

# New Jersey Court of Errors and Appeals.

FREDERICK HEYDER ET AL., <i>Appellants,</i>	}
AND	
THE EXCELSIOR BUILDING AND LOAN ASSOCIATION NO. 2, OF THE CITY OF NEWARK, NEW JERSEY, <i>Respondents.</i>	}

## POINTS FOR APPELLANTS.

CHARLES T. GLEN, for appellants.

GUILD & LUM, for respondents.

1. The original mortgage was not produced or proved, nor were the contents proven, but the registry thereof was improperly admitted in evidence, objection having been made. Page 19, testimony.

Both president and treasurer of complainants testify that they do not know whether the bond produced is the original or not—or whether the paper produced is a copy of mortgage or not.

There is no other proof of the contents, or that the alleged mortgage covered appellants' property. Pages 31, 33 and 37, testimony.

The registry of a mortgage is not admissible as evidence.

*N. J. R. R. & T. Co. v. Suydam*, 2d Harrison (25) page 60.

*Harker v. Gustin*, 7 Halsted (49) 50 to 53.

It will become secondary evidence on July 4, 1886, by statute passed April 28, 1886.

2. The mortgage mentioned in the bill was duly cancelled of record before appellant purchased the premises, and said mortgage and the bond secured thereby were produced to

appellant before the purchase, duly cancelled with the certificate of cancellation endorsed on the mortgage in usual form by the register of Essex.

3. That appellant purchased said premises in good faith by warranty deed free of encumbrance, and paid full value therefor, after making a careful search in and relying fully upon the records of Essex county, which showed at the time of his purchase that said mortgage was regularly and properly cancelled of record.

4. That a minute of the discharge of said mortgage was made on the margin of the registry thereof before the purchase in accordance with the statute, and certified by the register upon the original mortgage, and appellants were entitled to rely and did rely upon said record and minute as a full and absolute bar and discharge of said registry and mortgage as provided by the statute.

5. Sec. 23 of "An act concerning Mortgages," page 707 Revision of 1874, provides as follows: "When any mortgage, registered as aforesaid, shall be redeemed, paid and discharged, it shall be the duty of the said clerk, on application to him, made by the *mortgagor* or person redeeming, paying and discharging the said mortgage, and producing to him the said mortgage *cancelled*, or a receipt thereon, signed by the mortgagee or his executors, administrators or assigns, to enter in a margin to be left for that purpose, opposite the said abstract, a minute of the said redemption, payment and discharge; which minute shall be a full and absolute bar to and discharge of the said entry, registry and mortgage."

The clerk is authorized to make the cancellation whenever the instrument is produced "cancelled or a receipt thereon," but this is the artificial standard of evidence by which the officer is to regulate his conduct.

*Harrison v. N. J. R. R. & T. Co.*, 4th C. E. Green (488) page 501.

See also *Harker v. Gustin*, 7th Halsted 49, pages 52 and 53.

The register's minute of cancellation on the margin in

this case is regular, and shows that mortgage was both receipted and cancelled.

There is no evidence on the part of the complainant that it was *not receipted* by them in proper form.

The burden of proof is upon them to show that this record of receipt is false. They have failed to do so.

*Miller v. Wack*, Saxton 204 page 214.

A cancellation of a mortgage and a discharge of record unless effected through fraud, accident or mistake is an absolute bar and discharge of the mortgage.

*Garwood v. Admrs. of Eldridge*, 1 Green Chy, 145.

*Trenton Banking Company v. Woodruff*, 1 Green Chancery, 117.

*Frazer v. Insley*, 1st Green Chy, 239.

Is an innocent purchaser bound by the fraud, accident or mistake perpetrated or occurring without his knowledge and to which he has not contributed by omission or commission?

Several cases were cited by the complainants and the Advisory Master in the court below, viz.:

*Garwood v. Admrs. of Eldridge*, 1 Green Chy, 145.

*Trenton Banking Co. v. Woodruff*, 1 Green Chy 117.

*Frazer v. Inslee*, 1 Green Chy, 239.

*Miller v. Wack*, Saxton, 204.

*Freeholders of Middlesex v. Martin*, 5 C. E. Green, 39.

*Dudley v. Bergen*, 8 C. E. Green, 397.

*Dubois v. Schaffer*, 8 C. E. Green, 401.

*Hampton v. Nicholson*, 8 C. E. Green, 423.

