson: I don't know. If I knew it to be the fact I would admit it.

Mr. Seymour: Do you admit the signature?

Mr. Nelson: I won't admit the signature. I raise no objection to the admission of the card.

20

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

Q. Did you ever see Mr. Pesselano sign his name? A. Yes.

Q. Can you tell whether that is his signature? A. That is.

Q. That is Antonio Pesselano's signature on Exhibit D-1? A. Yes.

Q. Miss Cooper, do you recall whether or not John Di Benedetto ever went into the vault and opened the box in the absence of Mr. Pesselano? A. Yes, he did.

30

Q. Did you see him taking anything from the box? A. Yes, I did.

Q. What did you see him take from the box? A. A package of papers.

Q. Did you recognize what they were? A. They looked like bonds.

Q. What kind of bonds? A. I cannot say what kind of bonds but they looked like bonds.

40

Q. How many times did he come to the box with-

Mary Josephine Cooper, direct.

out Mr. Pesselano being there with him? A. Not more than 3 or 4 times.

10 Q. Do you recall, after you saw Mr. Di Benedetto take this package from the box, which you say looked like bonds, Mr. Pesselano going to the safe deposit vault for the purpose of going into this box? A. Yes, I waited on him.

Q. Tell us what happened?

Mr. Nelson: I object, conversation with the testator.

Mr. Seymour: That only covers testimony of parties to the action, not witnesses.

The Court: You are right.

20 Q. And when was it, Miss Cooper? A. It was some time—it was in the summer time.

Q. Of what year? A. That I cannot say. It was between the day that box was rented, and the time it was given up. The dates are recorded on these cards. The box was rented in 1921, was it not?

Q. Does that card show when it was given up? A. No, that one doesn't show, but the other one does.

30 Q. I show you Exhibit D-2. Does that show? A. It was given up by John Di Benedetto on July 9, 1923.

Q. Exhibit D-1 shows that? A. No, Exhibit D-1 shows that Antonio Pesselano appointed John Di Benedetto as his deputy on that date, 1921.

Q. And Exhibit D-2 shows when it was given up? A. Yes.

Q. Was the authority of Di Benedetto ever revoked by Pesselano? A. Not in writing. If he ever told anyone at the bank, I don't know about it.

40 The Court: You were asked about an

Mary Josephine Cooper, direct.

occurrence, when this gentleman came into the bank. You said you waited on him. When was that?

The Witness: I cannot recall the date. It was between the time the box was rented, and the time it was given up.

10

Q. How long before the box was given up? A. I cannot say.

Q. You say it was in the summer of that same year? A. Yes.

Q. It was in the summer that Mr. Pesselano came there? A. I cannot recall whether it was summer. I remember he didn't have an overcoat on.

Q. Mr. Pesselano? A. Yes.

Q. What happened? A. He came in and came out of the vault very much excited and said that his box was not in the condition that it should have been in, that there were some things missing. Of course he didn't make very much fuss about it, but you could see that he was quite excited.

20

Q. Did he say what was missing? A. Not to me.

Q. Nor describe them in any way? A. No, he didn't say very much about it.

Q. Where did he go then? A. He just went out of my department.

30

Q. Did you have any conversation with him after that as to the missing things? A. No, I never spoke to him again.

Q. Did John Di Benedetto have a key to that box? A. Yes.

Mr. Seymour: I would like to read the cards into the records.

The Court: There is not much question about the cards. The box was rented in 1921 and given up in 1923 by Mr. Di Benedetto.

40

Henry E. Healy, direct.

Mr. Nelson: No dispute about that and John Di Benedetto had access and had keys.

The Court: No dispute about that.

Cross examination by Mr. Nelson:

10 Q. You don't know the exact time when this package was taken out by Mr. Di Benedetto, do you? A. I cannot say the date.

Q. Do you know the year? A. No, I don't know the year.

Further direct examination by Mr. Seymour:

20 Q. You have looked for your "record of visitors" card or whatever you call it, to show who goes into the box? A. Yes, it is missing. We haven't been able to locate that card.

HENRY E. HEALY, a witness called on behalf of defendant, being duly sworn according to law on his oath, says:

Direct examination by Mr. Seymour:

30 Q. Where do you live? A. 228 Duane Street, Orange.

Q. Are you employed in the Orange National Bank? A. Yes, I am.

Q. What capacity? A. Manager of the Savings and Safe Deposit Department.

Q. How long have you been in that capacity? A. In the capacity as manager of the department, about three years.

Q. How long have you worked for the bank? A. It will be sixteen years in June.

40 Q. You were connected with the Safe Deposit Department for how long? A. For three years.

John Di Benedetto, direct.

Q. Did you know Antonio Pesselano? A. I did not.

Q. Did he have any conversation with you, or hear any conversation he had with any officer of the bank with relation to the bank? A. I heard none, but I know that he did have with the Vice-President at that time, Mr. Holmes. I only remember that there was some fuss at that time, but I wasn't familiar enough with that to know what it was all about.

10

Q. Were you present at the conversation he had with Mr. Holmes? A. No.

Q. Did you get any instructions from Mr. Holmes about the funds or transaction?

Mr. Nelson: Objected to.

20

The Court: Objection sustained.

Q. You had no conversation with Mr. Pesselano, either? A. No.

No Cross Examination.

JOHN DI BENEDETTO, a witness called on behalf of the defendant, being duly sworn according to law on his oath, says:

30

Direct examination by Mr. Seymour:

Q. Where do you live? A. 95 South Essex Avenue, Orange.

Q. Are you a son of Anthony Di Benedetto? A. Yes.

Q. And Antonio Pesselano is your uncle? A. Yes.

Q. Did you have joint access to this safe deposit box, in the Orange National Bank? A. Yes.

40

Q. Was that before or after he went to Italy,

John Di Benedetto, direct.

that you received joint access? A. Before he went to Italy.

Q. Do you remember when he went to Italy, what year it was? A. No, I don't.

10 Q. How long was it that he was away? A. About nine months, something like that.

Q. And when he returned did he make any accusations against you, in relation to Liberty Bonds? A. No, sir.

Q. He didn't? A. No, sir. He came and lived with us when he returned from Italy.

20 Q. When he came back from Italy was there any conversation between him and your mother and yourself about these alleged stolen bonds? A. He claimed that there was stolen bonds missing and he said he had them in the safe deposit box.

Q. How much? A. He said there was \$12,000 worth.

Q. What did he say about it; tell us what he said to you and your mother about it? A. He claimed they were missing and he had them in the Orange Safe Deposit Box. I said I had never seen any bonds. I went down with him when he hired the box. The only thing he had there was books, bank books and a mortgage paper.

30 Q. Did he say anybody took them? A. He claimed that I took them, and he said the bonds were numbered, that they couldn't be changed.

Q. Go on and tell us all that took place between him and your mother in relation to bonds? A. They started arguing to my mother.

40 Q. What did they say? A. That they were going to have me arrested, this Capone comes with my uncle, and meeting the old lady, told her that they were going to have me arrested for taking bonds,

John Di Benedetto, direct.

so I told my mother that there was no such thing missing. I didn't take no bonds.

Q. Why should she sign a \$12,000 mortgage; you haven't said anything about that. What did he say about that? A. They said, Pesselano and Capone came to the house and started to talk to my mother about this mortgage, that if she didn't sign the mortgage that they would have me arrested, so Capone and my uncle went out of the house, and they come back and when they come back, they asked my mother to come up in Judge Davis' office and when I went up, I drove them out there with the car, and when we went up in Judge Davis' office I asked Mr. Davis what they wanted my mother up there for. He said, "She has got to sign the \$12,000 mortgage." I said, "I won't stand for her to sign it." He said, "What have you got to do with your mother—"

The Court: What has the conversation between Judge Davis and this man got to do with this case?

Q. Who was present at that conversation? A. Capone, my uncle, and some girl that works in Judge Davis' office.

Q. Your mother and yourself? A. Yes.

Q. Tell us what happened in Judge Davis' office? A. I tried to stop her from signing the papers and I was put out.

Q. You were asking Judge Davis a question. Continue on from there. A. I asked Judge Davis and he said that the papers were—there was a mortgage drawn up from Pesselano that my mother should sign and I told her that I wouldn't let her sign, so he said, "You have nothing to do with it," and I was put out and they called Mr. Giordano in while I was waiting out in the hall.

John Di Benedetto, direct.

Q. Who was with Pesselano during these conversations, when the mortgage was executed? A. Mr. Capone was.

Q. Mattio Capone? A. Yes.

10 Q. How many days were they in town trying to get this mortgage? A. Two days they were there.

Q. How many conversations did you hear between them and your mother? A. Only two.

Q. Where was the first one? A. In the house.

Q. Where was the second? A. Up in Judge Davis' office.

20 Q. Will you tell us all that took place in the conversation in the house, tell us everything that was said. A. In the house Capone said, "Now, listen here, why don't you let your mother sign this mortgage? Your Liberty Bonds are all numbered. You know the way he made the will out, it left half to her and half to her sister, and if the Bonds are numbered, they got to be found." So to satisfy him, he claims that the \$12,000 was in this box, and he said "Let her sign this mortgage, and the Liberty Bonds will have to show up some time."

