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Bill of Complaint.

In Chancery of New Jersey.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

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The Complainant, John J. Van Order, of the Borough of Caldwell, County of Essex and State of New Jersey, respectfully shows:

1. That on June 29, 1926, Complainant, together with Alderman S. Newbern, entered into an agreement with the United States Fidelity & Guaranty Company, a true copy of which is annexed hereto and made a part hereof and designated as Schedule "A".

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2. That by the true intent and meaning of the said agreement annexed hereto and made a part hereof and designated as Schedule "A", the Complainant and Alderman S. Newbern agreed to indemnify the United States Fidelity & Guaranty Company against any loss that it might incur through the issuance by it of a bond in favor of Pierce, Butler & Pierce Manufacturing Corporation, for the purpose of discharging a mechanic's lien filed by Pierce, Butler & Pierce Manufacturing Corporation against Alderman S. Newbern, Owner and Builder, A. J. Hoffman, Contractor, Catherine Muir, Emma A. Mayer, Orange National Bank, a corporation, and Fannie D. Herman, Mortgagees, which said bond the United States Fidelity & Guaranty Company agreed to issue, and relying on which promise the indemnification agreement entered into with the United States Fidelity &

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Bill of Complaint.

Guaranty Company by Complainant and Alderman S. Newbern, annexed hereto was made.

3. The United States Fidelity & Guaranty Company never issued, executed or filed the bond in favor of Pierce, Butler & Pierce Manufacturing Corporation for the purpose of discharging the mechanic's lien, as aforesaid, and as it agreed to do.

4. That Complainant had no knowledge that the United States Fidelity & Guaranty Company had not filed a bond in favor of Pierce, Butler & Pierce Manufacturing Corporation to discharge the lien, as aforesaid, until he, through his Attorney, advised with the Attorney for the United States Fidelity & Guaranty Company, for the purpose of instituting a motion by the United States Fidelity & Guaranty Company to discharge the lien claim and the bond supposed to be filed by the United States Fidelity & Guaranty Company as aforesaid, and which motion was subsequently made; on the hearing of said motion, which was had on or about September 22, 1928, Counsel for Pierce, Butler & Pierce Manufacturing Corporation pointed out to the Court that instead of a bond being issued in favor of the said Pierce, Butler & Pierce Manufacturing Corporation the agreement entered into by Complainant and Alderman S. Newbern and the United States Fidelity & Guaranty Company was filed instead; as a result thereof, the motion to dismiss the bond and lien claim was dismissed by the Court, as set out in an order of said Court, dated October 5, 1928, a copy of which is annexed hereto and made a part hereof and designated as Schedule "B"; this was the first intimation that the Complainant had that the bond which the United States Fidelity & Guaranty Company agreed to

file, had not been filed; but inasmuch as the United States Fidelity & Guaranty Company had incurred no liability on its part, because of its failure to file the bond as agreed upon, and the Complainant's obligation being to indemnify the said United States Fidelity & Guaranty Company only in the event of the loss suffered by it, the Complainant did nothing concerning the matter.

5. That as the United States Fidelity & Guaranty Company did not file the bond in favor of Pierce, Butler & Pierce Manufacturing Corporation for the purpose of discharging the lien, as aforesaid and as it agreed to, the motion to dismiss the lien claim and the bond, if it had been filed, would have been sustained and the liability of the United States Fidelity & Guaranty Company and the liability of the Complainant and Alderman S. Newbern also would have been dissolved.

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6. Subsequently on December 19, 1928, a final judgment was recovered in the Essex County Circuit Court by Pierce, Butler & Pierce Manufacturing Corporation on the lien claim referred to herein, for the sum of \$1600.96 damages, and \$85.97 costs of suit generally against the Defendant, A. J. Hoffman, and to the extent of \$800.48 to be specially made out of the lands and building described in the second tract in said lien claim referred to; and that on December 22, 1928 in said Court Pierce Butler & Pierce Manufacturing Corporation also recovered a judgment of \$800.48 damages, and \$85.97 costs, on said lien claim already referred to, against the lands and buildings described in the first tract of the lien claim already mentioned.

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7. Complainant is reliably informed and verily believes that on or about March 22, 1929 the said Pierce, Butler & Pierce Manufacturing Corpora-

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Bill of Complaint.

tion assigned the above judgment to Louise G. Johnson.

8. Complainant is also reliably informed and verily believes that the United States Fidelity & Guaranty Company has assigned all its rights, title and interest in the indemnity agreement referred
10 to herein and annexed hereto and made a part hereof and designated as Schedule "A" to the said Louise G. Johnson.

9. That on or about April 17, 1929 the said Louise G. Johnson instituted suit in the New Jersey Supreme Court against complainant and Alderman S. Newbern on the agreement entered into between the Complainant and Alderman S. Newbern and the United States Fidelity & Guaranty
20 Company, which is annexed hereto and made a part hereof and designated as Schedule A, to recover the sum of the judgments obtained by the Pierce, Butler & Pierce Manufacturing Corporation, as set out herein, and which have been assigned to the said Louise G. Johnson and which said suit is now pending in the New Jersey Supreme Court.

10. The complaint filed by the said Louise G. Johnson in the action instituted by her in the New Jersey Supreme Court, as aforesaid, does not
30 allege any loss incurred by the United States Fidelity & Guaranty Company, of which company said Louise G. Johnson is the assignee.

11. Complainant further shows that the United States Fidelity & Guaranty Company was in duty and conscience bound to return to the Complainant the said indemnity agreement or bond annexed hereto and made a part hereof and designated as
40 Schedule "A", but instead, and with intent to in-

Bill of Complaint.

jure and defraud the Complainant, unlawfully assigned the said instrument to Louise G. Johnson, the defendant herein, and that the said Louise G. Johnson took the same with intent to embarrass and defraud the Complainant knowing that the Complainant would have no defense to the same in a suit at law.

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12. That Complainant filed an answer to complaint of the said Louise G. Johnson in the suit instituted by her in the New Jersey Supreme Court as aforesaid, alleging the facts set out herein, which answer the Attorney for the Plaintiff, the said Louise G. Johnson, moved to strike out as being sham and frivolous; the matter having come on to be heard on June 8, 1929 before the Honorable William S. Gummere, at Newark, New Jersey, and after reading the affidavits and reading the argument of Counsel, the Court decided that the said answer filed by the Complainant, as aforesaid, did not constitute a legal defense and that he would order it stricken out; however, the Court before entering such an order granted leave, for a period of one week, to Counsel for Complainant to afford him an opportunity to apply to the Court of Chancery for relief.

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That Complainant is without adequate remedy in the Courts of law and therefore prays:

1. That Louise G. Johnson, who is the Defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That it be decreed that the said Louise G. Johnson surrender the said agreement or bond annexed hereto and made a part hereof and designated as Schedule "A" for cancellation.

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Bill of Complaint.

3. That the said Louise G. Johnson, her Counsel, Attorneys, Solicitors, Officers and Agents, and each and every one of them, may be restrained and enjoined against proceeding further against the Complainant in the said action at law commenced against him in the said New Jersey Supreme Court and now pending therein, for the recovery of
10 \$1600.96 damages, and \$85.97 costs, as set out in complaint filed in said Court by the said Defendant herein, as shown in copy of complaint, annexed hereto and made a part hereof and designated as Schedule "C".

4. That a Writ of Subpoena may issue, commanding said Defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.
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FORLENZA & HARRINGTON,
Solicitors for and of Counsel
with Complainant.

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Answer.

IN CHANCERY OF NEW JERSEY.

Between

JOHN J. VAN ORDER,
Complainant,

and

LOUISE G. JOHNSON,
Defendant.} On Bill, etc. 10
} Answer.

Louise G. Johnson, of the Borough of Verona, County of Essex and State of New Jersey, answering the bill of complaint in this cause says:

1. She admits paragraph 1. 20
2. She has no knowledge of paragraph 2 and leaves complainant to his proof.
3. She has no knowledge of paragraph 3 and leaves complainant to his proof.
4. She denies paragraph 4.
5. She has no knowledge of paragraph 5.
6. She admits paragraphs 6, 7, 8 and 9. 30
7. She denies paragraph 10 as pleaded. She admits that she did not allege any loss incurred by the United States Fidelity & Guaranty Company but alleged a breach of the condition of the bond by the entry of a judgment on mechanics' liens.
8. She denies paragraph 11.
9. She admits paragraph 12. 40

Answer.

And this defendant further answering says that about May 1926 and prior thereto, Alderman S. Newbern, a building contractor (and the co-defendant of John J. VanOrder in the suit at law herein sought to be restrained) had erected two houses on Gould Street, Verona, New Jersey.

10 About May 26th, 1926, Newbern contracted to sell these two house, one to a man named Smith and the other to a man named Muir. Each house was to be sold subject to a first mortgage of \$7000.00 then a lien thereon; as part of the purchase price, Newbern was to take back on the house sold to Smith a purchase money mortgage of \$2500.00; on the house sold to Muir a purchase money mortgage of \$2000.00. The firm of Ames & Crane was retained by Smith and by Muir to examine the title, to tend to and represent and protect them on the

20 purchase of the property. The search developed that two mechanics' lien claims had been filed against Newbern affecting this very property, one filed February 16th, 1926 by one Alfred J. Hoffman, Inc., a plumbing company; another filed May 12th, 1926 by Pierce, Butler & Pierce Mfg. Corp. who supplied plumbing fixtures. Newbern alleged that he had a defense as the two liens really covered the same items. Ames & Crane refused to pass

30 title until these liens were cleared of record.

The defendant further says that at this juncture complainant John J. VanOrder called upon Ames & Crane and explained to them that he was vitally interested in seeing that these titles passed; that Newbern owed him a very large sum of money which he saw no way to collect; that Newbern was to assign to the said VanOrder or to his nominee, the two second mortgages; he agreed that if Ames

40 & Crane passed the title, he would indemnify and

Answer.

hold them harmless; that Ames & Crane represented that they preferred to have the record cleared, and suggested that he have Newbern get a Bonding Company to bond the liens. A few days later, the said John J. VanOrder entered into a bond of indemnity to the United States Fidelity & Guaranty Company and the United States Fidelity & Guaranty Company issued a bond to Alfred J. Hoffman, Inc., plaintiff in one of the liens, and that lien was properly discharged of record. That in the latter part of June 1926, VanOrder again called on Ames & Crane to urge them to pass the title at once, although the lien by Pierce, Butler & Pierce Mfg. Corp. was still open of record, and the said John J. VanOrder then and there agreed to indemnify and protect Ames & Crane or their client against said judgment. That the said John J. VanOrder was a man of large financial means; that Ames & Crane had known him well for many years and placed absolute confidence in his promise. That they thereupon prepared an exactly similar bond of indemnity to the United States Fidelity & Guaranty Company as was prepared on the Hoffman lien, with instructions to issue an exactly similar bond and thereupon, upon VanOrder's promise and representations to clear the premises of the lien and to indemnify and protect them, the said Ames & Crane passed the title.

Defendant further answering says that apparently through inadvertence or mistake on the part of the United States Fidelity & Guaranty Company, instead of issuing a bond to the plaintiff Pierce, Butler & Pierce Mfg. Corp., as they had in the former case and as of course, was intended, they carelessly and erroneously signed their name to

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Answer.

the bond which was intended to indemnify them. That said bond was taken by Newbern and deposited in the Court House and a notation of the filing of the bond made upon the lien. That Ames & Crane learned nothing further about the matter until the entry of final judgment on the mechanics' lien case of Pierce, Butler & Pierce Mfg. Corp. on December 19th, 1928, and a subsequent threat on the part of the attorneys of the lien claimant. That thereupon said Ames & Crane immediately called upon complainant to protect them and their clients by the payment of the lien; this the said John J. VanOrder refused to do and said Ames & Crane in order to protect the purchasers whom they represented, which they were in duty bound to do, purchased said judgment under the name of this defendant. This defendant further says that after making further demands upon the said John J. VanOrder to keep his promise and protect them and their clients, and for the purpose of compelling him to do the very thing that he contracted to do, induced the United States Fidelity & Guaranty Company to assign its bond to this defendant.

And this defendant further answering says that as a suitor in this Court, the said John J. VanOrder is bound and required to do equity. That it was his promise and intention to pay the Pierce, Butler & Pierce Mfg. Corp. claim if and when a judgment was entered, and to protect Ames & Crane and the land purchased by their clients from this mechanics' lien.

And this defendant prays that the said bill of complaint may be hence dismissed with her reasonable costs and charges.

CHARLES JONES,
Solicitor of Defendant.

Replication.

Filed Oct. 9, 1929.

IN CHANCERY OF NEW JERSEY.

Between

JOHN J. VAN ORDER,
Complainant,

and

LOUISE G. JOHNSON,
Defendant.

On Bill, etc.
Replication.

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John J. Van Order, of the Borough of Caldwell,
County of Essex and State of New Jersey, reply-
ing to the Answer filed by the Defendant herein
says:

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Complainant joins issue on the answer of the De-
fendant.

FORLENZA & HARRINGTON,
Solicitors for and of Counsel
with Complainant.

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Order of Reference.

Filed Oct. 16, 1929.

IN CHANCERY OF NEW JERSEY.

10	Between JOHN J. VAN ORDER, Complainant, and LOUISE G. JOHNSON, Defendant.	}	On Bill, etc. Order of Reference.
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20 This matter being opened to the Court by Hubert J. Harrington, Esquire, of Counsel, Solicitors of Complainant, and it appearing that Charles Jones, Esquire, Solicitor for Defendant, has consented thereto;

30 It is on this 16th day of October, Nineteen Hundred and Twenty-nine, on motion of Hubert J. Harrington, Esq. of Counsel, Solicitors of Complainant, ORDERED that the above entitled cause be referred to Hon. Alonzo Church, one of the Vice Chancellor's of this Court to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
C.

I hereby consent to the entry of the foregoing order.

CHARLES JONES,
Solicitor for Defendant.

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Notice.

IN CHANCERY OF NEW JERSEY.

Between

JOHN J. VAN ORDER,
Complainant,

and

LOUISE G. JOHNSON,
Defendant.On Bill, etc.
Notice.

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To FORLENZA & HARRINGTON,
Solicitors of Complainant:

Take Notice, that on Tuesday, the 3rd day of
December, 1929 at 10:00 in the forenoon, or as soon
thereafter as counsel can be heard thereon, at the
Chancery Chambers, No. 1060 Broad Street, New-
ark, New Jersey, I shall apply to have a day fixed
for the hearing of the above entitled cause.

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Respectfully,

CHARLES JONES,
Solicitor of Defendant.

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Final Decree Dismissing Complainant's Bill.

IN CHANCERY OF NEW JERSEY.

Between

JOHN J. VAN ORDER,
Complainant,

and

LOUISE G. JOHNSON,
Defendant.

On Bill, etc.

Final Decree
Dismissing
Complainant's
Bill.

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This matter coming on to be heard in the presence of Hubert J. Harrington, of Forlenza & Harrington, of counsel with complainant, and Charles Jones, of counsel with defendant, on bill, answer, replication and proofs taken in open court;

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And the court having read the pleadings, considered the evidence and the arguments of respective counsel; and it appearing from the consideration of the same, that it would be inequitable to grant the relief prayed for by the complainant, and that the same should be denied;

It is on this 16th day of Sept. 1930, on motion of Charles Jones, of counsel with defendant, Ordered, Adjudged and Decreed, that the complainant's bill of complaint be and the same is hereby dismissed;

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And it is further Ordered, that the complainant pay to the defendant her costs of suit to be taxed, in which shall be included a counsel fee of \$250 for defendant's solicitor.

EDWIN R. WALKER,
C.

Respectfully advised.

ALONZO CHURCH,
V. C.

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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

10	Between JOHN J. VAN ORDER, Complainant, and LOUISE G. JOHNSON, Defendant.	}	On Bill, etc. Notice of Appeal.
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20 The Complainant, John J. Van Order, hereby
 appeals from the final decree made by the Chancellor on the advice of Vice Chancellor Alonzo Church
 in the above entitled cause on September 16, 1930,
 and from the whole and every part thereof, to the
 Court of Errors and Appeals in the last resort in
 all causes.

Dated: September 23, 1930.

FORLENZA & HARRINGTON,
 Solicitors for and of Counsel with
 Complainant, John J. Van Order.

30 I conceive there is good cause for appeal in the
 above entitled cause.

FELIX FORLENZA,
 Of Counsel with Complainant,
 John J. Van Order.

Amended Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between JOHN J. VAN ORDER, Complainant, and LOUISE G. JOHNSON, Defendant.	}	On Bill, etc. Amended Notice of Appeal.	10
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The Complainant, John J. Van Order, hereby appeals from the final decree made by the Chancellor on the advice of Vice Chancellor Alonzo Church, Esquire, in the above entitled cause on September 16, 1930, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. 20

Dated: September 23, 1930.

FORLENZA & HARRINGTON,
 Solicitors for and of Counsel with
 Complainant, John J. Van Order.

I conceive there is good cause for appeal in the above entitled cause. 30

FELIX FORLENZA,
 Of Counsel with Complainant,
 John J. Van Order.

Petition of Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	JOHN J. VAN ORDER, Complainant-Appellant, vs. LOUISE G. JOHNSON, Defendant-Appellee.	}	On Appeal from the Court of Chancery. 73/498. Petition of Appeal.
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*To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:*

20 The Petition of John J. Van Order, the Appellant in the above entitled cause, respectfully shows that:

30 Your Petitioner finds himself 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 date September 16, 1930, in a certain cause in said Court of Chancery, wherein the said John J. Van Order was Complainant, and the said Louise G. Johnson was Defendant, in that the said decree recites and adjudges that it would be inequitable to permanently enjoin and restrain the Defendant, Louise G. Johnson, her counsel, attorneys, solicitors, officers and agents, and each and every one of them, against proceeding further against the Complainant in a certain action at law commenced against the said Complainant in the New Jersey Supreme Court and that the said relief prayed for in the said bill

40 of complaint be denied.

Petition of Appeal.

And your petitioner appeals from the said decree and from every part thereof, on the ground that the same is erroneous in that the said Chancellor should have recited and adjudged that the Defendant, Louise G. Johnson, her counsel, attorneys, solicitors, officers and agents, and each and every one of them, should have been permanently restrained and enjoined against proceeding further against your petitioner in an action commenced against him in the New Jersey Supreme Court and should have granted the petition of your Petitioner. 10

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that your petitioner may have such other relief in the premises as to this Court shall seem proper. 20

FORLENZA & HARRINGTON,
Solicitors for and of Counsel
with Appellant.