*Banta v. Vreeland*, 2d McCarter, 103.

*Lilly v. Quick*, 1 Green Chy, 97.

*Stover v. Wood*, 11 C. E. Green, 417.

*Hall v. Lamben*, 3d Halsted, E. & A., 651.

*Hutchinson v. Swartzwilde*, 4th Stewart, 205.

*Young v. Hill*, 4th Stewart, 429.

*Tradesmen's Building and Loan Association of Camden v. Thompson*, 4 Stewart, 536.

*Fine v. King et al*, 6 Stewart, 108.

*Woodruff v. Mutchler*, 7th Stewart, 33.

An examination of these cases will show that in none of them were the rights of an innocent purchaser at issue.

In *Trenton Banking Co. v. Woodruff*, the question whether a mortgage cancelled of record by mistake or fraud would be established against a subsequent mortgagee who took his mortgage after such cancellation of record and in reliance of the record, was not presented.

In *Harrison's Admrs. v. Johnson*, 3d C. E. Green, 420, the Chancellor says :

"A mortgage cancelled upon the record will not be revived against a bona fide purchaser for full value and without notice in law or fact that it was a subsisting encumbrance at the time he purchased."

This case was reversed by the Court of Errors under the title of *Harrison v. N. J. R. R. & T. Co.*, 4th C. E. Green, 488, on other grounds and the Chief Justice on page 499, says :

"This case does not present the question as to the effect which should be adjudged to follow a statutory extinguishment of the registry of a mortgage, when such extinguishment has been obtained by covin, and against a party who has not forfeited any of his rights by his negligence or misconduct.

"That opposition is in nowise involved in the present issue, and no opinion is intended to be intimated in regard to it. The rights of the present parties were fixed before this mortgage was erased from the record, and such rights cannot be affected by the act of the defendants subsequent to the transaction, and in which the other party did not, either expressly or by indirection, participate. The rule—admitting such to be the rule—that the cancellation of record is conclusive in favor of subsequent bona fide purchasers and mortgagees, is one of great harshness, and can be vindicated only on consideration of public utility and social

policy. In cases in which an instrument of this nature is cancelled by fraud and without fault in the owner of it, the property of an innocent party is obviously made a sacrifice for the common good; and I think, therefore, it is clear that the sphere of the operation of the rule should not be extended to any case not strictly within it. In the case now before the court, the defendants did not part with their money on the faith of the representations of this public record, and the consequence is, they do not bring themselves within the principles which they invoked."

The case of *Harris v. Cook*, 1st Stewart, 345, cited by the advisory master in his opinion, is clearly not in point, for in that case there was no compliance with the statute. It was *not* produced at the clerk's office at all, and was not receipted or cancelled, hence the action of the clerk was void, as he had not complied with the statute.

The chancellor says, "The fact that Cook and Bernheimer are bona fide purchasers for valuable consideration will not *under the circumstances* give them any equity against the complainants."

In the case of *Johns v. Norris*, Errors and Appeals, 12th C. E. Green, page 485, it was held that bona fide purchasers must be charged with notice actual or constructive of their grantor in order to set aside the sale.

In this case there was no notice of the fraud actual or constructive.

"The appellants have upon their side both the equity and the law—equity as bona fide purchasers for full value, and the legal protection of a public record.

"Where there is equal equity the law must prevail. In such case the defendant has an equal claim to the protection of a court of equity for his title as the plaintiff has to the assistance of the court to assert his title, and then the court will not interpose on either side.

"And the equity is equal between persons who have been

equally innocent and equally diligent. It is upon this account that a court of equity constantly refuses to interfere either for relief or discovery against a bona fide purchaser of the legal estate for a valuable consideration without notice of the adverse title if he chooses to avail himself of the defence at the proper time and in the proper mode."

1st Story Equity Jurisprudence, p. 75, sec. 64,  
also p. 413, sec. 413.

In all cases of mistake in written instruments, courts of equity will interfere only as between the original parties or those claiming under them in privity: such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of the facts.

As against bona fide purchasers for a valuable consideration without notice, courts of equity will grant no relief because they have at least an equal equity to the protection of the court.