30 Q. That is the end of the conversation. I want the conversation from the beginning, the whole of it. A. Capone brings the uncle over there to the house and my mother and my uncle were crying, and she said that they were missing. My mother said, "I don't know what to say about it." And Capone said, "Well, if you don't find this, he claims that they were in his box, your son is liable to go to jail, and there was some argument, I cannot remember it all.

Q. Was any complaint made against you for the stolen bonds? A. No, sir, no complaint, no, sir.

Q. Were you ever indicted? A. No, sir.

40 Q. Or tried for the stolen bonds? A. No.

*John Di Benedetto, cross.**Cross examination by Mr. Nelson:*

Q. You didn't steal the bonds, did you? A. No, sir.

Q. Were threats of arrest made in your presence? A. There was threats that Capone made in my presence.

10

Q. That he would arrest you? A. He wasn't to arrest me. He told my mother that he would have me arrested.

Q. What did your mother say? A. My mother was crying, I didn't want her to go there, and they started talking that the money was left, this and that, and they confused her.

Q. You told your mother that you didn't steal the bonds? A. I did.

20

Q. You were not present in the room when this mortgage was signed by your mother, were you? A. I was put out.

Q. Why were you put out? A. Because I wouldn't let her sign.

Q. And she signed even though you told her that you did not steal the bonds? A. She must have signed, yes sir.

Q. Where you ever convicted of a crime? A. No sir.

30

Q. Weren't you convicted of receiving stolen goods?

Mr. Seymour: That is not proper cross examination. In denial of his answer a conviction should be presented.

The Court: Objection sustained.

40

Joseph Di Benedetto, direct.

JOSEPH DI BENEDETTO, a witness called on behalf of defendant, being duly sworn according to law on his oath, says:

Direct examination by Mr. Seymour:

- 10 Q. Are you a son of Antonio Di Benedetto? A. A nephew of Antonio Di Benedetto.
- Q. Do you know what year it was that Antonio Pesselano went to Italy? A. It is pretty hard to remember those things.
- Q. How old is your mother? A. 76.
- Q. Was your uncle younger or older than she? A. About four years older.
- Q. How long was your uncle in Italy, when he took the trip? A. About a year.
- 20 Q. And when he came back did you hear him say anything about papers being missing out of his safe deposit box? A. Not when he came back from Italy.
- Q. When he came back from Italy did he go to live with you. A. He lived about a month or two with me.
- Q. Then where did he go? A. From there he went to Rhode Island.
- Q. To whose house? A. Mattio Capone's house.
- 30 Q. He lived there until he died? A. Then he come back.
- Q. When did he come back? A. About two weeks after that and he come over to the house and he said—
- Q. Who did he say it to? A. To me. He said "Joe, let us take a walk over to the bank." I said "Alright uncle," so the two of us went out to the bank, and the young lady there (indicating) opened the vault and I stood outside while he went
- 40 in and opened the vault. He come out and said "There are some papers missing."

Joseph Di Benedetto, direct.

Q. Did he say what papers? A. Not there, but I said "Let us go home and we will talk it over," and we went over to the house, and he told me that there was \$12,000. in Liberty Bonds missing, and the only one could have taken them—it was between him and my brother John, the only two that had access to the vault. I was surprised, the only time since he lived with us that he confided in me, because it was him and John all the time, like two buddies.

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Q. Go on, tell the conversation. A. So he come over there and he said he had some papers missing. I said "Look here, uncle, my brother is away. You are my uncle and he is my brother. If there is any papers missing that John took, I am sure that he will make good and if he don't make good I will make good, because we are square." So he said "Alright." I said "When John comes home—", I said "He has gone to Asbury Park with a load—", he was in the trucking business at the time. I said "He will be back in a day or two, sure." He come back, I don't know whether the following day or the day following that, and they come over to the house, him and Mr. Capone, so we had a little argument with the uncle. I said "I will tell you, uncle, you are my uncle, he is my brother. To deny you or deny him, I don't know what to do." I said "Let us straighten this thing out by my brother, if he took it I know he will make good, because I don't think he would do a dirty trick like that." Capone said "What is the difference." He said "Let your mother sign the mortgage for that, it is their money, anyhow, it is in the family. He only got two sisters and himself. He is a bachelor, it is all in the family." I said "Nothing doing for my brother, no mortgage for nothing. If John admits he took it, all well

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Joseph Di Benedetto, direct.

and good, but if he don't, then I will get out of the picture." That is all I know.

10 Q. What conversation did you hear between your brother and Capone and Mr. Pesselano, in relation to John's arrest? A. They threatened him that if he would not sign that, that they would lock him in jail, and he didn't want the papers to talk about us because we had a big reputation in the Oranges and we wouldn't want that to occur. He said "You know Liberty Bonds are numbered; you cannot lose a thousand dollar Liberty Bond, because every Liberty Bond is numbered and will not be credited to anybody that tries to cash it."

20 Q. Who said he would put John in jail? A. To tell you the truth Mr. Capone was the whole thing in the conversation, because my mother and my uncle—

Q. Was Pesselano present when this talk was going on? A. It was a confused affair. My uncle and my mother were talking, and there was a fuss, and this fellow was doing this threatening.

30 Q. Was your uncle there when he was doing all this threatening? A. Yes, but I don't believe my uncle understood half of what was going on because he didn't seem to be very anxious about the thing. I don't believe my uncle thought he lost the Bonds because he had two or three safe deposit vaults, and if he ever had any Bonds he should have collected the coupons—in three years in our house he should have collected some coupons, so I believe my uncle took the Liberty Bonds.

The Court: We are not interested in what you believe.

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No Cross Examination.

Theresa Monoca, direct.

THERESA MONOCA, a witness called on behalf of defendant, being duly sworn according to law on her oath, says:

Direct examination by Mr. Seymour:

Q. Mrs. Monoca, where do you live? A. 148 Palmer Street, Newark. 10

Q. Are you a daughter of Antonio Di Benedetto? A. Yes.

Q. Antonio Pesselano is your uncle? A. Yes.

Q. Do you remember hearing about these stolen bonds, how did it come to your attention? A. Only my mother called up and she said to me, "you know—."

Mr. Nelson: I object. 20

Q. She called up first, what did you do after she talked to you? A. I went up in Orange.

Q. Whom did you see? A. I saw my mother and my uncle.

Q. And what conversation took place? A. My uncle said to me, he said, "Theresa," in Italian, he couldn't speak English, "There is \$12,000 Liberty Bonds missing and your brother John took them, so if John don't make good with those Liberty Bonds we will have him arrested," and then I said, "What for, if he didn't take them why should he be arrested?" "Well," he said, "the safe deposit box, only two have the key, so John has got them," so he said, "You tell your mother to make good. We will make a mortgage and let her sign that mortgage for \$12,000 or we will have John arrested." So I said, "Why should my mother sign a mortgage for \$12,000, and lose that money." He said, "She will never lose the money because your mother has worked hard for me 30 40

Theresa Monoca, cross.

when she was young, and her share is always there."

Q. Did you tell that to your mother? A. I did, but he said it in—

10 Q. Did he tell your mother anything in your presence? A. Yes, he said, "I am going to see that you make up your mind, that if John don't come up with the \$12,000 Liberty Bonds, you will have to sign a mortgage or we will have John arrested."

Q. Did you ever hear any conversation between your mother and uncle in relation to it, besides that? A. Yes, my uncle said later, "If you sign this mortgage the money is always yours, you will never lose it."

20 Q. Did you hear any other conversation? A. That was all.

Q. Did you hear any conversation between Pesselano and Capone with your mother? A. No, I wasn't there when Capone was there.

30 Q. What did your mother do when you told her that? A. My mother said, "Must I see my son in jail for nothing." She said, "I won't lose anything I might as well sign the mortgage." He said, "It is up to you, if you feel that way about it," but I said, "Remember, Ma, you know we have so many children home, we can make use of that money ourselves."

Cross examination by Mr. Nelson:

Q. When did this conversation take place? A. In my mother's house, 95 South Essex Avenue.

Q. Do you remember when? A. I don't remember the date.

40 Q. Who was present? A. My mother, my uncle and I.

Theresa Monoca, cross.

Q. Mr. Capone was not present? A. No, not at that time. I never saw Mr. Capone.

Q. Were you present at the time that your mother signed this mortgage? A. No sir.

Q. Is your husband's name Angelo? A. No, my husband is dead and died twelve years ago.

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Mr. Nelson: I offer at this time all the Exhibits marked for identification. (Marked Exhibits C-5, 6 and 7.)