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Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	JOHN J. VAN ORDER, Complainant-Appellant, vs. LOUISE G. JOHNSON, Defendant-Appellee.	}	On Appeal from the Court of Chancery. Answer to Petition of Appeal.
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20 The answer of the above named respondent to the petition of appeal of the above named appellant.

30 This defendant, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereto nevertheless, says and admits that a decree was on the 16th day of September, 1930 made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated;; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said decree is agree- to equity, and she prays that the same may be af- firmed with costs to be adjudged to this respond- ent.

CHARLES JONES,
Solicitor for and of Counsel
with Defendant-Appellee.

Memorandum.

IN CHANCERY OF NEW JERSEY.

Between

JOHN J. VAN ORDER,
Complainant,

and

LOUISE G. JOHNSON,
Defendant.

Memorandum.

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(Not for
print)

This Memorandum is not to be published in the official or unofficial reports.

MESSRS. FORLENZA & HARRINGTON, for complainant.

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MR. CHARLES JONES, for defendant.

CHURCH, V. C.

The facts as alleged in the oral stipulation in open court, and supplemented by the testimony taken, seem to be:

In the spring of 1926, Alderman S. Newbern was a building contractor. He had dealings to a considerable extent with Mr. Van Order and his lumber concern, and he owed him considerable money. Ames & Crane are really the interested parties in the suit, in other words, the parties that are financially interested, and Louise G. Johnson is their stenographer. Prior to May 1, 1926, Mr. Newbern had built several houses in Verona, and before that date he sold one of these houses to Catherine Muir, and subsequently, about the same time, he sold an-

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Memorandum.

10 other house near it on the same street to John Howard Smith and Eleanor Smith, his wife. According to the contract, a small amount of cash was to pass; they were to be sold subject to a first mortgage of approximately \$7,000., and on the Muir deal a purchase money second mortgage of \$2,000. was to be given back to Newbern, and on the Smith deal a purchase money second mortgage of \$2,500. was to be given back to Newbern.

Before the title was closed, and, in fact, while the negotiations for these sales were going on, Mr. Van Order demanded that these two purchase money mortgages, one for \$2,000. and the other for \$2,500. should, when executed, be assigned for a pre-existing debt due to Van Order or his concern, as had been done before in similar cases.

20 No money was advanced on the face of these mortgages at the time. Ames and Crane were employed by the respective purchasers, Muir and Smith, to search the titles and protect them in the transactions.

30 On February 16, 1926, Alfred J. Hoffman, Inc. filed a lien claim against Mr. Newbern, owner and builder, Orange National Bank, and Mayer A. Mayer, mortgagee, claiming a balance of \$1,535. covering the Smith tract. On the same day they filed a similar lien with the parties plaintiff and defendant, covering the Muir tract, claiming the same amount due.

40 After negotiations between Mr. Newbern and the United States Fidelity & Guaranty Company, the latter agreed to issue two bonds, in conformity with the mechanic's lien statute, in order to cancel the two Hoffman liens; and in order to get the United States Fidelity & Guaranty Company to

Memorandum.

issue two bonds on the Hoffman liens, two separate agreements, which are in the same language as the Pierce, Butler and Pierce agreement, were signed, wherein John J. Van Order and Alderman S. Newbern entered into a bond with the United States Fidelity & Guaranty Company that they would pay any judgments that were obtained in these Hoffman cases on the face of that bond after it was delivered and put on file in the office of the United States Fidelity & Guaranty Company. 10

The United States Fidelity & Guaranty Company issued proper bonds under our lien law, which were sent to the County Clerk, and the two Hoffman liens were properly cancelled of record. Title to the Muir piece was then passed, bond and mortgage executed, and assignment was made to May Van Order, who is the wife of John J. Van Order, but the bond and mortgage and the unrecorded assignment were left with Ames and Crane until after the passage of the Smith title and after the Pierce, Butler & Pierce matter came to a head. 20

On May 12, 1926, Pierce, Butler & Pierce Manufacturing Corporation filed a mechanic's lien in the Essex County Clerk's Office against A. J. Hoffman, contractor, Alderman S. Newbern, owner, and the various mortgagees. This covered both the Muir tract and the Smith tract. 30

After negotiations between Mr. Van Order and Mr. Newbern, Mr. Newbern came to the United States Fidelity & Guaranty Company and made arrangements with them for a bond similar to the one in the Hoffman case, which was prepared and signed by Newbern and Van Order, in which they both agreed in any and all facts in accordance with the terms of the bond, to pay any judgment that was recovered by Pierce, Butler & Pierce. 40

Memorandum.

10 The United States Fidelity & Guaranty Company agreed that on receiving the bond they would, in turn, issue their bond as they did in the Hoffman case and cancel the lien in the Pierce, Butler and Pierce case. Some error took place in the office of the United States Fidelity & Guaranty Company, and the agreement which Mr. Van Order and Mr. Newbern made with the United States Fidelity & Guaranty Company was attached to their printed matter. Their name, United States Fidelity & Guaranty Company, was added to that particular bond, and the bond was given to Mr. Newbern, who put it on record in the County Clerk's Office. The County Clerk marked on the margin of the lien, the bond was filed July 8, 1926: "United States Fidelity & Guaranty Company guarantees this lien in the event of judgment."

20 The second title, namely, the Smith title, was then passed by Ames & Crane, they having assured themselves that this second bond had been filed and the notation made on the lien as stated above. Subsequent to this and with the assurances from the record, which have been indicated by the previous agreement, Ames & Crane then, a month or so afterward, delivered the bonds, mortgages and assignments to Mr. Van Order.

30 Between a year and a half and two years later, the United States Fidelity & Guaranty Company, under a statute in which such practice is permissible, made a motion to discharge the lien claim of Pierce, Butler & Pierce, because it had not been diligently prosecuted within the year. When the consideration of the motion came before Judge Smith, October 5, 1928, this defect in the bond was found, and it was found, of course, that the bond

Memorandum.

instead of running to the plaintiff, ran to the United States Fidelity & Guaranty Company; therefore the United States Fidelity & Guaranty Company had no standing in court, and an order was entered by Judge Smith, the pertinent language of which is as follows: "And the matter being argued by the respective counsel and the attorney for plaintiff contending that the bond filed herein was not in form required by statute, but was given to the United States Fidelity & Guaranty Company instead of to the plaintiff herein, and the said bond not running to the plaintiff, the United States Fidelity & Guaranty Company is therefore not a party to the above entitled proceedings; it is on this 5th day of October, 1928, ordered that the motion of the United States Fidelity & Guaranty Company to dismiss the above proceedings and to discharge the lien and the bond filed herein, be and the same is hereby denied. William A. Smith, Judge."

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Thereafter, not having a bond to look to, the Pierce, Butler & Pierce people entered two judgments on each separate tract of land. The first was recorded in the Circuit Court in Book 106, page 241, Pierce, Butler & Pierce Manufacturing Company v. A. J. Hoffman, contractor, Alderman S. Newbern, owner, and the various mortgagees. Judgment entered December 22, 1928, for \$885.45. The other judgment was entered December 19, 1928, between the same parties plaintiff and the same parties defendant, marked after verdict Book 196, page 211, damages \$1,600. After the judgments were entered, execution was threatened which was to sell the properties of Mr. Smith and Mr. Muir, which Ames & Crane had been hired to protect, and

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Memorandum.

agreed to protect. They secured the figures in settlement and made demand on Mr. Van Order for payment. When Van Order refused payment and thereupon Ames & Crane paid the sum of \$1,797.67, an assignment was taken on the judgments from Pierce, Butler & Pierce to Louise G. Johnson, defendant, who is an employee in their office. They again made demand on Mr. Van Order for reimbursement, and he again refused. An assignment of the bond made by Van Order and Newbern to the United States Fidelity & Guaranty Company was made by the United States Fidelity & Guaranty Company to Louise G. Johnson, defendant.

Suit was then brought in the Supreme Court by Louise G. Johnson against Mr. Van Order to compel him to pay what was conceived to be the terms of the bond. An answer was filed by Forlenza & Harrington on behalf of Mr. Van Order. Motion was made before the Chief Justice to strike out the answer. The Chief Justice denied the answer being stricken out, but, in Mr. Harrington's argument before the Chief Justice, the facts of which were not subscribed to or admitted by counsel for defendant, there were some apparently equitable defenses.

The situation that confronts the court, therefore, is as follows:

Van Order desired to get \$4,500. worth of mortgages as collateral for a pre-existing debt. He asked Ames and Crane to pass the titles with that end in view. He said that if that were done, he would enter into an agreement to pay the mechanic's liens if judgment were entered thereon. He knew that one or the other of these liens would

Memorandum.

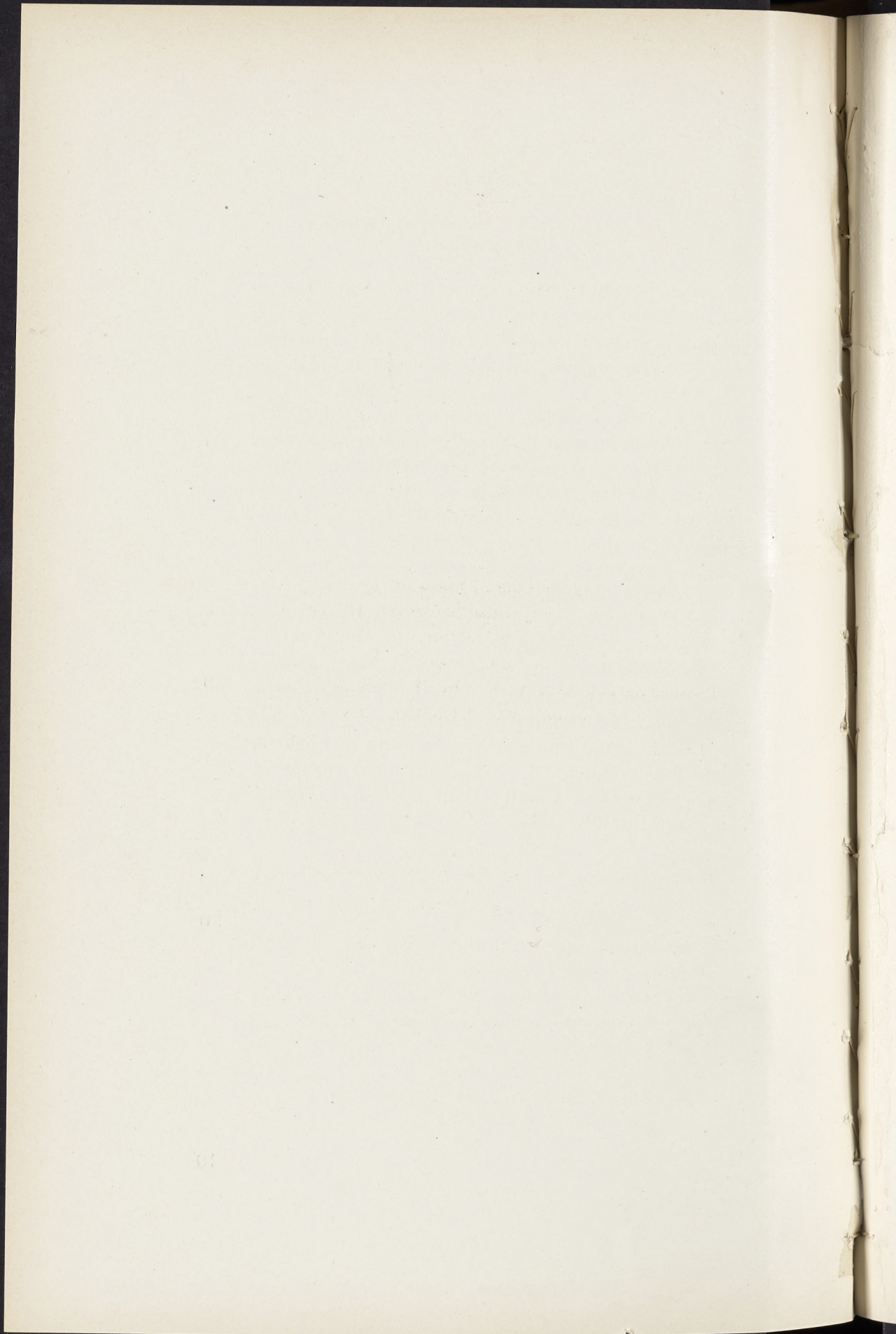
have to be paid. He seeks now to escape his responsibility because the bonding company put his bond on record instead of issuing the company's bond. His bond says that he will pay if judgment is recovered.

The facts, I think, warrant me in finding that Mr. Crane's statement is the correct one. In other words, that this language was deliberately chosen so that the lien and they, themselves, would be protected. In the last analysis it would not have made much difference, as I see it, whether the Van Order bond were filed, or as apparently was intended, the company's bond, because if the company's bond were filed and were collected upon they could have recourse to Van Order. 10

It seems to me that in such a situation, in a court of equity, Van Order has not standing. He who comes into equity must do equity. If he had agreed in his bill to pay the judgment, he might be entitled to relief. As it is, and under the pleadings as they now stand, I shall advise a decree dismissing the bill. 20

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Testimony.

IN CHANCERY OF NEW JERSEY.

January 15, 1930.

Between

JOHN J. VAN ORDER,
Complainant,

and

LOUISE G. JOHNSON,
Defendant.

10

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, ALONZO CHURCH, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of FORLENZA & HARRINGTON (by HUBERT J. HARRINGTON) for Complainant; CHARLES JONES, for Defendant.

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JOHN J. VAN ORDER, sworn for complainant.

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Direct-examination by Mr. Harrington:

(After opening and discussion).

The Court: Read into the record what is admitted and then prove the rest.

Mr. Jones: You state what you think I agree to and I will correct you on the points I do not admit.

Mr. Harrington: Defendant admits—(interrupted).

Mr. Jones: Have you got your bill?

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John J. Van Order—Direct.

Mr. Harrington: Yes, I have.

The Court: "It is admitted that—", whatever it is.

Mr. Harrington: It is admitted that—

Mr. Jones: Maybe I better put it on the record. I know what I will admit. Do you want me to dictate it?

10

Mr. Harrington: All right.

Mr. Jones: Correct me, if I am wrong.

Mr. Harrington: All right.

20

Mr. Jones: It is admitted that in the Spring of 1926, Aldermen S. Newbern was a building contractor, that he had dealings to a considerable extent with Mr. Van Order and his lumber concern; that he owed him considerable money, that Ames & Crane are really the interested parties in the suit; in other words, parties that are financially interested; that Louise G. Johnson is their stenographer; that prior to May 1, 1926, Alderman S. Newbern had built several houses in Verona; prior to that date, he sold one of these houses to Catherine Muir and subsequently, around about the same time, sold another house near it on the same street to John Howard Smith and Eleanor, his wife; according to the contract, a small amount of cash was to pass; they were to be sold subject to a first mortgage of approximately \$7,000 and on the Muir deal a purchase money second mortgage of \$2,000 was to be given back to Newbern and on the Smith deal a purchase money second mortgage of \$2500 was to be given back to Newbern.

30

It is further agreed that before the title was closed, and, in fact, while the negotiations for these sales were going on, John Van Order demanded that these two purchase money mortgages, one of \$2,000, the other of \$2500 should, when executed,

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John J. Van Order—Direct.

be assigned for a pre-existing debt due to Van Order or his concern.

Mr. Harrington: I don't think that is exactly so. I do not agree to that.

The Court: What?

Mr. Harrington: I won't agree to that. I will agree that in keeping with a previous agreement with Newbern in all these instances the second mortgages were turned over to Mr. Van Order. This is not a special instance, by any means. There were hundreds of them. 10

Mr. Jones: A debt?

Mr. Harrington: Yes. I don't want to put in there before this title was passed that Mr. Van Order was negotiating for this because there is an understanding between he and Newbern—in many transactions. 20

Mr. Jones: These mortgages were given for pre-existing debts. No money was advanced on the face of these mortgages at the time. Ames & Crane were employed by the respective purchasers, Smith and Muir, to search that title and protect them in the transaction.

It is further agreed that in the examination of that title—of these titles—there was discovered that on February 16, 1926, one Alfred J. Hoffman, Inc., claimant, filed a lien claim against Alderman S. Newbern, owner and builder, Orange National Bank, and Mayer, A. Mayer, mortgagee, in which they claimed—dated February 16, 1926, claiming a balance of \$1535, that this covered the Smith tract. On the same day, February 16, 1926, they filed a similar lien with the parties plaintiff and parties defendant, just the same, but covering the Muir tract, claiming the same amount due. 30

It is further agreed that, after negotiations be- 40

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10 tween Mr. Newbern and the United States Fidelity and Guaranty Company, that latter concern agreed to issue two bonds in conformity with the mechanics lien statute in order to cancel those two Hoffman liens; that, in order to get the U. S. F. G., United States Fidelity & Guaranty Company to issue two bonds on the Hoffman cases, two separate agreements, which are in the same language as the Pierce, Butler & Pierce agreement, were signed.

Mr. Harrington: Between whom?

20 Mr. Jones: Wherein John J. Van Order and Alderman S. Newbern entered into a bond with the United States Fidelity & Guaranty Company that they, Newbern and Van Order, would pay any judgments that were obtained in these Hoffman cases on the face of that bond after it was delivered and put on file in the office of the United States Fidelity & Guaranty Company—

Mr. Harrington: Just one point there. I want it also stipulated that United States Fidelity & Guaranty Company on the strength of this agreement between them and Van Order and Newbern—they would issue a bond to discharge the lien, because it is our contention that this—(interrupted).

30 The Court: This is the Hoffman matter?

Mr. Harrington: The statements are exactly the same.

Mr. Jones: The same language.

Mr. Harrington: You didn't say anything about them issuing a bond on the strength of this agreement.

The Court: If that is so, put it in.

Mr. Harrington: That they agreed to.

40 Mr. Jones: What is the last that I said?

(Statement read as follows: "That they, New-

John J. Van Order—Direct.

bern and Van Order, would pay any judgments that were obtained in these Hoffman cases on the face of that bond after it was delivered and put on file in the office of the United States Fidelity & Guaranty Company—”).

