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EXHIBITS.

Complainant's:

Complaint.
(Filed July 3, 1926.)

IN CHANCERY OF NEW JERSEY.

TO THE HONORABLE EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey.

The complainant, K. S. S. Realty Co., Inc., a corporation of the State of New Jersey, respectfully shows:

1. On December 29, 1925, David Kaess and Angela Kaess, his wife, being indebted to K. S. S. Realty Co., Inc., a corporation as aforesaid, in the sum of Seventy-five Thousand Dollars, executed to it a bond of that date to secure that sum, payable on August 18, 1929, with interest at the rate of six per centum per annum, payable quarterly on the first day of January, April, July and October in each year.

2. To secure payment of the bond, said David Kaess and Angela Kaess, his wife, executed to said K. S. S. Realty Co., Inc., a corporation of the State of New Jersey, a mortgage of even date with the bond; and thereby conveyed to it all his right, title and interest in the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon was recorded in the office of the Register of Hudson County, in book 1352 of mortgages, page 72, &c.

3. The mortgaged premises are described as follows:

All that tract, plot, piece or parcel of land and premises, situate, lying and being in Jersey City, N. J. designated, bounded and described as follows:

Beginning at the intersection of the Northeasterly line of Montgomery Street and the division line between plots 18 and 19, Block 1832 as shown on Fowlers Official Assessment Map of 1894, which point is also distant Three hundred ten and twenty-two hundredths (310.22) feet measured Northwesterly along the said Northeasterly line of Montgomery Street from the intersection of the same with the Northwesterly line of Bergen Avenue as shown on Map of proposed widening of Bergen Avenue between Montgomery Street and Bergen Square dated June 9, 1922. Thence (1) running Northeasterly along the said division line between plots 18 and 19 Block 1832 Fowlers Official Assessment Map of 1894 one hundred eighty-four (184) feet to a point in the rear line of Plot 19, Block 1832 Fowlers Official Assessment Map of 1894, thence (2) running Southeasterly along the rear line of Plot 19, Block 1832 Fowlers Official Assessment Map of 1894, ninety-seven and eighty hundredths (97.80) feet to an angle point, thence (3) still running in a Southeasterly direction and along the rear line of Plot 20 Block 1832 Fowlers Official Assessment Map of 1894, Two and twenty-nine hundredths (2.29) feet to a point; thence (4) running Southwesterly parallel with the course first run one hundred ninety-two and fifty hundredths (192.50) feet to a point in the said Northeasterly line of Montgomery Street, thence (5) running Northwesterly along the said Northeasterly line of Montgomery Street, one hundred and twelve hundredths (100.12) feet to the point or place of beginning.

Being known as parts of Plots 19 and 20, Block 1832 Fowlers Official Assessment Map of 1894.

4. Both bond and mortgage contained an agreement that the whole of the principal sum herein expressed shall at the option of the holder of said mortgage become due after default in the payment of any installment of principal, or interest for thirty days, or after default in the payment of any tax, water rate or assessment for thirty days, or in default in keeping the buildings insured against loss by fire for the benefit and to the satisfaction of the mortgagee, its successors and assigns.

5. On December 29, 1925, said David Kaess did convey his right, title and interest in said mortgaged premises to Albert Ostroff and Albert Cohn, which said instrument was in due form of law acknowledged before Henry J. Melosh, a Master in Chancery of New Jersey, and recorded on the eighth day of January, 1926, in liber 1587 of deeds for Hudson County on pages 510 &c.

Any interest which said Albert Ostroff and Albert Cohn have in said land, is subject to the lien of complainant's mortgage.

6. On January 15, 1926, said Albert Ostroff and Albert Cohn under the name of "Cohen" made a certain agreement in writing with the O'Mealia Outdoor Advertising Co., a corporation of the State of New Jersey, which said agreement was recorded on the same January 15, 1926, in book 1584 of deeds for Hudson County, on pages 649, &c., wherein and whereby the said Albert Ostroff and Albert Cohn as "Cohen" did lease the roof of the said mortgaged premises for advertising purposes for

one year from date, and thereafter for five years as by the record thereof will more fully appear.

Any interest which said O'Mealia Outdoor Advertising Co. a corporation of the State of New Jersey, has in said land is subject to the lien of complainant's mortgage.

7. Said Albert Ostroff is married, and his wife's name is Jennie Ostroff. Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to complainant's mortgage.

8. Said Albert Cohn is married, and his wife's name is Florence Cohn. Any claim or interests she may have, by way of inchoate right of dower, or otherwise, is subject to complainant's mortgage.

9. On February 25, 1926, there was recorded in the Hudson County Clerk's Office a paper writing purporting to be a bond given by Albert Ostroff to Motor Finance Corporation for the sum of Eleven hundred dollars, in the matter of John Satter, Insolvent debtor, in the Hudson County Court of Common Pleas, which said paper writing purporting to be a bond is recorded in book 6 of bonds to the Sheriff of Hudson County, on pages 29, &c.

Any interest which said Motor Finance Corporation has in said land, is subject to the lien of complainant's mortgage.

10. On June 1, 1926, there became due to the authorities of Jersey City the sum of $1495.07, or some other sum, being the tax levied on the said mortgaged premises for the period of January 1st, 1926, to July 1, 1926, and on July 1st, 1926, although the taxes were then a lien on said premises

from June 1st, 1926, the same had not been paid and are not paid at this time.

On May 25, 1926, there became due to the authorities of Jersey City the sum of $35.64, for metered water consumed on said premises to the said May 25, 1926, and said sum or some other sum has remained unpaid and in arrears for the space of more than thirty days and is still unpaid.

Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

11. Said Albert Ostroff and Albert Cohn, or one of them has always been in possession of the mortgaged premises.

12. The whole amount of principal, with interest thereon, from April 1, 1926, is due upon complainant's bond and mortgage.

Complainant is without adequate remedy in the courts of law, and therefore prays—

1. That Albert Ostroff and Jennie Ostroff, his wife, Albert Cohn and Florence Cohn, his wife, O'Mealia Outdoor Advertising Co., and Motor Finance Corporation, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

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

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

Complaint.

payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

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

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

MELOSH, MORTEN & MELOSH,
Solicitors and Counsel with Complainant.

Amended Answer.
(Filed September 22, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
K. S. S. REALTY CO., INC., a corporation of New Jersey,
Complainant,
and
ALBERT OSTROFF, *et als.*,
Defendants.
} On Bill, etc.

The defendants, Albert Ostroff and Jennie Ostroff, Albert Cohn and Florence Cohn, answering the bill of complaint in the above entitled action, say:

1. They admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the bill of complaint.

2. They admit that taxes were due, as set forth in the bill of complaint, and that a charge had been made on the books of the City of Jersey City for water used in said premises and that defendants had received a bill for the same, but deny that failure to pay the same constituted a forfeiture under the terms of the said mortgage; and these defendants further say that on or about June 11, 1926, the defendants called upon one Louis Kanengeiser, an officer and a duly authorized agent of complainant corporation, through whom these defendants had always transacted all their business with said company, and showed said Kanengeiser the bills received from the City of Jersey City for taxes and water, and called said Kanengeiser's attention to the high tax assessment made against

said property, and asked said Kanengeiser what they should do about paying said tax and water bills, and the said Kanengeiser advised these defendants not to pay the same, but to take an appeal from the tax bill, and to pay the tax and water bills together after the appeal had been determined, and these defendants asked said Kanengeiser if it would be all right not to pay the same in view of the provisions of the mortgage and said Kanengeiser replied to defendants that it would be all right and that they need not pay said bills until the appeal had been determined, and these defendants, relying upon the statement of the said Kanengeiser, thereupon on or about June 14, 1926, filed an appeal from said assessment with the Hudson County Board of Taxation, and these defendants confiding in and relying upon the statement and agreement of the said Kanengeiser that it would not be necessary for them to pay said bills, thereupon refrained from paying any of said bills due to the City of Jersey City on said premises and permitted said period of thirty days referred to in the mortgage and in the bill of complaint to elapse without paying the same; and these defendants further say that said complainant never made any demand of the defendants that said municipal liens or charges be paid in accordance with the terms of said mortgage, and gave no notice to the defendants that payment thereof was required or that failure to pay the same would render said mortgage due or that said mortgage would be foreclosed if the same were not paid.

3. These defendants further say that on or about April 26, 1926, defendants contracted with Frank's Centre Garage, Inc., a corporation of New Jersey,

to transfer and assign lease for said premises referred to in the bill of complaint, and that under the terms of said agreement title was to be transferred on July 1, 1926; that on July 1, 1926, these defendants met a representative of the said Frank's Centre Garage, Inc., and the title closing was adjourned until July 2nd, on which day all the papers were signed and deposited in escrow and the money required to be paid by the said Frank's Centre Garage, Inc., was paid in escrow, and the matter was then continued until July 9th, when all papers were delivered and money paid; that at no time during said period were these defendants aware that the complainant had declared a forfeiture of said mortgage and had contemplated or had instituted foreclosure proceedings thereon; and these defendants carried out their said agreement, and the purchaser assumed the payment of said taxes and water rents without any knowledge that the complainant had elected to declare a default in said mortgage, and relied upon the declaration of the complainant, through its agent, the said Kanengeiser, that said municipal liens and charges would not have to be paid until the determination of the appeal.

4. These defendants further say that on the 5th or 6th of July, 1926, the defendant, Albert Ostroff, telephoned the said Kanengeiser at the office of Alexander Seclow, a counselor at law of the State of New Jersey, and asked the said Kanengeiser if he, the said Ostroff, could call upon the said Kanengeiser at said law office and pay him the interest which was then due on said mortgage. Said Ostroff informed said Kanengeiser that he, said Ostroff, had made several efforts to pay said interest at the

office of the complainant at #127 Montgomery Street, Jersey City, and could not find anyone there to whom payment could be made, and said Ostroff offered to come over to said law office and pay Mr. Kanengeiser said interest. Mr. Kanengeiser replied, "You had better see me in my office on Wednesday, July 14th." On Wednesday, July 14th, following said conversation, said Ostroff went to the office of the complainant and tendered the interest to the said Kanengeiser, who then informed said Ostroff that he had better see complainant's lawyer and that complainant had started foreclosure. Said Ostroff then inquired upon what grounds and was informed by said Kanengeiser simply that complainant wanted its money. At no time, either during the conversation earlier in the week or on Wednesday, did the said Kanengeiser inform the said defendant that the defendants had defaulted in the payment of taxes or water rents and that the complainant had elected to declare a forfeiture of said mortgage by reason thereof; and these defendants say that the said complainant is estopped by reason of the aforesaid premises from declaring a forfeiture of said mortgage and from foreclosing the same.

5. These defendants further say that since the institution of said suit and after the transfer of title to said premises from these defendants to Frank's Centre Garage, Inc., the said Frank's Centre Garage, Inc., has paid all municipal liens and charges referred to in the bill of complaint, and that there are now no municipal liens or charges against said premises unpaid or unsatisfied of record.

6. These defendants further say that they have tendered the interest to the complainant and that complainant has refused to accept the same, and these defendants have at all times and are now ready and willing to pay the same to the complainant or as this court may direct.

These defendants therefore pray that the complainant's bill of complaint be dismissed with costs.

AARON A. MELNIKER,
Solicitor and of Counsel for Defendants.

Replication to Amended Answer of Defendants, Albert Ostroff and Others.

(Filed Oct. 16, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
K. S. S. Realty Co., Inc.,
a corp, &c.,
Complainant,
and
Albert Ostroff, *et als.*,
Defendants.

61-248.
On Bill, &c.

1. Complainant joins issue on so much of paragraph 2 of the said answer as denies that the failure to pay the municipal liens referred to in said paragraph constituted a forfeiture under the terms of said mortgage.

In reply to the defense stated in the remainder of paragraph 2, and paragraphs 3, 4, 5 and 6 of the answer interposed herein by the defendants Albert Ostroff and others, and not anticipated in the bill of complaint, complainant, by leave of the court, says that:

2. It denies that on or before June 11th the defendants called upon Louis Kanengiser; it denies that Louis Kanengiser is an officer and a duly authorized agent of the complainant corporation through whom said defendants have always transacted their business with complainant.

It denies that said defendant showed said Kanengiser bills receivable from the City of Jersey City for taxes and water, and called said Kanengiser's attention to the high tax assessment made against said property and asked said Kanengiser what they

should do about paying said tax and water bills, and the said Kanengiser advised said defendants not to pay the same but to take an appeal from the tax bill and to pay the tax and water bills together after the appeal had been determined.

It denies that said defendants asked said Kanengiser if it would be all right not to pay the same in view of the provisions of the mortgage, and that said Kanengiser replied to defendants that it would be all right and that they need not pay said bills until the appeal had been determined.

It has no knowledge or belief as to whether or not said defendants filed an appeal on or about June 14, 1926, from said assessment with the Hudson County Board of Taxation; it denies that the defendants relied upon any statement or upon any agreement of said Kanengiser that it would not be necessary to pay said bills; it has no knowledge as to why defendants refrained from paying said bills as alleged in said paragraph.

It admits that complainant never made any demand on defendants to pay said municipal liens and that it gave no notice to the defendants that payment thereof was required, and that failure to pay the same would render the mortgage due and that the mortgage would be foreclosed if the same were not paid.

3. It has no knowledge or information sufficient to form a belief as to the statement contained in paragraph 3 of said amended answer.

4. It admits that defendant, Albert Ostroff, telephoned to Louis Kanengiser at the office of Alexander Seclow, but denies the conversation took place on July 5th or 6th, 1926.

It denies that conversation took place between the defendant, Ostroff, and said Louis Kanengiser as alleged in said paragraph 4, but admits that among other things said Kanengiser told said Ostroff that if he wanted to know anything about the payment of the interest on said mortgage, he should appear at the office of the company at a later date.

It admits that the interest was tendered by said Ostroff but as to the exact date on which said tender was made, complainant is not informed.

It admits that said Kanengiser informed said Ostroff that this suit had been instituted to foreclose said mortgage, and that said Ostroff was referred to complainant's soliictors, but believes said Ostroff was so referred by Samuel Kanengiser.

It denies said Louis Kanengiser said that the reason for the foreclosure was simply that the complainant wanted its money.

It admits that Louis Kanengiser did not inform defendant, Ostroff, that the defendants had defaulted in the payment of the taxes and water rents, and that complainant had elected to declare a forfeiture of said mortgage by reason thereof; it denies that complainant is estopped as alleged in said paragraph.

5. It admits the allegations of paragraph 5 of said amended answer.

6. It admits that defendants have tendered the payment of the interest to complainant, and that complainant has refused to accept same and believes that defendants are ready and willing to pay the same.

7. It avers that none of the facts set up in said answer constitute any defense to the bill of complaint herein; that even if the facts therein stated

are true any and all of the acts alleged to have been performed by said Louis Kanengiser, and any and all of his promises and agreements as therein stated were not authorized or ratified by this complainant; that if the same were made by the said Louis Kanengiser, it was wholly without any authority from the complainant so to do, and that complainant is not bound thereby.

MELOSH, MORTEN & MELOSH,
Solicitors and of Counsel
With Complainant.

Conclusions.
(Filed January 21, 1927.)

January 20, 1927.

IN CHANCERY OF NEW JERSEY.

Between
K. S. S. REALTY CO., INC.,
Complainant,

and

ALBERT OSTROFF, *et als.*,
Defendants.

61-248.
On Bill, &c.

Mr. LOUIS G. MORTEN, for complainant.

Mr. AARON A. MELNIKER, for defendants Ostroff and Cohen.

Mr. JAMES D. CARPENTER, for defendant Frank's Centre Garage, Inc.

FIELDER, V. C.:

The bill was filed July 3, 1926, to foreclose a mortgage on premises in Jersey City. The due date of the mortgage in August 18, 1929, but the mortgage contains a provision "that the whole of the principal sum herein expressed shall, at the option of the holder of this mortgage, become due after default in the payment * * * of any tax, water rate or assessment for thirty days." The bill alleges that on June 1, 1926, there became due to Jersey City a tax levied on the mortgaged premises for the period of January 1, 1926, to July 1, 1926, and on July 1, 1926, although the taxes were then a lien on said premises from June 1, 1926, the same were unpaid; that on May 25, 1926, there became due to

said city a sum for metered water consumed on said premises to May 25, 1926, and that the same remained unpaid and in arrears for more than thirty days; that said tax and water rent remained unpaid up to the filing of the bill and that complainant has elected that the whole principal sum, with interest, shall be now due. The answer filed by defendants Ostroff and Cohen (record owners when the bill was filed) admits said allegations. After the bill was filed the mortgaged premises were conveyed to Frank's Centre Garage, Inc., which new owner, being admitted as a defendant, filed an answer denying that the tax and water rent were due and payable as alleged in the bill. The tax and water charge were paid after the bill was filed and besides the defense that they were not due and payable as alleged by complainant, the further defense is that one Kanengeiser, a director and vice president of complainant, advised defendants Ostroff and Cohen not to pay said tax and to appeal therefrom and to pay the tax and water bills together after the determination of the appeal.

By statute (P. L. 1918, Chapter 226, Sec. 6) the default clause in this mortgage is construed to mean that should any tax or water charge imposed or required against the mortgaged premises become due and payable and remain unpaid and in arrears for thirty days, then the principal and interest should, at the option of the complainant, become due and payable immediately.