Mr. Seymour: I have no objection to Exhibits C-5 and C-6 which are letters from Howe and Davis. I object to the exemplified copy of the petition marked Exhibit C-7, because it hasn't been shown that the witness is responsible for the statements in the petition as read by counsel, that the money was loaned to her. It seems to me that her admission as to that ought to be clear and beyond dispute. This is a petition drawn by a lawyer in Rhode Island, a paper necessary in the preparation of an appeal from the probate of a will, and, of course we know these things are more or less signed as a matter of course, and unless it is shown that she clearly understood just everything that was in that, particularly the statement to the particular counsel, and it hasn't been shown that it is admissible.

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The Court: That is not a reason for excluding it from evidence. It will be admitted in evidence for what it is worth.

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Ralph Giordano, direct.

RALPH GIORDANO, a witness called on behalf of complainant, being duly sworn according to law on his oath, says:

Direct examination by Mr. Nelson:

10 Q. You are a member of the New Jersey Bar?
A. Yes.

Q. How long have you been practicing? A. 18 years.

Q. Do you know Angelina Di Benedetto, the defendant in this case? A. Yes.

20 Q. Do you remember witnessing her signature to that instrument (showing the witness Complainant's Exhibit C-2, the mortgage in question)? A. I know that I witnessed it, I don't remember very much about it.

Q. Do you remember explaining to Mrs. Di Benedetto, the contents of that instrument, prior to her signature? A. I will answer that by saying I cannot say that I explained that particular paper, but I explained every paper. That is my best answer to it.

Q. Do you recall having explained the contents of that paper to her?

30 The Court: He says he doesn't.

No Cross Examination.

MATTIO CAPONE, a witness called on behalf of complainant, being duly sworn according to law on his oath, says:

Direct examination by Mr. Nelson:

40 Q. You are related to Angelina Di Benedetto, the defendant in this case? A. Yes.

Mattio Capone, direct.

Q. How? A. I married her niece.

Q. How long have you known her? A. I know her about 32 years.

Q. Did you know Antonio Pesselano? A. Yes, sir.

Q. When did he die? A. June 2nd, 1926. 10

Q. Did you know him before this? A. Yes.

Q. Do you remember when this mortgage (showing Exhibit C-2) was made by Angelina Di Benedetto? A. Yes.

Q. Do you remember what happened before that mortgage was signed by her? A. Yes.

Q. What happened? A. I was going down to New York on business and my uncle told me that—

Mr. Seymour: Objected to. 20

The Court: Objection sustained.

Q. Do you remember a conversation between yourself and Angelina Di Benedetto in the presence of Pesselano before that mortgage was signed? A. Yes.

Q. Where was that conversation? A. In Mrs. Di Benedetto's house.

Q. How long before that mortgage was signed? A. About a week before, I think. 30

Q. Tell what happened? A. My uncle took me over there, and the argument my uncle had with Mrs. Di Benedetto, it was that Mr. Di Benedetto had the key of the vault and he asked her, "why did you give John Di Benedetto, the key?" "Well," she said, "I don't know, but you don't have to worry, you don't lose a penny, if he took the bonds." She said, "Wait until John comes home." John wasn't there at the time. We sat down and we had something to eat and we went away, so 40

Mattio Capone, direct.

later on we come back again and at that time Joe had a little argument with Pesselano; he said, "If you didn't go away from my house this thing wouldn't happen." "Well," he said, "I don't want your money, I want my money." Mrs. Di Benedetto gave him the key to go down in the vault, and I don't know whether she sent him down there or who sent him down or he went down himself to get the bonds. I didn't say anything at all. Then he asked John if he took the bonds. John said, "No." The only thing I said, I remember now, I said, "John, if you didn't take the bonds then someone in the bank must have taken them." I said, "Uncle is upset about it and he is going to sue the bank for it." I said, "You don't want to do that, Mrs. Di Benedetto, you don't have to do that because he won't lose a cent." That is all I said.

Q. Did you threaten to arrest or cause the arrest of John Di Benedetto? A. No, sir. What I seen and what I heard in that house, I will be afraid to make any threats, because I know their reputation. There is no such thing as threats.

Q. Did Mr. Pesselano threaten to arrest—? A. No, no threats at all.

30 Q. Was anything said about arresting at all?
A. Absolutely not.

Q. Do you remember a transaction at the office of Howe and Davis, after that? A. Yes.

40 Q. When was that, how soon after? A. Mrs. Di Benedetto and Joe Di Benedetto made a suggestion to go up to Howe and Davis. He said "They are very nice lawyers." Mrs. Di Benedetto said "We can make a mortgage at the same rate, $4\frac{1}{2}\%$ as the Liberty Bonds was, because just now I am building a house across the street and cannot give you the

Mattio Capone, direct.

cash money, to put in the mortgage, if I want to pay you in Liberty Bonds, because they are only worth now 96." So he said "Alright." My uncle said "Alright." So we had dinner there and after dinner we went up to Howe and Davis. Excuse me, I forgot a little bit there. We went up to Howe and Davis and spoke to Mr. Davis and told him all about it. Mr. Davis put down the bonds at 4½%. Then we come back to Mr. Di Benedetto and had dinner there, my John and all the family. After we had dinner John went over and got his friend and drove us up to Mr. Davis' office. We went up there. Someone was called in to translate in Italian language to Mrs. Di Benedetto. I think it was Mr. Giordano, and Mrs. Di Benedetto signed and we went downstairs afterwards and then shook hands and went away. 10

Q. Who was in the office of Howe and Davis when she signed the mortgage? A. Two or three men were present.

Q. Who? A. I don't exactly know.

Q. You were there? A. I was there.

Q. Mr. Pesselano? A. Mr. Pesselano was there.

Q. And John Di Benedetto was there? A. He came in with us. And then, I don't know who the others were, but three or four men were in there. I didn't know the law firm. 30

Q. Was Judge Davis there? A. Mr. Davis was there, because in the conversation I heard his name, Mr. Davis, because we asked for him.

Q. When Mrs. Di Benedetto signed the mortgage was John Di Benedetto there? A. I cannot say. He took us up. I cannot say for sure.

Q. Did you make any threat to arrest John Di Benedetto at that time? A. No, we wouldn't dare. 40

Q. Did Mr. Pesselano make any threat? A. No threats were made whatsoever.

Mattio Capone, direct.

Q. You are the executor of the Estate of Antonio Pesselano, are you not? A. Yes.

Q. I ask you to state whether you ever saw these letters. A. I saw these letters, I found them on the dresser.

10 Q. When? A. About three years ago.

Q. Whose dresser? A. My uncle's dresser in his room.

Q. You mean Antonio Pesselano? A. Yes.

Q. Did you ever show these letters to Mrs. Di Benedetto? A. No. I never showed them to her. I give them to my lawyer.

Mr. Nelson: I offer this letter in evidence.

20 Mr. Seymour: I object to it because it hasn't been properly proved.

The Court: What letter is it.

Mr. Nelson: Letter purporting to have been signed by Angelina Di Benedetto, the defendant in this case, to the deceased mortgagee.

The Court: She says she cannot even write, and if that is the letter that was shown to her, she didn't identify it as having been signed by her or for her.

30 Q. Do you remember Mrs. Di Benedetto testifying in the case in Rhode Island? A. Yes.

Q. Were you present? A. Yes sir.

Q. What, if anything, was said by her about this letter dated November 25, 1924?

The Court: Testify in court?

Mr. Nelson: Yes.

A. She said she paid interest on the mortgage.

40 Q. Did she say anything about this letter? A. Yes, I think she said she had her niece, Angelina

Mattio Capone, cross.

Di Benedetto write for her whenever she sent interest to my uncle, and she had Joe and other people write for her.

Q. Did she say anything in particular about this letter, do you remember? A. I don't remember exactly, she said Angelina Di Benedetto was writing to her. 10

Cross examination by Mr. Seymour:

Q. Didn't she also say that Angelina wrote but she didn't know what Angelina said in the letter? A. I don't remember.

Q. You wouldn't say that she didn't say that? A. I don't remember exactly. I like to say what I hear for sure. I don't remember that.

Q. Mr. Capone, was any money passed in this mortgage transaction? A. No, not as I saw. 20

Q. Did Pesselano lend to Mrs. Di Benedetto \$12,000 on that occasion? A. I don't know.

Q. On that occasion did he loan her \$12,000? A. I don't know what he loaned her.

Q. Were you not there? A. At that time he didn't loan it to her, no, not in my presence.

Q. You knew, didn't you, at that time that this mortgage was given, because he said some Liberty Bonds were stolen to the amount of \$12,000. A. I know a little bit more, if the court will permit me to say, I will, but some things I cannot say. 30

Q. Tell me what you know, if the court is willing to hear you, yes. A. Uncle told me that Mrs. Di Benedetto asked for more money because she was building a house and they refused to give it to her. My uncle told me that is why he gave the key to John to go down and get the Liberty Bonds. I didn't see that.