Mr. Jones:—That the latter concern issued proper bonds under our lien law which was sent to the county clerk and the two Hoffman liens were properly cancelled of record. Title to the Muir piece was then passed, bond and mortgage was executed, assignment was made to May Van Order, who is the wife of John J. Van Order, but the bond and mortgage and the unrecorded assignment was left with Ames & Crane until after the passage of the Smith title and after the Pierce, Butler & Pierce matter should have come to a head.

It is further agreed on May 12, 1926, Pierce, Butler & Pierce Mfg. Corp. filed a mechanics lien in the Essex County Clerk's office against A. J. Hoffman, contractor, Alderman S. Newbern, owner, and the various mortgagees. This covered both tracts, both the Muir tract and the Smith tract.

It is further agreed that after negotiations with Mr. Van Order and Mr. Newbern that Mr. Newbern came to the United States Fidelity & Guaranty Company, made arrangements with them and that an exactly similar bond with merely a change of name as was made in the Hoffman case was made and signed by Newbern and John J. Van Order with the United States Fidelity & Guaranty Company, in which Newbern and Van Order agreed in any and all facts in accordance with the terms of the bond, which we will put in evidence, to pay any judgment that was recovered by Pierce, Butler & Pierce.

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John J. Van Order—Direct.

It is further agreed that through some mistake
—(interrupted).

Mr. Harrington: At that point let me interrupt
you. I would like to say that that bond, by virtue
of this agreement, they agreed to issue a bond and
discharge the lien claim of Pierce, Butler & Pierce.
10 That is very important.

Mr. Jones: That the United States Fidelity &
Guaranty Company agreed that on receiving the
bond that they would, in turn, issue their bond the
same as they did in the Hoffman case and cancel
the lien in the Pierce, Butler & Pierce case, so at
this point some error took place in the office of
the United States Fidelity & Guaranty Company
and the agreement which Mr. Van Order and Mr.
Newbern made with the United States Fidelity &
20 Guaranty Company was attached to their printed
matter, their name was United States Fidelity &
Guaranty Company, the name was added to that
particular bond. That particular bond was given
to Mr. Newbern and Mr. Newbern put it on record
in the County Clerk's office; that the County Clerk
marked on the margin of the lien, the bond filed
July 8, 1926, "United States Fidelity & Guaranty
Company guarantees this lien in the event of judg-
30 ment." That subsequent—(interrupted).

Mr. Harrington: Let me interrupt a moment. I
think at that point you want to state that that was
not discovered until almost two years.

The Court: He will—

Mr. Harrington: (Continued). After it was
filed.

The Court: He will come to it.

Mr. Harrington: All right.

Mr. Jones: That the second title, namely, the
40 Smith title, was then passed by Ames & Crane, they

John J. Van Order—Direct.

having assured themselves that this second bond had been filed and the notation made on the lien that I have just read; that subsequent to this and with the assurances from the record, which have been indicated by the previous agreement, Ames & Crane then, a month or so afterward, delivered the bonds, mortgages and assignments to Mr. Van Order; that somewhat over a year and a half—no, that Ames & Crane had nothing to do with the conduct of the lien claim whatsoever. 10

Mr. Harrington: Now, at that point, I would like to say that Ames & Crane filed the answer for Newbern and so they did have something to do. That is not hearsay. That is right here in the record.

Mr. Jones: No.

Mr. Harrington: It is. 20

Mr. Jones: If you were going to dispute, why try to make me agree?

Mr. Harrington: There is no dispute.

The Court: If Mr. Jones won't admit it, you will have to prove it, that is all.

Mr. Jones: How much did we admit?

(Statement read as follows: "That Ames & Crane had nothing to do with the conduct of the lien claim whatsoever.") 30

Mr. Jones: That you don't want?

The Court: No, strike that out.

Mr. Jones: That about a year and a half—a motion was then made—

Mr. Harrington: May I—I am sorry to do this, it is really about two years and a half. It was October 5th—

Mr. Jones: It was one year, eleven months and twenty-one days, wasn't it? 40

John J. Van Order—Direct.

Mr. Harrington: It is very important in my argument.

The Court: Very well, make it one year eleven months and twenty-one days.

10 Mr. Jones: Between a year and a half and two years later, the United States Fidelity Company, under a statute passed for that purpose—under a statute in which such practice is permissible, made a motion to discharge the lien claim of Pierce, Butler & Pierce, because it had not been diligently prosecuted within the year; that when the consideration of the motion came before Judge Smith, October 5, 1921, this defect in the bond was found, and it was found, of course, that the bond, instead of running to the plaintiff, ran to the United States Fidelity & Guaranty Company; therefore, the
20 United States Fidelity & Guaranty Company had no standing in court, and an order was entered by Judge Smith, the pertinent language of which is as follows: "And the matter being argued by the respective counsel and the attorney for plaintiff contending that the bond filed herein was not in form required by statute, but was given to the United States Fidelity & Guaranty Company instead of to the plaintiff herein, and the said bond
30 not running to the plaintiff, the United States Fidelity & Guaranty Company is therefore not a party to the above entitled proceedings; it is on this 5th day of October, 1928, ordered that the motion of the United States Fidelity & Guaranty Company to dismiss the above proceedings and to discharge the lien and the bond filed herein, be and the same is hereby denied. William A. Smith, Judge."

40 Thereafter, not having a bond to look to, the Pierce, Butler & Pierce people entered two judgments on each separate tract of land. The first

John J. Van Order—Direct.

was recorded in the Circuit Court in book 106, page 241, Pierce, Butler & Pierce Manufacturing Company v. A. J. Hoffman, contractor, Alderman S. Newbern, owner, and the various mortgagees. Judgment entered December 22, 1928, for a total—that is including damages and costs \$885.45; the other judgment was entered December 19, 1928, between the same parties plaintiff and the same parties defendant, marked after verdict Book 196, page 211, damages \$1600. That after that judgment was entered execution was threatened, which was, of course, to sell the property of Mr. Smith and Mr. Muir which Ames & Crane had been hired and agreed to protect, that they secured the figures in settlement, made demand on Mr. Van Order for payment of it, that when Van Order refused payment and thereupon Ames & Crane paid the sum of \$1797.67, took an assignment on the judgment from Pierce, Butler & Pierce to Miss Louise Johnson, defendant, who is an employee in their office; that they again made demand on Mr. Van Order to reimburse him; he again refused; that an assignment of the bond made by Van Order and Newbern to the United States Fidelity & Guaranty Company was made by the United States Fidelity & Guaranty Company to Louise Johnson, the defendant, which I shall introduce in evidence.

Mr. Harrington: Does counsel want to agree on the consideration of that assignment?

Mr. Jones: The Chief Justice gave you a few remarks about that.

Mr. Harrington: All right. That don't answer the question. If you don't want to, it is all right.

Mr. Jones: No, certainly not. I am telling you what I am agreeing upon. The Chief Justice told you that was silly.

John J. Van Order—Direct.

How far had I gotten?

(Statement read as follows: "He again refused; that an assignment of the bond made by Van Order and Newbern to the United States Fidelity & Guaranty Company was made by the United States Fidelity & Guaranty Company to Louise Johnson, the defendant, which I shall introduce in evidence.")

That suit was then brought in the Supreme Court by Louise Johnson against Mr. Van Order to compel him to pay what we conceived was the terms of the bond. An answer was filed by Forlenza & Harrington on behalf of Mr. Van Order; motion was made before the Chief Justice to strike out the answer. The Chief Justice denied the answer should be stricken out, but, in Mr. Harrington's argument before the Chief Justice, the facts of which I did not, of course, subscribe to or admit, there were some apparently equitable defenses.

Mr. Harrington: I will say that practically the same facts that have been submitted here in evidence, in stipulation.

Mr. Jones: No.

The Court: Well, I don't think that is very important.

(Discussion.)

Mr. Harrington: I just want to ask Mr. Van Order one question.

The Court: All right.

Mr. Jones: Shall we agree on the documents that are to go in?

Mr. Harrington: Document from the County Clerk's office here. I will offer at this time bond from the County Clerk's office in

John J. Van Order—Direct.

the matter of Pierce, Butler & Pierce, vs. Hoffman, et al.

The Court: Any objection? All right, let it be marked, and then give it to the young lady.

(Marked Exhibit C-1.)

Mr. Harrington: This is a correct copy of the bond that was filed in the matter of Pierce, Butler & Pierce which I have just offered. 10

(Marked Exhibit C-2.)

Mr. Harrington: I will offer the file number 397-72 of the Essex County Clerk's records in the matter of Alfred J. Hoffman vs. Alderman S. Newbern.

(File marked Exhibit C-3.)

Mr. Harrington: I offer file number 397-71 of the Essex County Clerk's office in the matter of Alfred J. Hoffman vs. Alderman S. Newbern. 20

(File marked Exhibit C-4.)

Q. Mr. Van Order, did you at any time personally agree, or by any other method, agree to personally indemnify the firm of Ames & Crane in this matter or in the matters connected with this suit? 30
A. I did not.

Mr. Harrington: I want Mr. Jones, if he will, to agree that one year plus two terms of court have gone by without this suit of Pierce, Butler & Pierce either being tried or noticed for trial.

Mr. Jones: Is that a fact?

Mr. Harrington: This is a fact.

Mr. Jones: Will you assure me that is a fact? 40

John J. Van Order—Direct.

Mr. Harrington: Yes.

The Court: That is agreed to. Is that all, now, of Mr. Van Order?

Mr. Harrington: That is, Mr. Van Order.

Cross-examination by Mr. Jones:

10 Q. Mr. Van Order, at the time these—this Smith transaction and this Muir transaction—you are acquainted with those, aren't you? A. Yes.

Q. You knew when those were going through that there was to be a purchase money bond and mortgage in each case given back, didn't you? A. Well, I know that Mr. Newbern came to see me in connection with the sale of those two places and I did understand that he was to get back a second mortgage in each case.

20 Q. Then your answer is Yes, isn't it?

The Court: Yes.

A. Yes.

Q. Your answer is Yes? A. Yes.

Q. And you had arranged with him that you should get an assignment to each of those bonds and mortgages, didn't you? A. Yes.

30 Q. So that when this question of lien came up on the Hoffman case and subsequently on the Smith case, you were pretty anxious to get those deals through in order to get your mortgages, weren't you? A. Yes.

Q. And didn't you have conversations with Mr. Crane in reference to getting those things through? A. Mr. Crane was Mr. Newbern's attorney at that time.

40 Q. I didn't ask you that. I asked you whether you had conversations with Mr. Crane with reference to getting this through? A. I did, yes. We

John J. Van Order—Cross.

had conversations in which he stated that it would be necessary to have those liens taken care of before he would pass title and he—Newbern came—then Newbern came to see me in connection with it and told me that he—

The Court: Now, what Newbern told you
—(interrupted) 10

Witness: Well, I had a conversation with Mr. Crane over the telephone in connection with the matter.

Q. Had several talksf didn't you? A. Had several talks and he advised me so I knew of the situation.

Q. Had several talks, didn't you? A. Had sev- have had one or two or three or four.

Q. And didn't you in order to get Mr. Crane to pass the title give your own bond to Crane? A. I did not. 20

Q. Didn't you ask him to pass that on your assurance that you would take care of him? A. I did not.

Q. You had done business with Ames & Crane for a good many years—haven't you? A. The only discussion was in connection with the bond.

Q. No. I say, you have done business with Ames & Crane for some fifteen or sixteen years, haven't you? A. Yes. 30

Q. Know them very well? A. Yes.

Q. Didn't you also as an alternative proposition suggest that they keep the bonds and mortgages which were being given back as security and pass the title? A. I did not.

Mr. Harrington: Now, your Honor, I want to object—

Witness: I did not. 40

John J. Van Order—Cross.

Mr. Harrington: —at this point. What ever preliminary discussions were had before they arrived on some method of discharging the lien, I do not believe that is evidence now.

10 The Court: The door was opened by yourself to this cross-examination. You asked him if he ever personally guaranteed in any way this debt and he said No.

Mr. Harrington: He said No, two or three times.

The Court: I know he did, but since you opened the door Mr. Jones has the right to cross-examine him on whether he did or whether he didn't.

20 Q. It was explained to you, wasn't it, before signing these three documents in the Hoffman and the Smith cases, that one or the other lien would have to be paid, wasn't it? A. Yes.

Q. You understood that Hoffman was a plumber and that Pierce, Butler & Pierce was a plumbing supply house and that they are both filing liens for practically the same thing? A. Well, Newbern claimed that he had an adequate defense.

30 Q. To one of them? A. No, the one was predicated on the Hoffman claim and his claim was that he had an adequate defense against Hoffman's claim and that was the man with whom he was doing business, he was the contractor.

Q. But it was agreed in conversation that one or the other claim must be paid but not both? He owed one or the other, but not both? A. Yes.

Q. And you understood that that would have to be paid. A. Yes.

40 Q. And you understood that when you went on the bond, didn't you? A. Yes.

John J. Van Order—Cross.

Q. Isn't that so? And when you went on that bond you intended to pay—(interrupted)

Mr. Harrington: I object to that. That is not—

The Court: Yes.

Mr. Harrington: He is going far afield. He has asked him two or three times in various ways whether he had any personal agreement. 10

The Court: That is not the ground of sustaining your objection. The ground is that the question was as to his intention and not what he did.

Q. Now, subsequent—you received several letters from Ames & Crane, did you not, in connection with this matter? A. In—I think in March or April of 1929 I received, I think, two letters from them in which they advised me that action had been taken and I immediately then took those letters to Mr. Harrington, who had been retained by me to get the dismissal of my obligation and had advised me that I had that discharge, so I took those letters to Mr. Harrington and gave them to him and he took up the matter with Mr. Crane subsequently. 20 30

Q. Did you receive a letter from Mr. Newbern addressed "Ames & Crane"? A. As of what date?

Q. March 1, 1927. A. March 1st, 1927. I don't recollect it.

Q. I will show you a copy to you and copy to Ames & Crane. A. Well, I don't recollect the letter, although I suppose possibly I might have received a copy of the letter.

Mr. Jones: You were asked to produce 40

John J. Van Order—Cross.

all your letters, weren't you? I offer that.

Witness: Well, in my file I found—I did not find any letters from Ames & Crane on this date.

10 Q. That is not the question I asked you. You were asked to produce all your letters, weren't you? A. I had none to bring.

Q. Your answer is that you were given a notice to produce your letters, weren't you? A. Yesterday noon.

Q. Yes. I might refresh your memory. Did you receive a letter dated February 24, 1927?

Mr. Jones: Don't take this.

(Letter read.)

20 Mr. Harrington: Why don't you show it to Mr. Van Order and ask him if he received it. He probably can't remember from the date.

(Letter of March 1, 1927 marked Exhibit D-1.)

Witness: I think that was about that time I took the matter down to Mr. Harrington, yes.

30 Q. You did receive such a letter. A. Yes—I don't recollect specifically that I did receive the letter, but I will admit that I did, or I assume I did.

Mr. Jones: I am offering that in evidence.

Mr. Harrington: May I look at it?

(Letter marked Exhibit D-2.)

(Exhibit D-2 read.)

40 Q. Now, when you got that letter you went right to Mr. Harrington, didn't you? A. I think I did, yes.

John J. Van Order—Cross.

Q. You put the matter in his hands? A. Yes.

Q. So that an answer would be filed, and gave him all the facts?

Mr. Harrington: I object to that part "that an answer would be filed".

Mr. Jones: Well, I am asking the witness.

The Court: Well, you put the words in his mouth. 10

Q. You went to Mr. Harrington— A. That is my recollection.

Q. —and gave the story as you know it right up to that date? A. Right.

Q. Did you receive this letter on December 16, 1927, from Ames & Crane (handing witness letter)? A. Yes. Yes, that was taken to Mr. Harrington along with the other papers. 20

Mr. Jones: I offer that.

(To Mr. Harrington:) You must have the original.

(Letter marked Exhibit D-3.)

(Exhibit D-3 read.)

Q. Did you get this letter of February 20th? A. Subsequent to the date of that one?

Q. Yes. A. Yes. 30

Q. Did you give that to Mr. Harrington, too?

A. Yes, all those papers went to Mr. Harrington.

The Court: Go on, introduce them. He says he got them. Just mark them. If you want to read them afterwards, all right.

(Letter marked Exhibit D-4.)

(Letter D-4 read.)

John J. Van Order—Cross.

Q. Now, this letter of March 14th you produce through your attorney, don't you? A. Yes, sir.

Q. That is the— A. That was the—

Q. That letter, in effect, is a demand on you to pay that judgment. A. Yes.

Mr. Jones: I offer it.

10

(Letter marked Exhibit D-5.)

Q. This letter you produced in response to this notice, didn't you? A. Yes, both of those letters written to Mr. Harrington.

Q. And that, in effect, was another demand on you to pay that judgment. A. Yes.

Mr. Jones: I offer those two.

(Letters marked Exhibit D-6.)

20

Q. Now, after you got those letters demanding payment, you went down to Mr. Crane's office, didn't you? A. Yes.

Q. And Crane asked you why you didn't pay? A. Yes, I think he did.

Q. Do you remember saying that you had gotten stuck enough by Newbern and that is the reason — A. No.

30

Mr. Harrington: Is he still on cross examination? I fail to see where there is any connection of proof of personal liability at the time that this transaction arose and I think he is confined to that.

The Court: Yes. I must say I don't think it is cross examination.

Mr. Harrington: First of all, there is no written agreement here, anyhow, and it is trying to charge Mr. Van Order for the debt of somebody else.

40

John J. Van Order—Redirect.

Witness: I am willing to answer the question, as far as that is concerned.

Mr. Harrington: The Court ruled it out, very properly.

The Court: Thank you.

Mr. Jones: That is all.

10

Redirect-examination by Mr. Harrington:

Q. When you received these letters, which have now been introduced in evidence, you immediately took the matter up with me and instructed me to take whatever steps were necessary? A. Yes, after going down and telling Mr. Crane that that was my intention; that I had been advised by you that the matter had been taken care of and that you had the matter in charge, and I brought that immediately to your office. 20

Q. Subsequently I advised you your liability under both these bonds had been discharged? A. Had ceased.

Mr. Harrington: That will be the plaintiff's case.

Mr. Jones: I would like to introduce in evidence some papers.

I offer by consent an abstract of title of John Howard Smith and Ellen Smith. 30

(Abstract marked D-7.)

Mr. Jones: I offer certified copy of deed from Newbern to Muir, dated May 3, 1926.

(Certified copy of deed marked Exhibit D-8.)