The proofs show that the tax in question is the one-half part of the tax imposed or required against the mortgaged premises for the year 1926. Said one-half part of said tax became payable April 1, 1926, and remaining unpaid, became delinquent June 1, 1926 (P. L. 1920, Chapter 224). The only

proof concerning the water charge is that Jersey City entered such charge on its books May 25, 1926, and that the charge was not paid until after the bill of complaint was filed. Sections 8, 11, 12 and 30, Article 32, Chapter 152, P. L. 1917, empower the city to pass ordinances for fixing and collecting water rents and make the owner of the building and land to which water is supplied, liable for such charge. If the charge remains in arrear six months, a statement thereof is to be filed with the collector of tax arrears and from the time of such filing, the charge is a lien on the land and building. I believe the city has passed an ordinance providing that metered water consumed for commercial and industrial purposes shall be billed and payable monthly. The mortgaged premises were and are used for commercial purposes, but I cannot take judicial notice of such ordinance (23 C. J., page 138, sec. 1961). The case is therefore without proof that the water charge entered on the city's books May 25, 1926, was properly entered and was payable on the date of entry. Whether or not there was a thirty day default in the payment of this water charge, there was such default in the payment of the tax for more than thirty days after the same became payable, which default gave complainant the right to require immediate payment of the principal of its mortgage, unless failure to pay the tax was occasioned by declarations of complainant's authorized agent (Newark Trunk Co. v. Clark, 94 N. J. Equity, 79; Garfinkle v. Hickey, 96 N. J. Equity, 720; Derechinsky v. Epstein, 130 Atl. 720; affirmed 131 Atl. 922).

The defendants Ostroff and Cohen testified that they had obtained bills for the tax and water charge by June 1, 1926, and that a few days after that date

they called on Kanengeiser and told him that they though the tax assessment too high and desired to appeal therefrom and asked him if complainant would waive the thirty-day default clause and what should they do about paying the water bill; that Kanengeiser thereupon agreed to waive the default clause pending the appeal and told them they could wait to pay the water bill until they paid the tax bill; that they filed a tax appeal at once, which appeal was undetermined when this suit was commenced. Kanengeiser categorically denied such testimony and since the burden of proof is on the defendants to prove that their default is attributable to complainant, their defense fails. (Derechinsky v. Epstein, supra). Moreover, Kanengeiser had no power, by virtue of his office, to alter the provisions of an agreement under seal, made for complainant's benefit. To bind complainant, the defendant must show that he was given such power by the charter, by-laws or corporate action of complainant's stockholders or directors, or that the agreement he is alleged to have made with defendants, was within authority which complainant had caused defendants to believe it had conferred upon him. (Mausert v. Feigenspan, 68 N. J. Equity, 671; Universal, &c. Co. v. American, &c. Co., 95 N. J. Equity, 752; Aerial League, &c. v. Aircraft &c. Co., 97 N. J. Law, 530; Horner v. Georgia, &c. Co., 100 N. J. Law, 347) and in this their proofs fail.

There will be a decree for complainants in the usual form.

Final Decree.
(Filed Feb. 2, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
K. S. S. REALTY CO., INC.,
Complainant,
and
ALBERT OSTROFF, *et als.*,
Defendants.

61-248.
On Bill, &c.

This matter coming on to be heard in the presence of Melosh, Morten & Melosh, of counsel with the complainant, in the presence of Aaron A. Melniker, of counsel for defendants Albert Ostroff and Jennie Ostroff, his wife, and Albert Cohen and Florence Cohen, his wife, and in the presence of James D. Carpenter, of counsel with the defendant, Frank's Center Garage, Inc., and the court having read the pleadings and heard and considered the proofs submitted by the respective parties and the argument of counsel thereon;

And it appearing from the proofs taken in open court that the amount due the complainant is the full amount of principal money expressed in the complainant's mortgage, to wit, the sum of Seventy-five thousand ($75,000.) Dollars, with interest thereon at six per cent from December 29th, 1925, upon which amount the defendants are entitled to be credited with the sum of Eleven hundred and twenty-five ($1125.) Dollars with interest thereon at six per cent from April 10th, 1926;

Final Decree.

It is on this 31st day of January, A. D. 1927, on motion of Melosh, Morten & Melosh, of counsel with the complainant Ordered, Adjudged and Decreed that all the right, title and interest of the defendants Albert Ostroff and Jennie Ostroff, his wife, Albert Cohen and Florence Cohen, his wife, and Frank's Centre Garage, Inc., a corporation of the State of New Jersey, and each and every of them, in and to the premises described in complainant's mortgage and the bill of complaint herein, including any and all estate, right, title, interest, privileges and options contained in a certain lease assigned by the complainant to David Kaess on December 29th, 1926, and on the same date assigned by him to the defendants, Albert Ostroff and Albert Cohen, said assignment being recorded in book 1587 of deeds for Hudson County, pages 510 &c, which said lease was subsequently assigned to the defendant Frank's Centre Garage, Inc., a corporation as aforesaid, be sold to raise and satisfy the money due the said complainant, that is to say, to pay and satisfy unto the complainant the sum of Seventy-eight thousand seven hundred ninety-four dollars and fifty-one cents ($78,794.51), together with lawful interest thereon to be computed from the date hereof, with the complainant's costs in this cause to be taxed, including a counsel fee of Eight hundred and fifty ($850.) Dollars, which is hereby allowed to said complainant, and that a writ of fieri facias issue for that purpose out of this court, directed to the Sheriff of the County of Hudson, commanding him to make sale, according to law, of the said mortgaged premises, and that out of the money arising from said sale he pay to the complainant, or his solicitor, his said debt, interest and costs, and that, in case more money shall

Final Decree.

be raised by said sale than shall be sufficient to answer such several payments, such surplus be brought into this court, to abide its further order, unless otherwise previously disposed of by it, and that the said sheriff make return, without delay, of his proceedings by virtue of said writ.

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

E. R. WALKER,
C.

Respectfully recommended,
JAMES F. FIELDER,
V. C.

Amended Notice of Appeal.

(Filed Feb. 10, 1927.)

IN CHANCERY OF NEW JERSEY.

Between K. S. S. REALTY CO., INC., Complainant-Appellee, and ALBERT OSTROFF, JENNIE OSTROFF, ALBERT COHN and FLORENCE COHN, Defendants-Appellants.	On Bill to Foreclose.

The defendants, Albert Ostroff, Jennie Ostroff, Albert Cohn and Florence Cohn, hereby appeal from the final decree made in the above entitled cause on January 31, 1927, by the Chancellor on the advice of Vice Chancellor James F. Fielder, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: February 8, 1927.

A. A. MELNIKER,
Solicitor for and of Counsel
with the Defendants-appellants.

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

A. A. MELNIKER,
Of Counsel with the above
named Defendants-appellants.

Petition of Appeal.

(Filed Feb. , 1927)

NEW JERSEY COURT OF ERRORS AND APPEALS.

K. S. S. Realty Co., Inc., Complainant-Appellee, vs. Albert Ostroff, *et als.*, Defendants-Appellants.	On Appeal from the Court of Chancery.

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

The petition of Albert Ostroff, Jennie Ostroff, Albert Cohn and Florence Cohn, the appellants in the above entitled cause, respectfully show that:

1. Petitioners find themselves 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 January 31, 1927, in a certain cause in the said Court of Chancery wherein the said K. S. S. Realty Co., Inc., is complainant, and the said Albert Ostroff, Jennie Ostroff, Albert Cohn and Florence Cohn are defendants in this respect, to wit: that the said decree adjudges that the right, title and interest of the said defendants in and to the premises described in the bill of complaint be sold to raise and satisfy to the complainant the sum of $78,794.51 with interest from the date of said decree and costs, and that a writ of fieri facias issue for that purpose directed to the Sheriff of the County of Hudson, commanding him to make sale of said premises and that the said defendants stand absolutely debarred and foreclosed of and from all equity of redemption in said premises when sold as aforesaid.

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, on the ground that the same is erroneous in that a decree should have been entered dismissing the bill of complaint, and on the further grounds that the Chancellor found and decreed that there had been a default in the terms of the mortgage mentioned and described in the bill of complaint when he should have found and decreed that there was no such default, and on the further ground that the Chancellor found and decreed that the complainant had not waived the default in the terms of said mortgage alleged in the bill of complaint when he should have found and decreed that there was such waiver, and on the further ground that the evidence does not warrant said decree, and on the further ground that the Chancellor should have found and decreed in favor of the defendants instead of the complainant, and on the further ground that there is no evidence to sustain such finding and decree in favor of the complainant, and on the further ground that the Chancellor found and decreed that the complainant was not bound by the waiver agreement made by an officer and director of the complainant Company whereas he should have found and decreed that the complainant was so bound.

Petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that the complainant's bill of complaint be dismissed and that the petitioner may have such other relief in the premises as to this Court shall seem proper.

A. A. Melniker,
Solicitor and of Counsel
with Appellants.

Answer to Petition of Appeal.

(Filed Feb. , 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

K. S. S. Realty Co., Inc., Complainant-Appellee, vs. Albert Ostroff, *et als.*, Defendants-Appellants.	On Appeal from the Court of Chancery.

The answer of K. S. S. Realty Co., Inc., a corporation of the State of New Jersey, the above named appellee, to the petition of appeal of Albert Ostroff, Jennie Ostroff, Albert Cohn and Florence Cohn, the above named appellants.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on January 31st, 1927, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and it prays that the same may be affirmed with costs to be taxed in favor of this appellee.

Melosh, Morten & Melosh,
Solicitors for and of
Counsel with Appellee.

Case.

IN CHANCERY OF NEW JERSEY.

Between K. S. S. Realty Co., Inc., Complainant, and Albert Ostroff, *et als.* Defendants.	On Bill, &c.

Transcript of shorthand notes of Testimony taken on final hearing in above stated cause, at Chancery Chambers, Jersey City, January 31, 1927, before His Honor James F. Fielder, Vice Chancellor.

Appearances.

Messrs. Melosh, Morten & Melosh (Mr. Morten) for complainant.

Messrs. McDermott, Enright n Carpenter (Mr. Carpenter) for defendant, Frank's Centre Garage, Inc.

Aaron A. Melniker, Esq., for defendants, Albert Ostroff, et al.

Complainant's Case.

Mr. Morten: I offer in evidence bond made by David Kaess and wife to K. S. S. Realty Co., Inc., dated December 29, 1925, given to secure the payment of the sum of $75,000 on the 18th day of August, 1929, interest payable quarterly, with instalments, commencing 1927.

(Marked Exhibit C1.)

Mr. Morton: I offer in evidence mortgage made by David Kaess and wife to the K. S. S. Realty Company, bearing date December 29, 1925, accompanying the bond just offered in evidence, which mortgage is recorded in the Hudson County Register's office in book 1352 of mortgages, page 72, on December 31, 1925.

(Marked Exhibit C-2).

Mr. Morten: I offer in evidence certified copy of lis pendens filed in the Register's office of Hudson County, on July 6, 1926, in a suit wherein K. S. S. Realty Company, Inc., is complainant, and Albert Ostroff and others are defendants, the lis pendens being recorded in book 15 of lis pendens, page 522.

(Marked Exhibit C-3).

Mr. Morten: I offer to admit that the only payment made on account of the moneys due on this mortgage is the sum of $1,125, interest paid between April 10 and April 16, 1926. I do not know the exact date it was received. We have not got the record of the date that it was received, but it was deposited on April 16, 1926, and was received a day or so before.

The Court: Is it admitted that taxes for the year 1926 were levied against the mortgaged premises as alleged in paragraph 10 of the bill?

Mr. Melniker: Yes.

The Court: And that on May 25, 1926, a charge for metered water was levied against the mortgaged premises and that both taxes and water rent were unpaid for more than thirty days.

Mr. Melniker: I will admit that they were unpaid at the time the bill was filed. I want to raise a question of law as to whether that constitutes default. I thought it would be better to admit they were unpaid at the time the bill was filed and that they were afterwards paid, on July 29, 1926.

Mr. Morten: Yes.

Mr. Melniker: I think it is also admitted that tender of the interest due on July 1st was made after the bill was filed, I think about the 14th of July, and that interest accruing at a subsequent date was tendered and refused.

The Court: When did you say that the taxes and water rent were paid?

Mr. Melniker: July 29, 1926.

The Court: And the interest fell due—

Mr. Melniker: July 1st, and was tendered on July 14th.

The Court: And refused?

Mr. Morten: Yes.

Mr. Melniker: And that subsequent interest was tendered when due.

Mr. Morten: There was a tender of interest which was refused because of the pendency of the foreclosure suit.

The Court: That was the basis of both refusals.

Mr. Morten: Yes.

Mr. Melniker: There is a question of law involved, which may dispose of the entire suit, and it may not be necessary to go into the question of fact.

(Further argument.)

Mr. Morten: I submit the defendant is not entitled to make this motion unless he closes his case.

The Court: It is a question I want to consider. I think you better put your case in.

DEFENDANT'S CASE.

ALBERT OSTROFF, one of the defendants, sworn as a witness on the part of the defense, testifies as follows:

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Where do you live? A. I live 1204 Hudson Boulevard, Bayonne.

Q. You are one of the defendants in this action? A. I am.

Q. What is your business? A. Drug business and real estate.

Q. Are you actively engaged in the drug business now? A. No, not active now, in the drug business.

Q. Have you reaired from the drug business? A. Practically.

Q. You are a pharmicist? A. A pharmicist.

Q. You were one of the owners of this garage referred to in this case? A. I was.

Q. Do you know any of the officers of the K. S. S. Realty Company? A. I do.

Q. Whom do you know? A. I know most of the company.

BY THE COURT:

Q. Mr. Melniker asked you what officers you knew? A. I know Mr. Louis Kannengeiser.

Q. Point him out. Is he in court? A. Yes; he is in court, the grey-haired gentleman sitting down there.

Q. Whom else do you know? A. I know the other gentleman, Samuel Kannengeiser, brother of his.

Q. Who else? A. I also know Mr. Starr, Harry Starr, also a member of the K. S. S. Company and Silverman—I don't know his first name—I believe Herman.

Q. They are all here in court? A. They are all here in court.

Q. You did not buy this garage directly from the K. S. S. Realty Company? A. No, sir; not direct.

Q. You bought from a man named Kaess? A. David Kaess.

Q. He got it from the K. S. S. Realty Company? A. He got it from the K. S. S. Realty Company.

Q. Did Kaess turn it over to you the same day he got it from them? A I believe so; yes; it was the same day.

Q. Did you have any transactions with any of these people you mentioned with regard to this garage, after you got title? A. Yes; I had quite a few.

Q. What transactions did you have?

Mr. Morten: I object upon the ground that any transactions with these gentlemen are not binding on this corporation.

The Court: I will take the testimony, subject to your objection.

A. As soon as we bought the garage some question arose as to the sprinkler system, which was not acceptable in the garage, according to the understanding of the Building Department, and they were supposed, they promised, to install it and they had not at the time we bought the garage. On the following day after we bought the garage a notice was served on us from the Building Department, why the system was not acceptable yet. Of course the notice was served on the K. S. S. and

it was delivered to me in the office. I immediately got in touch with Mr. Kannengeiser.

BY THE COURT:

Q. Which one? A. Mr. Louis Kannengeiser.

BY MR. MELNIKER:

Q. What conversation did you have with him about it?

Mr. Morten: Same objection.
The Court: About what?
Mr. Melniker: The sprinkler system.
Mr. Morten: Same objection.
Mr. Melniker: Question withdrawn for the present.

Q. Did you get a bill for taxes and for water against the garage after you got title to it? A. No; there was no taxes.

Q. After you got title? A. Oh, yes; later on; yes.

Q. When did you get it? A. On June first.

Q. And did you pay it? A. I have not paid it.

Q. Why not?

Mr. Morten: I object upon the ground that any reason why he should not pay it, unless it is proposed to show it was waived by the complainant, is not binding on the complainant.

The Court: I assume that is the reason it is offered.

Mr. Melniker: That is the purpose.

A. Then I came to the city hall and asked for the tax bill—

Q. You got a tax bill and water bill? A. At that time, but there was—

Q. What did you do after that? A. It seemed to me the taxes were a little too high and I subsequently took it up with Mr. Louis Kannengeiser and asked him whether—I told him I am about to appeal for the taxes, and then I asked him—

Mr. Morten: I object to anything Mr. Kannengeiser said, unless it is shown to be binding on the corporation.

The Court: Same ruling.

Q. When did you take it up with Mr. Louis Kannengeiser? A. That was about June 11th, 1926.

Q. Just what did you say and what did he say to you?

Mr. Morten: I do not know whether I should object to each of these questions?

The Court: I am taking this testimony over your objection.

Mr. Morten: All of it?

The Court: Yes.

A. I have asked him whether he will waive the thirty days, as I am about to make an appeal for the taxes, and it will take me a few weeks before I will have a reply, whether they will have any objection of me paying the taxes at the time when it is due. He says: "Go right to it."

BY THE COURT:

Q. He said what? A. "Go right to it. We would not stand in your way. Go right to it. We have no objection at all."

Q. Did you have the water bill with you at that time? A. I did. I had the water bill with me.

Q. Was there anything said about that? A. Yes; at the time when I showed him the bill, I said: "I got my bill last week. I was about to see you before in reference to this bill. What shall I do with this bill?" He said: "What is the other bill?" I said: "It is the water bill." He said: "How big is it?" I said: "Around $35", I says, "Do I have to pay it now?" He says: "It don't make any difference; just wait. When you pay the other pay all of them at the same time."

Q. Did you see him after that? A. After this transaction, after that, no. I spoke to him over the telephone. I have not seen him.

Q. When was that? A. That was about—it was on a Wednesday, on July 7th, if that is the correct date. It was on a Wednesday. I remember one thing: It was on a Wednesday.