Q. Your uncle didn't know whether she stole 40

Mattio Capone, cross.

the bonds or whether John stole the bonds and that is what he said. A. No. He was the one that went down there.

10 Q. Didn't you testify in answer to Mr. Nelson that your uncle said to Mrs. Di Benedetto that he didn't know whether John or whether she opened the box, didn't you say that? A. Pesselano opened the box.

Q. Didn't you say a moment ago that Mr. Pesselano said to Mrs. Di Benedetto that Mrs. Di Benedetto had the key and that she gave it to John and that he didn't know whether she or John went to the box and took the bonds, isn't that what you said? A. No, I didn't say that.

20 Q. What did you say? A. That was what Mr. Pesselano told me.

Q. No, I mean when Mr. Nelson asked you a question, did you not say then that Mr. Pesselano said to Mrs. Di Benedetto, not what he told you, but he said to Mrs. Di Benedetto that she had the key, and didn't know whether she or John took the bonds? A. No. The argument was, why did she give him the key to go down and get the bonds.

30 Q. What was the argument? A. The argument was, he said to her, "Why did you give him the key?" because they only had one key. She said she gave him this key because he had to go down for certain things— I don't like to explain that. I will explain if the court wants me to.

Q. Your uncle told Mrs. Di Benedetto, that \$12,000 in Liberty Bonds had been taken from this box? A. Yes. He told her that the Liberty Bonds were taken. She said "Don't worry, you won't lose a cent."

40 Q. He also told her that John took the bonds? A. He said he must have taken them.

Mattio Capone, cross.

Q. He said "Either you took them or John took them." A. No, he didn't say that. He said, "You give him the key to go down and get the box." She said "No, but anyway you won't lose a nickel."

Q. And didn't he also say that John had to make good that loss? A. He didn't say that.

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Q. Didn't your uncle say to Mr. Di Benedetto that John had to make good? A. Uncle said "If John didn't take them some representative from the bank must have taken them. I will not lose \$12,000." So Mrs. Di Benedetto said, "Don't be afraid; you will not lose a cent."

Q. He said he would sue the bank? A. Yes.

Q. Did he say he would arrest John? A. If you want to know the truth, whether he took it or not, "if you didn't take it for sure, I will sue the bank."

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Q. Did he say he would sue Mrs. Di Benedetto? A. No.

Q. And what did he say he would do to John? A. Nothing.

Q. He didn't threaten to arrest him? A. I don't remember that.

Q. You didn't threaten to arrest him? A. No.

Q. What were you there for? A. He took me along with him. He wanted someone to be a witness of what was going on.

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Q. Why did he want you to be a witness? A. He didn't call me, he called my brother-in-law first.

Q. Why did he want you to be a witness? A. I don't know why he wanted me to be a witness.

Q. He wanted you to be a witness to John's admission that he book the bonds? A. No, not exactly. He said, "I want you to be there and sometime you have to go to American people, our lawyers, or down in the bank and I want you to explain something to me," so I couldn't refuse to go.

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Mattio Capone, direct.

Q. You deny that either you or Mr. Pesselano ever mentioned that John would be arrested and taken for these \$12,000 in bonds? A. No threats were made about having John arrested, and they know that too.

10 Q. The old man was satisfied, all he wanted to know was who took them? A. Yes. He said if he didn't take it he had to do something else, but he said, "Don't worry and don't lose a nickel."

Further direct examination by Mr. Nelson:

Q. Was Mrs. Di Benedetto there frequently with Mr. Pesselano at the time that this mortgage was being made? A. Yes, they gave us dinner there, they treated us right.

20 Q. After this mortgage was made, where did you go? A. He went to Brooklyn and I went on my business up town in New York. He went to his sister in Brooklyn and I went to New York on my business.

(Complainants rest.)

The Court: Is there any question in the mind of counsel as to what I ought to do? There isn't any question in mine.

30 This is a bill to foreclose a mortgage brought by the Executor of the deceased mortgagee. The defense is duress. The execution of the mortgage itself and the bond which it is given to secure is admitted and it is admitted that if anything is due on the bond and mortgage the amount claimed by the complainant is the correct amount. The defense of duress which is set up consists of duress by the threats of arrest of

40 the defendant's son. It would be futile for

Decision.

me to recite the evidence which has been given this morning. The defense is an affirmative one and must be proved by a preponderance of the evidence. It is enough for me to say that the evidence which has been submitted here is not sufficient to warrant me in finding that there was duress in the securing of the execution of this mortgage from the defendant. The mortgagee himself is dead; he is not here to refute the accusations which are made against him. The lawyer, Judge Davis, who prepared the mortgage and the bond and in whose presence it was executed, is not here. He also has passed on. He, of all others, would be best qualified to testify as to circumstances under which this mortgage was executed. In the face of these facts it seems to me I would be going a long way in accepting the uncertain testimony of the defendant here and the evasive testimony of the two children who will be the chief beneficiaries by reason of the invalidity of this mortgage, if the defense were sustained, especially when that testimony is refuted, by the testimony of Capone who is certainly entitled to as much credence as any of the other witnesses who have testified here. The complainant may have a decree for the amount claimed in the Bill of Complaint.

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*Exhibits.***Exhibit C-1.**

KNOW ALL MEN BY THESE PRESENTS: That I, Angelina Di Benedetto, widow of the City of Orange in the County of Essex and State of New Jersey held and firmly bound unto Antonio Pessolano, of the City of Orange, County of Essex and State of New Jersey, in the sum of Twelve thousand dollars lawful money of the United States of America to be paid to the said Angelina Di Benedetto, widow or to her certain Attorney, Executors, Administrators or Assigns; To which payment well and truly to be made, I bind myself, my Heirs, Executors and Administrators firmly by these presents. Sealed with my seal and Dated the seventh day of August in the year of our Lord One Thousand Nine Hundred and twenty-two.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the above bounden Angelina Di Benedetto, her Heirs, Executors and Administrators, shall well and truly pay, or cause to be paid, unto the above named Antonio Pessolano, his Executors, Administrators or Assigns, the just and full sum of Twelve thousand dollars lawful money aforesaid in one year from the date hereof, with lawful interest thereon at the rate of four and a quarter per cent, payable semi-annually, without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

her

ANGELINA X DI BENEDETTO (L.S.)

mark

SIGNED, SEALED AND DELIVERED }
IN THE PRESENCE OF }

40 J. FRED BERSTECHER JR.
RALPH E. GIORDANO

(\$6.00 in documentary
stamps)

*Exhibits.***Exhibit C-2.**

THIS INDENTURE

Made the seventh day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-two

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BETWEEN Angelina Di Benedetto, widow of the City of Orange in the County of Essex and State of New Jersey party of the first part;

AND Antonio Pessolano of the City of 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 Twelve Thousand Dollars lawful money of the United States of America, to her 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, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto 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

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BEGINNING at the Southeasterly corner of Essex Avenue and Hurlbut Street; thence Easterly along said Hurlbut Street one hundred fifty-three feet and eighty-three hundredths of a foot to the land

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Exhibits.

10 of Dato; thence Southerly along his land thirty feet; thence Westerly one hundred fifty-three feet and sixty hundredths of a foot to a point in the East side of Essex Avenue distant thirty feet southerly from the BEGINNING; and thence Northerly along Essex Avenue thirty feet to the BEGINNING. The party of the first part has the privilege of paying off the principal of this mortgage at any time in Liberty Bonds instead of cash.

20 TOGETHER with all and singular the 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 tract or lot of Land and Premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

30 PROVIDED ALWAYS, and it is agreed by and between the parties to these presents, that if the said party of the first part, her heirs, executors and administrators, do and shall well and truly pay, or cause to be paid, to the said party of the second part, or to his certain attorney or attorneys, heirs, executors, administrators or assigns, the sum of Twelve Thousand Dollars in one year from the date hereof, with lawful interest for the same, at the rate of four & one-quarter per centum per annum, payable semi-annually, according to the condition of a certain bond bearing even date herewith, in the penal sum of Twenty-four Thousand Dollars without any deduction or defalcation for taxes, assessments, or

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Exhibits.

any other imposition whatsoever; then, and from thenceforth, these presents and said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained to the contrary in any wise notwithstanding.

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AND the said party of the first part, for herself, her heirs, executors and administrators, does covenant and grant to and with the said party of the second part, his heirs and assigns, that the said party of the first part her heirs and assigns, shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof; and that the said party of the second part, his heirs and assigns, shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, her heirs or assigns, or of any other person or persons whatsoever.

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AND it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies, to an amount not less than Twelve Thousand Dol-

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Exhibits.

10 lars, and assign the policy and certificate thereof to the said party of the second part 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, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand with legal interest.

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

20 Signed, Sealed and Delivered }
in the Presence of }

her
Angelina X Di Benedetto Seal
mark

J. Fred Berstecher
Ralph E. Giordano

MORTGAGE.