Mr. Jones: I offer certified copy of deed, Newbern to Smith, dated July 1—recorded July 1, 1926. 40

John J. Van Order—Redirect.

(Certified copy of deed marked Exhibit D-9.)

Mr. Jones: I offer the assignment of the bond from the United States Fidelity & Guaranty Company to Louise B. Johnson. (Bond marked Exhibit D-10.)

10 Mr. Jones: I offer in evidence bond, Catherine Muir and Husband to Alderman S. Newbern for \$2,000; mortgage from Catherine Muir to Alderman S. Newbern bearing even date with the bond and assignment by Alderman S. Newbern to May D. Van Order dated May 3, 1926, but not recorded until December 2nd, 1926.

20 (Counsel consent that the other bond and mortgage, \$2500, the assignment recorded the same day as shown in the Abstract, has since been paid and cancelled of record and can be produced.)

(Papers marked Exhibits D-11, 12, 13.)

WILLIAM W. CRANE, sworn for defendant.

Direct-examination by Mr. Jones:

30 Q. Mr. Crane, you are an attorney at law? A. I am.

Q. And how long have you been practicing? A. About twenty-six years.

Q. And the partnership name is Ames & Crane in Montclair? A. Yes, sir.

Q. And what are the relations between your office and John J. Van Order?

40 Mr. Harrington: Well, I object to that question.

William W. Crane—Direct.

The Court: I will allow it.

A. Why, the relations were— Was that objected to? Was that allowed?

Q. It was allowed. A. The relations were always very friendly and done a lot of business with Mr. Van Order in the past. We always—(interrupted). 10

Mr. Harrington: I thought he meant something else.

A. —trusted him and he has trusted us in connection with very large matters, matters involving a great many thousands of dollars.

Q. Did you have a talk with Van Order at the time this Smith agreement and the Muir agreement were first entered into? A. I did. 20

Q. What was that talk? A. The first conversation I had with Mr. Van Order was shortly after Hoffman, a plumber, had filed two liens. That conversation with Mr. Van Order was to this effect; that he had been informed by Newbern, contractor, that Hoffman had filed liens against his properties in Verona, properties which Mr. Van Order had furnished lumber to for the construction of the houses, and that he would like me to look after the matter, as Mr. Newbern had told him that Pierce, Butler & Pierce were going to file liens for practically the same thing that Hoffman had filed liens for. I told him, Mr. Van Order, that I did not have any confidence left in Mr. Newbern and I did not care to represent him, and I thought that if he continued to deal with him he would get stuck. 30

Mr. Harrington: I object to what he thought. 40

William W. Crane—Direct.

Q. Did you say that? A. I said that to Mr. Van Order.

The Court: I don't see that this has very much to do with it.

Mr. Harrington: I don't, either.

10 The Court: What you are trying to prove by this agreement is some agreement between him and Van Order. Why don't you get down to that?

Mr. Jones: I suppose that was the conversation—

Witness: He asked—I may say, Mr. Van Order asked me to file the answers in the Hoffman cases and out of courtesy to him I did.

20 Q. What conversation did you have with him about a lien, if any? A. About the lien?

Q. Yes, about the passing of title. A. He said—well, that was a later conversation.

30 Q. All right. Let us get down to that. A. Later there was an agreement to sell one of the properties in Verona and we searched the title, found a lien which he knew about, of Hoffman, and had conversations with Mr. Stickel about the other lien. Mr. Van Order called at our office and told me he was going to take a second mortgage from Mr. Newbern to pay him for the lumber furnished on the house and wanted me to prepare the assignment to him or to Mrs. Van Order, and that he would guarantee that the debt was paid, of Hoffman's or Pierce, Butler & Pierce, one or the other. I told him that I must insist upon the record being clear. He then said he would assign the bond and mortgage which he was to take back to me for security. I told him that wouldn't be sufficient, as

40

William W. Crane—Direct.

I must get it off the record. He then stated he would tell Newbern to get a surety bond and get it off the record. I subsequently prepared the bond for Mr. Newbern and for Mr. Van Order, in which they agreed, if a judgment was entered—

Mr. Harrington: To whom was that bond drawn? 10

Mr. Jones: Probably the United States Fidelity.

Witness: It is drawn to the United States Fidelity, yes, and Mr. Van Order and Mr. Newbern signed the bond.

Mr. Jones: There is a bond in evidence, which you have seen in this Pierce, Butler & Pierce case, to the United States Fidelity.

Was the language in the two Hoffman bonds precisely the same as that, with the proper change of names? 20

Witness: Yes, the language was the same, exactly the same.

Q. And there were how many bonds given in the two Hoffman cases? A. Two bonds.

Mr. Harrington: Pardon me. By that you mean the two bonds from Van Order and Newbern to the U. S. F. G.? 30

Witness: Yes.

Q. Between the passing of this title, that is, the Muir title, the first title, and the other, what was done with the bonds and mortgages which were assigned to Van Order?

Mr. Harrington: I object to that for the same reason. There is no evidence in that question of any evidence of an agreement. 40

William W. Crane—Direct.

The Court: He said he would agree to assign those bonds and mortgages.

Mr. Harrington: He said he did not accept them.

Mr. Jones: And it is admitted—

10 The Court: What is the object of tracing the bonds and mortgages any further, then?

Mr. Jones: Because I want to have him explain why they are kept off the record.

The Court: I don't think that is—all right.

Mr. Jones: Your Honor please—

The Court: Go on.

Mr. Jones: You may be right, but I want to keep the record.

20

Q. I notice the assignments from Newbern to Van Order were kept off record until December. What was the idea of that? A. The idea was I kept the mortgage off in the Smith case, as well as the assignment, and the assignment off in the Muir case for six months to protect myself, as I was trying to get Mr. Hoffman to discontinue his suit so that we could pay the Pierce, Butler & Pierce suit.

30 Q. And then the Pierce, Butler & Pierce suit did not come to a head until, well, along in July, 1926, is that so? That is the Pierce, Butler & Pierce. A. It was some time—

Mr. Harrington: Counsel really is leading the witness. I don't want to object all the time, but nearly every question is leading.

The Court: That is leading.

40 Q. The Muir title closed when, do you recall? A. May 1st, 1926.

William W. Crane—Direct.

Q. And the Smith title? A. July 1st, 1926.

Q. When was the first that you heard about the —after these titles had closed when was the first you heard about any trouble in reference to this judgment?

Mr. Harrington: Your Honor, I don't like to rise all the time, but it is all agreed what happened after this. The purpose of this witness, I understand, is to prove an agreement that Mr. Van Order agreed to indemnify his firms and their clients outside of this bond. 10

The Court: That is right. And all these things you are asking him now have already been stipulated.

I don't want to shut you off, though, if you think you ought to put it in over again. 20

Mr. Jones: I think at this point I ought to control the record. I do not think Mr. Harrington ought to control my record.

Mr. Harrington: I don't want to interfere about it, but I thought we would save time by doing that.

Mr. Jones: If you will let me go on, your Honor, and put it in, I will appreciate it.

The Court: Go ahead. 30

Q. When the trouble arose, and Pierce, Butler & Pierce threatened to sell the Smith and Muir property under their mechanics lien, what did you do? A. Notified Mr. Van Order that I wanted him to pay the judgment.

Q. Did you see Mr. Van Order? A. I did.

Q. Where did you see him? A. In my office.

Q. And who was there? A. Mr. Van Order and Miss Johnson. 40

William W. Crane—Cross.

Q. And what did you say and what did he say?

10 A. I asked Mr. Van Order why he didn't clean up this judgment of Pierce, Butler & Pierce. He said, "Well, I have lost twenty-five or thirty thousand dollars with this man, Newbern, and I think somebody else ought to bear part of the loss of this judgment with me." I said, "Who do you think ought to pay it, Mr. Van Order? Do you think the owner of the property ought to pay it?" He did not reply. I said, "Do you think that we ought to pay it or I ought to pay it? I only passed the title because of you." To that he did not make any reply.

Mr. Jones: All right. Take the witness.

20 *Cross-examination by Mr. Harrington:*

Q. How long have you been practicing, Mr. Crane? A. Twenty-six years.

Q. And during that time you have done quite a lot of title work? A. Yes.

Q. Both for Mr. Van Order and for Mr. Newbern? A. Yes, sir.

Q. And at the time that this incident arose, you did represent Mr. Newbern? A. Yes.

30 Q. Did you represent the owners of the property, too? A. Yes, sir.

Q. Did you file an answer for any of them? A. No.

Q. One of them was a party. You did not file an answer, did you? A. No. At least, I don't think so.

40 Q. And on this occasion when Mr. Van Order came down to your office in reference to this trouble with Pierce, Butler & Pierce and Hoffman, Mr. Van Order made—offered several methods of dis-

William W. Crane—Cross.

posing of this thing so the title could be cleared, didn't he? A. Yes, sir.

Q. And you rejected them all and insisted that these surety bonds must be filed, is that right? A. I told him—

Q. Now, wait a minute. Isn't that right? A. No.

Q. Oh, well, then, what did you do? A. I told him I wanted the record cleared.

Q. And the way to clear it was by having a surety bond placed there, wasn't it? A. I only mentioned that I wanted the record cleared.

Q. Well, as a matter of fact, that is what you agreed to do, wasn't it? A. No.

Q. No. What did you— A. I thought that he would get, through the aid of Mr. Newbern—no—yes, through the aid of Mr. Newbern that he would get Mr. Hoffman to withdraw his suit, because they were both practically the same thing.

Q. What was the purpose of taking the matter up with the United States Fidelity & Guaranty Company? A. I didn't take it up with them.

Q. Well, somebody took it up. You just testified they did.

The Court: You cannot ask him what was the purpose of somebody else taking it up. He didn't take it up.

Q. You drew an agreement between Mr. Van Order and Mr. Newbern and the United States Fidelity & Guaranty Company. A. Yes.

Q. And Mr. Newbern and Mr. Van Order executed it. A. Yes, sir.

Q. What was the purpose of that agreement?

Mr. Jones: I object.

William W. Crane—Cross.

A. That if Pierce, Butler & Pierce obtained a judgment, that Mr. Newbern and Mr. Van Order would pay it.

Q. It was not for the purpose of having the United States Fidelity & Guaranty Company issue a bond and discharge the lien, was it?

10

Mr. Jones: I object to that. The agreement speaks for itself.

Mr. Harrington: I have a right to ask him that. I just stipulated they were to draw a bond. This is cross-examination, too.

The Court: Go on.

Witness: The agreement protected the U. S. F. G. as well as it protected our office.

20

Q. What was the U. S. F. G.?— A. I drew it.

Q. What was the U. S. F. G. to do with anything because or by virtue of this agreement that was made in their favor?

Mr. Jones: I object to that.

Q. If you know.

Mr. Jones: The bond speaks for itself.

30

The Court: Mr. Jones, you must address the Court in the proper way.

Mr. Jones: (Rising). I object to that, because the language of the bond speaks for itself.

Mr. Harrington: Your Honor, the bond—no bond was filed in this case, and it is because of that that this difficulty has arisen. I am right on that, because he brought that out on his direct-examination. He drew this agreement. I am asking why it was drawn.

40

William W. Crane—Cross.

The Court: I think you have a right to.

Q. Will you answer that? A. The bond was drawn by me as a protection to our office for any judgment that might be entered by Pierce, Butler & Pierce, and also for the protection of the United States Fidelity & Guaranty Company, if they issued a bond. 10

Q. Well, were they to issue a bond? A. I believe they were.

Q. Well, they did in the Hoffman case, didn't they? A. Yes, sir.

Q. And they filed the bond and that discharged the lien, didn't it? A. In the Hoffman case, yes.

Q. And this was to be a similar transaction, wasn't it? A. Yes.

Q. Exactly. Now, when a bond is filed, discharging the lien, the liability immediately rests with the bonding company, doesn't it? 20

Mr. Jones: I object to that. That is law.

The Court: I will sustain the objection.

Q. When a bond is filed, it removes the lien, doesn't it, and protects everybody. It would protect you, for instance, in the guaranteeing of a title?

Mr. Jones: The same objection. 30

The Court: I will sustain the objection. You are asking this man—

Mr. Harrington: Yes—for a conclusion at law. I realize that.

The Court: —for a conclusion.

Q. Do you know whether or not a bond was filed by the United States Fidelity & Guaranty Company? 40

William W. Crane—Cross.

Mr. Jones: That is included in the stipulation.

Mr. Harrington: All right.

10 The Court: This has all been stipulated. You objected to Mr. Jones and desired to keep him down to whether or not there was an oral agreement. Now you are going just as far afield as he did. I have these facts pretty thoroughly in mind.

Q. Now, no other agreement was made between you and Mr. Van Order except this agreement which you have testified to between Van Order and Newbern and the United States Fidelity & Guaranty Company? A. Oh, yes.

20 Q. There is some other agreement? A. Not in writing.

Q. Well, what is the agreement? A. The agreement was that I was to hold the bond and mortgage in both of these cases, keep them off the record as a protection for those judgments—for these liens that had been filed, and I don't know how they ever came to get into Mr. Van Order's possession.

30 Q. Well, Mr. Crane, when the bond was filed, didn't that discharge the lien? A. So far as I was concerned.

Q. You searched the title, didn't you, and you found the lien marked discharged by a bond, didn't you? A. Yes.

Q. Tell me, did you, when you searched this title before you closed title, did you examine the record to see the bonds were filed? A. They were not filed at the time the titles were closed.

40 Q. What did they— A. (Continuing) —in the Pierce, Butler & Pierce case.

William W. Crane—Cross.

Q. Did you at any time after that examine the records to see if they were filed? A. I caused it to be examined.

Q. And did you examine the bond to see if it was in proper form at the time this examination was made? A. I don't know what my searcher did. He reported what was on record. The search shows. 10

Q. Did you ever try to find out whether or not he examined the bond as to that?

Mr. Jones: I object.

Mr. Harrington: I think that is necessary.

Mr. Jones: That is in the stipulation.

Mr. Harrington: That has nothing to do with the stipulation.

The Court: I think, Mr. Jones, this is all right. This seems to be a question of laches brought in. 20

Mr. Jones: That is the objection.

(Discussion).

The Court: Ask the question. Do not waste so much time on argument.

Mr. Harrington: He said he don't know what the searcher did, whether the searcher examined it or not. That is all.

The Court: That is all. Have you finished? 30

Mr. Jones: Yes.

The Court: We will have to have this testimony written out, and I suppose you want to file memorandums? How long do you want after you get the testimony?

Mr. Jones: Ten days.

The Court: Then what? Exchange briefs

William W. Crane—Cross.

and then each have another five days for reply briefs?

Mr. Harrington: I would like to say something about the facts.

Mr. Jones: The Court may forget it.

The Court: I think you better put it in the memorandum. That is the safest way to do.

10

Mr. Harrington: All right. I will do that.

20

30

40

Exhibit C-1.

ESSEX COUNTY CIRCUIT COURT.

PIERCE, BUTLER & PIERCE MFG.
CORP.,

Plaintiff,

vs.

10

A. J. HOFFMAN, Contractor,

and

Action at Law.

CATHERINE MUIR, Owner,

On Mechanic's
Lien.

and

Answer.

EMMA A. MAYER, ORANGE NA-
TIONAL BANK, a corporation,
and FANNIE BE. HERMAN,
Mortgagees,
Defendants.

20

The defendant, Alderman S. Newbern, residing
in East Orange, New Jersey, says:

1. He admits the first Paragraph. 30
2. He admits the second Paragraph.
3. He admits the third Paragraph.
4. He admits the fourth Paragraph.
5. He denies the fifth Paragraph.
6. He denies the sixth Paragraph.
7. He denies the seventh Paragraph.
8. He denies the eighth Paragraph. 40

Exhibit C-1.

9. He denies the ninth Paragraph.
10. He denies the tenth Paragraph.
11. He denies the eleventh Paragraph.

DEFENSE.

- 10 Any goods or materials as alleged in Complaint as furnished and delivered were furnished and delivered four months prior to the institution of this action.

AMES & CRANE,
Attorneys for Defendants.

20

30

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Exhibit C-1.

ESSEX COUNTY CIRCUIT COURT.

PIERCE, BUTLER & PIERCE MFG.
Co., a corporation,
Plaintiff,

vs.

ALFRED J. HOFFMAN, Alderman
S. Newbern, Catherine Muir,
Emma Meyer, Orange National
Bank and Fanny D. Her-
man,
Defendants.

Action at Law.
Notice.

10

To STICKLE & STICKLE, Attorneys of Plaintiff,
Pierce, Butler & Pierce Mfg. Co., a corpora-
tion:

20

Sirs:

Take Notice that on Saturday, July 28, at 10
o'clock in the forenoon, or as soon thereafter as
counsel may be heard, I shall apply to His Honor,
William A. Smith, one of the Judges of the Essex
County Circuit Court, at the Hall of Records
Building, Newark, New Jersey, from an Order dis-
missing the above entitled matter on the grounds
that the same has not been diligently prosecuted
within one year.

30

WILLIAM P. BRAUN,
Attorney of United States Fidelity &
Guaranty Co., Surety on Release of
Mechanic's Lien Bond in the above en-
titled matter.

40

Exhibit C-1.

SCHEDULE "B."

ESSEX COUNTY CIRCUIT COURT.

10	PIERCE, BUTLER & PIERCE MAN- UFACTURING CORP., Plaintiff,	}	Action at Law. Order.
	vs. A. J. HOFFMAN, contractor, Al- derman S. Newbern, owner, Catherine Muir, owner, Emma A. Meyer and Orange National Bank, a corp. and Fannie B. Herman, mortgagees, Defendants.		
20			

This matter coming on for hearing, on motion of the United States Fidelity & Guaranty Co., a corp. to dismiss the lien filed in the above entitled matter and discharge the bond for failure on the part of the claimant to diligently prosecute and reduce the claim to judgment in the presence of William P. Braun, attorney for the United States Fidelity & Guaranty Co. and Fred G. Stickel, Jr. Attorney of plaintiff and the matter being argued by respective counsel and the attorney of the plaintiff contending that the bond filed herein was not in form required by the statute but was given to the United States Fidelity & Guaranty Co. instead of to the plaintiff herein and the said bond not running to the plaintiff, the said United States Fidelity & Guaranty Co. was therefore not a party to the above entitled proceedings.

Exhibit C-2.

It is on this 5th day of October 1928 ordered that the motion of the United States Fidelity & Guaranty Co. to dismiss the above proceedings and to discharge the lien and the bond filed herein be and the same is hereby denied.