Q. Where did you call him on the 'phone? A. I tried to get him before.

BY THE COURT:

Q. Where did you talk to him? A. At the office of Alexander Seclow in Bayonne.

BY MR. MELNIKER:

Q. You called up the office of Alexander Seclow, the lawyer? A. Yes; and asked for Mr. Louis Kannengeiser.

Q. Did he come to the 'phone? A. Yes; he answered the wire.

Mr. Morten: I interpose a further objection that any conversation that might have taken

place after the filing of the bill of complaint can have no effect upon our right.

The Court: How is it material?

Mr. Melniker: I want to show that Mr. Kannengeiser said nothing at all, did not tell him that there was a foreclosure.

The Court: Objection overruled.

A. I asked him whether he would be there long enough for me to come down and pay the interest on the mortgage which was due on July 1st. I also told him I tried to get him before and I could not get him until then. He says: "I am very busy. I have to go back to Asbury Park," or somewheres else, "in a few minutes. You see me the following week on Wednesday." I don't remember the date. I think it was the 14th. He says: "See me at my office on Montgomery Street," somewheres, and he says: "Then everything will be all right."

Q. Did you see him then? A. Yes, then I saw him, July 14th, at his office.

Q. What took place? A. They refused to accept. They referred me to their lawyers, Melosh & Morten, to take up the case with them.

BY THE COURT:

Q. That is, they refused to accept the interest? A. They refused to accept the interest.

BY MR. MELNIKER:

Q. Was there anything said about foreclosure at that time? A. Yes. I happened to be served the day before, on the 12th. I was served already with papers.

Albert Ostroff. Called by Defendants. Direct.

Q. You were served on the 12th? A. Yes; the 12th of July.

Q. Prior to the service upon you on the 12th of July, had you any knowledge or intimation that there was a foreclosure pending? A. No; I had not.

Q. Had Mr. Kannengeiser said anything about it to you when you talked to him on the telephone on the 7th? A. No; he never said a thing.

Q. Or at any time before that? A. No.

Q. Had he or anybody else representing this company ever told you that you ought to pay your taxes and water rents?

Mr. Morten: Objected to upon the ground that it is immaterial, irrelevant and incompetent.

The Court: Objection overruled.

A. No; I never heard it.

Q. Did anybody say anything to you about paying taxes? A. No; they never did.

Q. Prior to this conversation that you had with Mr. Kannengeiser on or about the 11th of June, which you have related, had you had any dealings with Mr. Kannengeiser regarding business between you and this company? A. A few dealings; yes.

Q. What dealings did you have with him and when?

Mr. Morten: I object upon the ground that any other matters are immaterial.

The Court: It will show his connection with the company, I suppose and show ratification of certain of his acts by the company. I assume that is the reason.

Albert Ostroff. Called by Defendants. Direct.

A. (No answer.)

Q. Tell us about your dealings with Louis Kannengeiser?

Mr. Morten: Subject to the same objection.

The Court: Yes.

A. It was in the month of January, 1926, taking possession of that garage, there was a little difference we had to straighten out, as the adjustment of accounts coming to them from the previous month in December, which was not collected yet, and he authorized me to collect it, to collect all the accounts coming to the garage for cars and accessories and gas and so on.

BY THE COURT:

Q. What did you do with the money after you collected it? A. We met in March, some day in March, and we adjusted it, and I gave him a check that time—

Q. Gave who a check? A. To the K. S. S. at that time.

Q. That is, you drew a check to the order of the K. S. S. Realty Company and gave it to Louis Kannengeiser? A. There were a few others there. There were the other members of the company there at the time.

BY MR. MELNIKER:

Q. Whom did you give the check to? A. Well, I was there, and there was a bookkeeper and the two Kannengeisers, I believe, and Starr was there and Mr. Silverman, and we had a little argument

about the adjustments, and finally I gave the check for the full amount.

Q. After that did you have any transactions with him? A. We had previous transactions as to the sprinkling system which was not complete.

Q. Did you take that up with Louis Kannengeiser? A. With Mr. Louis Kennengeiser.

Q. You made your arrangement with him about the system? A. Yes.

Q. After this conversation on or about June 11, when you told him about the taxes being too high and that you wanted to take an appeal, did you file an appeal with the county board? A. I filed an appeal June 14th. The board was meeting then, on June 14th.

Q. When was the appeal decided? A. We had a reply from the board. I think you have the letter.

Q. (Showing witness) Is this the notice from the county tax board that the assessment was affirmed? A. Correct.

Mr. Melniker: I offer this notice in evidence.

Mr. Morten: I object upon the ground that it is immaterial.

The Court: Objection overruled.

(Marked Exhibit D-1.)

No cross examination.

ALBERT COHN, sworn as a witness on the part of the defendants, testifies as follows:

DIRECT EXAMINATION BY MR. MELNIKER:

Q. What is your business? A. Clothing merchant.

Q. You were interested in this property with Mr. Ostroff? A. Yes.

Q. You know Louis Kannengeiser? A. Yes.

Q. Were you present at a conversation between Mr. Kannengeiser and Mr. Ostroff some time in the early part of June? A. Yes.

Q. Do you know the date? A. I don't know the exact date. It was around June 11th, I think.

Q. At that time had you had a bill for the taxes and water rent against that garage property? A. Yes, sir; Mr. Ostroff had it with him.

Q. Did you go with Mr. Ostroff to see Mr. Kannengeiser? A. Yes; I was going down—

Q. Just listen to the question. Did you go with him to see Mr. Kannengeiser? A. Yes.

Q. Did you see him? A. Yes.

Q. What conversation did you hear between Mr. Ostroff and Mr. Kannengeiser?

Mr. Morten: Same objection.

The Court: Same ruling.

A. He was talking to him about a little adjustment about the sprinkler system. Mr. Ostroff was taking out some papers from his pocket. It was the bill for taxes and the bill for water. They were lying together. He was talking about the taxes—it was a little too high, and Mr. Kannengeiser answered, "Well, it is." Mr. Ostroff was talking

about making an appeal; Mr. Kannengeiser said: "Why not make your appeal?" Mr. Ostroff was talking to him about the thirty days' notice of the taxes, would there be any objection? A. He says: "Why, no; I am not as little as that. You go right ahead and make your appeal." Ostroff says: "There is the water bill of thirty some dollars." Kannengeiser says: "That will be all right. You will pay it together." At that time they kept on talking about the sprinkler system. Mr. Louis Kannengeiser told him everything is all right. He said: "We are not small people about paying to the minute and making any complaints."

No cross examination.

WILLIAM F. FRANK, sworn as a witness on the part of the defendant, Frank's Center Garage, Inc., testifies as follows:

DIRECT EXAMINATION BY MR. CARPENTER:

Q. What is your connection with Frank's Center Garage, one of the defendants? A. I am the president and treasurer.

Q. I show you a tax bill of the city of Jersey City and a check to the order of the city collector, and ask you if you are the man who paid these taxes and on what date you paid them? A. Yes, sir; I paid the taxes. I paid them on July 29th.

Q. 1926? A. 1926.

Mr. Carpenter: The check is dated July, 1927, but it was stamped paid July, 1926.

Q. I show you a water bill, city of Jersey City, the perforated dated being 7-29-26, and a check to the order of the water cashier for $36.58, and I ask you if that was your payment? A. Yes, sir.

Q. Paid on that date? A. Yes, sir; I paid both of them together.

Q. When did you first see these bills or either of them? A. When did I—

Q. When did you first see or receive any or either of these bills? A. The first I received either of these bills was around July 20, or July 22, around that time. They came through the mail to me from Brodsky's office.

Q. When did the Frank's Center Garage first receive possession of that property? A. The first of May, 1926.

Q. You went into possession that date? A. Yes, sir.

Q. How long did you remain in possession? A. I am still in possession.

Q. What was the date, if you can give it, that you took title to the property? A. I was supposed to take it on July 1st; I did not take it until about the 3rd, I guess.

Q. That was the date that you had a meeting in Mr. Brodsky's office? A. Yes; the 2nd.

Q. When were the title papers actually delivered, if you know? A. The title papers were delivered to me around the 27th of July.

Q. When were any papers recorded? A. The 9th of July.

Q. Were the papers executed on or before July 2nd? A. They were.

Q. Were the assignment of lease and the other papers delivered on July 2nd or later? A. They were not delivered to me until a later day.

Q. When was the first that you learned of the pendency of this foreclosure suit?

Mr. Morten: Objected to.

Mr. Carpenter: He was not made a party until after he paid the taxes.

The Court: Has that anything to do with the foreclosure of the mortgage?

Mr. Carpenter: I think it will have, if the complainant knew he was in possession and did not give him any notice and let him purchase subject to this foreclosure suit.

The Court: All right.

A. (No answer.)

Q. Do you know whether any of the officials of the K. S. S. Realty Company knew of your being in possession under a contract of purchase? A. I know that they did know it, one of them or two of them.

Q. How do you know that? A. They were both at my place to see me.

Q. When? A. Mr. Kannengeiser was in there.

By the Court:

Q. Which Kannengeiser? A. This gentleman right here (indicating).

Q. Mr. Sam Kannengeiser? A. That is the man. He was in my place. He was in my place some time in May—about the middle of May I guess.

By Mr. Carpenter:

Q. You say there were two of them; who was the other gentleman? A. The other one I have reference to is Mr. Starr—Mr. Albert Starr I think it is.

By Mr. Morten:

Q. Henry Starr? A. This is the man, right next to Mr. Miller.

Q. (Calling on man to stand up.) Is that the man? A. Yes; that is the gentleman that was in my place.

The Court: That is Harry Starr?

Mr. Morten: Yes.

By Mr. Carpenter:

Q. Now, when was he in there? A. He was in there some time in June, about a month later, the time Kannengeiser came in.

By the Court:

Q. When you say "my place" you mean this property? A. Yes; this garage.

By Mr. Carpenter:

Q. Was anything said by either of these gentlemen or both of them to you, or you to them, relating to the fact that you had a contract to buy? A. Yes, sir; Mr. Kannengeiser spoke to me about it.

Q. What was the conversation? A. Kannengeiser spoke to me about it.

Q. What was the conversation? A. Kannengeiser came in the office of the Star Garage while I was there and while the secretary was there and my man, Charlie Banks was there—

Mr. Morten: Objected to.

The Court: Objection overruled.

Q. Go on with your answer. A. He told me that he understood I purchased the property off Ostroff & Cohn for $175,000. I says: "No; I didn't purchase it, but I have a deposit and I am under contract to purchase it July 1st." He said: "Well, I heard through the landlady of this property. You have got a fine garage here, but you have got a tough lot of people to deal with". He says: "I wish you success." I says: "How much did Ostroff & Cohn make on that deal? He started to figure and he says "$35,000." I says: "I guess he did." He said: "That is to damned much. He ain't entitled to it." That is all, and he left his card with me.

Q. That was Mr. Kannengeiser? A. That was Mr. Kannengeiser.

Q. Was anything said by Mr. Starr to indicate that he knew you were in possession under a contract to purchase? A. Yes.

Q. What was said? A. Mr. Starr came in the place about a month later. Mr. Nugent and he came in to see my colored man that worked there for Kannengeiser and for Starr and for Ostroff and for Cohn, and he was working there yet for me, but I discharged him. At that time he introduced me to Mr. Starr. Mr. Nugent introduced me to Mr. Starr as the new owner of the place and he wished me success. That is all the conversation I had with him.

Mr. Carpenter: I offer in evidence the tax bill and the water bill and the two checks.

Mr. Morten: No objection on the part of the complainant.

Mr. Melniker: We have no objection.

(Tax bill is marked Exhibit D-F-1. Water bill is marked D-F-2; check is marked D-F-3; check is marked D-F-4.)

CROSS EXAMINATION BY MR. MORTEN:

Q. What conversation took place when Mr. Starr was there? A. When Mr. Starr was there, why Mr. Starr came there, in fact—

BY THE COURT:

Q. The question is: What conversation took place? A. The conversation that took place was that he came in and looked around the place and talked to me for awhile.

Q. That is not telling us the conversation. Mr. Morten wants to know the conversation. That means what was said by him to you and what you said to him. A. The only thing that was said at that time was that Mr. Nugent introduced me to Mr. Starr and wished me success. That is all he said. He wished me success.

Q. Mr. Nugent introduced Starr to you? A. To me as the new owner.

Q. Did he say you were the new owner? A. Yes.

BY MR. MORTEN:

Q. Were you the new owner? A. I said I was.

Q. You had not taken title? A. No, but I had taken possession under an agreement to take title.

Q. What did he say when he introduced you to Mr. Starr? Did he say: "This is Mr. Frank, the new owner of the property"? A. "The new purchaser of the property."

Q. He used the word "purchaser of the property"? A. Yes; that is all he said.

Q. Did he say you had purchased the property? A. He told him I had purchased the property. He

The Court: I assume, Mr. Melniker, you are talking about dealings that Mr. Rose had in connection with insurance matters in which the K. S. S. Realty Company were concerned.

Mr. Melniker: Yes. That is what I meant, if I did not say it.

The Court: And the question then that you are asking Mr. Rose is: Who represented the K. S. S. Realty Company in those transactions? Is that it?

Mr. Melniker: Yes.

By Mr. Melniker:

Q. Who represented the K. S. S. Realty Company in those transaction? A. Why, as I said, I spoke to all of them, but mostly with Mr. Kennengeiser.

By the Court:

Q. This is concerning insurance matters? A. Yes.

Q. What insurance matters are they? A. I placed insurance on the garage and some insurance on other property that they had.

No cross examination.

Mr. Melniker: I want to offer in evidence petition of appeal filed by Albert Ostroff with the Hudson County Board of Taxation, from the assessment on this garage, the property in question, sworn to on June 14, 1926, before H. J. Ballarene, Notary Public, and filed in the office of the County Board of Taxation June 24, 1926.

Mr. Morten: I have no objection to the manner of proof, but I object to the appeal being received in evidence on the ground that it is immaterial and irrelevant to the issue.

The Court: Objection overruled.

(Marked Exhibit D-2).

The Court: Is that all, Mr. Melniker?

Mr. Melniker: Yes.

The Court: Have you anything further, Mr. Carpenter?

Mr. Carpenter: Nothing further.

Mr. Melniker: I ask if your Honor will take into consideration the affidavit filed, in which Mr. Louis Kannengeiser has admitted that he is a director and officer of the company?

The Court: Yes.

Rebuttal.

Louis Kannengeiser, sworn as a witness on the part of the complainant in rebuttal, testifies as follows:

Direct Examination by Mr. Morten:

Q. You have been in court and heard the testimony of Mr. Albert Ostroff and Mr. Cohn to the effect that in June, 1926, you had a conversation with them in which they spoke to you about the payment of taxes on the garage property for 1926 and about the payment of the water bill, and that you told them they did not have to pay them within thirty days. Was there ever any such conversation between you? A. Never.

Q. Did you ever speak to Mr. Cohn or Mr. Ostroff about the payment of the taxes or water rent on this property prior to the filing of the bill of complaint on June 3, 1926? A. No, sir.

Q. You were at Mr. Seclow's office? A. Yes.

Q. Mr. Ostroff called you up? A. Yes.

Q. What did he say to you? A. He said: "Can I come down to see you?" I says: "No; it is late now. I haven't got the time." He says: "I want to give you some money." I says: "What kind of money?" He says "Interest on the mortgage." I says: "The mortgage, I have no right to accept any money and I never do accept any money because the treasurer has the right to accept the money." He says: "What is the idea of foreclosing that mortgage?" I says: "I don't know. Ask Mr. Melosh and Morten."

Q. That was all? A. Yes.

Q. You are sure about that? A. Yes.

Q. He asked you what was the idea of foreclosing the mortgage? A. Yes.

Q. Don't you know that the subpoenas in the foreclosure suit were not served on Mr. Ostroff until July 12th? A. I don't know.

Q. When did you know about the foreclosure? A. When I know about the foreclosure?

Q. Yes. A. About the 4th or 5th or 6th some time.

Q. How did you know about it? A. Mr. Melosh and Morten let me know.

Q. They let you know or you let them know? A. They told me.

Q. What did they tell you about it? A. That the mortgage was being foreclosed.

Q. That is the first you knew about it, is it? A. That is the first I knew it is being foreclosed.

Q. It was spoken about, a foreclosure, before that time? A. Of course we did.

Q. To whom? A. To the whole company.

Q. When? A. Before we foreclosed.

Q. When was it; what date? A. On July 1st we had a meeting and we authorized Mr. Melosh and Morten to foreclose that mortgage.

Q. Where did you have the meeting? A. In our office.

Q. Where is that? A. 127 Montgomery Street.

Q. And then did you notify Melosh and Morten to go ahead with it? A. The secretary did.

Q. How did he notify them? A. I don't know.

Q. What time did you have this meeting of July 1st? A. Around noon time, I believe, one o'clock or twelve o'clock; something like that.

Q. You decided then to foreclose this mortgage? A. Yes.

Q. Why? A. For non-payment of taxes and water rent.

Q. How did you know they were not paid? A. I had been notified.

Q. Who notified you? A. The secretary.

Q. When? A. Before that.

Q. Did you know that you had a right to foreclose on that day, July 1st? A. I did not know until I let know Mr. Melosh and Morten.

Q. You had a meeting and decided to foreclose the mortgage? A. We decided if we have a right, we should foreclose.

Q. At noon time, July 1st, you had a meeting and you decided to foreclose the mortgage for non-payment of taxes. That is right, is it? A. Yes.

Q. Did you pass a resolution? A. We did.

Q. At that time you knew or you thought you had a right to foreclose for non-payment of taxes? A. Yes.

Q. When were the taxes supposed to be paid? A. I don't remember now.

Q. When did you understand you had a right to foreclose the mortgage? A. When the taxes are not paid.

Q. When the taxes were not paid, you had a right to foreclose it—when they were not paid for how long? A. For how long?

Q. Yes. A. For the time being, when we seen there was no payment made.

Q. How long did you have to wait before you could foreclose? A. I don't know how long.

Q. You don't know? A. I don't know.

Q. You voted on the resolution, didn't you? A. I voted.

Q. You had a discussion about it, didn't you? A. Yes.

Q. Wasn't there anything said by anybody about the time having elapsed for the payment of the taxes? A. They were speaking—

Mr. Morten: I object upon the ground that the minutes will be the best evidence of what took place.