In like manner as equity will grant relief in cases of mistake in written instruments to prevent manifest injustice and wrong and to suppress fraud, it will also grant relief and supply defects where by mistake the parties have omitted any acts or circumstances necessary to give due validity and effect to written instruments. \* \* \* \*

The same principle applies to cases where an instrument has been delivered up or cancelled under a mistake of the party and in ignorance of the facts material to the rights derived under it. \* \* \*

1st Story Equity Jurisprudence, p. 184, 185  
and 186, secs. 165, 166 and 167.

But in all cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief must stand upon some equity superior to that of the party against whom he asks it.

1st Story Equity Jurisprudence, p. 193 sec. 176.

Although voluntary and other conveyances in fraud of

creditors are thus declared to be utterly void, yet they are so far only as the original parties and their privies and others claiming under them who have notice of the fraud are concerned, for bona fide purchasers for a valuable consideration without notice of the fraudulent or voluntary grant are of such high consideration that they will be protected as well at law as in equity in their purchases.

1st Story Equity Jurisprudence, p. 384, sec. 381.

A purchaser with notice may protect himself by purchasing the title of another bona fide purchaser for a valuable consideration without notice.

1st Story Equity Jurisprudence, p. 409 sec. 409.

This doctrine in both its branches has been settled for nearly a century and a half in England and it arose in a case in which A purchased an estate with notice of an encumbrance, and then sold it to B who had no notice, and B afterwards sold it to C who had notice, and the question was whether the encumbrance bound the estate in the hands of C. The then Master of the Rolls thought that although the equity of the encumbrance was gone while the estate was in the hands of B, yet it was revived upon the sale to C. But the Lord Keeper reversed the decision and held that the estate in the hands of C was discharged of the encumbrance notwithstanding the notice of A and C. This doctrine has ever since been adhered to as an indispensable muniment of title and it is wholly immaterial of what nature the equity is, whether it is a lien or an encumbrance or a trust or any other claim; for a bona fide purchaser of an estate for a valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the violation of his trust and mediated fraud.

1st Story Equity Jurisprudence, p. 410, sec. 410.

Purchases from executors of the personal property of their testator are ordinarily obligatory and valid, notwith-

standing they may be affected with some peculiar trusts or equities in the hands of the executors.

1st Story Eq. J., page 422, sec. 422.

But although voluntary conveyances and covenous conveyances, may thus—although good between the parties, be set aside and held void as to creditors and purchasers and others whom they may injure in their rights and interests—yet we are not to understand that courts of equity grant this relief, and interpose in favor of the latter under all circumstances.

On the contrary they never do interpose at all where the property has been conveyed by the voluntary and covenous grantee to a bona fide purchaser for a valuable consideration without notice. Such a person is a favorite in the eyes of courts of equity and is always protected against claims of this sort. Indeed, in every just sense his equity is equal to that of any other person, whether he be a creditor or a purchaser of the grantor, and where the equity is equal we have seen that the rule applies. \* \* \*

The civil law proceeded upon the same enlightened policy. In the case of alienations of movables and immovables, bona fide purchasers for a valuable consideration, having no knowledge of any fraudulent intent of the grantor or debtor, were protected. \* \* \* And the very case is afterwards put of a bona fide purchaser from a fraudulent grantee, the validity of whose purchase is unequivocally affirmed.. \* \*

The same doctrine is fully recognized by Voet. And its intrinsic justice is so persuasive and satisfactory that whether derived from Roman sources or not, it would have been truly surprising not to have found it embodied in the jurisprudence of England.

Indeed the principle is more broad and comprehensive, and although not absolutely universal, yet it is generally true, and applies to cases of every sort where an equity is sought to be enforced against a bona fide purchaser of the legal estate without notice, or even against a bona fide purchaser

not having the legal estate, where he has a better right or title to call for the legal estate than the other party.

It applies therefore to cases of accident and mistake, as well as to cases of fraud, which however remediable between the original parties, are not relievable as against such purchasers under such circumstances.

1st Story Eq. Jurisprudence, pages 433, 434 and 435; sections 434, 435 and 436.

Court held in *Rutgers v. Kingsland*, 3d Halsted, chancery, page 178, that mistake would not be corrected and mortgage reformed as against a bona fide purchaser, and this court affirmed the decision in 3d Halsted, 658.

The court said in *Trenton Banking Co. v. Woodruff*, 1 H. W. Green, page 127: "If they have really taken their last mortgage, ignorant of the one now disputed, they have a strong claim for the consideration of the court, for, as at present advised, I should not feel willing to interpose in a case where the testator had, by the very act of constituting his debtor an executor, placed it in his power to practice a fraud on innocent parties."