WILLIAM A. SMITH,
Judge. 10

On Motion of
STICKLE & STICKLE,
Attorneys of Plaintiff.

The above order is hereby consented to.

WILLIAM P. BRAUN,
Atty. of United States Fidelity
& Guaranty Co.
Oct. 6, 1928. 20

Exhibit C-2.**BOND.**

(Filed July 8, 1926)

Know All Men by These Presents, That We, Alderman S. Newbern of East Orange, and John J. Van Order of Caldwell, are held firmly bound unto United States Fidelity & Guaranty Company of Baltimore, Maryland, in sum of \$3,000. lawful money of the United States of America, to be paid to United States Fidelity & Guaranty Company of Baltimore, Maryland, its successors or assignees, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally firmly by these presents. 30

Sealed with our Seals June 20, 1926 40

Exhibit C-2.

Condition of obligation is such that:

10 WHEREAS, Pierce, Butler & Pierce Manufacturing Corporation filed a Mechanics Lien against Alderman S. Newbern, Owner and Builder, A. J. Hoffman, Contractor, Catherine Muir, Owner and Emma A. Mayer, Orange National Bank and Fannie D. Herman, Mortgagees, Defendants, in Mechanics Lien Book 18 Pg. 132, against said premises in said lien claim described.

20 NOW, THEREFORE, the condition of the bond is such that if a judgment is obtained on said lien claim said Alderman S. Newbern and John J. Van Order, the above bounden shall pay same and such costs as may be recovered by said lien claimant against said lands and building described in said lien claim as above set forth; then this obligation to be void, otherwise to remain in full force and virtue.

Signed and Sealed in the presence of:

ALDERMAN S. NEWBERN
JOHN J. VAN ORDER

UNITED STATES FIDELITY & GUARANTY COMPANY,

By Percy A. S. Rogers,
Attorney-in-fact.

30

Attest:

HARRY E. VERNOY,
Attorney-in-fact.

40

Exhibit D-1.

A. S. NEWBERN
 Builder of Better Homes
 439 Main Street.

East Oronge, N. J., March 1, 1927.

Ames & Crane,
 495 Bloomfield Ave.,
 Montclair, N. J.

10

Attention Mr. Crane:

My dear Mr. Crane:

Referring to your letter of February 24th. regarding the Hoffman, Pierce, Butler and Pierce case:

I enclose you herewith a copy of a letter I received from Mr. Harrington regarding this case. This letter will explain itself.

20

I am very sorry that you went into such lengthy detail with Mr. Van Order regarding this case as I had no idea that I bore the reputation of being so careless as to let a man take judgment against me when he has no claim whatsoever.

In the future I would appreciate it very much if you would handle such matters with me first.

Very truly yours,

A. S. NEWBERN.

30

E.

ASN-FMW.

Copy to Mr. J. J. Van Order.

“ “ Mr. Hubert J. Harrington.

40

Exhibit D-2.

February 24, 1927.

Mr. John J. Van Order,
62 Arlington Avenue,
Caldwell, N. J.

Dear Mr. Van Order:

10 You will remember that sometime in the latter part of last year A. J. Hoffman Inc., filed a Mechanics Lien against property in Verona of Mr. Newbern and also Pierce, Butler & Pierce, a plumbing supply house, also filed a lien in both of these cases and you and Mr. Newbern entered into a bond together with the United States Fidelity and Guaranty Company so that the lien would be released and the property sold.

20 We filed an answer in both of these cases for Mr. Newbern out of courtesy more or less to you and then told him that he would have to get another lawyer to look after the matter when it came up for trial and then prepared a substitution at his request and sent it to him with all the papers as he said that he had an attorney in Newark who was going to look after the matter. You will remember that Mr. Crane called you on the telephone and told you that these matters should be attended to in the proper manner, otherwise, both of
30 these creditors would get judgments for what looks to us the same bill.

Today an attorney by the name of David M. Kirsch of Newark, served us with a notice of trial and states that no substitution in either of the cases has been filed and that Mr. Newbern hasn't any attorney and that he is not going to do anything about it.

40 Therefore, we suggest that you immediately get

Exhibit D-2.

in touch with Mr. Newbern and see that some attorney is employed to look after your interest in both these cases.

Yours very truly,

LY

10

Exhibit D-3.

December 16, 1927.

Mr. John J. Van Order,
62 Arlington Ave.,
Caldwell, N. J.

Dear Mr. Van Order:

Enclosed find a notice of trial in the case of Hoffman, Inc. vs. Newbern where you are on the bond and it affects one of the houses in Verona on which you have a second mortgage. We filed an affidavit of merits in this for Mr. Newbern and then we gave him a substitution and he delivered it, we understand, to Mr. Harrington and after that we heard that Mr. Harrington refused to act for him and he had employed a Mr. Degan, but now attorney Kirsch for Hoffman states that Degan refuses to admit service and for fear that you have left the matter to Newbern and there is no attorney looking after the matter I am mailing you this notice which they served on us. 20

As you will remember this is a case where Newbern was sued by two people for the same goods and you are on the bond in each case, and if you do not have it attended to you are liable to get two judgments for the same thing. The other suit 30

40

Exhibit D-4.

I believe is by Pierce, Butler & Pierce, the materialmen who furnished the material to Hoffman.

I have been expecting to hear from you in regard to those taxes which are advertised for sale.

Yours very truly,

10 WWC:LGJ

Exhibit D-4.

Feb. 20, 1928.

Mr. John J. Van Order,
62 Arlington Avenue,
Caldwell, N. J.

20 Dear Mr. Van Order:

Here is another notice of trial in the case of Pierce, Butler & Pierce vs. Newbern on the Muir house on which you hold a second mortgage. Judge Stickel's office informs us that your attorney is not paying any attention to the matter and has not even filed the substitution of attorneys which we gave Newbern a year ago and has refused to admit service of the notice of trial and therefore they served it on us. As we have already told you someone should take care of it so that you do not get a judgment against you in the Hoffman case and in this case too as you have given your bond and you will certainly get stuck for them both if it is not attended to.

30

Yours very truly,

WWC:LGJ

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Exhibit D-5.

Law Offices
 AMES AND CRANE
 506 Bloomfield Avenue
 Montclair, New Jersey

March 14, 1929

Mr. John J. Van Order,
 62 Arlington Ave.,
 Caldwell, N. J.

10

Dear Mr. Van Order:

It is absolutely necessary for you to take care of the Pierce, Butler & Pierce judgments against the Smith properties in Verona. We are afraid that there will be considerably more costs added by advertising the properties for sale under the liens and if we do not hear of the sale some one might buy the property and the owner would be cut off as well as Mrs. Van Orders' mortgage and then you would be liable for damages to the owner. As you know the judgments are ahead of Mrs. Van Order's mortgage and Newbern gave a warranty deed and these mortgages were purchase money mortgages given back to Newbern. Please give the matter your immediate attention as the judgments have got to be satisfied.

20

Yours very truly,

30

WM. W. CRANE.

WWC:LGJ

40

Exhibit D-6.

Law Offices
AMES AND CRANE
506 Bloomfield Avenue
Montclair, New Jersey

Mar. 1, 1929.

10 Mr. John J. Van Order,
62 Arlington Ave.,
Caldwell, N. J.

Dear Mr. Van Order:

20 The amount due on both judgments on the Verona property, formerly of Newbern, which are held by Pierce, Butler and Pierce amount to \$1791.75. This amount was given to me by Stickel & Stickel and must be taken care of immediately, otherwise they will advertise the property for sale and this will add several hundred dollars more expense. Please take care of the matter next week without fail.

Yours very truly,

W. W. CRANE.

WWC:LGJ

30

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Exhibit D-7.**MORTGAGE.**

John Howard Smith and Ellen, his wife, To Alderman S. Newbern	Dated May 17, 1926 Ack. June 30, 1926 Rec. Dec. 2, 1926 Book O59-363 Sec. \$2500. 6%	10
--	--	----

Covers premises in the Borough of Verona.

Same premises conveyed to parties of the first part by deed of even date herewith.

Together with all the right, title and interest of the parties of the first part, in and to so much of Gould Street and Reid Place as adjoin said premises to the center lines thereof.

Being the same premises this day conveyed to the parties of the first part by Alderman S. Newbern and wife, this mortgage being a purchase money mortgage given to secure a part of the consideration for said deed. 20

Subject to a first mortgage in the sum of \$7000. now a lien upon premises hereinabove described.

ASSIGNMENT OF MORTGAGE.

Alderman S. Newbern to May B. Van Order	Dated June 30, 1926 Ack. Oct. 6, 1926 Rec. Dec. 2, 1926 Book 185-236 Cons. \$1.00, etc.	30
---	---	----

Assigns mortgage of \$2500. recorded in Book O 59-363.

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Exhibit D-8.**DEED.**

Alderman S. Newbern and Carrie O. Newbern, his wife,	Dated May 1, 1926 Ack. May 1, 1926 Rec. May 3, 1926 Book Z 73 of Deeds, pages 239-240.
to Catherine Muir	

10

Covers land in Borough of Verona, County of Essex and State of New Jersey, and recorded as follows:

20

Beginning in the easterly line of Gould Street at a point distant fifty feet and eighteen one-hundredths feet southerly from the southerly line of Reid Place; thence running south sixty-three degrees six minutes east one hundred and twenty feet; thence south twenty-six degrees fifty-seven minutes west forty-two and seventy-three one-hundredths feet; thence north sixty-six degrees thirty-one minutes west one hundred twenty and twenty-two one-hundredths feet to the easterly line of Gould Street, and thence along the same north twenty-six degrees fifty-seven minutes east fifty feet to the place of Beginning.

30

40

Exhibit D-9.

DEED.

Alderman S. Newbern and Carrie O. Newbern, his wife to John Howard Smith and Ellen Smith, his wife	Dated, Nov. 17, 1926 Ack. June 28, 1926 Rec. July 1, 1926. Book W 74 of Deeds Pages 152-153.	10
---	--	----

Covers lands located in Borough of Verona, County of Essex and State of New Jersey, and described as follows:

Beginning at the corner formed by the intersection of the easterly line of Gould Street with the southerly line of Reid Place; thence running along said southerly line of Reid Place south twenty-six degrees thirty-one minutes east one hundred and twenty and twenty-two hundredths feet; thence South twenty-six degrees fifty-seven minutes west fifty-seven and forty-five hundredths feet; thence north sixty-three degrees six minutes west one hundred and twenty feet to said easterly line of Gould Street; and thence along the same north twenty-six degrees fifty-seven minutes east fifty and eighteen hundredths feet to the place of Beginning. Together with all the right, title and interest of the parties of the first part, in and to so much of Gould Street and Reid Place as adjoins said premises to the centre line thereof. Subject to a mortgage in the sum of Seven Thousand Dollars, now a first lien on the premises hereinabove described, which the parties of the second part hereto hereby assume and agree to pay.

Exhibit D-10.

Know All Men by These Presents, That United States Fidelity and Guaranty Company of Baltimore, Maryland, for and in consideration of the sum of One Dollar and other valuable considerations, hereby assigns, transfers and sets over unto Louise G. Johnson, her executors, administrators
 10 and assigns, all its right, title and interest in a certain bond (a copy of which is hereto annexed) made by Alderman S. Newbern and John J. Van Order to United States Fidelity and Guaranty Company of Baltimore, Maryland, bearing date June 29th, 1926.

In Witness Whereof, the said United States Fidelity and Guaranty Company of Baltimore, Maryland has caused these presents to be signed by its
 20 Attorney in Fact and its corporate seal to be hereto affixed this 22nd day of April, 1929.

UNITED STATES FIDELITY AND GUARANTY
 COMPANY OF BALTIMORE, MARYLAND

By John B. Geyler,
 Attorney in Fact.

Attest:

Percy A. S. Rogers,
 Attorney-in-Fact.

30 (Corporate Seal)

Know All Men by These Presents, That We, Alderman S. Newbern of the City of East Orange in the County of Essex and State of New Jersey, and John J. Van Order of the Borough of Caldwell, County of Essex and State of New Jersey, are held firmly bound unto United States Fidelity and Guaranty Company of Baltimore, Maryland,
 40 in the sum of Three Thousand Dollars lawful

Exhibit D-10.

money of the United States of America to be paid to United States Fidelity and Guaranty Company of Baltimore, Maryland, its successors or assignees, for which payment well and truly to be made we bind ourselves our heirs, executors, administrators, jointly and severally firmly by these presents.

Sealed with our seals, Dated this 29th. day of June, Nineteen Hundred and Twenty-six. 10

The conditions of the obligation above is such that:

Whereas Pierce, Butler & Pierce, Mfg. Corp. filed a mechanics lien against Alderman S. Newbern, owner and builder; A. J. Hoffman, contractor; Catherine Muir, owner and Emma A. Mayer, Orange National Bank, a corporation and Fannie D. Herman, Mortgagees, Defendants, in the County Clerks office of the County of Essex on May 12, 1926 and recorded in Book 18 of mechanics liens page 132 against said premises in said lien claim described. 20

Now, therefore the condition of the bond is such that if a judgment is obtained on said lien claim the said Alderman S. Newbern and John J. Van Order the above bounden shall pay the same and such costs as may be recovered by said lien claimant against said lands and building described in said lien claim as above set forth then this obligation to be void, otherwise to remain in full force and virtue. 30

Exhibit D-10.

Signed and sealed in the Presence of

ALDERMAN S. NEWBERN (L.S.)

JOHN J. VAN ORDER (L.S.)

U. S. F. & G. COMPANY,

By Percy A. S. Rogers

Attorney in fact.

10

Attest:

HARRY E. VERNON,

Attorney in fact.

U. S. F. & G.

Company

(Seal)

20

30

40

Exhibit D-10.

STATEMENT.

U. S. F. & G. COMPANY—Baltimore, Md.

At close of business March 31st, 1926.

Commenced Business August 1st, 1896.

<i>Par Value</i>	<i>Assets</i>	<i>Market Value</i>	10
\$6,637,000.00	Government Bonds	\$6,761,401.25	
9,193,600.00	Baltimore City & other Municipal State and County Bonds,	9,239,690.74	
5,556,000.00	Railroad Bonds,	5,504,067.50	
4,837,000.00	Public Utility Bonds,	4,863,111.25	
3,366,002.21	Miscellaneous Bonds,	3,343,822.21	
510,000.00	Railroad Stocks,	529,000.00	
150,000.00	Public Utility Stocks,	163,875.00	
466,600.00	Bank & Trust Company stocks,	1,284,282.50	20
1,069,870.00	Miscellaneous stocks,	1,188,920.00	
100,000.00	Lawyers Surety Co. stock—rep- resented by \$150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York and other assets	137,000.00	
<hr/>		<hr/>	
\$31,886,072.21	Total Bonds & Stocks Market value March 31st, 1926	\$33,015,170.45	30
Home Office Bldg. appraised by Insurance Dept. of Maryland,		1,562,007.81	
N. Y. Office Bldg. appraised by Insurance Dept. of N. Y.		1,029,055.73	
Philadelphia Office Bldg. appraised by Insurance Dept.		325,245.07	
Other real estate,		15,226.49	
Loans secured by pledge of collaterals,		16,322.25	40

Exhibit D-10.

	Cash on hand and in depositories,	3,272,095.33
	Premiums in course of collection, not more than three months due,	7,135,958.71
	Deposit with Workmen's Compensation Re- insurance Bureau,	200,397.46
	Interest due and accrued,	451,314.55
10	Due for Subscriptions Dept. of Guaranteed Attorneys,	95,363.42
	Accounts with Suspended Bonus,	59,333.41
	Amount due from Reinsurers on Paid losses,	48,568.51
	Other assets,	100,819.76
		<hr/>
		\$47,326,878.95

LIABILITIES.

	Capital stocks paid in cash	\$6,000,000.00
	Funds held under Reinsured Treaties	704,046.10
20	Due for Return Premiums and Reinsurance	366,329.30
	Reserve for 1926 Taxes and Expenses in Transit	959,028.49
	Commissions accrued on uncollected premiums	1,413,661.83
	Premium Reserve in accordance with requirements of N. Y. Insurance Dept.	15,122,466.91
	Reserve for claims admitted and not admitted in all Depts. including costs of adjustment in accordance with N. Y. Laws,	15,094,142.30
	Surplus	7,667,204.02
		<hr/>
30		\$47,326,878.95

CHAS. O. SCULL, V. President.

W. GEORGE HYNSON, Treasurer.

Exhibit D-10.

State of Maryland, }
 City of Baltimore. } ss.:

On this 26th day of April, 1926, before me, A. D. Patrick, a Notary Public in and for the City and State aforesaid, personally appeared Charles O. Scull, and W. George Hynson, Vice President and Treasurer, respectively of the U. S. F. & G. Company, who being by me severally duly sworn, did depose and say that they are such officers of the said Company, and that the above and foregoing is a full, true and correct statement of the assets and liabilities of the said Company, as they appeared upon the books of the said Company on the 31st day of March, A. D. 1926. 10

In Witness Whereof, I have hereunto set my hand and official seal the day and year aforesaid. 20

A. D. PATRICK,
 N. P.

(Notary Seal).

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

On this 29th day of June 1926 before me the subscriber personally came Harry E. Vernoy, who being by me duly sworn on his oath says that he is one of the attorneys-in-fact of the U. S. F. & G. Company, a corp. of the State of Maryland; that he resides in the city of Newark, that he knows Percy A. S. Rogers the attorney-in-fact of the said U. S. F. & G. Company, signing the foregoing bond for the said Company, that he knows also the corporate seal of said Company; that the seal affixed to the foregoing instrument is such corporate seal and was so affixed by the said attorney-in-fact; that the said instrument was signed by the said attorney-in-fact and attested by deponent as one of the 30 40

Exhibit D-10.

attorneys-in-fact of said Company by order of the Board of Trustees of said Company in deponents presence as the voluntary act and deed of said Company that the said Company has duly complied with all the requirements of Chapter 134 of the laws of the State of N. J. of the year 1902, that
 10 the good and available assets of the company exceed its liabilities as such liabilities are ascertained in the manner provided in such Chapter, that the said U. S. F. & G. Company is duly incorporated under the laws of the State of Maryland and is authorized by the laws of said State and under its Charter to become surety on bonds and obligations such as are mentioned in such Chapter that it has on deposit with the treasurer of the State of Maryland \$300,000.00 in good securities worth at par
 20 value at least that sum and held for the benefit of the holders of the obligations of said Company and deponent further says that the said Company has appointed Walter C. Schryver, John B. Geyler and Percy A. S. Rogers its attorneys-in-fact in the city of Newark, that said appointment was made by a certain power of attorney of which the following is a true copy.