The Court: The minutes may not be complete. Objection overruled.

Q. What was the discussion about the payment of taxes? A. Taxes are not paid, thirty days overdue, and taxes were not paid; so we decided to foreclose that mortgage.

Q. Did you know the payment of taxes was thirty days overdue? A. I didn't know.

Q. You did not know? A. At that time I did not know. Now I do know.

Q. Was there any other business transacted at this meeting? A. No, sir.

Q. It was called for that purpose, was it? A. Yes.

Q. When did you get notice of it? A. There wasn't any notice.

Q. How did you know to be there? A. Telephoned one to the other.

Q. When did you get the telephone message? A. A couple of days before, a day or two days before.

Q. A couple of days or a day or two before you were notified to be there the first of July? A. Yes.

Q. And pass a resolution foreclosing this mortgage? A. I believe it was the 30th of June my brother telephoned to me that the secretary called a meeting.

Q. For that purpose? A. For that purpose, that we should foreclose.

Q. Who was watching to see whether the taxes were paid within thirty days? A. The secretary.

Q. The secretary was watching that? A. Yes.

Q. You never said anything to Mr. Ostroff or Mr. Cohn about paying these taxes, did you? A. Nothing was spoke about that.

Q. Never mentioned it? A. No, sir.

Q. You just waited until the thirty days were up? A. I didn't wait. I was not waiting. I was notified I should come to the meeting.

Q. You were waiting to get a chance to foreclose this mortgage?

Mr. Morten: Objected to.

The Court: Objection sustained.

Q. You wanted to get your money as soon as you could? A. No, sir.

Mr. Morten: Objected to.

The Court: Objection sustained.

Q. When was this time when you and Mr. Starr and your brother had a conference with Mr. Ostroff about some of the business relating to the garage—what was the date of that? A. I don't remember the date. That was in the early part of January, 1926.

Q. And where was that? A. At the garage.

Q. What was it about? A. We shall straighten out in regard to the sprinkler system.

Q. Are you sure it was in the early part of January? A. Yes.

Q. And not the latter part of January? A. I am not sure about it.

Q. It was in January, though? A. It was in January.

Q. Who was there? A. Mr. Ostroff.

Q. And who else? A. That is all.

Q. And you? A. And myself and Mr. Starr.

Q. You never talked to Ostroff after that until the telephone conversation? A. No, sir. That was Cohn in March. I met Mr. Cohn to straighten out that deal in the office in the month of March.

Q. Whose office? A. In our office.

Q. Now, you remember taking an affidavit in this case, do you not—several of them, in fact? You remember signing some affidavits in this case? A. My own I signed.

Q. I want to show you one that you swore to on September 22, 1926, page 3, in which you say: "There was a meeting attended by Mr. Starr and Mr. Kannengeiser and myself representing the complainant." Do you remember saying that? A. "Representing the complainant"?

Q. Yes. A. There was a meeting when—in September?

Q. This affidavit was taken in September. I am just referring to the date to identify the affidavit, because you have taken several in this case, but at this particular time, September 22, 1926, did you say that "there was a meeting attended by Mr. Starr and Mr. Kannengeiser and myself representing the complainant"? A. We are always at meetings together, all of us.

Q. So, you were there on that occasion, representing the complainant?

Mr. Morten: I object. It does not say so.

The Court: Show him the affidavit.

Q. (Showing witness) I call your attention to that affidavit. Read it and tell us whether in your recital about the telephone conversation— A. (Interrupting) I am very sorry. I have no glasses with me.

Q. Suppose you try? A. I cannot read very well.

Q. You cannot read English? A. I do.

Q. Did you read this affidavit when you signed it? A. I did read part of it.

Q. Do you remember this in paragraph six, page four: "July eighth or ninth, 1926, while I was at the office of Alexander Seclow, I was called on the telephone by the defendant, Albert Ostroff, who told me that he wanted to see me with reference to some business of the company, meaning the complainant corporation. I then told him that I could not do any business for the company and that every person interested in the company would have to be present. I then told him that I would not be in the city again until the following week and that he could meet the persons interested in said company

at the office of the company during the following week, but whether it was July 14th or not, I cannot remember." Is there anything in this affidavit about Mr. Ostroff saying to you: "Why did you foreclose the mortgage?"

Mr. Morten: I object.
The Court: Objection sustained.

Q. Did you say in this affidavit, or in any other affidavit, or at any time, or in any paper in this case, prior to your testimony here this morning, that Mr. Ostroff said anything to you about the foreclosure of the mortgage?

Mr. Morten: I object upon the ground that it is irrelevant and immaterial.
The Court: Objection overruled.

A. He did.

BY THE COURT:

Q. You misunderstood the question. The question is this: Mr. Melniker wants to know if you ever said anywhere before today that Mr. Ostroff asked you: "What about the foreclosure? A. No, sir.

BY MR. MELNIKER:

Q. This is the first time, today, when you ever made that statement?

The Court: I am going to assume, if he never said it before, this is the first time.

Q. Will you tell us why, when you told Mr. Morten the facts which are set forth in these affidavits, in which you refer to this telephone conversation and made an affidavit about what was said between you and Mr. Ostroff, why didn't you say then that Ostroff asked you: "Why did you foreclose the mortgage?"

Mr. Morten: I object.
The Court: Objection overruled.

A. Because the taxes were not paid and the water rent.

BY THE COURT:

Q. You have not got the question. You said, in answer to a question that Mr. Melniker asked you, that you never said before today that Mr. Ostroff asked you what was the idea of foreclosing the mortgage. You said you never had said so? A. No, sir.

Q. Mr. Melniker wants to know why you did not tell that to Mr. Morten before today? A. Why I didn't tell Mr. Morten?

Q. Why you did not tell Mr. Morten before today that Ostroff had said: "What is the idea of foreclosing?" A. For not paying taxes.

Q. No. A. I cannot get it.

Q. I will try again. You just testified that you never said before today, in any paper filed in this case, or to anyone else, I understood you to say, that in this telephone conversation with Ostroff that you had at Seclow's office, he said to you: "What is the idea of foreclosing?" You never said that in any affidavit or paper? A. No.

Q. Or to anybody before? A. No.

Q. Before today? A. No.

Q. Mr. Melniker wants to know why you did not tell that to Mr. Morten before today? A. Why I didn't? I don't get it, because I was talking from the time I began, to Mr. Morten.

Q. Did you tell Mr. Morten that Ostroff had said to you in this conversation: "What is the idea of foreclosing?" A. Yes.

BY MR. MELNIKER:

Q. You did tell Mr. Morten? A. I told Mr. Morten.

BY THE COURT:

Q. When did you tell him that? A. When I had the conversation with Mr. Ostroff over the telephone, so Mr. Ostroff offered me the deposit—

Q. We do not want to go over that conversation again. You said you had that conversation with Ostroff about July 7th? A. Yes.

Q. When did you tell Mr. Morten that you had this conversation with Ostroff? A. When I told Mr. Morten this conversation? Now I get it. I told him the next week, in the early part, Monday.

Q. Somewhere around the 14th or 15th of July? A. Yes, something like that.

Q. Did you tell Mr. Morten then that Mr. Ostroff had said to you over the telephone: "What is the idea of this foreclosure?" A. Yes.

BY MR. MELNIKER:

Q. Do you know why it was not put in your affidavit?

Mr. Morten: I object. It is immaterial.

The Court: Objection overruled.

A. Why it was not put in?

BY THE COURT:

Q. What do you suppose we are talking about? A. I don't know why.

BY MR. MELNIKER:

Q. You don't know why? A. No.

Q. Let me call your attention to page three of your affidavit. Did you say this: "It is true that during the telephone conversation between Ostroff and myself, while I was in the office of Mr. Seclow as above stated, I did not tell him that the defendant had defaulted in the payment of taxes or water rents and that the complainant had elected to declare a forfeiture of the mortgage by reason thereof, but this information was given to the defendant, Ostroff and Cohn, at the meeting held on July 14, 1926." Do you remember saying that? A. I do not.

Q. You do not remember that at all, do you? A. No, sir.

Q. Do you remember meeting Mr. Ostroff on a tube train? A. On a tube train?

Q. You know what a tube train is? A. Exactly.

Q. You know the Journal Square station in Jersey City. Do you remember getting on that train at that station? A. I do not.

Q. You do not remember getting on the train at all? A. No, sir.

Q. Never? A. I don't remember.

Louis Kannengeiser. Called in Rebuttal. Cross.

Q. You won't say that you did not? A. I don't remember.

Q. What is your business? A. Real estate.

Q. Mortgages? A. Real estate; selling and buying.

Q. You are also in the mortgage business, are you not? A. No, sir.

Q. Just buying and selling real estate? A. Yes, sir.

Q. Do you place any mortgages? A. No, sir.

Q. Never? A. Unless I sell the property I must take a mortgage back.

Q. That is the only time? A. Yes.

Q. You do not make a business of placing mortgages? A. No, sir.

Q. Does your company? A. No, sir.

Q. Does the K. S. S. Realty Company? A. No, sir.

Q. Are you a licensed broker?

Mr. Morten: I object upon the ground that it is immaterial.

The Court: Objection sustained.

Mr. Melniker: I want to show that this man says he is in the real estate business. If he is not a licensed broker, it would have some effect upon his credibility.

The Court: Objection sustained.

Mr. Carpenter: I have no questions.

Albert Ostroff. Called in Rebuttal. Direct.

ALBERT OSTROFF, one of the defendants, already sworn as a witness on the part of the defense, recalled in rebuttal and further examined as follows:

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Was there anything said either by you or by Mr. Kannengeiser, on the occasion of the telephone conversation of July 7th about any foreclosure? A. No.

Q. Do you know anything about a foreclosure at that time?

The Court: He has testified to that.

No cross examination.

Case closed.

Exhibit C-1.

KNOW ALL MEN BY THESE PRESENTS: That WE DAVID KAESS and ANGELINE KAESS, his wife, of the City, County and State of New York, are held and firmly bound unto K S S REALTY CO. INC., a corporation of the State of New Jersey, in the penal sum of ONE HUNDRED AND FIFTY THOUSAND DOLLARS lawful money of the United States of America, to be paid to the said

K S S REALTY CO. INC., a corporation as aforesaid, its successors and assigns; For which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the twenty-ninth day of December, One Thousand Nine Hundred and twenty-five.

The condition of the above obligation is such that if the above bounden, David Kaess and Angeline Kaess, his wife, their heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named

K S S REALTY CO. INC., a corporation of the State of New Jersey, its succesors or assigns, the just and full sum of SEVENTY-FIVE THOUSAND DOLLARS which will be in the year One thousand Nine hundred and twenty-nine, or any time prior thereto at the option of the obligors with interest thereon from the date hereof, at the rate of six per centum per annum, payable quarterly on the first day of January, April, July and October in each year (the first interest being paid on April 1st, 1926) together with a payment on account of principal in

a sum of not less than $1250.00 quarterly with the first payment of principal being made on April 1st, 1927, the whole principal sum herein expressed becoming due as aforesaid; it being further provided that on and after the payment of any principal sum interest shall be computed upon the balance of such principal sum then remaining unpaid, without any fraud or other delay, and if the said obligors shall carry out and perform all the terms, covenants and conditions contained in the mortgage accompanying this bond, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or installment or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest or any part thereof or installment of principal or any part thereof remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of thirty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, or upon default being made by the obligors in the performance of any of the terms, covenants and conditions contained in the mortgage accompanying this bond, the aforesaid principal sum of SEVENTY-FIVE THOUSAND DOLLARS

with all arrearage of interest thereon, shall, at the option of the said K S S Realty Co. Inc., a corporation of the State of New Jersey, or its legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

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..... (L. S.)

..... (L. S.)

Signed, sealed and delivered in the presence of

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Exhibit C-2.

Know all men that we, David Kaess and Angeline Kaess, his wife, of the City, County and State of New York, hereinafter called the "Mortgagors" for securing the payment of the sum of $1. lawful money of the United States, duly paid by K S S Realty Co. Inc., a corporation of the State of New Jersey, hereinafter called the "Mortgagee," at or before the ensealing and delivery of these presents, and of other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby assign, grant, bargain and sell unto the Mortgagee, the said lease and lease-hold interest and agreement dated August 16, 1924, made by and between Mary Winner, widow, and Benjamin S. Gorlin, recorded in the Hudson County Register's office on the 4th day of September, 1924, in Book 1539, page 218, wherein and whereby the following described lands and premises were leased by the said Mary Winner to the said Benjamin S. Gorlin, namely:

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All that tract, plot, piece or parcel of land and premises, situate, lying and being in Jersey City, N. J., designated, bounded and described as follows:

Beginning at the intersection of the Northeasterly line of Montgomery Street and the division line between plots 18 and 19 Block 1832 as shown on Fowlers Official Assessment Map of 1894 which point is also distant Three hundred ten and twenty-two hundredths (310.22) feet measured Northwesterly along the said Northeasterly line of Montgomery Street from the intersection of the same with the Northwesterly line of Bergen Avenue as shown on Map of proposed widening of Bergen Avenue

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between Montgomery Street and Bergen Square dated June 9, 1922. Thence (1) running Northeasterly along the said division line between plots 18 and 19 Block 1832 Fowlers Official Assessment Map of 1894 One hundred eighty-four (184) feet to a point in the rear line of Plot 19 Block 1832 Fowlers Official Assessment Map of 1894, thence (2) running Southeasterly along the rear line of Plot 19 Block 1832 Fowlers Official Assessment Map of 1894, Ninety-seven and eighty hundredths (97.80) feet to an angle point, thence (3) still running in a Southeasterly direction and along the rear line of Plot 20 Block 1832 Fowlers Official Assessment Map of 1894, Two and twenty-nine hundredths (2.29) feet to a point; thence (4) running Southwesterly parallel with the course first run one hundred ninety-two and fifty hundredths (192.50) feet to a point in the said Northeasterly line of Montgomery Street, thence (5) running Northwesterly along the said Northeasterly line of Montgomery Street, one hundred and twelve hundredths (100.12) feet to the point or place of beginning.

Being known as parts of Plots 19 and 20 Block 1832 Fowlers Official Assessment Map of 1894, which said lease, and lease-hold interest, was assigned by the said Benjamin S. Gorlin, to Jacob Starr et als by assignment dated October 14, 1924, recorded in said register's office in book 1542 of deeds for said county, on pages 550 &c, assigned by Jacob Starr et als to the K S S Realty Co. Inc., a corporation as aforesaid, by assignment dated November 14, 1924, recorded in book 1556 of deeds for said county, on pages 617 &c, and this day assigned by the K S S Realty Co. Inc., a corporation as aforesaid, to the said David Kaess; together with all rights, privileges, options and benefits mentioned in said lease.

TO HAVE AND TO HOLD the same to the MORTGAGEE its successors and assigns forever.

AND the said Mortgagors for themselves and their heirs, executors and administrators, the said lease, and the said rights, privileges, options and benefits thereof, in the quiet and peaceable possession of the mortgage, its legal representatives and assigns, against every person whomsoever will WARRANT and forever DEFEND.

PROVEDED ALWAYS and these presents are upon the express condition, that if the Mortgagors, their heirs, executors, or administrators will well and truly pay unto the Mortgagee, its successors and assigns the sum of SEVENTY-FIVE THOUSAND DOLLARS on the eighteenth day of August, which will be in the year Nineteen hundred and twenty-nine, or any time prior thereto at the option of the mortgagors, with interest thereon from the date hereof, at the rate of six per centum per annum, payable quarterly on the first day of January, April, July and October in each year (the first interest being paid on April 1st, 1926) together with a payment on account of principal in a sum of not less than $1250.00 quarterly with the first payment of principal being made on April 1st, 1927, the whole principal sum herein expressed becoming due as aforesaid; it being further provided that on and after the payment of any principal sum interest shall be computed upon the balance of such principal sum then remaining unpaid, and upon the payment of the principal and interest as herein provided, these presents shall cease, determine and be void.

AND PROVIDED FURTHER that the exercise by the Mortgagors of any of the rights, privileges, benefits or options, prior to the payment of the said sum of

SEVENTY-FIVE THOUSAND DOLLARS and accrued interest, will enure to the benefit of the Mortgagee, its successors and assigns, and the same are to be considered as assigned, transferred and conveyed by this Instrument.

AND PROVIDED FURTHER that should the right or rights of the said David Kaess and Angeline Kaess, his wife, or either of them, in the said lease, or leasehold interest, be levied upon under any judgment or attachment, or in any legal proceedings, that thereupon, this assignment and conveyances shall be and become absolute in the Mortgagee, its successors and assigns.

AND PROVIDED FURTHER "that upon the mortgagors, their heirs, administrators or assigns, exercising the option contained in the lease aforesaid and taking a deed for the said property, and negotiating and obtaining a mortgage loan thereon, the principal sum thereof shall be apportioned as follows: the sum of Forty-Thousand Dollars as purchase money for the sale of the land; an allowance not to exceed Five Thousand Dollars for incidental expenses thereto, and the balance to be paid to the said mortgagee its successors and assigns and credited upon the balance then due upon this mortgage, whereupon the mortgagors shall execute and deliver to the mortgagee, its successors and assigns a second mortgage, the principal sum of which shall be the balance due on this mortgage after deducting the payment provided for above out of the principal sum of the mortgage obtained by the mortgagors at the time when deed is obtained as aforesaid; said second mortgage shall run for a period of two and one half years from the date of execution and delivery, to bear interest at the rate of six per centum per annum payable quarterly together with an in-

stallment of not less than $1250.00 on account of the principal sum therein expressed, and shall contain the usual full covenant, tax, interest and insurance clauses".