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ANGELINA DI BENEDETTO, widow,
TO
ANTONIO PESSOLANO.

Dated, August 7th, 1922.

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Received in the Register's Office of the County of Essex N. J., on the 8th day of August A. D., 1922, at 2:40 o'clock, in the afternoon, and Recorded in Book C-46 of MORTGAGES for said County, on pages 556-557.

Exhibits.

STATE OF NEW JERSEY, }
 County of Essex } ss.:

BE IT REMEMBERED, That on this seventh day of August in the year of our Lord One Thousand Nine Hundred and Twenty-two, before me, the subscriber, An Attorney at Law of New Jersey personally appeared Angelina Di Benedetto, widow who, I am satisfied, is the mortgagor mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

10

J. FRED BERSTECHER
 An Attorney at Law.

20

Exhibit C-3.

STATE OF RHODE ISLAND AND PROVIDENCE
 PLANTATIONS.

Bristol, sc.

At a session of the Probate Court of the Town of Bristol, holden at Bristol, on the Twenty-sixth day of June in the year of our Lord one thousand nine hundred and twenty-six ON THE PETITION OF Mattia Capone of said Bristol, praying that the instrument therewith presented, purporting, to be the last Will and testament of Antonio Pessolano late of said Bristol, deceased, may be proved and allowed, and letters testamentary issued to said Mattia Capone and Antonio Spinello the executors therein named and notice thereof having been given according to the order of the Court, and no person objecting thereto, and it appearing that said instrument is the last Will and testament of said

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Exhibits.

deceased and was legally executed and that said;
 testator was at the time of making the same of full
 age and sound mind; said instrument is thereupon
 adjudged to be proved, and the same is approved,
 accepted and allowed as the last Will and testa-
 10 ment of said deceased. It is further ordered that
 letters testamentary be issued to Mattia Capone
 and Antonio Spinello they first giving bond with-
 out surety for the due performance of said trust.

Said Executors to give notice of their appoint-
 ment in the Bristol Phoenix. Vincenzo Celetta is
 appointed appraiser of all the goods, chattels,
 rights and credits, which were of said Antonio
 Pessolano deceased.

JOHN W. CHURCH

20 (Exemplified copy)

Clerk.

Exhibit C-5.

HOWE & DAVIS
 Counsellors at Law
 Orange, N. J.

National Bank Building
 Cable Address Howeblake
 Telephone 332 Orange

Thomas A. Davis
 Edward L. Davis
 30 Richard J. Fitzmaurice
 J. Fred Berstecher

November 13th, 1926.

Samuel O. Offen, Esq.,
 Prudential Building,
 Newark, N. J.

Re: Capone v. Di Benedetto.

Dear Sir:

40 We are arranging a loan to pay off this mort-
 gage and would appreciate it if you would send

Exhibits.

us a statement of the amount due for interest, costs,
etc. up to Saturday of next week, November 20th.

Very truly yours,

HOWE & DAVIS

ELD:MB

10

Exhibit C-6.

HOWE & DAVIS
Counsellors at Law
Orange, N. J.

National Bank Building
Cable Address Howeblake
Telephone 332 Orange

Thomas A. Davis
Edward L. Davis
Richard J. Fitzmaurice
J. Fred Berstecher

October 5th, 1926.

20

Samuel O. Offen, Esq.,
Prudential Building,
Newark, N. J.

Dear Sir:

We represent Mrs. Angelina Di Benedetto who
has just received a Chancery subpoena in a case
of Matteo Cappone against her. Would you be
kind enough to lend us a copy of the bill of com-
plaint?

30

Very truly yours,

HOWE & DAVIS

ELD:MB

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*Exhibits.***Exhibit C-7.**

SUPREME COURT,

STATE OF RHODE ISLAND.

10

ANGELINA DI BENEDETTO

*v.*MATTIA CAPONE *et al.*, Executors.

} Ex. No.

PETITION FOR RELIEF UNDER GENERAL LAWS, 1923,
CHAPTER 347, SECTION 3.

20

Respectfully represents Angelina Di Benedetto
hereinafter referred to as petitioner, as follows:

1. That your petitioner is a resident of Orange,
New Jersey and a sister, heir and one of the next
of kin of Antonio Pessolano who died at Bristol,
Rhode Island, on June 2, 1926, at the age of eighty
years.

30

2. That Mattia Capone, of Bristol, Rhode
Island and Antonio Spinello, of Brooklyn, New
York, hereinafter referred to as respondents, are,
or purport to be executors of an alleged will of
said Antonio Pessolano which was offered for pro-
bate in the Probate Court of the Town of Bristol
on the 9th day of June, A. D., 1926 and after notice
by publication only, was admitted to probate on
the 26th day of June, A. D., 1926.

40

3. That Antonio Pessolano was unmarried and
that his only heirs and next of kin were and are
his sisters and the issue of deceased sisters and
brother.

4. That for a considerable period of time prior

Exhibits.

to his taking up his residence in Bristol, Rhode Island, Antonio Pessolano lived with your petitioner and the relations between your petitioner and said Antonio Pessolano were always friendly and affectionate, and on many occasions said Antonio Pessolano expressed his affection for your petitioner and assured her that in the event of his decease, ample provision would be made for her and in his lifetime had loaned to your petitioner \$10,000.00 at 5% and \$12,000.00 at 4¼%, at less than the legal rate of interest in New Jersey, which is 6%, and for a number of years made his home with the petitioner and left the home of your petitioner without any ill feeling towards her. 10

5. That your petitioner is a native of Italy, and while she has resided in the United States for approximately forty-four years, she has never received an education, she is not able to read or write, and she has no knowledge of the laws and customs of the several states relating to the division or distribution of the estates of deceased persons. 20

6. That your petitioner, knowing that her brother Antonio Pessolano had considerable estate, and having confidence in Mattia Capone and Elizabeth Capone, of Bristol, Rhode Island, a niece of said Antonio Pessolano and of your petitioner, permitted said Mattia Capone and Elizabeth Capone to take charge of the funeral services and assumed, and received their assurance, that they would keep your petitioner in touch with affairs relating to said Antonio Pessolano and his estate. 30

7. That your petitioner had been advised by Antonio Pessolano during his lifetime of the making of a will by an attorney in Orange, New Jer- 40

Exhibits.

sey, wherein your petitioner was named as beneficiary of a substantial share of his estate, a copy of said will is hereto attached, and that your petitioner had no knowledge of the existence of the instrument offered for probate in the Probate Court of Bristol aforesaid, no knowledge of the fact that it had been so offered for probate and no knowledge of any proceedings upon the petition for the probate thereof until after the expiration of the period within which she could and would have appealed from the decree admitting said instrument to probate, the first notice of each and all of said facts having come to your petitioner upon receipt of a letter dated August 17, 1926, enclosing a copy of the alleged will, from attorneys acting for the alleged executors, a copy of which letter is attached hereto and by reference made a part hereof.

8. That the instrument offered for probate purports to dispose of the substantial estate of Antonio Pessolano among heirs and next of kin other than your petitioner, whose legacy purports to be in the sum of Twelve (\$12) Dollars, and is contrary to the assurances given by Antonio Pessolano to your petitioner during the lifetime of the former.

9. That upon investigation made since receipt of said letter of August 17, 1926, your petitioner has satisfied herself that Antonio Pessolano signed said instrument which was offered for probate, if in fact the same contains his true signature, at a time when he was mentally incompetent and that he was unduly influenced so to do by the principal beneficiaries named in said instrument and particularly by his sister, Francesca Spinello, of Brooklyn, New York, and his niece Elizabeth Ca-

Exhibits.

pone, of Bristol, Rhode Island, who were guided in their actions by one Antonio Romano, now or formerly an attorney practising his profession in the State of Rhode Island and husband of a niece of Antonio Pessolano, who is named as one of the legatees in said instrument.

10

10. That had the petitioner not relied upon the assurances of Elizabeth Capone and Mattia Capone with reference to being advised as to matters relating to Antonio Pessolano and his estate, or had your petitioner been advised of the fact that any instrument other than that prepared by the Orange, New Jersey, attorney of Antonio Pessolano would be offered for probate, or had your petitioner been notified within the period during which she might have appealed from the decree of the Probate Court of the Town of Bristol, or had your petitioner known that an instrument purporting to be the will of her brother could be offered for probate without notice except by publication, then, and in any of such events, your petitioner would have been present or represented at the hearing upon the petition seeking the probate of said instrument and would have appealed from any decree granting such petition.

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11. That your petitioner is aggrieved by the decree of the Probate Court of the Town of Bristol, County of Bristol and State of Rhode Island entered upon the 26th day of June, A. D. 1926 admitting to probate a certain instrument in writing purporting to be the last will and testament of Antonio Pessolano, and purporting to appoint Mattia Capone, of Bristol, Rhode Island, and Antonio Spinello, of Brooklyn, New York, as executors thereof; that by reason of accident, mistake and

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Exhibits.

unforeseen cause, your petitioner has failed to claim an appeal from said decree; and that justice requires a revision of the case and an opportunity afforded your petitioner to claim and prosecute such appeal.