30 Power of Attorney (no stamp required, Stamp)
 (affixed to the original)
 (of which this is a copy)

40 Know All Men by These Presents, That the U. S. F. & G. Company, a corp. organized and existing under the laws of the state of Maryland and having its principal office at the City of Baltimore in the state of Maryland does hereby constitute and appoint Walter C. Schryver, John B. Geyler and Percy A. S. Rogers of the city of Newark, State of N. J. its true and lawful attorneys-in-fact

Exhibit D-10.

for the State of N. J. for the following purposes to wit.

To sign its names as surety to and to execute seal and acknowledge any and all bonds and to respectively do and perform any and all acts, things set forth in the resolution of Board of Directors of the said U. S. F. & G. Company, a certified copy of which is hereto annexed and made a part of this power of attorney and the said U. S. F. & G. Company through us its Board of Directors hereby ratifies and confirms all and whatsoever any one of the said Walter C. Schryver, John B. Geyler and the said Percy A. S. Rogers may lawfully do in the premises by virtue of these presents. 10

In witness whereof the said U. S. F. & G. Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice President and Assistant Secretary, this 27th day of Nov. A. D. 1922. 20

U. S. F. & G. COMPANY,
By (Sig) Chas. O. Scull, V. P.
(Sig) Charles V. Hemslen,
Ass't. Secretary.

(Seal)

30

State of Maryland, }
Baltimore City. } ss. :

On this 27th day of November A. D. 1922 before me personally came Charles O. Scull Vice President of the U. S. F. G. Company and Charles V. Hemslen, Assistant Secretary of said Company with both of whom I am personally acquainted who being by me severally duly sworn said that they resided in the City of Baltimore, Maryland, that 40

Exhibit D-10.

they the said Charles O. Scull and Charles V. Hemslen, were respectively the Vice President and Assistant Secretary of the said U. S. F. & G. Company, the corporation described in and which executed the foregoing power of attorney, that they each knew the seal of said Corporation, that the seal affixed to said power of attorney was such corporation seal, that it was so affixed by order of the Board of Directors of said corporation and that they signed their names thereto by like orders as Vice President and Assistant Secretary respectively of said Company.

My commission expires the 1st Monday in May 1924.

(Sig.) A. D. PATRICK,

(Seal)

N. P.

20

State of Maryland, }
Baltimore City. } ss.:

I, Stephen C. Little, of Superior Court of Baltimore City which is a court of Record and has a seal do hereby certify that A. D. Patrick, Esq. before whom the annexed affidavits were made and who has thereto subscribed his name was at the time of so doing a Notary Public of the State of Maryland in and for the City of Baltimore duly commissioned and sworn and authorized by law to administer oaths and take acknowledgment of proofs of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of said Notary and verily believe the signature to be his genuine signature.

30

In Testimony Whereof I hereunto set my hand and affix the seal of the Superior Court of Balti-

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Exhibit D-10.

more City the same being a Court of Record, this
27th day of November A. D. 1922.

(Sig.) STEPHEN C. LITTLE,
Clerk of the Superior Court
of Baltimore City.

(Seal)

10

COPY OF RESOLUTIONS.

That Whereas, it is necessary for the effectual
transaction of business that this Company appoints
agents and Attorneys with power and authority to
act for it, and its name in States other than Mary-
land, and in the Territories of the United States,
and in the Provinces of the Dominion of Canada,
and in the Colony of Newfoundland;

20

Therefore, be it resolved, that this Company do
and it hereby does authorize and empower its Pres-
ident and either of its Vice Presidents in conjunc-
tion with its Secretary, or one of its Assistant Sec-
retary's under its Corporate seal to appoint any
person or persons as Attorney or Attorneys-in-fact
or Agent or Agents of said Company, in its name,
and as its act, to execute and deliver any and all
contracts guaranteeing the fidelity of persons
holding positions of public or private guaranteeing
the performance of contracts other than insurance
policies and executing or guaranteeing bonds and
undertakings, required or permitted in all actions
or proceedings or by law allowed, and

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Also in its name, and as its Attorney or Attor-
neys-in-fact, or agent or agents, to execute and
guarantee the conditions of any and all bonds, rec-
ognizances, obligations, stipulations, undertakings,
or anything in the nature of either of the same

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Exhibit D-10.

10 which are or may be by law, municipal or otherwise or by any Statute of the United States, or of any State or Territory of the United States, or of the Provinces of the Dominion of Canada, or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice, or discretion of any board, body, organization, office or offices, local, municipal, or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization, whatsoever, in any and all capacities, whatsoever, conditioned for the doing or not doing of anything or on any conditions which may be provided for in any

20 such bond, recognizance, obligation, stipulation or undertaking or anything in the nature of either of the same.

30 I, Charles V. Hemsley, Assistant Secretary of the U. S. F. & G. Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which

Exhibit D-10.

Resolutions the foregoing is a true copy, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and the seal of the U. S. F. & G. Company, this 27th day of November, A. D. 1922.

(signed) CHARLES V. HEMSLEY,
Asst. Secy. 10

HARRY E. VERNOY.

(Seal)

Sworn and subscribed to before me
this 29th day of June, A. D. 1926,

Edwin Sork,
N. P. of N. J.

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30

40

87 may

New Jersey Court of Errors and Appeals

Between

JOHN J. VAN ORDER,
Complainant-Appellant,

and

LOUISE G. JOHNSON,
Defendant-Appellee.

On Bill, &c.

BRIEF OF APPELLANT.

This matter comes up on appeal from decree entered in the Court of Chancery of the State of New Jersey on the 16th day of September, 1930.

Facts.

Practically all the facts were stipulated at the hearing in the Court below (S. C., p. 22, l. 14 to 30, l. 23). Briefly they constitute the following:

The Complainant-Appellant is in the wholesale builders' material business in Caldwell, N. J., and at the time of the commencement of the incidents, hereinafter related and for a long time prior thereto, one Alderman S. Newbern was a builder on a very large scale, building a large number of houses at a time, and the Complainant-Appellant had been for some time supplying Newbern with materials necessary to carry on all of Newbern's various enterprises and operations. In connection with this relationship it had been the custom over a large period of time to assign to Complain-

ant-Appellant, or his nominee, as payment on account of Newbern's indebtedness to Complainant-Appellant, various mortgages given to Newbern as part of the purchase price of different properties sold by Newbern.

This practice of assigning mortgages was a general practice and not one especially adopted in the matter now before the Court.

In May 1926 Newbern sold, or contracted to sell, two houses on Gould Street, Verona, one to one John Howard Smith and one to Catherine Muir. On each of these houses a purchase money mortgage was to be given back to Newbern. The Smith mortgage was to be for Twenty-five Hundred (\$2500.00) Dollars and the Muir mortgage was for Two Thousand (\$2000.00) Dollars. In keeping with their previous custom and practice these two purchase money mortgages were, upon delivery, to be assigned by Newbern to the Complainant-Appellant, or his nominee.

Ames & Crane, (who are the real defendants in this matter,) represented the purchasers, Smith & Muir, and were engaged by them to search the titles.

An examination of the titles by Ames & Crane disclosed that lien claims on each of the properties had already been filed by a party named Hoffman and that shortly thereafter lien claims on both properties were filed by Pierce, Butler & Pierce.

With these liens on the properties the title, of course, could not be closed and Ames & Crane so notified Newbern and after some discussion it was decided to discharge the liens of record by the filing of a surety bond, which is the usual practice.

Ames & Crane communicated with the United States Fidelity & Guaranty Company, with whom they have done business for some time, and the

United States Fidelity & Guaranty Company agreed to issue bonds discharging the lien provided a suitable indemnitor was procured.

Newbern communicated with the Complainant-Appellant, who agreed to indemnify the United States Fidelity & Guaranty Company provided they would issue a bond for the purpose of discharging the record of the Hoffman lien claim. Ames & Crane drew up the indemnity agreement between Newbern and the Complainant-Appellant and the United States Fidelity & Guaranty Company. For some reason or other this document instead of being in the form of the usual indemnity agreement practically followed the form required by the United States Fidelity & Guaranty Company to issue as a release of Mechanics' Lien Bond. This was forwarded to the Bonding Company and they issued a proper bond which was properly filed and the Hoffman lien claim cancelled of record. When the Pierce, Butler & Pierce Manufacturing Corporation's claim was filed Newbern again communicated with the Complainant-Appellant, who again agreed to indemnify the United States Fidelity & Guaranty Company provided they would issue a bond discharging the Pierce, Butler & Pierce Manufacturing Corporation's lien in the same manner as the Hoffman lien had been discharged.

Ames & Crane drew up the agreement between Newbern and the Complainant-Appellant and the United States Fidelity & Guaranty Company and this agreement (S. C., 57, l. 29 to 58, l. 30) was forwarded to the Bonding Company, on receipt of which they were to issue a bond discharging the lien claim of Pierce, Butler & Pierce Manufacturing Corporation. Again the form of indemnity agreement was practically the same as a regular release of Mechanic's Lien Bond, excepting that it

ran to the United States Fidelity & Guaranty Company instead of the lienor.

The true intention of the agreement (S. C., 57, l. 29—58, l. 30) was that Newbern and the Complainant-Appellant would indemnify the United States Fidelity & Guaranty Company if it suffered a loss on a bond which they agreed to issue for the purpose of discharging of record the lien claim of Pierce, Butler & Pierce Manufacturing Corporation. No other intention or purpose was contemplated by the parties.

The United States Fidelity & Guaranty Company never issued, executed or filed the bond in favor of Pierce, Butler & Pierce Manufacturing Corporation for the purpose of discharging the mechanic's lien, as aforesaid, and as it agreed to do. Instead, it filed, or caused to be filed, the aforesaid agreement (S. C., 57, l. 29—58, l. 30).

Upon the filing of said agreement the County Clerk of the County of Essex apparently believing the same to be the usual form of Release of Mechanic's Lien Bond caused the record of said lien of Pierce, Butler & Pierce to be marked "Discharged by Bond" and Ames & Crane acting on the said record and without examining the "bond" referred to, certified the title to the respective purchasers.

Meanwhile Ames & Crane had filed an answer (S. C., pp. 53-54) to the Mechanic's Lien suit of Pierce, Butler & Pierce in behalf of Newbern whose attorney of record they continued to be, although this action was not diligently prosecuted to judgment within a year as required by statute, they admittedly did nothing further in the matter for the protection of Newbern's interest and permitted the suit to go to judgment by default, as will hereafter appear without formally withdrawing from Newbern's defense. The only explanation of their conduct was their letter to Complainant-Appellant

of February 24, 1927 (S. C., p. 60) to the effect that they had only filed the answer as a favor to Complainant-Appellant.

The Complainant-Appellant had no knowledge that the United States Fidelity & Guaranty Company had not filed a bond in favor of Pierce, Butler & Pierce Manufacturing Corporation to discharge the lien, as aforesaid, until he, through his attorney, advised with the attorney for the United States Fidelity & Guaranty Company for the purpose of instituting a motion by the United States Fidelity & Guaranty Company (the Complainant-Appellant not being a party to the suit himself) to discharge the lien claim and the bond supposed to have been filed by the United States Fidelity & Guaranty Company, as aforesaid, on the ground that the action had not been diligently prosecuted, which motion was subsequently made; on the hearing of said motion, which was had on or about September 22, 1928, counsel for Pierce, Butler & Pierce Manufacturing Corporation pointed out to the Court that instead of a bond being issued in favor of the said Pierce, Butler & Pierce Manufacturing Corporation, the agreement entered into by Newbern and the Complainant-Appellant and the United States Fidelity & Guaranty Company was filed instead; as a result thereof, the motion to dismiss the bond and lien claim was dismissed by the Court, as set out in an order of said Court dated October 5, 1928 (S. C., 56 & 57, ll. 1-20).

This was the first intimation that the Complainant-Appellant had that the bond which the United States Fidelity & Guaranty Company agree to file had not been filed, but inasmuch as the United States Fidelity & Guaranty Company had incurred no liability on its part because of its failure to file a bond as agreed upon, and the Complainant-Appellant's obligation being to indemnify the said

United States Fidelity & Guaranty Company only in the event of a loss suffered by it, the Complainant-Appellant did nothing further concerning the matter.

Subsequently on December 19, 1928, a final judgment was recovered in the Essex County Circuit Court by default by Pierce, Butler & Pierce Manufacturing Corporation on the lien claim referred to herein, for the sum of Sixteen Hundred Dollars and Ninety-six Cents (\$1600.96) damages and Eighty-five Dollars and Ninety-seven cents (\$85.97) costs of suit generally against the defendant, A. J. Hoffman, and to the extent of Eight Hundred Dollars and Forty-eight cents (\$800.48) to be specially made out of the lands and building described in the second tract in said lien claim referred to; and that on December 22, 1928, in said Court Pierce, Butler & Pierce Manufacturing Corporation also recovered a judgment of Eight Hundred Dollars and Forty-eight Cents (\$800.48) damages and Eighty-five Dollars and Ninety-seven Cents (\$85.97) costs, on said lien claim already referred to against the lands and buildings described in the first tract of the lien claim already mentioned.

Subsequently the said judgment obtained by Pierce, Butler & Pierce Manufacturing Corporation was assigned to Defendant-Appellee—a stenographer in the employ of Ames & Crane, and admittedly acting in their behalf as their agent. Said assignment was made for the purpose of protecting said Ames & Crane against any loss or responsibility incurred by them by reason of their failure to discover their discrepancies in the foregoing instrument erroneously filed instead of a proper release of Mechanic's Lien Bond. The money paid for said assignment of judgment was furnished and paid by Ames & Crane.

Thereafter Ames & Crane procured from the

said United States Fidelity & Guaranty Company an assignment to the Defendant-Appellee of said agreement of indemnity (S. C., p. 68 to 79). No consideration was paid for said assignment and the same was procured for the specific purpose of instituting suit thereon against the Complainant-Appellant not for the recovery of any loss sustained by the United States Fidelity & Guaranty Company, but for the loss or expense incurred by Ames & Crane in obtaining the aforesaid assignment of judgment and in order to protect them against the results of their failure to discover the aforementioned discrepancies in the titles certified by them as well as their laches in failing to have the said Mechanic's Lien suit dismissed for lack of prosecution, although they were still attorneys of record for Newbern and had a right as the representative of said party to the proceedings to make such motion.

On or about April 17, 1929, the said Defendant-Appellee, Louise G. Johnson, by virtue of said assignments instituted suit in the New Jersey Supreme Court against the Complainant-Appellant and Alderman S. Newbern to recover the sum of the judgments obtained by Pierce, Butler & Pierce Manufacturing Corporation, claiming that by virtue of said assignments the amounts of said judgments were recoverable from Complainant-Appellant under and by virtue of the terms and conditions of said agreement between the said Newbern, Complainant-Appellant, and the United States Fidelity & Guaranty Company.

The Complainant-Appellant filed an answer to said suit which answer the attorney for Louise G. Johnson moved to strike out at a hearing before the Chief Justice of the said New Jersey Supreme Court. The Court pointed out that there apparent-

ly was no defense at law but advised that entry of judgment would be withheld to give counsel for Defendant in said suit an opportunity of filing a bill in Chancery for relief on grounds that the Court considered apparent.

As previously stated these facts were all agreed upon and the only question that the Court below was called upon to decide was as to whether or not there was any further agreement made by the Complainant-Appellant to indemnify Ames & Crane specifically in addition to the protection given them and their clients by the execution and filing of a release of Mechanic's Lien Bond to be issued by the United States Fidelity & Guaranty Company in consideration of the agreement of Complainant-Appellant and the said Newbern to indemnify them in the event of any loss suffered by said Company by reason of executing said bond.

Complainant-Appellant never agreed to incur any further liability than to indemnify the United States Fidelity & Guaranty Company. A further admission of fact was to the effect that Mr. Crane of the firm of Ames & Crane who handled this matter admittedly had been engaged in the practice of law for a period exceeding twenty-six years, during which time he dealt almost exclusively with real estate and the law pertaining thereto and was therefore well aware and very conversant with the the transactions of this nature.

Acting on the suggestions of Chief Justice Gummere in taking advantage of the temporary stay in the entry of judgment as aforesaid against Complainant-Appellant, Complainant-Appellant filed a bill in the New Jersey Court of Chancery praying for relief in the form of a permanent injunction against the said Louise G. Johnson in the prosecution or entry of judgment in the said suit in the New Jersey Supreme Court and also praying for

the surrender and cancellation of said aforementioned agreement executed by Complainant-Appellant in favor of the United States Fidelity & Guaranty Company. (S. C., 5, ll. 37-40; p. 6, ll. 1-16).

The matter coming on for hearing before the Honorable Alonzo Church, Vice Chancellor, resulting in the making of an order by the said Honorable Vice Chancellor advising a decree dismissing the bill of Complainant-Appellant in accordance with which a decree to that effect was entered on the 16th day of September, 1930, from which order and decree Complainant-Appellant takes this appeal.

POINT I.

The true intention and purpose of the agreement executed by the Complainant-Appellant was to indemnify the United States Fidelity & Guaranty Company in the event that a loss was sustained by reason of the execution and filing of a bond in favor of Pierce, Butler & Pierce Manufacturing Corporation.

In the stipulation of facts (S. C., 26, ll. 10-15) appears:

“That the United States Fidelity & Guaranty Company agreed that on receiving the bond (S. C., 57, l. 29 to 58, l. 30) they would, in turn, issue their bond the same as they did in the Hoffman case and cancel the lien in the Pierce, Butler & Pierce case.”

It is also agreed that the United States Fidelity & Guaranty Company refused to execute any bond without proper indemnification from Complainant-Appellant.

As will clearly appear from the evidence and stipulated facts, the only purpose of the document upon which the entire controversy centers was to satisfy the United States Fidelity & Guaranty Company in securing execution by them of the release of Mechanic's Lien bonds. In this respect the instrument speaks for itself. No other parties of interest are mentioned therein. The testimony is clear and convincing in that respect (S. C., 30, ll. 26-30).