AND PROVIDED FURTHER that should the mortgage that is to be negotiated and obtained at the time when the deed is received as hereinbefore mentioned, become due and payable and the payment of its principal demand, the said mortgagee its successors and assigns, hereby agree to subrogate the second mortgage to be given to it as hereinbefore provided to any other first mortgage in the like principal sum that may be procured by the said mortgagors, their heirs, administrators or assigns in the place and stead of such called mortgage.

AND PROVIDED FURTHER, that upon the institution of any proceedings to foreclose this mortgage the said mortgagors, their heirs, administrators and assigns, do hereby each and severally agree to waive any right that they or either of them may have against the immediate appointment of a receiver by a court of competent jurisdition.

AND PROVIDED FURTHER, that the whole of the principal sum herein expressed shall at the option of the holder of this mortgage become due after default in the payment of any installment of principal or interest for thirty days, or after default in the payment of any tax, water rate or assessment for thirty days or in default in keeping the buildings insured against loss by fire for the benefit of and to the satisfaction of the Mortgagee, its successors and assigns.

AND PROVIDED FURTHER that the Mortgagee, its successors and assigns shall have the right which is

hereby expressly, reserved and given to it, to pay to the said Mary Winner or to her heirs, executors, administrators or assigns, any sum of money that may be due to her or them, under the terms of the said lease immediately on or after any default with respect to the making of such payment by the Mortgagors; and that such payment by it or them, shall not be held to be a waiver of such default on the part of the mortgagors, nor shall they receive any rights because or any such payment, and any such default may be taken advantage of by the Mortgagee, its successors or assigns, notwithstanding any such payment made by the Mortgagee or its successors, or assigns.

IN WITNESS WHEREOF, the said Mortgagors have hereunto set their hands and seals the twenty-ninth day of December, in the year of our Lord One thousand nine hundred and twenty-five.

DAVID KAESS (L.S.)
ANGELA KAESS (L.S.)

Signed, sealed and delivered
in the presence of
HENRY J. MELOSH.

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

Be it remembered that on this 13th day of December, in the year of our Lord One thousand nine hundred and twenty-five, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared DAVID KAESS and ANGELINE KAESS, his wife, who, I am satisfied are the mortgagors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

HENRY J. MELOSH,
Master in Chancery of New Jersey.

Rec. Dec. 31, 1925.

Exhibit D-1.

HUDSON COUNTY BOARD OF TAXATION

2387

Philip McGovern, Pres.
Clarence T. Van Deren
John E. Jacobson

Court House
Jersey City, N. J.

Aug. 9, 1926.

Albert Ostroff,
1204 Boulevard,
Bayonne, N. J.

Your appeal has been considered by this Board and the valuation of your property has been

Affirmed as Assessed

Taxing District—Jersey City Block 1832 Lot 19

Apply to your collector for correction of Tax Bill.

JOS. P. MCLEAN,
Secretary.

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New Jersey
Court of Errors and Appeals

K. S. S. Realty Company, Inc., Complainant-Appellee, vs. Albert Ostroff, et als, Defendants-Appellants.	Appeal from Court of Chancery.

BRIEF FOR DEFENDANTS-APPELLANTS.

Statement of Facts.

The complainant filed its bill to foreclose a mortgage for $75,000.00 on a leasehold of a garage in Jersey City. The mortgage is dated December 29, 1925, and is payable August 18, 1929, with an option to the mortgagors to extend it for a further period of two and one-half years, making an aggregate term of upwards of six years.

The mortgage provides for the payment of quarterly installments of $1250.00 on account of principal to be paid on the first days of January, April, July and October of each year. The April installment was paid, and the subsequent installments were tendered and refused. The mortgage provides that the whole principal sum shall, at the option of the mortgagee, become due after default in payment of any installment of principal or interest for thirty days, or after default in payment of any tax, water rent or assessment for thirty days.

The bill of complaint alleges that the taxes for the period from January 1 to July 1, 1926, amounting to $1,495.07 became due on June 1, 1926, and that a water bill of $35.64 became due on May 25, 1926; and that said sums remained unpaid for more than thirty days, and that complainant has elected that the whole principal sum shall be now due. The defendants admit the non-payment of these items, but say that they were induced not to pay these taxes and water rents within such thirty day period by Louis Kanengeiser, the authoriezd agent of the complainant corporation. Defendants also say that the complainant's exercise of its alleged option to declare a forfeiture was premature and void.

On or about June 11, 1926, within the thirty day period after said taxes became due, the defendants exhibited to the said Louis Kanengeiser said tax and water bills, and discussed with said Kanengeiser the advisability of taking an appeal from the assessment for taxes, to the Hudson County Board of Taxation, with the view of reducing the assessed valuation of the property and, consequently, the amount of taxes. The said Kanengeiser advised defendants to take such appeal, and they thereupon filed notice of appeal.

The defendants asked said Kanengeiser whether they should pay the taxes immediately or wait until the termination of said appeal by the Hudson County Board of Taxation. Said Kanengeiser told defendants not to pay the taxes until the appeal was determined, and said that the complainant would waive the payment of said taxes within the thirty day period provided in said mortgage.

At the time when the defendants exhibited said tax bill to said Kanengeiser on June 11, as aforesaid, the defendants also showed to said Kanengeiser the said water bill and asked him whether

they should pay it at that time, or wait until they paid the tax bill. Said Kanengeiser told defendants to pay both tax and water bills together, after determination of the appeal by the Hudson County Board of Taxation.

After this conversation of June 11 between said Kanengeiser and the defendants, in which the said Kanengeiser told defendants that they need not pay the taxes until after the determination of said appeal, the secretary of the complainant corporation was watching to see whether the taxes were paid before July 1 (p. 55, l. 19).

A day or two *before* July 1 (p. 55, l. 7) Louis Kanengeiser was notified by his brother that the secretary had called a special meeting for July 1, for the purpose of foreclosing this mortgage (p. 55, ll. 10-18). The "meeting" was held by Louis Kanengeiser and the secretary at *noon time,* July 1 (p. 5[illegible], l. 30). No other business was transacted at this "meeting".

The bill to foreclose was filed on July 3, 1926, being six months and five days after the execution of this $75,000.00 mortgage, which had six years to run.

The defendants admit that the taxes became a lien on June 1, 1926; but say that the thirty day period during which said taxes could be paid did not expire until July 1 at midnight. Therefore, the complainant's pretended exercise at *noon time* on July 1, of its option to declare a forfeiture was premature and void. Defendants deny that the water bill became a lien on May 25, 1926.

The learned Vice Chancellor has found that the water bill was not a lien upon the premises on May 25. Therefore, the only questions involved in this appeal are: First: Whether such conduct on the part of Louis Kanengeiser precluded complainant from foreclosing said mortgage for failure

to pay the taxes for thirty days after they became due, the defendants having relied upon Kanengeiser's agreement to waive payment of said taxes until the determination by the Hudson County Board of Taxation of the appeal which said Kanengeiser advised the defendants to take. Second: Whether on July 1st *at noon time* the complainant could, and did, legally exercise its option to foreclose this mortgage for non-payment of taxes which were not in default until July 1 *at midnight.*

POINT I.

Payment of the taxes within thirty days after they became due was waived by agreement made within the said thirty day period.

On June 1, 1926, the defendant Ostroff went to the city hall and obtained the tax and water bills (p. 32, l. 25 to p. 33, l. 2). He considered the assessed valuation too high (p. 33, l. 3); and subsequently took up the matter with Louis Kanengeiser, who was the vice president of the complainant and managed its affairs, and told Kanengeiser the defendants were about to appeal from the assessment (p. 33, l. 8). This conversation with Kanengeiser took place on June 11, 1926 (p. 33, l. 18; p. 39, ll. 13-20).

The defendant Ostroff asked Kanengeiser whether the complainant would waive the thirty day period provided in the mortgage for the payment of the taxes, as defendants were about to appeal—and it would take a few weeks until the appeal was determined. The defendants asked Kanengeiser if he had any objection to the payment of the taxes at the time when the "reply" from the appeal was due.

Kanengeiser said that the complainant corporation would not have any objection at all, and that they would not stand in the way of the appeal, and he told Ostroff to "Go right to it" (p. 33, ll. 30-40). Ostroff had the water bill with him at the time, and showed this bill to Kanengeiser, and asked whether he should pay the water bill at that time. Kanengeiser answered "It don't make any difference; just wait. When you pay the other, pay all of them at the same time" (p. 34, ll. 1-15).

After this conversation of June 11, 1926, and on June 14, the defendants filed notice of appeal from the assessment for taxes to the Hudson County Board of Taxation (p. 38, ll. 12-18). The appeal was not decided until August 9, 1926, which was after the foreclosure proceedings were instituted (p. 38, ll. 19-29. See Exhibit D1 printed at end of State of the Case).

The defendant Cohn was present on June 11, at the conversation between the defendant Ostroff and the said Kanengeiser (p. 39, ll. 13-18). Cohn and Ostroff went together to see Mr. Kanengeiser (p. 30, l. 25).

Ostroff told Kanengeiser that the taxes were a little too high, and Kanengeiser answered that they were (p. 39, l. 38). Kanangeiser told Ostroff to take an appeal (p. 40, l. 2). Ostroff asked Kanengeiser whether there would be any objection to the non-payment of the taxes within the thirty day period, and Kanengeiser answered: "Why no; I am not as little as that. You go right ahead and make your appeal" (p. 40, ll. 4-8).

Kanengeiser told Ostroff to pay the tax and water bills together (p. 40, l. 10). Kanengeiser told Ostroff that everything is all right, and said: "We are not small people about paying to the minute and making any complaints" (p. 40, ll. 13-16).

There was no cross-examination of either of the defendants Ostroff or Cohn, and no attempt whatever was made to impeach their testimony.

The only evidence introduced by the complainant to contradict this testimony of the defendants Ostroff and Cohn was the categorical denial of Louis Kanengeiser (p. 49, ll. 25-40), his entire testimony in this respect consisting of the words "Never" and "No sir."

On cross-examination, Kanengeiser was shown to be utterly unworthy of belief. He testified that on July 7, Ostroff telephoned to him and said "What's the idea of foreclosing that mortgage" (p. 50, ll. 16-18; p. 52, l. 13). The date of that conversation was July 7, (p. 50, l. 25; p. 51, ll. 21-40).

The fact is that the subpoenas were dated July 9—two days after this conversation. Ostroff was not served with this subpoena until July 12; and prior to that time he had no knowledge or intimation that there was a foreclosure proceeding pending (p. 35, l. 38 to p. 36, l. 12). Ostroff testified that nothing was said by either him or Kanengeiser about any foreclosure on the occasion of the telephone conversation of July 7, (p. 63, ll. 9-12).

In his affidavit filed in this case, verified Sept. 22, 1926, in referring to the conversation with Ostroff over the telephone on July 7, Kanengeiser did not say anything about Ostroff having said "Why did you foreclose the mortgage?" (p. 57, l. 27). Kanengeiser said he never said to anybody before the day of the trial that Ostroff asked him "What about the foreclosure?" (p. 58, l. 30; p. 60, ll. 1-2). When asked why he did not tell his solicitor, Mr. Morten, about this matter, he finally said he told Mr. Morten around July 14 or 15 that Ostroff said "What's the idea of this foreclosure?" (p. 60, ll. 31-35). Kanengeiser does not know why it was not put in his affidavit (p. 60, l. 40 to p. 61, l. 15).

When Kanengeiser's attention was called to page three of his affidavit, in which he said that during the telephone conversation with Ostroff on July 7, he did not tell Ostroff about the foreclosure but that this information was given to Ostroff and Cohn on *July 14,* Kanengeiser said he did not remember saying that, and that he could not remember that at all (p. 61, ll. 15-29). He does not even remember whether he ever met Ostroff on a tube train in Jersey City (p. 61, l. 31 to p. 62, l. 2).

Kanengeiser said that on July 1, at noon time, he decided to foreclose this mortgage for non-payment of taxes and water rents (p. 53, ll. 12-18). Asked when the taxes were supposed to be paid, he answered: "I don't remember now" (p. 53, l. 38). He did not know how long he had to wait before he could foreclose for non-payment of taxes (p. 54, ll. 4-13); although he said there was a discussion about that, and that he voted on a resolution to foreclose for non-payment of taxes (p. 54, ll. 15-18). At that time he did not know that payment of taxes was thirty days overdue (p. 54, ll. 35-36), although he says that there was a special meeting called for the purpose of declaring a forfeiture for non-papment of these taxes for thirty days (p. 54, ll. 38-40).

Manifestly, Kanengeiser told an untruth when he testified that Ostroff said anything to him on July 7 over the telephone about the foreclosure of this mortgage. Consequently, it is a fair conclusion that if he testified falsely in this respect, he would also falsify in respect to the agreement to waive payment of the taxes within the thirty day period.

In contrast with this untruthful testimony of Kanengeiser—the complainant's only witness—is the fact that the testimony of the three witnesses for the defendant was not discredited in any particular.

The defendant Franks Centre Garage, Inc. took possession of this garage on May 1, 1926 (p. 41, l. 17), under an agreement to take title (p. 45, l. 30). Title was actually taken about July 3, 1926 (p. 41, l. 26). The officers of the complainant knew that the Franks Centre Garage, Inc. was in possession under a contract to purchase (p. 42, l. 20). Samuel Kanengeiser was there about the middle of May, 1926 (p. 42, l. 34), and Harry Starr was in the garage in June (p. 43, ll. 1-18). Mr. Kanengeiser figured out how much profit the defendants were alleged to have made on the deal (p. 44, l. 13), and said that it was too much, and that the defendants were not entitled to it (p. 44, l. 15).

Feeling that upon the sale of the premises to the Franks Centre Garage, Inc., the defendants had made a greater profit than they were entitled to, the complainants deliberately set about to find means by which they could get from the defendants some of this alleged profit. The foreclosure of this $75,000.00 mortgage was the only way by which this could be accomplished. The whole company spoke about a foreclosure (p. 52, ll. 36-40). If this mortgage could be foreclosed, the complainant would get back the property which had been sold just six months before for $140,000.00; or complainant could get the $75,000.00 in cash immediately, although this amount was not payable for about 6 years.

When the defendants spoke to Kanengeiser on June 11, about appealing from the taxes, Kanengeiser immediately saw the opportunity for which the complainant had been waiting. He advised the defendants to take an appeal from the taxes, and told them that the taxes for the first half of 1926 need not be paid until the appeal was determined. He was in the real estate business (p. 62, l. 3), and knew that the appeal would not be decided by the County Board in the ordinary course of business until after July 1—at which time the thirty day period for the payment of taxes would have expired. Kanengeiser having thus lulled the defendants into a sense of security by stating that no advantage would be taken of the failure to pay the taxes within the thirty days period, the secretary of the complainant was charged with the duty of watching to see whether the taxes were paid within the thirty day period (p. 55, ll. 19-21).

The thirty day period for the payment of taxes did not expire until July 1 at midnight. Had there been no agreement made between the defendants and Kanengeiser, waiving the payment of the taxes within the thirty day period, the secretary could not possibly have known until after July 1 whether the defendants had paid these taxes within such thirty day period. Yet Kanengeiser swears (p. 55, ll. 7-11) that "A couple of days, or a day or two before" July 1, he received a telephone message to be present at noon time on July 1 (p. 53, l. 13) for the purpose of declaring the mortgage forfeited for non-payment of the taxes due June 1. The defendants had until midnight of July 1, to pay these taxes, yet at noon time on July 1, Kanengeiser and the secretary of the complainant held a "meeting" and decided to foreclose the mortgage for non-payment of the taxes (p. 53, l. 30).

How could Kanengeiser and the secretary of the company anticipate that the taxes would not be paid before midnight of July 1, unless Kanengeiser had told the defendants that the taxes need not be paid until the appeal was determined? This proves conclusively that Kanengeiser was not telling the truth when he said that he never spoke to the defendants about payment of the taxes before the bill of complaint was filed (p. 49, l. 35). The

bill was filed *July 3* and not *June 3,* as stated in the last line on page 49.

The defendant Ostroff was in the real estate business (p. 30, ll. 15-20). Therefore, he knew the difficulty and tremendous expense involved in procuring a new $75,000.00 mortgage upon a leasehold, to run for six years. Unless Kanengeiser had told him the payment of the taxes would be waived until the appeal was decided by the Hudson County Board of Taxation, Ostroff would certainly not have defaulted in the payment of the taxes amounting to $1495.07, when he knew that such default wold result in a foreclosure of this large mortgage.

There can be no doubt whatever that Kanengeiser told the defendants that the taxes need not be paid until the determination of the appeal by the Hudson County Board of Taxation.

Not only is a forfeiture abhorent to equity, but the courts of equity have stated and reiterated that no forfeiture will be enforced if occasioned by the act of the party seeking to enforce it.

> *DeGroot* vs. *McCotter,* 19 Equity 531;
> *Davis* vs. *Salem County Mutual Fire Ins. Co.,* 85 Equity 324;
> *Newark Trunk Company* vs. *Clark,* 94 Equity 79.

The latter case refers to decisions in other States which have gone so far as to relieve a mortgagor from the effect of a forfeiture for failure to pay the taxes, where the taxes were paid even after suit was commenced, thereby restoring the security.