It is well settled in law that reasonable care and precaution only are required.

Appellants took this reasonable care and precaution.

The bond and mortgage both being produced cancelled of record, was presumptive evidence of payment upon which he was entitled to rely.

In *Harrison v. N. J. R. R. & T. Co.*, 4 C. E. Green, 500, this court regarded the production or non-production of the bond as of great importance, saying: "The mortgage is the mere adjunct of the bond which is the obligation manifesting the debt, and which, wherever it may reside, draws its adjunct to it. It is common knowledge that when the bond is assigned it carries in equity the mortgage security with it, and the consequence is that the mortgage is often in one hand and the equitable right to it in another. When, therefore, the bond does not accompany the mortgage, the presumption of payment does not arise, but the

reverse. The separation of the papers denotes something very different from payment. The bond not being accounted for, the legal intendment in the absence of explanation must be that the debt remains, and of consequence if the mortgage be fairly in the possession of the mortgagee it must be so by virtue of some special and unusual arrangement."

In this case both bond and mortgage were produced cancelled of record.

Complainants did not exercise reasonable care and precaution. On the contrary they were guilty of gross carelessness and placed it in Johnson's power to commit the fraud they now complain of.

They held out Johnson as their solicitor, thereby inviting others to place trust and confidence in him.

Having created him an officer of the company they are bound by his acts in dealing with innocent third parties. Their by-laws define his duties as solicitor. They were not made known to the public, but set forth only in the little pass-books issued exclusively to their members not obtainable by the public, and not produced at the trial of the cause, although called for.

They had no office, no meeting place, except two evenings a month in a public hall.

While they did not permit Johnson to examine his own title, they did permit him to record this mortgage, and also permitted him to withdraw it from Register's office after record. They permitted him either to retain the bond and mortgage in his possession, or, to substitute copies which must have been detected by the treasurer on the most ordinary inspection.

In either case they put it in Johnson's power to commit the fraud.

Section 9 of the bill contains a strong admission of their carelessness; it charges that "Johnson, solicitor of the company, availing himself of his opportunities, fraudulently, &c."

The treasurer swears that he cannot tell whether he ever

got the original papers from Johnson, or copies. The treasurer says he kept all the papers locked up in a box, first at Newark Savings Institution, then in German National Bank, that the only keys were in his hands and the president's, and that the papers produced by complainant were never out of his hands.

This is clearly disproved; 1st, by the record on page 72, which shows that the original mortgage was produced in the office, receipted, cancelled and made void; 2d, by the testimony of the president on page 31, and of the treasurer pages 33 and 37.

Although they are the chief officers of the association, neither of them will swear that the papers produced are the original, or even copies; 3d, it is disproved by Mr. Pileh, who shows the carelessness of their people by stating that after Johnson ran away, he found in his office and delivered to the association, thirty-two packages of papers containing abstracts, cancelled mortgages and *recorded* mortgages belonging to this association; 4th, it is disproved by the testimony of the attorney, Mr. Rosinger, (pages 62 and 65,) who states that both bond and mortgage were produced, cancelled, with certificate of cancellation endorsed upon the mortgage in usual form by the Register of Essex county.

The conclusion of the advisory master that Johnson stole the mortgage seems unwarranted by the testimony.

He could not steal it without breaking into the treasurer's box at the Newark Savings Institution, or the German National Bank, unless permitted by the neglect or carelessness of the president or treasurer who held the keys.

There is no evidence of a burglary at either place.

On the contrary, the evidence shows that Johnson came lawfully into possession of the mortgage after its record by the consent of the complainants.

See Guild's admission, page 21:

"I will save you that trouble by now admitting that as solicitor of the company, it was part of the duty and practice of Mr. Johnson to take the mortgages given to com-

plainants, to the register's office, leaving them for record, and after they were recorded, obtaining and receipting for them."

See also testimony of president and treasurer, pages 24, 25, 34, 35, 36, 37 and 38.

In *Harrison v. N. J. R. R. & T. Co.*, 4 C. E. Green, page 494, the chief justice says:

"It becomes then a matter of prime importance to settle the question of fact as to the manner in which the mortgage in controversy came to the possession of Mr. Johnson the vendor of the defendants.

The evidence shows conclusively in this case that the withdrawal of the mortgage from the record office was authorized by complainants.