The attempt of the Defendant-Appellee to show an oral agreement, namely an attempt or effort to protect Ames & Crane as well as the United States Fidelity & Guaranty Company, falls flat and fails to ring true, not only because of the fact that no oral agreement would avail under the Statute of Frauds but primarily because it is inconceivable that a member of the Bar of this State of long standing conversant with such matters would fail to include as obligee the name of his own firm, if such additional attempt were contemplated by the parties. If indeed such intent had been contemplated why was no attempt made either by the Defendant-Appellee directly or by the intervention of Ames & Crane in the case at Bar, requesting their joinder as codefendants and praying for relief in the form of reformation of the instrument in question on the ground of mutual mistake. There can be no question, even admitting the truth and probabilities of the conflicting testimony in respect to the intended effect of the document in question, that the intention in the mind of the Complainant-Appellant was to indemnify the United States Fidelity & Guaranty Company, provided it executed a release of Mechanic's Lien Bond which would be filed and release the Mechanic's Lien. Under these circumstances there was un-

doubtedly such a unilateral mistake as would come under the numerous decisions in this State:

“Where the parties have apparently entered into a contract evidenced by writing, but owing to a mistake their minds did not meet as to all the essential elements of the transaction, so that no real contract was made by them, then a court of equity will interpose to rescind and cancel the apparent contract as written, and to restore the parties to their former positions.”

See 9 C. J. 1166.

“This also applies to cases where only one of the parties executed the contract under a mistake as to a fact which is of the essence of the contract.”

See 9 C. J. 1167, Sec. 18; *Tygar v. Cook*, 77 N. J. E. 300, 78 Atl. 23; *Chelsea National Bank v. Smith*, 74 N. J. E. 275, 69 Atl. 533; *Wirsching v. Grand Lodge F. and A. N. of N. J.*, 67 N. J. E. 711, 56 Atl. 713; 63 A 1119 - 3 Ann Cas 442.

It is therefore respectfully contended that the Court below erred in failing to decree the relief prayed for by the Complainant-Appellant in the form of surrender, rescision or cancellation of the document in question.

POINT II.

The assignment to the Defendant-Appellee by the United States Fidelity & Guaranty Company of the indemnity agreement was the result of fraud.

The assignment to the Defendant-Appellee by the United States Fidelity & Guaranty Company was made some time after October 5, 1928, at which time the order of the Circuit Court (S. C., 56 to 57, ll. 20) had been entered and the United States Fidelity & Guaranty Company knew that it had no right to claim indemnity against the Complainant-Appellant for the reason that it had not suffered any loss. It also knew at that time that the said agreement (S. C., 57, l. 29—58, l. 30) by its true intent and meaning, was intended to indemnify the United States Fidelity & Guaranty Company only, and was conditioned upon their issuance of a bond to Pierce, Butler & Pierce Manufacturing Corporation for the purpose of discharging the lien claim, and also that because of the reason given for the order of the Circuit Court (S. C., 56 to 57, l. 20) it had never executed the release of Mechanic's Lien bond which was the only consideration for the agreement in question and that Complainant-Appellant had received no other consideration for said agreement.

The Defendant-Appellee and her principals, Ames & Crane, also knew at the time of said assignment that no bond had been issued in consideration of said agreement and that Complainant-Appellant had therefore received no consideration for the said indemnity agreement; that because no bond had been executed and filed by the said Unit-

ed Fidelity & Guaranty Company the said Company had sustained no loss chargeable against said indemnity agreement and that under these circumstances Defendant-Appellee, as assignee of the United States Fidelity & Guaranty Company, having no greater right than her assignor, was not entitled to any payment of money from the Complainant-Appellant by reason of any loss sustained by her assignor. She, nevertheless, knowing that she could have no greater right than her assignor and acting in concert and collaboration with her principals, Ames & Crane, secured an assignment of the said agreement or "bond" for the sole purpose of attempting to secure thereby an indemnity from said Complainant-Appellant, which was never contemplated thereunder, namely an indemnity or payment of a sum of money expended by her principals, Ames & Crane, and not by the United States Fidelity & Guaranty Company, her assignor.

It is inconceivable that the Defendant-Appellant's purpose was not communicated to the United States Fidelity & Guaranty Company when the said assignment was secure and this fact may be fairly presumed by the surrounding circumstances. Such conduct on the part of the Defendant-Appellant and the United States Fidelity & Guaranty Company clearly indicates no natural business transaction; for a large corporation so experienced in the bonding business does not lightly part with the protection of an indemnity agreement or bond.

Under these circumstances it is therefore respectfully contended that by knowingly assigning an instrument for which it had not parted with the consideration, with the knowledge that the instrument was to be used in a manner detrimental to the indemnitor, the United States Fidelity & Guaranty Company was guilty of a flagrant breach of trust

and it is further contended that the Defendant-Appellee by securing the assignment of said document with full knowledge of its original intent and purpose, as well as the fact that no consideration had passed and no loss been sustained and attempting to convert said document to a use and purpose never intended at the time of its execution, consummated a transaction, which in equity and good conscience constituted a perpetration, by both parties to the assignment, of a fraud on the Complainant-Appellant such as would entitle Complainant-Appellant to the relief prayed for in the original bill in the form of a permanent injunction against the Defendant-Appellee from prosecuting the cause of action in the New Jersey Supreme Court or entering judgment therein.

Defendant-Appellee, as assignee of the United States Fidelity & Guaranty Company, and as agent of Ames & Crane, is chargeable with their negligence and laches, and therefore not entitled to be considered as an innocent party by this Court.

As has previously been pointed out the United States Fidelity & Guaranty Company negligently and carelessly failed to execute a release of Mechanic's Lien bond running to Pierce, Butler & Pierce, and as a result thereof, precluded themselves from the rights which they otherwise would have had as a party to the suit to successfully move to dismiss the lien claim and discharge the bond had they executed a proper bond complying with the Statute.

Under the terms of the Mechanic's Lien claim law upon the execution as surety of a release of Mechanic's Lien bond running to the lienor the surety automatically becomes a party to the suit (P. L. 1917, pg. 121, Sec. 2).

This would have automatically have made the United States Fidelity & Guaranty Company a

party to the suit had they filed a proper bond. The Act further provides that in the event that a lien claim suit is not diligently prosecuted, that is to say within one year, unless the time is extended by the Court, it may be dismissed for lack of diligent prosecution.

Acting on the presumption that it was a proper party to the suit the United States Fidelity & Guaranty Company, through its attorney, made such a motion, which motion was denied only for the reason that not having executed a proper statutory bond running to the lienor, the said Company was not a party to the suit and therefore had no standing in Court (S. C., 28, ll. 8-37).

Having failed to comply with its agreement with the Complainant-Appellant, it is respectfully contended that the United States Fidelity & Guaranty Company was guilty of negligence in this respect.

The Defendant-Appellee's principals, Ames & Crane were likewise guilty of negligence and laches in that they failed to properly examine the record of the title in question and discover the lack of a proper bond.

See testimony of Mr. Crane (S. C., 50, ll. 32-40; 50, ll. 1-10)

Q. You searched the title, didn't you, and you found the lien marked discharged by a bond, didn't you?

A. Yes.

Q. Did you, when you searched this title, examine the record to see if the bonds were filed?

A. They were not filed at the time the titles were closed.

Q. Did you at any time after that examine the records to see if they were filed?

A. I caused it to be examined.

Q. And did you examine the bond to see

if it was in proper form at the time this examination was made?

A. I don't know what my searcher did. He reported what was on the record. The search shows.

They also failed as attorneys of record of Defendant, Newbern, in the Mechanic's Lien action to take advantage of the Act requiring diligent prosecution within one year of the institution of a Mechanic's Lien suit:

"If such a claimant shall fail to prosecute his claim diligently within one year from the date issuing such summons or such further time as the Court may by order direct, such claim shall be discharged."

(Mechanics' Lien Act, Compiled Statutes pg. 3305, par. 18)

Where there is no judgment or any extension order within the year and no adequate proof of diligent prosecution within that time, the lien upon application to the Court should be discharged.

(Buchanan Co. v. Dougherty, 88 N. J. Law 356;

Buchanan Co. v. Einstein, 87 N. J. Law 307;

Beehm v. Bryon, 85 N. J. Law 350;

Gluck v. Rinz-Urrtia, 101 N. J. Law 558;

Standard Lumber Co. v. Modern Home Building Construction Co., 6 Misc. Reports 743 and 142 Atl. 665).

The Complainant-Appellant at no time was in a position to take any action with respect to the alleged bond filed in the Mechanic's Lien action, nor with respect to the failure of the Plaintiff therein to prosecute the suit diligently within one year as

required by the Statute. From the record and the stipulated facts therefore it will appear that while there was no primary responsibility on the part of the Complainant-Appellant and/or Defendant-Appellee to pay the judgment recovered in the Mechanic's Lien action, nor any duty or obligation on the part of the Defendant-Appellee, as assignee of the United States Fidelity & Guaranty Company or her principals, Ames & Crane by reason of the execution of the document which forms the basis of this litigation. The only obligations arising from the entry of the judgment were created by the combined negligence and laches of the Defendant-Appellee's assignor and principals. In other respects, the parties would be ordinarily considered by the Court as innocent by-standers, in which event, being on an equal footing, the Court would permit the law to take its course, and this appeared to be the position taken by the Defendant-Appellee at the trial below, despite the other facts which appear in the record.

It must not be overlooked that the Defendant-Appellee's Principals, Ames & Crane, owed a duty not only to themselves but to their clients, namely, the purchasers to whom they had certified the respective titles, and Newbern, for whom they appeared as Attorneys of record and to whom they owed a duty until they had formally withdrawn from the case, or substituted another member of the Bar to act in their place and stead.

It is true that Ames & Crane contend that they forwarded a substitution of Attorneys to Newbern, but they subsequently had notice that no substitution had been made or filed and that they were still Attorneys of record. And notwithstanding the fact that they in the alleged letters to Complainant-Appellant claimed to have merely filed

the answer as a courtesy to him, they would still not only owe a duty to Newbern but to Complainant-Appellant to see that the matter was not permitted to go by *default*. Even if they owed no duty to Newbern or Complainant-Appellant, did they not owe some duty to their client, Muir, in the protection of that purchaser's interest and should they not have investigated the situation when they learned of Newbern's apparent indifference to the entire situation? If they were not negligent in respect to their client, Muir, why did they pay the judgment and take an assignment in the name of a stenographer? Was it for the purpose of protecting their client against their own negligence, or was it a business transaction? What profit could they hope to obtain by taking an assignment of the judgment? If they had been so negligent with respect to their client, Muir, as to feel responsible for the judgment to the extent that they paid and took an assignment of the same, why did they not protect their own interest when they, as Attorneys of record for a party Defendant in the Mechanic's Lien action, could have very readily had the same dismissed for lack of prosecution?

That equity favors the vigilant is one of the cardinal principles of this Court.

Complainant-Appellant by cooperating with the Attorney of the United States Fidelity & Guaranty Company in the motion to dismiss the Mechanic's Lien action (S. C., 39, ll. 10-20; 35, ll. 20-30) did everything which a reasonable vigilant individual could have done under the circumstances. Compare his actions with the indifferent attitude of Ames & Crane. The layman endeavoring to protect not only himself, but all parties concerned—the Attorneys of twenty-six years experience tak-

ing no steps other than to advise Complainant-Appellant that they had washed their hands of the matter. As between members of the Bar and laymen it has been the universal policy of Courts from time immemorial to decide all doubts, ambiguities or questionable situations in favor of the layman.

See

Condit v. Blackwell, 22 N. J. Eq. 481;

Porter v. Bergen, 54 N. J. Eq. 405;

Perkins v. Deal Beach Realty Co., 92 N. J. Eq. 526;

Rhodes v. Ries, 99 N. J. Eq. 638.

Condensing the entire situation we are faced with the following facts:

The Complainant-Appellant was deprived of the protection of a positive defense by an error committed by the United States Fidelity & Guaranty Company, which situation was aggravated by their assigning an instrument under which they had no claim against Complainant-Appellant to the agent of Ames & Crane. Messrs. Ames & Crane will now seek by means of this document to penalize Complainant-Appellant and force him to indemnify them for a loss occasioned by their own negligence and laches. They likewise deprived Complainant-Appellant of a defense by reason of their failure to take advantage of the statutory provisions particularly set forth above.

Such action on the part of the Defendant-Appellee and her Principals, who if they had vigilantly protected their own interest would not now have a loss they are attempting to saddle upon the Complainant-Appellant, or if they had no primary responsibility but had made a voluntary payment of the judgment should not be permitted to enforce

such gratuitous payment against the Complainant-Appellant, clearly establishes so equivocable a situation as to call for intervention by a Court of Equity.

Conclusions.

Under the cases and arguments in all of the points it is respectfully contended that the Court below erred in failing to grant the relief prayed for by the Complainant-Appellant, namely, a permanent injunction against the Defendant-Appellee, preventing her from prosecuting further the suit in the New Jersey Supreme Court and the delivery of and cancellation of the instrument executed by the Complainant-Appellant and Alderman S. Newbern to the United States Fidelity & Guaranty Company and that the decree of the said Court should be reversed and the Complainant afforded the relief prayed for.

Respectfully submitted,

FORLENZA & HARRINGTON,
Solicitors for and of Counsel
with Complainant-Appellant.

New Jersey Court of Errors and Appeals

Between

JOHN J. VAN ORDER,
Complainant-Appellant,

and

LOUISE G. JOHNSON,
Defendant-Appellee.

On Bill, etc.

BRIEF FOR THE DEFENDANT-APPELLEE.

Facts.

There is little or no dispute on the facts. Practically every point is set forth in the oral stipulation dictated during the course of the hearing, and appearing in the testimony. This oral stipulation, supplemented by brief testimony and the documents, constitute the case.

One Alderman S. Newbern was a building contractor, who built scores of houses in this vicinity. At the time we are interested in, Newbern owed Van Order or his concern, a great many thousands of dollars for building materials. Van Order was growing very anxious about his money and was looking around for collateral.

Ames & Crane are lawyers who have been practicing in Montclair, New Jersey twenty-six years and upwards. Van Order has done business with them sixteen years and more. By a long course of conduct, Van Order had shown implicit confidence in them by entrusting many transactions involving thousands of dollars on their mere "say so." Ames & Crane in turn, have trusted Mr. Van Order's word implicitly, so that during a course of years, there has been a relation of trust

and confidence, although in the strict sense of the word, Van Order was at no time a client of Ames & Crane.

About May, 1926, Newbern sold or contracted to sell one of his houses on Gould street, Verona to John Howard Smith; a few days later, he contracted to sell another of his houses on the same street to Catherine Muir. Each house was contracted to be sold subject to a \$7,000.00 first mortgage, and the contract provided for a purchase money second mortgage to be given back to Newbern. On the Smith house, this purchase money mortgage was to be \$2,500.00, and on the Muir house, \$2,000.00.

Before the negotiations for these sales were complete, Van Order had demanded that these two purchase money mortgages, one of \$2,500.00 and one of \$2,000.00, when executed and delivered, should at once be assigned to Van Order, or to Van Order's wife, as collateral for some of the money that Newbern owed to his concern. Van Order arranged with Ames & Crane to draw the assignments at the proper time.

It so happened that Smith, and then Muir, the vendees in these contracts for sale, employed Ames & Crane to examine their respective titles, to protect them and represent them at the closing. In the examination of the title, Ames & Crane discovered two mechanics' liens had been filed, one against each of these two houses, by a plumber named Hoffman. In making inquiries about those liens, Ames & Crane discovered that another lien was about to be filed by Pierce, Butler & Pierce Manufacturing Corp., a plumbing supply house, who supplied the plumbing materials to this same Hoffman. Manifestly, both liens could not prevail, as Hoffman had filed his

liens for the very materials which Pierce, Butler & Pierce Manufacturing Corp. had supplied to him. After a conference, at which Newbern and Van Order were present, it was explained carefully by Newbern that one or the other liens would have to be paid, but not both. To this, Van Order agreed. Van Order, knowing Newbern to be a little careless about such matters, asked Ames & Crane, as a matter of courtesy to him, to file a formal answer for Newbern, until the latter should employ an attorney to defend the suit. This they did, and immediately thereafter, handed the papers over to Newbern and retired from that case.

Van Order then began pressing Ames & Crane to get these two titles passed, so that he could get his mortgages. The attorneys refused to pass the titles unless the mechanics' liens were cleared *of record*. Van Order offered, Crane says, to give his personal bond to Ames & Crane, to indemnify them against any loss, if they should pass the titles. Crane refused because that would not clear the record. Van Order then offered to leave the purchase money bonds and mortgages with Crane as security, but Crane very properly refused for the very same reason. He explained that he had to certify to his purchasers that the *record* was clear. He thereupon told Van Order and Newbern that they would have to find some Bonding Company who would bond the lien, pursuant to the Statute, and thus clear the record (such bonds under the Statute, run to the plaintiff, and a notation is made on the margin of the mechanics' lien record).

Newbern came down of his own accord and selected the United States Fidelity & Guaranty Co. as the Bonding Company. His application, of course, at that time, only referred to the two

mechanics' liens that Hoffman had filed; that Bonding Company was willing to issue the bonds to clear the record; they demanded however, some collateral or some security. Van Order was intensely interested in getting these titles through and Newbern had no difficulty in inducing Van Order to sign such a bond. So Van Order entered into a bond with the United States Fidelity & Guaranty Co., to the effect that *if a judgment was entered on these two Hoffman liens, he would pay it* (the exact language of this lien is shown in Exhibit C. 2, Case, p. 57). The language of the Hoffman bond is precisely the same as the Pierce, Butler & Pierce Manufacturing Corp., except for the change of names. Thus protected, the United States Fidelity & Guaranty Co. issued its own bond, which Newbern put on record, and the two Hoffman liens were cancelled; these two liens, at this point, passed out of the picture.

Pierce, Butler & Pierce Manufacturing Corp., the plumbing materialmen before referred to, had now actually filed their mechanics' lien. Van Order knew that either the Hoffman lien or the Pierce, Butler & Pierce Manufacturing Corp. lien must be paid, as that had been carefully explained to him. Ames & Crane would not complete the passing of the title and deliver the purchase money bonds and mortgages to him until this lien was likewise bonded and the record cleared. *Newbern* thereupon went down and applied to the United States Fidelity & Guaranty Co. to bond this in a similar manner in which the two Hoffman liens had been bonded. The Bonding Company asked for a similar bond from Van Order. The same kind of a bond was prepared for Van Order's signature that had been prepared in the Hoffman cases, and Van Order

signed it. I quote verbatim, the essential part of this bond.