10 WHEREFORE your petitioner within one (1) year after the entry of said decree, and as permitted by Section 3, Chapter 347 of the General Laws of the State of Rhode Island, respectfully prays that she may be given the relief therein prescribed, and that she be permitted to claim an appeal from said decree of probate.

her

ANGELINA X DI BENEDETTO

mark.

20 HUDDY & MOULTON
Solicitors for Petitioner.

AFFIDAVIT.

30 I, Angelina Di Benedetto, the petitioner who has subscribed the foregoing petition, being first sworn, on oath make affidavit and say that I have caused the foregoing petition signed by my mark to be read and translated to me, and that each and all of the facts therein set forth are true.

Her

ANGELINA X DI BENEDETTO

mark

Subscribed and sworn to before me in the City of Orange, County of Essex and State of New Jersey, this 30th day of September, A. D. 1926.

40 (MARTHA WEBER
(L.S.) A notary Public of N. J.
(Exemplified copy)

Exhibits.

Exhibit D-1.

Safe No. 987

July 6th '21

Signature Antonio Pessolano	
Address 95 So. Essex Ave, Orange N. J.	10
Occupation Retired	
Birthplace Italy	

(Reverse side of foregoing) :

Orange, N. J., July 6th 1921

Received from the ORANGE NATIONAL BANK a receipt for rental paid for Box Numbered..... which is leased by the undersigned subject to all the rules and regulations of said Bank, as endorsed on said receipt and to all of which rules and regulations the undersigned hereby expressly agrees. & also acknowledge to have received 4 keys of said Box.

20

Witnessed by	ANTONIO PESSOLANO
--------------	-------------------

.....

Remarks:

SURRENDER	30
-----------	----

Orange, N. J., July 9th 1923

.....hereby surrender to the ORANGE NATIONAL BANK all right, title and interest in and to Box Numbered 987 with.....keys and acknowledge the removal of all property placed therein and discharge said Bank from all liability in respect thereto.

Witnessed by	JOHN DI BENEDETTO	40
--------------	-------------------	----

.....

M. J. COOPER

Exhibits.

Exhibit D-2.

Safe No. 987

Date July 6th 1921

10 Sign here John De Benedetto
 Residence 95 So. Essex Ave, Orange N. J.
 Business Taxi & Trucker
 Business Address Essex Ave
 Birthplace Italy Date May 16th
 Mother's Maiden Name Pessolano
 (Reverse side of foregoing) :

APPOINTMENT OF DEPUTY

Orange, N. J., July 6th 1921

20 I hereby designate John De Benedetto as my
 deputy & to have access to and control of Box
 Numbered 987 now rented by the undersigned of
 the ORANGE NATIONAL BANK with power to sur-
 render same until this authority is revoked in writ-
 ing to the said Bank.

Witnessed by ANTONIO PESSOLONO

.....

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40

New Jersey Court of Errors and Appeals

MATTIA CAPONE and ANTONIO
SPINELLO, executors under
the last will and testament of
Antonio Pessolano,

Complainants-Appellees,

vs.

ANGELINA DI BENEDETTO,

Defendant-Appellant,

and others,

Defendants.

On Appeal
from the
Court of
Chancery

STATEMENT.

The bill was filed to foreclose a mortgage of \$12,000.00 on property of defendant-appellant in Orange, N. J. The defendant pleaded that the mortgage was void because it was executed under duress (threats of arrest and imprisonment of her son, John) and to compound a felony and under an agreement that when complainants' intestate died the mortgage would be hers and therefore it would never have to be paid. The Chancellor (V. C. Berry) made a decree that the mortgage be foreclosed, and an appeal is taken from this decree.

New Jersey Court of Errors and Appeals

MATTIA CAPONE and ANTONIO
SPINELLO, executors under
the last will and testament of
Antonio Pessolano,

Complainants-Appellees,

vs.

ANGELINA DI BENEDETTO,

Defendant-Appellant,
and others,

Defendants.

On Appeal
from the
Court of
Chancery

BRIEF OF DEFENDANT-APPELLANT.

The following are the grounds of appeal in this cause:

1. The Chancellor should have decreed that the said Angelina DiBenedetto, the appellant, was not indebted to the complainant under said mortgage.
2. The Chancellor should have decreed that the said mortgage was void because it was given by said Angelina DiBenedetto and taken by said complainant's testator to compound a felony against the State of New Jersey.

3. The Chancellor should have decreed that said mortgage was made and executed by said Angelina DiBenedetto to complainant's testator under duress by complainant's testator of said Angelina DiBenedetto and was therefore void.

4. The Chancellor should have decreed that said mortgage was void because of the agreement made by complainant's testator that said defendant Angelina DiBenedetto would never have to pay said mortgage.

5. The Chancellor should have decreed that the bill of complaint be dismissed upon the evidence adduced at the hearing and the counterclaim of said Angelina DiBenedetto sustained.

They will be discussed together.

The answer of the defendant Angelina DiBenedetto defends against the foreclosure of the bond and mortgage on the ground of duress and that she was compelled to execute the bond and mortgage to save her son John from arrest and the family from disgrace, thus being forced into the making of an agreement to compound a felony; this agreement further provided that upon the death of the mortgagee, Antonio Pessolano, the mortgage would be devised to the appellant and would never be enforced in the mortgagee's lifetime. The mortgagee was a brother of the appellant.

See pages 9-11, case.

The learned Vice Chancellor in his opinion (p. 58) granted a decree for the complainants mainly on the ground, it seems, that the evidence supporting the defense came from the "two chil-

dren" of the defendant-appellant. The evidence of defendant as to transactions with her deceased brother was objected to and barred (p. 25) as being a transaction with a deceased party represented in the cause. It is respectfully contended that there was much more evidence than that of the "two children" tending to sustain the defense.

The defense, if sustained, would bar a decree under the case of

Slater v. Gittleman, 7 N. J. Adv. Rep.
208, 144 Atl. Rep. 598,

for the agreement being null and void the law would leave the parties where it found them.

The evidence produced by defendant was as follows:

Antonio Pessolano, complainants' testator, a brother of the defendant Angelina DiBenedetto, had come to make his home with her, moving from Brooklyn to Orange. He was a bachelor. After living awhile with her he decided to go to Italy for a visit. Before going he rented a safe deposit box in Orange National Bank, Orange, New Jersey, and gave John DiBenedetto, a son of defendant, joint access (Exhibits D-1 and D-2, p. 73; testimony Cooper, p. 34, ll. 30 to 40).

When he returned from Italy he went to Rhode Island to see Mattio Capone, a son-in-law of another sister (p. 44, l. 28), and then, coming back to Orange, he opened the box and, according to Mary Josephine Cooper, an employee of the bank in charge of safe deposit boxes, "came

out of the vault very much excited and said that there were some things missing" (p. 37, l. 20). Joseph DiBenedetto a son of defendant, was with him at the time (p. 44, l. 35). Joseph said to Pessolano, "Let us go home and we will talk it over" (p. 45, l. 1).

When "home" he told Joseph that \$12,000.00 in Liberty Bonds were missing and the only one who could have taken them "it was between him and my brother John" (p. 45, l. 10). Joseph suggested that they wait until his brother John returned from a trip next day. Next day there was "a little argument" (p. 45, l. 30) and Pessolano suggested that his mother give a mortgage, but Joseph protested (p. 45, l. 40).

Later on Pessolano appeared at defendant's house with Mattio Capone, one of the executors of his will and a complainant in this cause. Joseph says, "They threatened him (his brother John) that if he would not sign that (referring to the mortgage, no doubt), they would lock him in jail and he didn't want the papers to talk about us because we had a big reputation in the Oranges and we wouldn't want that to occur" (p. 46, l. 10). Pessolano was present at the time and was talking to defendant, "there was a fuss and this fellow was doing this threatening" (l. 26).

The defendant herself says, speaking through an interpreter, "They came to my house and convinced me" (p. 25, l. 35). "They both came to my house and convinced me" (p. 26, l. 24). She says her brother came to her house after his return from Italy and then went to Capone's house, then they both came to see her (p. 28, l. 17). Capone said to her in the presence of

Pessolano, "You come and sign the mortgage because the money is always yours, then I see you (meaning the interpreter) and that is how I signed the mortgage. Otherwise I would never have signed it" (p. 28, l. 30).

Capone told her "the bonds were stolen" and said, "Sign the mortgage" (p. 28, l. 30). "You sign the mortgage because you will never lose this money, it is always yours" (l. 38). "I didn't hear very well and I didn't know just what they were saying. I am very deaf. They made me sign like a stupid" (p. 29, l. 1).