In *DeGroot* vs. *McCotter,* 19 Equity 531, the Court of Errors and Appeal said (at p. 533):

> "* * * On the other hand, if the default or omission to pay the interest within thirty days after it became due, was the result of honest mistake or misapprehension, into which the

> defendant was led by the acts or declarations of the complainant, a court of equity will not, under such circumstances, hold the failure to pay, a forfeiture of the credit. If the complainant failed to call at the time and place appointed for payment of his interest, and by reason of such failure the defendant was not able to make payment within the precise time fixed, equity will not consider the defendant as in default. He has an excuse for non-payment, which will, in a court of equity, be regarded as valid, though by the condition of the bond time is of the essence of the contract. In the case before us, a court of equity will, contrary to the general rule, enforce a forfeiture if incurred, yet there must have been a 'default', according to the meaning of that term as used in the condition of the bond. If the complainant has given further day of payment, or in any other way waived the payment, according to the letter of the bond, the default contemplated and provided against has not happened. In the case of Albert v. Grosvenor Investment Co., 3 Law Rep. (Court of Queen's Bench) 123, it was held at law, that there had been no default in payment of a mortgage, similar to that now in question, where an extension of time of payment had been given by parol. The Chief Justice in his opinion in that case says: 'I see nothing which goes to show that, if by the consent of the person who is to receive payment the time of payment is extended, the omission to pay within the time specified must be a "default" within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default.'
>
> "It is not now necessary to determine whether the agreement by parol can be admitted to change the legal effect and operation of the writing under seal. The question here is, whether the default has happened, if the omis-

sion to pay was caused by the defendant's reliance in good faith on the parol agreement. I cannot see how the complainant can conscientiously insist on a forfeiture, when all the defendant did, or rather omitted to do, was in pursuance of a previous agreement between him and the complainant. * * *"

In *Davis* vs. *Salem County Mutual Fire Ins. Co.*, 85 Equity 324, the following language is used (see p. 327):

"The question of waiver of a contractual right of forfeiture by reason of the conduct or course of dealing of the party enjoying the right has given rise to a great diversity of views in insurance cases. Many cases will be found collected in 2 May Ins. 358, 361, 363, and 19 Cyc. 789, 801. The rule is stated in 19 Cyc. 789, as follows:

'It may be stated as a general rule, that the insurer is deemed to have waived the performance of conditions precedent or subsequent when in good conscience he ought not to be heard to assert them, as when by reason of his conduct he has led the insured to believe that they would not be insisted upon.'

"The rule thus broadly stated may perhaps be doubted when applied to acts or conduct contemporaneous with the execution of the contract; but cannot be doubted as a sound principal of equity when applied to future acts.

"Somewhat analogous situations have arisen in this state in mortgage foreclosures in cases in which the condition of the bond authorized the mortgagee to declare the whole debt due by reason of a default in the payment of an interest installment. These provisions are treated as stipulations for a period of credit on condition of prompt interest payment, rather than as clauses of forfeiture (Spring v. Fisk, 21 N. J. Eq. 175, 178; Bergman v. Fortescue, 74 N. J. Eq. 266, 269), but our court of errors and appeals has held that if the default or omission to pay interest within the time

specified was the result of honest mistake or misapprehension, into which the mortgagor was led by the acts or declarations of the mortgagee, a court of equity will not, under such circumstances, hold the failure to pay operative as a forfeiture of the future credit. DeGroot v. McCotter, 19 N. J. Eq. 531."

POINT II.

In extending the time for the payment of the taxes, complainant's agent Kanengeiser acted within the scope of his authority.

The complainant, the K. S. S. Realty Company, Inc., was a close corporation. It consisted of Harry Starr, President; Louis Kanengeiser, vice president; Mr. Silverman, secretary, and Samuel Kanengeiser, treasurer (p. 50, l. 38 to p. 51, l. 1).

Louis Kanengeiser is in the real estate business (p. 62, l. 3). He is the oldest member of the complainant corporation (p. 47, l. 15). Therefore, it is only natural that the complainant corporation (which, as its name indicates, is engaged in the real estate business) should allow him to manage and direct its affairs. In fact, the other officers of the complainant corporation were actually present in court at the hearing (p. 31, l. 5), but they took no part in the proceeding. None of them was even called as a witness to prove that Louis Kanengeiser had no authority to represent the complainant corporation, and to manage its affairs, and to waive the payment of the taxes.

There is no evidence that the complainant corporation had any directors. There is no evidence that the corporation ever held any meetings—except upon the one occasion at noon time on July 1,

when the secretary and Louis Kanengeiser held a "meeting" at which they decided to foreclose this mortgage (p. 53, l. 28). This "meeting" was called for the sole purpose of foreclosing the mortgage, and no other business was transacted at this "meeting" (p. 54, ll. 38-40). No notice was given of this "meeting" (p. 55, l. 1). Kanengeiser's brother telephoned him, saying that the secretary had called a meeting (p. 55, l. 15). There is no evidence that anybody, except Louis Kanengeiser and the secretary, attended this "meeting".

There is no evidence that the complainant corporation kept any minutes.

The corporation had no by-laws which defined the authority and duties of its vice president, Louis Kanengeiser, Kanengeiser was allowed to manage the affairs of the corporation and to direct and control the business of the company. Kanengeiser represented the complainant in all of the business dealings between defendants and complainant corporation.

The garage business on the mortgaged premises was purchased by the defendants from David Kaess on the same day that Kaess purchased it from complainant (p. 31, ll. 12-18).

The complainant had promised to install a proper sprinkler system, but had not done so at the time the defendants purchased the garage (p. 31, l. 35). On the day after the defendants purchased the garage, the Building Department served a notice that the sprinkler system was not acceptable. This notice was served on the complainant, and was then delivered to the defendant Ostroff. He immediately got in touch with Kanengeiser (p. 31, l. 35 to p. 32, l. 8). Arrangements about the sprinkler system were made with Kanengeiser, representing complainant (p. 38, ll. 4-11; p. 39, l. 33; p. 51, l. 11). Kanengeiser admits this (p. 56, l. 10).

In the month of January, 1926, when defendants took possession of the garage, Kanengeiser authorized defendant Ostroff to collect the accounts due to the complainant (p. 37, ll. 10-18). In March, 1926, the accounts were adjusted between Kanengeiser and the defendant Ostroff, and said defendant gave Kanengeiser a check to the order of the complainant (p. 37, ll. 20-30).

Kanengeiser admits that he met Cohn in March to straighten out these accounts (p. 56, l. 25).

The defendant Ostroff spoke to Kanengeiser over the telephone on July 7, 1926, and arranged with him about payment of the interest which became due on July 1 (p. 34, ll. 16-20; p. 35, ll. 11-20).

The uncontradicted testimony of Julius A. Rose, the real estate broker who effected the sale of the mortgaged premises from the complainant to the defendants (p. 46, ll. 25-30), was that Louis Kanengeiser represented the complainant corporation in negotiating the sale of the mortgaged premises, and all of the conversation concerning the terms of sale was with said Kanengeiser (p. 47, l. 15). Mr. Rose placed insurance on said premises, also on other property of the complainant (p. 48, l. 25). These insurance transactions were carried on "mostly with Mr. Kanengeiser" (p. 48, l. 18).

The complainant was bound by the act of Kanengeiser in extending the time for payment of the taxes, because Kanengeiser was allowed to manage the affairs of the complainant, and to direct and control its business.

Stokes v. *New Jersey Pottery Co.*, 46 Law 237;

Fifth Ward Savings Bank v. *First National Bank*, 48 Law 513;

Crossley v. *St. Philip Neri.* 74 Law 653;

Dierkes v. *Hauxhurst Land Co.*, 80 Law 369;

Murphy v. *W. H. & F. W. Cane, Inc.,* 82 Law 557;
Finance Corp. of New Jersey v. *Jones,* 97 Law 106.

In *Stokes* v. *New Jersey Pottery Co.,* 46 Law 237, it was held, at page 242:

> "There are cases in which the powers of an officer of a corporation, and his authority to act for the company, are enlarged beyond those powers which are inherent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Taylor on Corp. 202, 236-244; Ang. & A. on Corp., 299-302. Thus, when, in the usual course of the business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. Martin v. Webb, 110 U. S. 7. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases, as is said by Mr. Taylor, the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing. Taylor on Corp. 202. * * *"

In *Fifth Ward Savings Bank* v. *First National Bank,* 48 Law 513, at p. 527, the Court of Errors and Appeals stated:

> "There are cases in which the powers of an officer of a corporation and his authority to act for the company are enlarged beyond those powers which are inherent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Thus, when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases, the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing. Stokes v. New Jersey Pottery Co., 17 Vroom 237, 242; Martin v. Webb, 110 U. S. 7; Commercial Ins. Co. v. Union Mutual, 19 How. 318; Mining Co. v. Anglo-Californian Bank, 14 Otto 192; Taylor on Corp. Secs. 202, 236, 244; Ang. & A. on Corp., 229, 302."

In *Crossley* v. *St. Philip Neri,* 74 Law 653, at page 655 appears the following language:

> "We think the case was properly disposed of. In the absence of a statutory prohibition or limitation upon the authority of the agent (and there is none such in the present case) authority may be conferred by parol, and may be inferred from circumstances or implied from the acquiescence of the corporation or its

managers in a general course of business. Martin v. Webb, 110 U. S. 7; Stokes v. New Jersey Pottery Co., 17 Vroom 237, 242."

In *Dierkes* v. *Hauxhurst Land Co.,* 80 Law 369, the language employed by the Court, at the bottom of page 374, is as follows:

"* * * And as the fact of agency and the extent of the authority are matters peculiarly within the knowledge of the defendant, the courts have not compelled plaintiff to call hostile witnesses to prove this element of his case, but it may be inferred from certain facts and circumstances that would fairly give rise to such an inference. It is stated, in 31 Cyc. 1662, that 'as a general rule the fact of agency cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same, if unauthorized, the acts themselves are competent evidence of agency.' This, it will be observed, is not on the theory of estoppel in favor of a party contracting with the supposed agent because the conduct of the principal amounted to holding him out as such agent, but is a rule of evidence, permitting a jury to find agency as a fact and not merely estoppel to deny it."

See also page 377, as follows:

"We consider the rule applied in these cases to be a sound one and applicable in the present case; that from the habitual conduct of Wallace in ejecting trespassers through this protracted period, and the necessarily open manner of his doing so, the jury was entitled to infer that such conduct must have come to the knowledge of his employer, the defendant, and that having that knowledge and tacitly

permitting the conduct to continue, the defendant assented to its further continuance in protection of its property, thus impliedly authorizing Wallace to eject the plaintiff; and if in so doing he used unnecessary force, the defendant, under authorities already cited, was responsible for resulting damage."

The case of *Murphy* v. *W. H. & F. W. Cane, Inc.,* 82 Law 557, was also a case where the complainant corporation had no by laws, just as in the present case. At page 559, the Court said:

"* * * It would seem proper, therefore, that a company organized under this act should by its by-laws establish and define the authority of the president. But the defendant company had no by-laws, or at least the jury could reasonably so find from the entries in the minutes presently to be mentioned."

Concerning the authority of an officer who has been allowed to manage the affairs of a corporation, the Court said (at bottom of p. 559):

"But we think the present record contains abundant evidence from which the jury might reasonably find that Mr. William H. Cane, the president of the company, was authorized to represent it generally in the making of such contracts as that upon which the plaintiff relies, and therefore that this contract was within the scope of his agency. We do not find it necessary to determine whether the Supreme Court, in setting aside the verdict rendered at the first trial, took an erroneous view of the evidence that was before it. For the minutes of the company that were introduced in evidence upon the second trial presented the case in a very different aspect. From Mr. William H. Cane's own testimony it was to be gathered that the company was incorporated in 1904 to take over the business of a partnership firm that had for many years been conducted in the name of W. H. & F. W. Cane; that from its

incorporation the company had undertaken and executed many large building contracts; and that he as president of the company signed the contracts and superintended the work that was carried on under them. It is true that he testified that the contracts were awarded by the 'board of directors,' consisting of W. H. Cane, the president; his father, F. W. Cane, the treasurer; and Mr. Wills, the secretary of the company. But he did not testify to any formal resolution adopted by the so-called 'directors,' it being admitted that no minutes of their meetings were kept. It was reasonable to infer that there were informal conferences rather than meetings, and that they resulted in advice rather than more formal action."

Referring to the fact that said corporation was a "close corporation," the Court, at the bottom of page 561, said:

"From all this it seems to us that a jury might reasonably infer that this was a 'close corporation,' numbering at first three and afterwards only five stockholders, and that by common consent they dispensed with the adoption of any by-laws for the company and waived the election of directors, the stockholders themselves acting as de facto directors. That the stockholders knew the company was carrying on a successful business is to be inferred from the submission of annual statements and the declaration of dividends. And because of the fact that the stockholders elected and re-elected Mr. W. H. Cane as president, and refrained from establishing by-laws for prescribing his powers and authority or for regulating the mode in which the business of the company should be conducted, it seems to us the more reasonable to infer from the entire course of business that the company intended to confer upon him such authority as he is shown to have customarily exercised.

"In Stokes v. New Jersey Pottery Co., 17 Vroom 237, 242, Mr. Justice Depue, speaking

for the Supreme Court said: 'There are cases in which the powers of an officer of a corporation, and his authority to act for the company, are enlarged beyond those powers which are inherent in his office; but those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the control and direction of the business of the company. Taylor Corp. 202, 236, 244; Ang. & Ames Corp., Secs. 299, 302. Thus, when, in the usual course of business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. Martin v. Webb, 110 U. S. 7. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations.

"This language was reiterated by the same distinguished judge in delivering the opinion of this court in Fifth Ward Savings Bank v. First National Bank, 19 Vroom 513, 517, and has since been treated as an authoritative statement of the law upon this subject."

See also page 563, as follows:

"The language employed by Mr. Justice Depue was that the authority of the officer to represent the corporation may be implied (we would prefer to say *inferred*) 'from the manner in which he has been permitted by the directors to transact its business.' It is of course a necessary corollary that where there are no directors de jure the agency may be created in favor of third parties by the conduct of the directors de facto, and that where the functions

normally pertaining to a board of directors are in the particular instance performed by the stockholders themselves, they by common consent dispensing with the election of directors, the agency for the company may result as clearly as if action by a board of directors had intervened, for such directors would themselves be no more than agents for the body of stockholders.

"For these reasons it seems to us that the trial judge, instead of granting a nonsuit, should have submitted to the jury the question whether, under all the evidence, it was to be inferred that Mr. William H. Cane had been clothed by the defendant company with authority to represent it in the making of such contracts as the contract alleged by the plaintiff as the ground of his action."

In *Finance Corp. of New Jersey* v. *Jones,* 97 Law 106, the Court said (beginning at the last line of page 110):

"* * * In the absence of a statutory prohibition or limitation upon the authority of an agent (there being none in the present case), authority may be conferred by parol, and may be inferred from circumstances or implied from the acquiescence of the corporation or its managers in a general course of business. Crossley v. St. Philip Neri, 74 N. J. L. 653."

If, as complainant is forced to contend, Kanengeiser acted within the scope of his authority in holding the alleged meeting at noon time of July 1 with the secretary—a meeting of which there was no notice, according to Kanengeiser's own testimony (p. 55, l. 1)—and passing a resolution foreclosing this mortgage (p. 55, l. 12), it is difficult to see how complainant can possibly maintain that Kanengeiser was not acting within the scope of his authority when he agreed with the defendants to a mere waiver of payment of taxes within the thirty day period provided for in the mortgage.

POINT III.

The pretended exercise of complainant's option to foreclose the mortgage for non-payment of taxes was premature and void.

The mortgage provides that the whole principal sum shall, at the option of the holder of the mortgage, become due after default in the payment of any taxes for thirty days (p. 71, ll. 28-32).

By statute (P. L. 1918, Ch. 226, Sec. 6, at page 821) this default clause is construed to mean that, should any tax become due and remain *unpaid and in arrears for thirty days, then, and from thenceforth, that is to say, after the lapse or expiration of said period,* the principal and interest shall, *at the option of the mortgagee,* become due and payable.

The only evidence that the complainant exercised an option to declare the mortgage due, was the testimony of Louis Kanengeiser that he and the secretary held a "meeting" *at noon time* on July 1, and decided to foreclose this mortgage for non-payment of taxes (p. 53, l. 30).

These taxes became due on June 1 (p. 4, l. 33). The mortgage provides that the taxes may remain unpaid and in arrears for thirty days. This gave the defendants the right to pay these taxes at any time before *midnight* on July 1. The statute declares that "then, and from thenceforth, that is to say, *after the lapse or expiration of said period*" (midnight of July 1) the complainant could exercise its option to declare the principal and interest due because of non-payment of the taxes.

Therefore, the pretended exercise of this option *at noon time* on July 1, by Louis Kanengeiser and the secretary of the complainant corporation, was

premature and void. The complainant undoubtedly realized this fact, and for that reason the resolution which Kanengeiser says he and the secretary passed at noon time on July 1 (p. 53, l. 33) was not produced or offered in evidence.

On July 1, at noon time, Kanengeiser and the secretary of the complainant had a "meeting", and the secretary notified Melosh, Morten & Melosh to foreclose for non-payment of taxes and water rents (p. 53, ll. 1-18).

Melosh, Morten & Melosh proceeded to make the necessary foreclosure searches in the offices of the Register and County Clerk of Hudson County. They prepared the foreclosure bill, and mailed it to Trenton on July 2, it being received in the Clerk's office there, and filed on July 3 (p. 1, l. 1).