“Now, therefore the condition of the bond is such that if a judgment is obtained on said lien claim the said Alderman S. Newbern and John J. Van Order the above bounden shall pay the same and such costs as may be recovered by said lien claimant against said lands and building described in said lien claim as above set forth: then this obligation to be void, otherwise to remain in full and virtue.”

Now at this point, the Bonding Company made a slip. It is evident from the language of the bond that if any judgment was entered, Van Order would have to pay it. It was probably intended that the United States Fidelity & Guaranty Co. should in turn issue its bond, as it did in the Hoffman cases, but the bond was drawn broad enough so that it created an *absolute liability* on Van Order, and not a *mere indemnity*. And of course, in case of a judgment, the Bonding Company would collect from Van Order. Instead of doing this though, the Bonding Company erroneously signed the very bond which was made to them by Van Order (Exhibit C. 2). They not only attached their signature, but also put all their printed matter on showing their responsibility. This bond, when executed, was *handed to Mr. Newbern*, who took it to the County Clerk's Office. The County Clerk in turn, noted the bond on the margin of the mechanics' lien and Ames & Crane's searcher so reported the matter to them, and the record being clear, they passed the title. Van Order, by virtue of the passing of title, received the assignment of his two mortgages, aggregating \$4,500.00, and Ames & Crane supposed that the whole matter was concluded.

Between one and a half years or two years later, the attorneys for Pierce, Butler & Pierce Manufacturing Corp., during the course of a motion to strike out their complaint for want of prosecution, discovered that the bond issued to cancel this Pierce, Butler & Pierce Manufacturing Corp. lien was irregular as it did not run to the plaintiff. They thereupon proceeded to obtain judgment on their mechanics' lien and threatened to advertise the Smith and Muir properties, title to which Ames & Crane had certified to as clear.

Crane thereupon called upon Van Order several times to pay the judgment, as he had agreed to do. Newbern was insolvent and had absconded; Van Order refused. Ames & Crane then had to take an assignment of the judgment to protect their clients, Smith and Muir from having their property sold. The judgment was purchased in the name of Miss Louise Johnson, one of the stenographers in the office, and the lady who appears as defendant-appellee. Crane again asked Van Order to pay the judgment according to the obligation of his bond, and Van Order again refused. Then, in order to fulfill what in right and justice he should do under his solemn obligation, Ames & Crane had the United States Fidelity & Guaranty Co. assign the bond made by Van Order, to Miss Johnson, and started suit in the Supreme Court against Van Order. Van Order filed an answer, and on motion of the plaintiff to strike out the answer, the Chief Justice decided that the answer must be stricken out, but said that if he wished, he would give the defendant an opportunity to come into the Court of Chancery, in order that all the equities might be thrashed out, if there were any.

Thus we have this spectacle—Van Order, in order to get his \$4,500.00 worth of mortgages as collateral for a pre-existing debt, induces these attorneys to pass these titles in order that his end might be accomplished. To have it done and have it done properly, he enters into a solemn agreement to pay this mechanics' lien, if a judgment should be entered thereon, and he does it with the full knowledge and expectation at the time of the execution of the bond, that one or the other of these mechanics' liens must be paid. Then, having obtained his \$4,500.00, he tries to evade his plain contract, his clear liability, because a clerk in the Bonding Company's office put his bond on record instead of issuing the Surety Company's bond on the faith of it. He wants to keep his \$4,500.00 but be relieved of his bond on a technicality, and make these innocent men whom he agreed and contracted to protect, suffer.

This is the character of the man who comes as a suitor into this court. He comes into a court of equity and good conscience to help him.

POINT I.

Van Order clearly intended to pay the judgment and should be compelled to do so as a condition precedent to any relief.

Observe the character of the bond (Exhibit C. 2, Case, p. 57). This is what Van Order, who is a shrewd business man, agreed to do:

“Now, therefore the condition of the bond is such that if a judgment is obtained on said lien claim the said Alderman S. Newbern and John J. Van Order the above bounden shall pay the same and such costs as may be recovered by said lien claimant against said lands and building described in

said lien claim as above set forth; then this obligation to be void, otherwise to remain in full force and virtue.”

His counsel argues that he intended to *indemnify* the United States Fidelity & Guaranty Co.; perhaps he did, but that is the bond that he chose to enter into, and it was not prepared by the Bonding Company. The language of this bond is so simple that there can be no mistaking of its meaning, and Crane’s story is much more believable, that that language was chosen so that the land, and incidentally, themselves, would be protected in any event, which is the very thing that Van Order claimed he wanted to do. Moreover, if the bond is not what Mr. Van Order intended it should have been, his bill of complaint does not allege *mistake—it does not ask for reformation*. That Van Order clearly understood that he would be called upon to pay it, appears by the evidence (Case, p. 34, l. 20):

“Q It was explained to you, wasn’t it, before signing these three documents in the Hoffman and the Smith cases, that one or the other lien would have to be paid, wasn’t it? A Yes.”

(ll. 34-40):

“Q But it was agreed in conversation that one or the other claim must be paid, but not both? He owed one or the other, but not both? A Yes.

Q And you understood that that would have to be paid? A Yes.

Q And you understood that when you went on the bond? A Yes.”

This is Mr. Van Order’s own testimony, in which his attention was called, and refers to the fact that Hoffman, the plumber, had filed a lien, and subsequently, Pierce, Butler & Pierce Manufacturing Corp., the plumbing materialmen, had

filed a lien, and that it was agreed all around that one claim or the other would have to be paid, and he entered into this bond with the full knowledge that he would have to pay one or the other (Case, p. 38, l. 20):

“Q Now after you got those letters demanding payment, you went down to Crane’s office, didn’t you? A Yes.

Q And Crane asked you why you didn’t pay? A Yes, I think he did.”

This refers to letters and conversations after Pierce, Butler & Pierce Manufacturing Corp. had entered the judgment (Exhibits D. 5 and D. 6).

POINT II.

Van Order is not hurt by being made to pay; he is only doing what he intended to do, expected to do and contracted to do.

Let’s analyze Van Order’s motives. They were not eleemosynary; Newbern owed him \$50,000.00 or more. He wanted these titles to close so that he could get an assignment of the purchase money mortgages to apply against this debt of Newbern. He was willing to do almost anything to accomplish this. He knew that one lien claim or the other would have to be paid. See evidence (Case, p. 34, ll. 34-40).

With this knowledge and with this intention, he signed the bond, which primarily says that he must pay the judgment if one was entered. It doesn’t say he must indemnify somebody against loss; it says he must pay the judgment. His counsel tries to argue it was only indemnity. The language shows that it wasn’t. But even if this were so, that would simply mean that the Bonding Company would pay in the first instance, and would then look to him, so that the little slip

in the Bonding Company's office made no practical difference in dollars and cents to Van Order. In any event, the mistake of the Bonding Company should not injure this defendant or these lawyers, who had nothing at all to do with it.

Van Order received his two mortgages aggregating \$4,500.00. One of these mortgages for \$2,500.00 and interest, has been paid off in cash to Mr. Van Order (evidence, p. 40, l. 20). No! Van Order can't be the loser; \$2,500.00 in cash and interest from July 1, 1926, together with the other mortgage of \$2,000.00, which he still has—all came to him because he agreed by his solemn bond, to do the very thing he is now trying "to welch on." But his lack of business ethics does not stop at trying to evade his contract—to attain his end and this money, he is content to cast a loss of about \$1,800.00 on a firm of innocent lawyers, who passed the title largely for his benefit, on the security of the obligation Van Order now seeks to repudiate.

Can a man keep the fruit and repudiate the means by which he obtained that fruit? Can he keep his \$4,500.00 and repudiate the solemn obligation, on the strength of which, he got it?

He who seeks equity must do equity. He who comes into equity must come in with clean hands. Where conscience leads, equity follows.

AS TO ADVERSARY'S BRIEF.

Appellant has set up a statement of so-called facts; ordinarily, the basis for facts must be found in the record—testimony, documents and exhibits, or in the present case, in the agreed state of facts, testimony and exhibits. Counsel for the appellant has completely overlooked that

requirement. On p. 2, l. 35, of his brief, he says—

“Ames & Crane communicated with the United States Fidelity & Guaranty Company, with whom they have done business for some time, and the United States Fidelity & Guaranty Company agreed to issue bonds discharging the lien provided a suitable indemnitor was procured.”

The actual facts agreed upon are shown in Case, p. 23 last line and top p. 24:

“It is further agreed that, after negotiations between Mr. Newbern and the United States Fidelity & Guaranty Company, that latter concern agreed to issue two bonds in conformity with the mechanics’ lien statute in order to cancel those two Hoffman liens; that in order to get the U. S. F. & G., United States Fidelity & Guaranty Company to issue two bonds on the Hoffman cases, two separate agreements, which are in the same language as the Pierce, Butler & Pierce agreement, were signed.”

In the last paragraph p. 3, l. 5 of his brief, he says—

“The complainant-appellant agreed to indemnify the United States Fidelity & Guaranty Company provided they would issue a bond for the purpose of discharging the record of the Hoffman lien claim. Ames & Crane drew up the *indemnity* agreement, etc.”

Now there isn’t a word in the facts or exhibits to justify that statement or characterization. The paper Van Order signed is in evidence; it isn’t an indemnity agreement, and all the insistent on the part of counsel won’t make it so. At the risk of becoming monotonous, this is the essential part of the agreement—

“Now therefore, the condition of the bond is such that if a judgment is obtained on

said lien claim, the said Alderman S. Newbern and John J. Van Order shall pay the same, and such costs as may be recovered by said lien claimant against said lands and building described in said lien claim as above set forth.”

In other words, it is an absolute promise with no ifs or ands.

On p. 3, l. 20 he says—

“Newbern again communicated with the complainant-appellant who again agreed to *indemnify* the United States Fidelity & Guaranty Company provided they would issue a bond, etc.”

And again on p. 4, l. 3 he says—

“The true intention of the agreement was that Newbern and the complainant-appellant would *indemnify* the United States Fidelity & Guaranty Company if it suffered a loss on the bond, etc.”

Counsel repeats this time and time again throughout his brief; but the instrument itself which Van Order signed, as noted above, shows that it is not an indemnity agreement at all. If it were an indemnity agreement, it would of course, read—

“Now therefore, if the bounden John J. Van Order and Alderman S. Newbern shall indemnify and save harmless the United States Fidelity & Guaranty Company from any loss it might suffer by reason of being obliged to pay said judgment, etc.”

Reading adversary's statement and brief throughout, it is evident that he wishes to have read into the plain words of Van Order's contract, some such words of indemnity as those suggested above. But it is to be kept in mind that *this is not a bill for reformation or mistake*; there is not a suggestion in the bill of complaint or in

the prayer for relief, that *reformation* is sought. Again on p. 5, l. 37 he falls into the same error—

“And the complainant-appellant’s obligation being to *indemnify* the United States Fidelity & Guaranty Company only in the event of a loss suffered by it, the complainant-appellant did nothing further concerning the matter.”

Again on p. 8, l. 1, after stating that the Chief Justice said there was no defense at law, he says—

“but advised that he would withhold the entering of judgment to give counsel an opportunity of filing this bill in Chancery for reasons that the court thought were apparent.”

This statement is purely gratuitous. It has no basis in the testimony or in fact. In opposition to a motion to strike out this complainant-appellant’s defense to a suit on a bond, counsel for the present complainant-appellant told the Chief Justice that the real agreement was not in the bond, and the Chief Justice told him if he wanted to alter the terms of the bond, he was in the wrong court.

Again on p. 8, l. 6, after making these many misstatements of facts, he says—

“As previously stated, these facts were all agreed upon and the only question that the court below was called upon to decide was as to whether or not there was any further agreement made by the complainant-appellant to indemnify Ames & Crane specifically, etc.”

Defendant-appellee does not regard that as the issue at all, and in fact, such statements and evidence as have been put in as to his promises to Ames & Crane have been introduced, not be-

cause they have any strict legal effect, but because the defense being that Van Order comes into this court with unclean hands, his promises to Ames & Crane may have a very decided effect on that issue.

On p, 8, l. 19 he says—

“The complainant-appellant never agreed to incur any further liability than to indemnify the United States Fidelity & Guaranty Company.”

There is no justification for such a statement, and it is the writer's humble opinion that the Court will be guided by the actual language of the instrument that Van Order signed.

ANSWER TO POINT I OF APPELLANT'S BRIEF.

The bond signed by Van Order is not a bond of indemnity, it is an agreement that in any and all events should a judgment be entered, Van Order would pay it.

The language of the bond (Exhibit C. 2, p. 57) speaks for itself, and that language is the most complete answer to complainant-appellant's contention. The quotation from the stipulation (Case, p. 26) does not aid complainant-appellant in the least. Defendant-appellee's counsel does not understand Mr. Crane to say or to mean that Van Order by this instrument, indemnified Ames & Crane. Crane says in effect on p. 49, ll. 2-10 of the testimony that the bond was properly drawn in such form that if a judgment were entered, Van Order would have to pay it—and consequently, his firm and all concerned would be protected. Counsel does not suggest for a moment that anything Mr. Crane says would alter the meaning of the bond, any more than anything

Van Order or his counsel now says can change its meaning, but the explanation of Mr. Crane as to why that broad language was chosen seems most reasonable.

Again the Court is reminded that *reformation* is not sought by complainant-appellant. He is therefore bound by the language of his contract.

ANSWER TO POINT II OF APPELLANT'S BRIEF.

Under the statement that the assignment of appellant's bond to this defendant-appellee was a fraud, various other subjects not germane to that title are discussed.

(a) As to the assignment being fraudulent, it may be noted that the beginning of this bond reads slightly different than the ordinary one. It says, "are held and firmly bound unto United States Fidelity & Guaranty Company in the sum of \$3,000.00 lawful money, etc., to be paid to United States Fidelity & Guaranty Company, its successors or *assignees*." The agreement that Van Order made was manifestly to pay any judgment that should be obtained. This not being a suit for reformation, we can look only to the language of the agreement, and that is what it says. The agreement was manifestly made for the benefit of the land and any persons interested in it; clearly, such interested persons can take advantage of it as soon as the judgment is entered, and they had to take over the judgment.

Complainant-appellant has built up the whole structure of his argument upon one false premise, and that is—that this agreement is an *indemnity* instead of an out and out agreement to pay any

judgment that should be obtained. The question of *intention* is not germane because complainant-appellant's bill does not allege *mistake*, nor do they ask for reformation.

How can Van Order complain when he is only being made to do what he voluntarily contracted to do—that is, pay such judgment as is obtained in the lien claim suit?

Complainant-appellant makes the bald assertion that to allow his bond to get into the hands of defendant-appellee was a fraud upon him because he received no consideration. The fact is that by reason of executing the bonds in this way and only by reason thereof, he received \$4,500.00 worth of mortgages.

(b) It is asserted that the Bonding Company being the agent of Ames & Crane, the defendant is therefore liable for the Bonding Company's negligence, but the agreed state of facts show that the United States Fidelity & Guaranty Company was not the agent of Ames & Crane. Ames & Crane did not order the bond. *Newbern* ordered the bond; it was delivered to *Newbern*; *Newbern* filed it. It is certainly a novel proposition that a person is bound by the negligence of a Bonding Company who is not his agent, and according to the agreed state of facts, was not even selected by him. The fact that the United States Fidelity & Guaranty Company did not file a proper bond, and therefore, was deprived of the opportunity of dismissing the mechanics' lien suit for want of diligent prosecution, cannot under any theory be charged to this defendant.

(c) It is charged that Ames & Crane were guilty of negligence and laches—whatever that means. *The attorneys were not negligent.*

Negligence in a lawyer is determined by what is usually done by the average practitioner. The statute says that upon filing of a bond, the County Clerk shall note the filing of the bond upon the record of the lien claim, and upon doing so, the lands shall be released. Newbern filed a bond; the County Clerk made the notation; the searcher reported it to Ames & Crane, and they passed the title. The writer has had a rather extended experience in real estate searching. If each time a mortgage is found marked cancelled by the Register, or a judgment marked cancelled by the County Clerk, we had to get hold of the receipted mortgage, or had to go through the files to look at the actual warrant of satisfaction, it would make searching absolutely endless, and be an intolerable burden. A searcher has a right to assume that the County Clerk did his duty when he marked it.

Besides, how could all this avail Van Order; he agreed to pay the judgment in any event.

It is suggested that the lawyers were negligent because they did not follow up the lawsuit. In the first place, Ames & Crane never represented the owner Muir except to examine his title. It is inconceivable, after having passed the title and obtaining evidence from the County Clerk's office, that the record was clear, that they should be engaged by Muir to fight a lawsuit. As soon as the bond was filed and the title passed, Ames & Crane were through with the whole situation. In the second place, Ames & Crane did not represent Alderman S. Newbern, as is stated. After filing an answer out of

courtesy to Mr. Van Order; so that no snap judgment could be immediately entered, they *at once* gave Newbern a substitution of attorney, and notified Van Order that they had done so. Furthermore, they kept on notifying Van Order, as will be seen by the series of letters introduced in evidence (see Exhibits D. 1, D. 2, D. 3 and D. 4, Case, pp. 59, 60, 61 and 62).

What more can an attorney do than to tell a client that he doesn't represent him, and give him a substitution of attorney to somebody else? It is also quite clear from the correspondence that Newbern or Van Order consulted somebody else, and inferentially, from the correspondence, that somebody else was Mr. Harrington, his present solicitor. Certainly, it looks as though complainant-appellant, after receiving this series of letters, was not entirely free from negligence. It is clear that Crane's work ended when he passed title; that he passed title absolutely on Van Order's agreement to pay the judgment; that Van Order all along expected to pay the judgment, and though he saw some technicality whereby he might evade that responsibility.

The Vice-Chancellor before whom it was tried, who had an opportunity of seeing the witnesses and weighing their credibility, came to the conclusion, from all the facts, that Van Order had thoroughly discussed this whole matter with Ames & Crane; that he fully intended to pay this lien claim and protect the land against which the lien claims had been filed; and the broad and sweeping language of the bond was deliberately chosen for that reason; that Van Order, having as a direct result of his undertaking to protect the land against liens, received \$4,500, it would be inequitable to allow him to keep the rewards

which came to him as a result of his undertaking, and at the same time, escape the liability.

It is respectfully submitted that the decree of the Court of Chancery should be affirmed with costs.

CHARLES JONES,
Solicitor for and of Counsel
with Defendant-Appellee.