On cross-examination she says, "He gave me nothing" (p. 29, l. 20). "They made me sign; what could I do? I am a poor old deaf woman, I don't know any of these things." By "they" she means "Mattio Capone; my brother. It was those two" (p. 29, l. 30). The defendant does not know how to read (p. 31, l. 10) or write (l. 12). She is 76 years of age (p. 44, l. 15). She denies she got \$12,000 in Liberty Bonds (p. 32, l. 28).

John Di Benedetto says that after Pessolano returned from Italy "he claimed that there was stolen bonds missing and he said he had them in the safe deposit box; he said there was \$12,000.00 worth" (p. 40, l. 20). "He claimed I took them and he said the bonds were numbered and couldn't be changed." They started arguing to my mother that they were going to have me arrested, this Capone comes with my uncle, and meeting the old lady, told her that they were going to have me arrested for taking the bonds" (p. 40, ll. 20-40). "Pessolano and Capone came to the house and started to talk to my mother

about this mortgage and that if she didn't sign the mortgage that they would have me arrested, so Capone and my uncle went out of the house and they come back, and when they come back they asked my mother to come up in Judge Davis' office and when I went up, I drove them out there with the car, and when we went up in Judge Davis' office I asked Mr. Davis what they wanted my mother up there for and he said, 'She has got to sign the \$12,000.00 mortgage.' I said, 'I won't stand for her to sign it.' He said, 'What have you got to do with your mother?' I tried to stop her from signing it and I was put out" (p. 41, ll. 10-40).

He says no complaint was ever made against him nor was he indicted (p. 42, l. 40).

On cross, he says his mother "was crying" under the threats (p. 43, l. 15).

Theresa Monica, a daughter of defendant, says that she was called to the house by the defendant. She says, "My uncle said to me, 'There is \$12,000.00 Liberty Bonds missing and your brother John took them, so if John don't make good with those Liberty Bonds we will have him arrested.' 'You tell your mother to make good. We will make a mortgage and let her sign that mortgage for \$12,000.00 or we will have John arrested.' 'She will never lose the money because your mother has worked hard for me when she was young and her share is always there.' " Witness told all this to her mother (p. 48, l. 7).

Her uncle also said to her mother in her presence, "I am going to see that you make up your mind that if John don't come with the \$12,000.00

Liberty Bonds you will have to sign a mortgage or we will have John arrested." "If you sign this mortgage the money is always yours, you will never lose by it" (p. 48, ll. 10-20).

Defendant said, "Must I see my son in jail for nothing. I won't lose anything. I might as well sign the mortgage" (p. 48, l. 25).

Miss Cooper, the bank employee, says that she saw John DiBenedetto open the box in the absence of Pessolano and take a package of papers from the box. "They looked like bonds. I cannot say what kind of bonds they were, but they looked like bonds" (p. 35, ll. 30-40). It was after that Pessolano visited the box (p. 36, l. 10) and said some things were missing (p. 37, l. 28).

As to the execution of the mortgage, Judge Davis was dead at the time of the trial (p. 21, l. 15), but J. Fred Berstecher, an attorney connected with his office at the time the mortgage was signed, says he did practically all of the title work of the Judge's firm (p. 20, l. 15). He says, "I recall that I was not familiar with the circumstances involving the mortgage. Judge Davis, my recollection is, brought Mrs. Di Benedetto into my office and asked me to have this mortgage signed and I undertook to explain it to Mrs. Di Benedetto but apparently she couldn't understand me, so I called Mr. Giordano, whose office was just across the way, and he came in and interpreted the mortgage and I notice he signed as a subscribing witness to it" (p. 20, l. 20).

No money passed through witness' hands (l. 35) and the firm's books show no money passing

and no charge for services to Mrs. Di Benedetto (l. 35 and on). Mrs. Di Benedetto couldn't speak English (p. 21, l. 30).

It is contended that this evidence at close of defendant's case proved all the facts necessary to sustain the plea of defendant.

Mattia Capone was sworn in rebuttal of defendant's testimony.

He is the husband of a niece of Pessolano and the defendant (p. 51, l. 1) and an executor of Pessolano's will (p. 54, l. 1). His story of the execution of the mortgage is found on page 51, line 30 *et seq.*, of the case. He corroborates defendant's witnesses here when he talks of Pessolano's question to defendant, "Why did you give John DiBenedetto the key?" thus showing that Pessolano had accused someone of the theft of the bonds. The witness' words on page 52, line 10, "Mrs. DiBenedetto gave him the key to go down in the vault and I don't know whether she sent him down there or who sent him down, or he went down himself to get the bonds. I didn't say anything at all," are mere opinion and hearsay.

Capone here admits that he spoke to John about the bonds; that John denied taking the bonds and said uncle was going to sue the bank (p. 52, l. 20). Denies he or Pessolano threatened arrest (l. 28). Says the defendant and her son offered to give a mortgage (l. 40).

On cross-examination he says (p. 56, l. 38) that Pessolano told defendant the Liberty Bonds were taken and said, "Don't worry, you won't lose a cent," and that John must have taken the bonds

(l. 40), but that she wouldn't lose a nickel (p. 57, l. 8); that "if you (defendant) didn't take it for sure I will sue the bank." Witness says he didn't threaten to arrest John but when asked whether Pessolano threatened to arrest John answers, "I don't remember that" (p. 57, l. 25). Says he was there to be a witness of what was going on (l. 30).

In the foregoing testimony and from the exhibits the following facts are undisputed:

1. That Pessolano had a safe deposit box to which he and John DiBenedetto had access.
2. That John DiBenedetto opened the box while Pessolano was in Italy and took out a package that looked like bonds.
3. That upon his return Pessolano missed the bonds and had some argument with Mrs. DiBenedetto about their being taken.
4. That as a result of that argument Mrs. DiBenedetto executed the mortgage in question.
5. That she received no money in the transaction.
6. That no demand for the mortgage money was made in the lifetime of Pessolano and no proceedings instituted to foreclose though the mortgage was long overdue.
7. That the mortgage bears the same rate of interest as the Libery Bonds, $4\frac{1}{2}\%$.

The only issue therefore is whether or not the mortgage was given under duress and to compound a felony or whether it was voluntarily offered to Pessolano by defendant. To believe the

latter it is necessary to discard entirely the testimony of the defendant and her three children. They are no more the "beneficiaries" of their testimony than is Capone of his. But Capone corroborates the defendant's witnesses in every essential except the threats. How can his presence with Pessolano at the time be explained except to sustain and support Pessolano in his threats? If the offer of a mortgage was a voluntary one his presence to "explain" was entirely unnecessary.

Furthermore, the testimony of Mr. Berstecher that the transaction went through his firm's office in an irregular way (no book record of it being made and the turning of the matter over to him by Judge Davis when it practically had been completed by the Judge, and no charges against defendant being made) showed that a transaction out of the ordinary was being put through.

It seems clear that if the mortgage was voluntary Pessolano's actions would have been very different than they were. The very haste with which the matter was consummated shows plainly that it was the result of the threats. Within two days, yes, within twenty-four hours the threats were made and the matter settled by the mortgage.

The payment of interest should not be taken against the defendant. To her it was a legitimate transaction, *i. e.*, she was giving a mortgage to save her son from jail and to her it was a mortgage upon which interest had to be paid. She had another mortgage on her property. She was old, couldn't read or write, and was very

deaf, and besides, it is a fair inference that she supposed if she didn't pay interest her son would be jailed the same as he would have been jailed if she didn't give the mortgage.

In the same light she may have considered the mortgage in the nature of a loan, which explains the statement in her petition of appeal in the Rhode Island will contest that her brother Pessolano had made two loans to her, one of \$12,000.00 at 4½%. The common understanding of a mortgage is that it is security for a loan, and when the Rhode Island lawyers were informed that Pessolano held two mortgages on defendant's property the petition's phraseology may be charged to their assumption that they were loans. There is no record in the office of Howe & Davis that it was a loan. Furthermore, the defendant may have wanted to conceal her son's dishonorable act from her Rhode Island attorneys. Incidentally, the facts in this petition show the craftiness of the witness Capone in concealing from defendant the existence of the Rhode Island will, probated June 26, 1926, until August 17, 1926, 52 days after its probate, which was after her right of appeal from the probate expired (p. 70, l. 15).

It may be that this case, if decided in favor of defendant, will have to be based on the testimony of her children, corroborated by other witnesses, but these children were the natural witnesses of such a transaction. John and Joseph lived with the defendant, and Theresa, the daughter, was called from Newark. The boys' presence is admitted and the girl's is not denied. They cannot fairly be called "beneficiaries" of their testi-

mony and their testimony discarded for that reason.

It is respectfully urged that a finding from the testimony that John DiBenedetto stole the bonds; that Pessolano could get no satisfaction alone; that he sought Capone's aid and together they threatened defendant that unless she executed the mortgage her son would be jailed and the family disgraced; that to save them and settle the theft the mortgage was signed, induced also by the promise of Pessolano that it would be hers at his death, would be a proper finding, and a decree made accordingly.