Complainant's right to exercise its option to declare a forfeiture for non-payment of taxes, did not accrue until after midnight on July 1. Subsequent thereto, the complainant did not exercise such option, nor did it take any action whatever for the purpose of declaring the mortgage forfeited. The filing of the bill of complaint on July 3 was not the exercise of such option, because Melosh, Morten & Melosh were never authorized by the complainant corporation to file the bill. The complainant never ratified the action of the secretary in notifying Melosh, Morten & Melosh to foreclose for non-payment of taxes. Apparently, none of the officers of the corporation knew that the secretary had taken it upon himself to so engage Melosh, Morten & Melosh. Kanengeiser swears that he did not know that the mortgage was being foreclosed until about July 4, 5 or 6 (p. 52, l. 25) and that Melosh, Morten & Melosh told him about the foreclosure (p. 52, ll. 27-31); and Kanengeiser swears "That is the first I knew it is being foreclosed" (p. 52, l. 35).

Even after Kanengeiser became aware of the fact that the mortgage was being foreclosed, there was never any meeting of the corporation to ratify the action of the secretary in engaging Melosh, Morten & Melosh to institute the foreclosure proceedings. As the tax and water rents were paid on July 29, the corporation could not thereafter declare a forfeiture, nor could it ratify the action of the secretary in instituting foreclosure proceedings.

CONCLUSION.

The complainant having waived payment of the taxes within the thirty day period, and the taxes and water rents having been actually paid by the Franks Centre Garage, Inc., on July 29, 1926 (p. 40, l. 35 to p. 41, l. 6), so that there has been no impairment of the security of the complainant's mortgage, and all installments of principal and interest having been tendered and refused (p. 29, ll. 20-30), it is respectfully submitted that the decree of the Court of Chancery should be reversed and the bill of complaint dismissed.

AARON A. MELNIKER,
Solicitor and of Counsel with the
Defendants-Appellants.

(9968)

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New Jersey
Court of Errors and Appeals

K. S. S. Realty Company, Inc., Complainant-Appellee, vs. Albert Ostroff, et als, Defendants-Appellants.	Appeal from Court of Chancery.

BRIEF FOR DEFENDANTS-APPELLANTS.

Statement of Facts.

The complainant filed its bill to foreclose a mortgage for $75,000.00 on a leasehold of a garage in Jersey City. The mortgage is dated December 29, 1925, and is payable August 18, 1929, with an option to the mortgagors to extend it for a further period of two and one-half years, making an aggregate term of upwards of six years.

The mortgage provides for the payment of quarterly installments of $1250.00 on account of principal to be paid on the first days of January, April, July and October of each year. The April installment was paid, and the subsequent installments were tendered and refused. The mortgage provides that the whole principal sum shall, at the option of the mortgagee, become due after default in payment of any installment of principal or interest for thirty days, or after default in payment of any tax, water rent or assessment for thirty days.

The bill of complaint alleges that the taxes for the period from January 1 to July 1, 1926, amounting to $1,495.07 became due on June 1, 1926, and that a water bill of $35.64 became due on May 25, 1926; and that said sums remained unpaid for more than thirty days, and that complainant has elected that the whole principal sum shall be now due. The defendants admit the non-payment of these items, but say that they were induced not to pay these taxes and water rents within such thirty day period by Louis Kanengeiser, the authoriezd agent of the complainant corporation. Defendants also say that the complainant's exercise of its alleged option to declare a forfeiture was premature and void.

On or about June 11, 1926, within the thirty day period after said taxes became due, the defendants exhibited to the said Louis Kanengeiser said tax and water bills, and discussed with said Kanengeiser the advisability of taking an appeal from the assessment for taxes, to the Hudson County Board of Taxation, with the view of reducing the assessed valuation of the property and, consequently, the amount of taxes. The said Kanengeiser advised defendants to take such appeal, and they thereupon filed notice of appeal.

The defendants asked said Kanengeiser whether they should pay the taxes immediately or wait until the termination of said appeal by the Hudson County Board of Taxation. Said Kanengeiser told defendants not to pay the taxes until the appeal was determined, and said that the complainant would waive the payment of said taxes within the thirty day period provided in said mortgage.

At the time when the defendants exhibited said tax bill to said Kanengeiser on June 11, as aforesaid, the defendants also showed to said Kanengeiser the said water bill and asked him whether

they should pay it at that time, or wait until they paid the tax bill. Said Kanengeiser told defendants to pay both tax and water bills together, after determination of the appeal by the Hudson County Board of Taxation.

After this conversation of June 11 between said Kanengeiser and the defendants, in which the said Kanengeiser told defendants that they need not pay the taxes until after the determination of said appeal, the secretary of the complainant corporation was watching to see whether the taxes were paid before July 1 (p. 55, l. 19).

A day or two *before* July 1 (p. 55, l. 7) Louis Kanengeiser was notified by his brother that the secretary had called a special meeting for July 1, for the purpose of foreclosing this mortgage (p. 55, ll. 10-18). The "meeting" was held by Louis Kanengeiser and the secretary at *noon time,* July 1 (p. 56, l. 30). No other business was transacted at this "meeting".

The bill to foreclose was filed on July 3, 1926, being six months and five days after the execution of this $75,000.00 mortgage, which had six years to run.

The defendants admit that the taxes became a lien on June 1, 1926; but say that the thirty day period during which said taxes could be paid did not expire until July 1 at midnight. Therefore, the complainant's pretended exercise at *noon time* on July 1, of its option to declare a forfeiture was premature and void. Defendants deny that the water bill became a lien on May 25, 1926.

The learned Vice Chancellor has found that the water bill was not a lien upon the premises on May 25. Therefore, the only questions involved in this appeal are: First: Whether such conduct on the part of Louis Kanengeiser precluded complainant from foreclosing said mortgage for failure

to pay the taxes for thirty days after they became due, the defendants having relied upon Kanengeiser's agreement to waive payment of said taxes until the determination by the Hudson County Board of Taxation of the appeal which said Kanengeiser advised the defendants to take. Second: Whether on July 1st *at noon time* the complainant could, and did, legally exercise its option to foreclose this mortgage for non-payment of taxes which were not in default until July 1 *at midnight.*

POINT I.

Payment of the taxes within thirty days after they became due was waived by agreement made within the said thirty day period.

On June 1, 1926, the defendant Ostroff went to the city hall and obtained the tax and water bills (p. 32, l. 25 to p. 33, l. 2). He considered the assessed valuation too high (p. 33, l. 3); and subsequently took up the matter with Louis Kanengeiser, who was the vice president of the complainant and managed its affairs, and told Kanengeiser the defendants were about to appeal from the assessment (p. 33, l. 8). This conversation with Kanengeiser took place on June 11, 1926 (p. 33, l. 18; p. 39, ll. 13-20).

The defendant Ostroff asked Kanengeiser whether the complainant would waive the thirty day period provided in the mortgage for the payment of the taxes, as defendants were about to appeal—and it would take a few weeks until the appeal was determined. The defendants asked Kanengeiser if he had any objection to the payment of the taxes at the time when the "reply" from the appeal was due.

Kanengeiser said that the complainant corporation would not have any objection at all, and that they would not stand in the way of the appeal, and he told Ostroff to "Go right to it" (p. 33, ll. 30-40). Ostroff had the water bill with him at the time, and showed this bill to Kanengeiser, and asked whether he should pay the water bill at that time. Kanengeiser answered "It don't make any difference; just wait. When you pay the other, pay all of them at the same time" (p. 34, ll. 1-15).

After this conversation of June 11, 1926, and on June 14, the defendants filed notice of appeal from the assessment for taxes to the Hudson County Board of Taxation (p. 38, ll. 12-18). The appeal was not decided until August 9, 1926, which was after the foreclosure proceedings were instituted (p. 38, ll. 19-29. See Exhibit D1 printed at end of State of the Case).

The defendant Cohn was present on June 11, at the conversation between the defendant Ostroff and the said Kanengeiser (p. 39, ll. 13-18). Cohn and Ostroff went together to see Mr. Kanengeiser (p. 30, l. 25).

Ostroff told Kanengeiser that the taxes were a little too high, and Kanengeiser answered that they were (p. 39, l. 38). Kanangeiser told Ostroff to take an appeal (p. 40, l. 2). Ostroff asked Kanengeiser whether there would be any objection to the non-payment of the taxes within the thirty day period, and Kanengeiser answered: "Why no; I am not as little as that. You go right ahead and make your appeal" (p. 40, ll. 4-8).

Kanengeiser told Ostroff to pay the tax and water bills together (p. 40, l. 10). Kanengeiser told Ostroff that everything is all right, and said: "We are not small people about paying to the minute and making any complaints" (p. 40, ll. 13-16).

There was no cross-examination of either of the defendants Ostroff or Cohn, and no attempt whatever was made to impeach their testimony.

The only evidence introduced by the complainant to contradict this testimony of the defendants Ostroff and Cohn was the categorical denial of Louis Kanengeiser (p. 49, ll. 25-40), his entire testimony in this respect consisting of the words "Never" and "No sir."

On cross-examination, Kanengeiser was shown to be utterly unworthy of belief. He testified that on July 7, Ostroff telephoned to him and said "What's the idea of foreclosing that mortgage" (p. 50, ll. 16-18; p. 52, l. 13). The date of that conversation was July 7, (p. 50, l. 25; p. 51, ll. 21-40).

The fact is that the subpoenas were dated July 9—two days after this conversation. Ostroff was not served with this subpoena until July 12; and prior to that time he had no knowledge or intimation that there was a foreclosure proceeding pending (p. 35, l. 38 to p. 36, l. 12). Ostroff testified that nothing was said by either him or Kanengeiser about any foreclosure on the occasion of the telephone conversation of July 7, (p. 63, ll. 9-12).

In his affidavit filed in this case, verified Sept. 22, 1926, in referring to the conversation with Ostroff over the telephone on July 7, Kanengeiser did not say anything about Ostroff having said "Why did you foreclose the mortgage?" (p. 57, l. 27). Kanengeiser said he never said to anybody before the day of the trial that Ostroff asked him "What about the foreclosure?" (p. 58, l. 30; p. 60, ll. 1-2). When asked why he did not tell his solicitor, Mr. Morten, about this matter, he finally said he told Mr. Morten around July 14 or 15 that Ostroff said "What's the idea of this foreclosure?" (p. 60, ll. 31-35). Kanengeiser does not know why it was not put in his affidavit (p. 60, l. 40 to p. 61, l. 15).

When Kanengeiser's attention was called to page three of his affidavit, in which he said that during the telephone conversation with Ostroff on July 7, he did not tell Ostroff about the foreclosure but that this information was given to Ostroff and Cohn on *July 14,* Kanengeiser said he did not remember saying that, and that he could not remember that at all (p. 61, ll. 15-29). He does not even remember whether he ever met Ostroff on a tube train in Jersey City (p. 61, l. 31 to p. 62, l. 2).

Kanengeiser said that on July 1, at noon time, he decided to foreclose this mortgage for non-payment of taxes and water rents (p. 53, ll. 12-18). Asked when the taxes were supposed to be paid, he answered: "I don't remember now" (p. 53, l. 38). He did not know how long he had to wait before he could foreclose for non-payment of taxes (p. 54, ll. 4-13); although he said there was a discussion about that, and that he voted on a resolution to foreclose for non-payment of taxes (p. 54, ll. 15-18). At that time he did not know that payment of taxes was thirty days overdue (p. 54, ll. 35-36), although he says that there was a special meeting called for the purpose of declaring a forfeiture for non-papment of these taxes for thirty days (p. 54, ll. 38-40).

Manifestly, Kanengeiser told an untruth when he testified that Ostroff said anything to him on July 7 over the telephone about the foreclosure of this mortgage. Consequently, it is a fair conclusion that if he testified falsely in this respect, he would also falsify in respect to the agreement to waive payment of the taxes within the thirty day period.

In contrast with this untruthful testimony of Kanengeiser—the complainant's only witness—is the fact that the testimony of the three witnesses for the defendant was not discredited in any particular.

The defendant Franks Centre Garage, Inc. took possession of this garage on May 1, 1926 (p. 41, l. 17), under an agreement to take title (p. 45, l. 30). Title was actually taken about July 3, 1926 (p. 41, l. 26). The officers of the complainant knew that the Franks Centre Garage, Inc. was in possession under a contract to purchase (p. 42, l. 20). Samuel Kanengeiser was there about the middle of May, 1926 (p. 42, l. 34), and Harry Starr was in the garage in June (p. 43, ll. 1-18). Mr. Kanengeiser figured out how much profit the defendants were alleged to have made on the deal (p. 44, l. 13), and said that it was too much, and that the defendants were not entitled to it (p. 44, l. 15).

Feeling that upon the sale of the premises to the Franks Centre Garage, Inc., the defendants had made a greater profit than they were entitled to, the complainants deliberately set about to find means by which they could get from the defendants some of this alleged profit. The foreclosure of this $75,000.00 mortgage was the only way by which this could be accomplished. The whole company spoke about a foreclosure (p. 52, ll. 36-40). If this mortgage could be foreclosed, the complainant would get back the property which had been sold just six months before for $140,000.00; or complainant could get the $75,000.00 in cash immediately, although this amount was not payable for about 6 years.

When the defendants spoke to Kanengeiser on June 11, about appealing from the taxes, Kanengeiser immediately saw the opportunity for which the complainant had been waiting. He advised the defendants to take an appeal from the taxes, and told them that the taxes for the first half of 1926 need not be paid until the appeal was determined. He was in the real estate business (p. 62, l. 3), and knew that the appeal would not be decided by the County Board in the ordinary course of business until after July 1—at which time the thirty day period for the payment of taxes would have expired. Kanengeiser having thus lulled the defendants into a sense of security by stating that no advantage would be taken of the failure to pay the taxes within the thirty days period, the secretary of the complainant was charged with the duty of watching to see whether the taxes were paid within the thirty day period (p. 55, ll. 19-21).

The thirty day period for the payment of taxes did not expire until July 1 at midnight. Had there been no agreement made between the defendants and Kanengeiser, waiving the payment of the taxes within the thirty day period, the secretary could not possibly have known until after July 1 whether the defendants had paid these taxes within such thirty day period. Yet Kanengeiser swears (p. 55, ll. 7-11) that "A couple of days, or a day or two before" July 1, he received a telephone message to be present at noon time on July 1 (p. 53, l. 13) for the purpose of declaring the mortgage forfeited for non-payment of the taxes due June 1. The defendants had until midnight of July 1, to pay these taxes, yet at noon time on July 1, Kanengeiser and the secretary of the complainant held a "meeting" and decided to foreclose the mortgage for non-payment of the taxes (p. 53, l. 30).

How could Kanengeiser and the secretary of the company anticipate that the taxes would not be paid before midnight of July 1, unless Kanengeiser had told the defendants that the taxes need not be paid until the appeal was determined? This proves conclusively that Kanengeiser was not telling the truth when he said that he never spoke to the defendants about payment of the taxes before the bill of complaint was filed (p. 49, l. 35). The

bill was filed *July 3* and not *June 3,* as stated in the last line on page 49.

The defendant Ostroff was in the real estate business (p. 30, ll. 15-20). Therefore, he knew the difficulty and tremendous expense involved in procuring a new $75,000.00 mortgage upon a leasehold, to run for six years. Unless Kanengeiser had told him the payment of the taxes would be waived until the appeal was decided by the Hudson County Board of Taxation, Ostroff would certainly not have defaulted in the payment of the taxes amounting to $1495.07, when he knew that such default wold result in a foreclosure of this large mortgage.

There can be no doubt whatever that Kanengeiser told the defendants that the taxes need not be paid until the determination of the appeal by the Hudson County Board of Taxation.

Not only is a forfeiture abhorent to equity, but the courts of equity have stated and reiterated that no forfeiture will be enforced if occasioned by the act of the party seeking to enforce it.

> *DeGroot* vs. *McCotter,* 19 Equity 531;
> *Davis* vs. *Salem County Mutual Fire Ins. Co.,* 85 Equity 324;
> *Newark Trunk Company* vs. *Clark,* 94 Equity 79.

The latter case refers to decisions in other States which have gone so far as to relieve a mortgagor from the effect of a forfeiture for failure to pay the taxes, where the taxes were paid even after suit was commenced, thereby restoring the security.

In *DeGroot* vs. *McCotter,* 19 Equity 531, the Court of Errors and Appeal said (at p. 533):

> "* * * On the other hand, if the default or omission to pay the interest within thirty days after it became due, was the result of honest mistake or misapprehension, into which the

defendant was led by the acts or declarations of the complainant, a court of equity will not, under such circumstances, hold the failure to pay, a forfeiture of the credit. If the complainant failed to call at the time and place appointed for payment of his interest, and by reason of such failure the defendant was not able to make payment within the precise time fixed, equity will not consider the defendant as in default. He has an excuse for non-payment, which will, in a court of equity, be regarded as valid, though by the condition of the bond time is of the essence of the contract. In the case before us, a court of equity will, contrary to the general rule, enforce a forfeiture if incurred, yet there must have been a 'default', according to the meaning of that term as used in the condition of the bond. If the complainant has given further day of payment, or in any other way waived the payment, according to the letter of the bond, the default contemplated and provided against has not happened. In the case of Albert v. Grosvenor Investment Co., 3 Law Rep. (Court of Queen's Bench) 123, it was held at law, that there had been no default in payment of a mortgage, similar to that now in question, where an extension of time of payment had been given by parol. The Chief Justice in his opinion in that case says: 'I see nothing which goes to show that, if by the consent of the person who is to receive payment the time of payment is extended, the omission to pay within the time specified must be a "default" within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default.'

"It is not now necessary to determine whether the agreement by parol can be admitted to change the legal effect and operation of the writing under seal. The question here is, whether the default has happened, if the omis-

sion to pay was caused by the defendant's reliance in good faith on the parol agreement. I cannot see how the complainant can conscientiously insist on a forfeiture, when all the defendant did, or rather omitted to do, was in pursuance of a previous agreement between him and the complainant. * * *"

In *Davis* vs. *Salem County Mutual Fire Ins. Co.*, 85 Equity 324, the following language is used (see p. 327):

"The question of waiver of a contractual right of forfeiture by reason of the conduct or course of dealing of the party enjoying the right has given rise to a great diversity of views in insurance cases. Many cases will be found collected in 2 May Ins. 358, 361, 363, and 19 Cyc. 789, 801. The rule is stated in 19 Cyc. 789, as follows:

'It may be stated as a general rule, that the insurer is deemed to have waived the performance of conditions precedent or subsequent when in good conscience he ought not to be heard to assert them, as when by reason of his conduct he has led the insured to believe that they would not be insisted upon.'

"The rule thus broadly stated may perhaps be doubted when applied to acts or conduct contemporaneous with the execution of the contract; but cannot be doubted as a sound principal of equity when applied to future acts.

"Somewhat analogous situations have arisen in this state in mortgage foreclosures in cases in which the condition of the bond authorized the mortgagee to declare the whole debt due by reason of a default in the payment of an interest installment. These provisions are treated as stipulations for a period of credit on condition of prompt interest payment, rather than as clauses of forfeiture (Spring v. Fisk, 21 N. J. Eq. 175, 178; Bergman v. Fortescue, 74 N. J. Eq. 266, 269), but our court of errors and appeals has held that if the default or omission to pay interest within the time

specified was the result of honest mistake or misapprehension, into which the mortgagor was led by the acts or declarations of the mortgagee, a court of equity will not, under such circumstances, hold the failure to pay operative as a forfeiture of the future credit. DeGroot v. McCotter, 19 N. J. Eq. 531."

POINT II.

In extending the time for the payment of the taxes, complainant's agent Kanengeiser acted within the scope of his authority.

The complainant, the K. S. S. Realty Company, Inc., was a close corporation. It consisted of Harry Starr, President; Louis Kanengeiser, vice president; Mr. Silverman, secretary, and Samuel Kanengeiser, treasurer (p. 50, l. 38 to p. 51, l. 1).

Louis Kanengeiser is in the real estate business (p. 62, l. 3). He is the oldest member of the complainant corporation (p. 47, l. 15). Therefore, it is only natural that the complainant corporation (which, as its name indicates, is engaged in the real estate business) should allow him to manage and direct its affairs. In fact, the other officers of the complainant corporation were actually present in court at the hearing (p. 31, l. 5), but they took no part in the proceeding. None of them was even called as a witness to prove that Louis Kanengeiser had no authority to represent the complainant corporation, and to manage its affairs, and to waive the payment of the taxes.

There is no evidence that the complainant corporation had any directors. There is no evidence that the corporation ever held any meetings—except upon the one occasion at noon time on July 1,

when the secretary and Louis Kanengeiser held a "meeting" at which they decided to foreclose this mortgage (p. 53, l. 28). This "meeting" was called for the sole purpose of foreclosing the mortgage, and no other business was transacted at this "meeting" (p. 54, ll. 38-40). No notice was given of this "meeting" (p. 55, l. 1). Kanengeiser's brother telephoned him, saying that the secretary had called a meeting (p. 55, l. 15). There is no evidence that anybody, except Louis Kanengeiser and the secretary, attended this "meeting".

There is no evidence that the complainant corporation kept any minutes.

The corporation had no by-laws which defined the authority and duties of its vice president, Louis Kanengeiser. Kanengeiser was allowed to manage the affairs of the corporation and to direct and control the business of the company. Kanengeiser represented the complainant in all of the business dealings between defendants and complainant corporation.

The garage business on the mortgaged premises was purchased by the defendants from David Kaess on the same day that Kaess purchased it from complainant (p. 31, ll. 12-18).

The complainant had promised to install a proper sprinkler system, but had not done so at the time the defendants purchased the garage (p. 31, l. 35). On the day after the defendants purchased the garage, the Building Department served a notice that the sprinkler system was not acceptable. This notice was served on the complainant, and was then delivered to the defendant Ostroff. He immediately got in touch with Kanengeiser (p. 31, l. 35 to p. 32, l. 8). Arrangements about the sprinkler system were made with Kanengeiser, representing complainant (p. 38, ll. 4-11; p. 39, l. 33; p. 51, l. 11). Kanengeiser admits this (p. 56, l. 10).

In the month of January, 1926, when defendants took possession of the garage, Kanengeiser authorized defendant Ostroff to collect the accounts due to the complainant (p. 37, ll. 10-18). In March, 1926, the accounts were adjusted between Kanengeiser and the defendant Ostroff, and said defendant gave Kanengeiser a check to the order of the complainant (p. 37, ll. 20-30).

Kanengeiser admits that he met Cohn in March to straighten out these accounts (p. 56, l. 25).

The defendant Ostroff spoke to Kanengeiser over the telephone on July 7, 1926, and arranged with him about payment of the interest which became due on July 1 (p. 34, ll. 16-20; p. 35, ll. 11-20).

The uncontradicted testimony of Julius A. Rose, the real estate broker who effected the sale of the mortgaged premises from the complainant to the defendants (p. 46, ll. 25-30), was that Louis Kanengeiser represented the complainant corporation in negotiating the sale of the mortgaged premises, and all of the conversation concerning the terms of sale was with said Kanengeiser (p. 47, l. 15). Mr. Rose placed insurance on said premises, also on other property of the complainant (p. 48, l. 25). These insurance transactions were carried on "mostly with Mr. Kanengeiser" (p. 48, l. 18).

The complainant was bound by the act of Kanengeiser in extending the time for payment of the taxes, because Kanengeiser was allowed to manage the affairs of the complainant, and to direct and control its business.

Stokes v. *New Jersey Pottery Co.*, 46 Law 237;

Fifth Ward Savings Bank v. *First National Bank*, 48 Law 513;

Crossley v. *St. Philip Neri.* 74 Law 653;

Dierkes v. *Hauxhurst Land Co.*, 80 Law 369;

Murphy v. *W. H. & F. W. Cane, Inc.,* 82 Law 557;
Finance Corp. of New Jersey v. *Jones,* 97 Law 106.

In *Stokes* v. *New Jersey Pottery Co.,* 46 Law 237, it was held, at page 242:

> "There are cases in which the powers of an officer of a corporation, and his authority to act for the company, are enlarged beyond those powers which are inherent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Taylor on Corp. 202, 236-244; Ang. & A. on Corp., 299-302. Thus, when, in the usual course of the business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. Martin v. Webb, 110 U. S. 7. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases, as is said by Mr. Taylor, the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing. Taylor on Corp. 202. * * *"

In *Fifth Ward Savings Bank* v. *First National Bank,* 48 Law 513, at p. 527, the Court of Errors and Appeals stated:

> "There are cases in which the powers of an officer of a corporation and his authority to act for the company are enlarged beyond those powers which are inherent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Thus, when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases, the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing. Stokes v. New Jersey Pottery Co., 17 Vroom 237, 242; Martin v. Webb, 110 U. S. 7; Commercial Ins. Co. v. Union Mutual, 19 How. 318; Mining Co. v. Anglo-Californian Bank, 14 Otto 192; Taylor on Corp. Secs. 202, 236, 244; Ang. & A. on Corp., 229, 302."

In *Crossley* v. *St. Philip Neri,* 74 Law 653, at page 655 appears the following language:

> "We think the case was properly disposed of. In the absence of a statutory prohibition or limitation upon the authority of the agent (and there is none such in the present case) authority may be conferred by parol, and may be inferred from circumstances or implied from the acquiescence of the corporation or its

managers in a general course of business. Martin v. Webb, 110 U. S. 7; Stokes v. New Jersey Pottery Co., 17 Vroom 237, 242."

In *Dierkes* v. *Hauxhurst Land Co.,* 80 Law 369, the language employed by the Court, at the bottom of page 374, is as follows:

> "* * * And as the fact of agency and the extent of the authority are matters peculiarly within the knowledge of the defendant, the courts have not compelled plaintiff to call hostile witnesses to prove this element of his case, but it may be inferred from certain facts and circumstances that would fairly give rise to such an inference. It is stated, in 31 Cyc. 1662, that 'as a general rule the fact of agency cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same, if unauthorized, the acts themselves are competent evidence of agency.' This, it will be observed, is not on the theory of estoppel in favor of a party contracting with the supposed agent because the conduct of the principal amounted to holding him out as such agent, but is a rule of evidence, permitting a jury to find agency as a fact and not merely estoppel to deny it."

See also page 377, as follows:

> "We consider the rule applied in these cases to be a sound one and applicable in the present case; that from the habitual conduct of Wallace in ejecting trespassers through this protracted period, and the necessarily open manner of his doing so, the jury was entitled to infer that such conduct must have come to the knowledge of his employer, the defendant, and that having that knowledge and tacitly

> permitting the conduct to continue, the defendant assented to its further continuance in protection of its property, thus impliedly authorizing Wallace to eject the plaintiff; and if in so doing he used unnecessary force, the defendant, under authorities already cited, was responsible for resulting damage."

The case of *Murphy* v. *W. H. & F. W. Cane, Inc.,* 82 Law 557, was also a case where the complainant corporation had no by laws, just as in the present case. At page 559, the Court said:

> "* * * It would seem proper, therefore, that a company organized under this act should by its by-laws establish and define the authority of the president. But the defendant company had no by-laws, or at least the jury could reasonably so find from the entries in the minutes presently to be mentioned."

Concerning the authority of an officer who has been allowed to manage the affairs of a corporation, the Court said (at bottom of p. 559):

> "But we think the present record contains abundant evidence from which the jury might reasonably find that Mr. William H. Cane, the president of the company, was authorized to represent it generally in the making of such contracts as that upon which the plaintiff relies, and therefore that this contract was within the scope of his agency. We do not find it necessary to determine whether the Supreme Court, in setting aside the verdict rendered at the first trial, took an erroneous view of the evidence that was before it. For the minutes of the company that were introduced in evidence upon the second trial presented the case in a very different aspect. From Mr. William H. Cane's own testimony it was to be gathered that the company was incorporated in 1904 to take over the business of a partnership firm that had for many years been conducted in the name of W. H. & F. W. Cane; that from its

incorporation the company had undertaken and executed many large building contracts; and that he as president of the company signed the contracts and superintended the work that was carried on under them. It is true that he testified that the contracts were awarded by the 'board of directors,' consisting of W. H. Cane, the president; his father, F. W. Cane, the treasurer; and Mr. Wills, the secretary of the company. But he did not testify to any formal resolution adopted by the so-called 'directors,' it being admitted that no minutes of their meetings were kept. It was reasonable to infer that there were informal conferences rather than meetings, and that they resulted in advice rather than more formal action."

Referring to the fact that said corporation was a "close corporation," the Court, at the bottom of page 561, said:

"From all this it seems to us that a jury might reasonably infer that this was a 'close corporation,' numbering at first three and afterwards only five stockholders, and that by common consent they dispensed with the adoption of any by-laws for the company and waived the election of directors, the stockholders themselves acting as de facto directors. That the stockholders knew the company was carrying on a successful business is to be inferred from the submission of annual statements and the declaration of dividends. And because of the fact that the stockholders elected and re-elected Mr. W. H. Cane as president, and refrained from establishing by-laws for prescribing his powers and authority or for regulating the mode in which the business of the company should be conducted, it seems to us the more reasonable to infer from the entire course of business that the company intended to confer upon him such authority as he is shown to have customarily exercised.

"In Stokes v. New Jersey Pottery Co., 17 Vroom 237, 242, Mr. Justice Depue, speaking

for the Supreme Court said: 'There are cases in which the powers of an officer of a corporation, and his authority to act for the company, are enlarged beyond those powers which are inherent in his office; but those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the control and direction of the business of the company. Taylor Corp. 202, 236, 244; Ang. & Ames Corp., Secs. 299, 302. Thus, when, in the usual course of business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. Martin v. Webb, 110 U. S. 7. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations.

"This language was reiterated by the same distinguished judge in delivering the opinion of this court in Fifth Ward Savings Bank v. First National Bank, 19 Vroom 513, 517, and has since been treated as an authoritative statement of the law upon this subject."

See also page 563, as follows:

"The language employed by Mr. Justice Depue was that the authority of the officer to represent the corporation may be implied (we would prefer to say *inferred*) 'from the manner in which he has been permitted by the directors to transact its business.' It is of course a necessary corollary that where there are no directors de jure the agency may be created in favor of third parties by the conduct of the directors de facto, and that where the functions

normally pertaining to a board of directors are in the particular instance performed by the stockholders themselves, they by common consent dispensing with the election of directors, the agency for the company may result as clearly as if action by a board of directors had intervened, for such directors would themselves be no more than agents for the body of stockholders.

"For these reasons it seems to us that the trial judge, instead of granting a nonsuit, should have submitted to the jury the question whether, under all the evidence, it was to be inferred that Mr. William H. Cane had been clothed by the defendant company with authority to represent it in the making of such contracts as the contract alleged by the plaintiff as the ground of his action."

In *Finance Corp. of New Jersey* v. *Jones,* 97 Law 106, the Court said (beginning at the last line of page 110):

> "* * * In the absence of a statutory prohibition or limitation upon the authority of an agent (there being none in the present case), authority may be conferred by parol, and may be inferred from circumstances or implied from the acquiescence of the corporation or its managers in a general course of business. Crossley v. St. Philip Neri, 74 N. J. L. 653."

If, as complainant is forced to contend, Kanengeiser acted within the scope of his authority in holding the alleged meeting at noon time of July 1 with the secretary—a meeting of which there was no notice, according to Kanengeiser's own testimony (p. 55, l. 1)—and passing a resolution foreclosing this mortgage (p. 55, l. 12), it is difficult to see how complainant can possibly maintain that Kanengeiser was not acting within the scope of his authority when he agreed with the defendants to a mere waiver of payment of taxes within the thirty day period provided for in the mortgage.

POINT III.

The pretended exercise of complainant's option to foreclose the mortgage for non-payment of taxes was premature and void.

The mortgage provides that the whole principal sum shall, at the option of the holder of the mortgage, become due after default in the payment of any taxes for thirty days (p. 71, ll. 28-32).

By statute (P. L. 1918, Ch. 226, Sec. 6, at page 821) this default clause is construed to mean that, should any tax become due and remain *unpaid and in arrears for thirty days, then, and from thenceforth, that is to say, after the lapse or expiration of said period,* the principal and interest shall, *at the option of the mortgagee,* become due and payable.

The only evidence that the complainant exercised an option to declare the mortgage due, was the testimony of Louis Kanengeiser that he and the secretary held a "meeting" *at noon time* on July 1, and decided to foreclose this mortgage for non-payment of taxes (p. 53, l. 30).

These taxes became due on June 1 (p. 4, l. 33). The mortgage provides that the taxes may remain unpaid and in arrears for thirty days. This gave the defendants the right to pay these taxes at any time before *midnight* on July 1. The statute declares that "then, and from thenceforth, that is to say, *after the lapse or expiration of said period*" (midnight of July 1) the complainant could exercise its option to declare the principal and interest due because of non-payment of the taxes.

Therefore, the pretended exercise of this option *at noon time* on July 1, by Louis Kanengeiser and the secretary of the complainant corporation, was

premature and void. The complainant undoubtedly realized this fact, and for that reason the resolution which Kanengeiser says he and the secretary passed at noon time on July 1 (p. 53, l. 33) was not produced or offered in evidence.

On July 1, at noon time, Kanengeiser and the secretary of the complainant had a "meeting", and the secretary notified Melosh, Morten & Melosh to foreclose for non-payment of taxes and water rents (p. 53, ll. 1-18).

Melosh, Morten & Melosh proceeded to make the necessary foreclosure searches in the offices of the Register and County Clerk of Hudson County. They prepared the foreclosure bill, and mailed it to Trenton on July 2, it being received in the Clerk's office there, and filed on July 3 (p. 1, l. 1).

Complainant's right to exercise its option to declare a forfeiture for non-payment of taxes, did not accrue until after midnight on July 1. Subsequent thereto, the complainant did not exercise such option, nor did it take any action whatever for the purpose of declaring the mortgage forfeited. The filing of the bill of complaint on July 3 was not the exercise of such option, because Melosh, Morten & Melosh were never authorized by the complainant corporation to file the bill. The complainant never ratified the action of the secretary in notifying Melosh, Morten & Melosh to foreclose for non-payment of taxes. Apparently, none of the officers of the corporation knew that the secretary had taken it upon himself to so engage Melosh, Morten & Melosh. Kanengeiser swears that he did not know that the mortgage was being foreclosed until about July 4, 5 or 6 (p. 52, l. 25) and that Melosh, Morten & Melosh told him about the foreclosure (p. 52, ll. 27-31); and Kanengeiser swears "That is the first I knew it is being foreclosed" (p. 52, l. 35).

Even after Kanengeiser became aware of the fact that the mortgage was being foreclosed, there was never any meeting of the corporation to ratify the action of the secretary in engaging Melosh, Morten & Melosh to institute the foreclosure proceedings. As the tax and water rents were paid on July 29, the corporation could not thereafter declare a forfeiture, nor could it ratify the action of the secretary in instituting foreclosure proceedings.

CONCLUSION.

The complainant having waived payment of the taxes within the thirty day period, and the taxes and water rents having been actually paid by the Franks Centre Garage, Inc., on July 29, 1926 (p. 40, l. 35 to p. 41, l. 6), so that there has been no impairment of the security of the complainant's mortgage, and all installments of principal and interest having been tendered and refused (p. 29, ll. 20-30), it is respectfully submitted that the decree of the Court of Chancery should be reversed and the bill of complaint dismissed.

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