Respectfully,

ARTHUR B. SEYMOUR,
Solicitor for and of Counsel with
Defendant-Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS

<p>MATTIA CAPONE and AN- TONIO SPINELLO, executors under the last will and testa- ment of Antonio Pessolano, Complainants-Appellees, vs. ANGELINA DI BENEDETTO, Defendant-Appellant. And Others, Defendants.</p>	<p>On Appeal from the Court of Chancery Sat below: M. L. Berry, V. C. Samuel O. Offen, Solicitor for Com- plainant, Samuel H. Nel- son of counsel with Complainant.</p>
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BRIEF OF COMPLAINANT-APPELLEE
STATEMENT

Complainant's testator and defendant-appellant were brother and sister. Prior to August 7, 1922 the following events transpired:

Complainant's testator, while living with defend-ant-appellant, hired a safe deposit vault in the Orange National Bank to which complainant's testator and a son of defendant-appellant were to have joint access. Complainant's testator left for Italy and upon his return he complained to defend-ant-appellant, who held the keys to the vault, that some liberty bonds in the sum of \$12,000. which he placed therein were missing. Defendant-ap-pellant voluntarily offered to give complainant's testator a mortgage for \$12,000. bearing interest at the same rate as liberty bonds bore, viz: 4½% per annum. Complainant's testator, Mattia Capone, (executor herein) defendant-appellant and defend-ant-appellant's son, John, went to the law office

of Judge Davis in Orange, New Jersey, where the bond and mortgage in question were drawn, executed and delivered on August 7, 1922. Prior to the execution of the said bond and mortgage defendant-appellant's son, John, was asked to and did actually leave the room where the said bond and mortgage were executed. Interest was paid on the said bond and mortgage at the rate therein specified up to August, 1925, up to which time no question was raised by the defendant-appellant concerning the validity of the said bond and mortgage. Complainant's testator and Judge Davis died thereafter.

The defendant-appellant filed an answer and counterclaim, wherein she sought to avoid payment of the said bond and mortgage on two grounds: (1) that the bond and mortgage were procured by duress of threats of arrest of defendant-appellant's son; (2) that there was an agreement that the obligor would never have to pay same.

At the final hearing before Vice Chancellor Maja Leon Berry defendant-appellant admitted the execution of the said bond and mortgage and that if anything was due thereon the amount set forth in the bill was correct. Testimony was presented by the parties and the Court found that there was no duress and that the full amount sought in the bill was due under the said bond and mortgage and entered a decree accordingly.

From that decision the defendant-appellant has taken this appeal, raising only issues of fact.

ARGUMENT

The first and fifth grounds of appeal are mere conclusions and involve the same issues presented

in the other three grounds. The second, third and fourth grounds will therefore be answered.

The second ground in substance is that the mortgage was void because given to compound a felony. In the first place the answer and counterclaim allege that the duress consisted in "wrongfully" accusing defendant-appellant's son, John, of stealing \$12,000. in liberty bonds, "though said John Di Benedetto denied the theft" (State of Case, page 10, lines 10 to 30). The pleadings not only fail to admit that a felony was committed but expressly deny same. In the second place the testimony of the defendant-appellant denies any theft or that of felony was committed (see State of Case, page 40, lines 36 to 40, page 41, lines 1 to 6, page 43, lines 1 to 8, lines 19 to 20).

It is well established that there can be no compounding of felony without the commission of a felony. (State vs. Hanson, 69 N. J. L. 42). The defense of illegality cannot be sustained unless a crime is alleged and proved. (Manning vs. Columbian Lodge, 57 N. J. Equity 338; Ball vs. Ward, 76 N. J. Equity 8).

The fourth ground of appeal is duress in the procurement of the instruments. The Vice Chancellor heard the testimony of the witnesses and concluded that there was no duress and that the bond and mortgage were given voluntarily. There are several circumstances which deserve consideration. The mortgage was acknowledged before an attorney at law as appears from an inspection of the instrument (page 65, State of Case). Interest was paid on the mortgage from August 7, 1922 to August 7, 1925 (page 31, State of Case, lines 1 to 7). ^(page 30 lines 28-31) Complainant, Mattia Capone, who was present when the conversation took place between defendant-appellant and complainant's testator prior

to the execution of the bond and mortgage testified that there was an argument by the complainant's testator and the defendant-appellant as to why defendant-appellant gave the key of the vault to her son, John, and that the defendant-appellant said: "Well, I don't know, but you don't have to worry, you don't lose a penny, if he took the bonds" (page 51, State of Case, lines 30 to 40). Said Capone further testified that there were no threats of arrest (page 52, State of Case, lines 23 to 30). Said Capone further testified **on cross examination**: "Uncle told me that Mrs. Di Benedetto asked for more money because she was building a house and they refused to give it to her. My uncle told me that is why he gave the key to John to go down and get the liberty bonds". (page 55, State of Case, lines 33 to 39). Said Capone further testified that the rate of interest on the mortgage was agreed upon as that on the liberty bonds, viz: $4\frac{1}{2}\%$ (page 52, State of Case, lines 34 to 40). Capone further testified that the defendant-appellant stated that she was putting up a building across the street and couldn't give the cash to complainant's testator but that a mortgage could be made at the same rate of interest as liberty bonds, $4\frac{1}{2}\%$. (see State of Case, page 52, lines 35 to 40, page 53, lines 1 to 20).

Defendant-appellant testified that Capone said in her presence: "You come and sign the mortgage because the money is always yours, you will never lose your home, the money is always yours. Then I see you and that is how I signed the mortgage. Otherwise I would never have signed it". (page 28, State of Case, lines 20 to 30). No mention is made of threats of arrest. Defendant-appellant further said "I didn't hear very well and I didn't know just what they were saying. I am very deaf". (page 29, State of Case, lines 1 to 20).

10). At another point in her testimony defendant-appellant was asked what Capone said to her in the presence of complainant's testator and she said: "He didn't tell me anything. They did it themselves. They mixed things up". (page 27, State of Case, lines 17 to 20). At another point the defendant-appellant was asked what Capone said about the keys, the liberty bonds and her son, John, and she said: "I don't know. I didn't hear anything. I didn't even know what they were saying. I couldn't hear". (page 30, State of Case, lines 12 to 18). It is very evident from her testimony that she knew little or nothing of what was being said prior to and at the time of the execution of the bond and mortgage in question. She didn't deny that she was building a house and needed the money which was testified to by complainant. Furthermore she made a petition in a Rhode Island case in which she stated that she received a loan of \$12,000. at 4% from complainant's testator. This fact is not contradicted. (page 32, State of Case, lines 9 to 25, page 68 to 72, State of Case.

John Di Benedetto, the son of defendant-appellant who was under suspicion, denied that he stole the bonds (page 41, State of Case, lines 1 to 5; page 43 State of Case, lines 1 to 5 and lines 18 to 20. He told this to his mother, defendant-appellant (page 43, State of Case, lines 18 to 20.) He said he was put out of the office of Judge Davis at the time of the execution of the bond and mortgage and consequently did not know what happened when the bond and mortgage were executed. (page 41, State of Case, lines 35 to 41).

Joseph Di Benedetto, another son of defendant-appellant, said that he did not believe that his uncle (complainant's testator) knew what was be-

ing said prior to and at the time of the execution of the bond and mortgage. When asked whether his uncle was present he said: "Yes, but I don't believe my uncle understood half of what was going on because he didn't seem to be very anxious about the thing. I don't believe my uncle thought he lost the bonds". (page 46, State of Case, lines 25 to 33). This refutes the contention that complainant's testator committed duress.

Vice Chancellor Berry saw and heard the witnesses, and undoubtedly formed his conclusions therefrom as to the weight to be given to the testimony of defense witnesses. He concluded that the defendant had not sustained the burden of proof and that there was no duress.

The fourth ground of appeal is in substance that there was an oral agreement that the obligor would never be called upon to pay the said bond and mortgage. There is no testimony whatsoever in the case which indicates that such an agreement was made. Assuming that the said oral agreement was in fact made, same would be and is inadmissible as it would tend to vary or alter the terms of a writing clear and unconditional upon its face and admitting of no doubt as to the intent and frame of mind of the parties to the said transaction. Furthermore, the fact that the obligor waited until after the obligee's death and until after the lips of a disinterested witness, Judge Davis, were sealed by death, before asserting such alleged agreement and the invalidity of the mortgage and the fact that the obligor paid interest on the said bond and mortgage for fully three years and the utter improbability of the truth of such story would entitle such testimony to no weight whatsoever. The Court below in its opinion referred to the testimony of the defendant as

“uncertain” and to the testimony of the two children “who will be the chief beneficiaries by reason of the invalidity of this mortgage, if the defense were sustained” as “evasive” (pages 58 and 59 of State of Case).

The complainant-appellee respectfully submits that the finding of fact and the determination of the Court below should be affirmed.

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