The advisory master's assumption that receipt was a forgery is not warranted by the evidence.

The officers of the association do not deny that they signed or authorized it.

The record which says they did, is not disproved by the testimony.

The advisory quotes *Harris v. Cook*, and *Trenton Banking Co. v. Woodruff*, but, as before stated, neither case is in point.

Johnson could not have substituted copies unless by gross negligence or stupidity on part of the treasurer.

The familiar rule of equity is, that, as between parties without fault, when a fraud is committed, the burden must fall upon him who was instrumental, though innocently so, in the realization of such deceit.

*Harrison v. N. J. R. R. & T. Co.*, 4 C. E. G., 498.

The record says: "On the 5th day of February, A. D. 1883, the original mortgage here registered, was produced

in the office by Finley A. Johnson, receipted, cancelled and made void. Henry W. Egner, Register.”

This record stands unimpeached, and the presumption of law is, that it was *receipted* by the complainants.

The burden of disproving this is upon them.

There is nothing in the testimony to show that they did not receipt this mortgage as alleged by the record.

On page 40, the president testifies as to the manner of cancelling in another institution.

On page 41, it appears that this association never cancelled a mortgage, except Heyder's, before Johnson ran away, and on pages 41 and 42, the president, after swearing that he receipted all mortgages cancelled under the seal of the company, admits that he delivered two out of the four mortgages handed to the solicitor for cancellation, without receipt or seal.

Consideration of public utility and social policy, forbid the destruction of confidence in a public record.

Great damage and inconvenience must follow such destruction.

It is evidence of a very high character.

*Miller v. Wack*, Saxton, 214.

The record is the faith and credit of evidence of the highest nature, viz., record evidence.

Justice Story in *Mills v. Duryee*, 7 Cranchs, R. quoted in *Moulin v. Ins. Co.*, 4 Zabris-  
kie, 236.

It appears by the testimony that the complainants held bonds in the sum of five thousand dollars, given by Johnson with two sufficient sureties conditioned for the faithful performance of his duties as solicitor, and that after his flight

they compromised these bonds for \$3,000 and released the sureties from the other \$2,000.

We insist that they had no right to release the sureties, but were bound to exhaust these bonds or give us the benefit of them before falling back upon the mortgage in question.

CHARLES T. GLEN,  
*for Appellants.*

## N. J. Court of Errors and Appeals.

<i>Between</i>	}	10
FREDERICK HEYDER, <i>et al.</i> ,		
<i>Appellants,</i>		
<i>and</i>		
THE EXCELSIOR BUILDING & LOAN	} <i>On Appeal.</i>	
ASSOCIATION No. 2, OF THE CITY		
OF NEWARK, NEW JERSEY,		
<i>Respondents.</i>		

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### BRIEF OF GUILD & LUM,

*Of Counsel with Respondents.*

The facts are undisputed, that at the time of the purchase of the mortgaged premises in February, 1883, by the appellant Frederick Heyder, from Johnson, the mortgagor, the Association held the mortgage sustained by the decree appealed from, and that Heyder had actual as well as constructive notice of it. 30

The original bond is in evidence, but the mortgage cannot be produced.

I. The mortgage is abundantly proved.

See evidence of the granting of application for loan, p. 13 of printed case.

Of the making of the loan, pp. 14, 23, 24.

Of the existence and contents of the mortgage, testimony of August W. Rosinger, pp. 59, 61, 62, 64, and 40

record of the abstract of the mortgage, pp. 19, 20, which is connected by Rosinger with the original mortgage, p. 62.

II. The cancellation of the mortgage was fraudulent and void.

The debt was not paid.

The bond was not surrendered, receipted or canceled.

10 Johnson, as solicitor, had no authority to cancel the mortgage, pp. 24, 39.

III. The cancellation was properly vacated.

The entry of cancellation upon the record was not conclusive.

*Miller vs. Wack*, Saxton, 214.

*Lilly vs. Quick*, 1 Gr. Ch. 97.

20 *Trenton Banking Co. vs. Woodruff*, Id. 117.

*Banta vs. Vreeland*, 2 McC. 103.

*Harrison's Admrs. vs. The N. J. R. R. & T. Co.*,  
4 C. E. Gr. 488.

*Freeholders, &c. vs. Thomas*, 5 C. E. Gr. 39.

*Harris vs. Cook*, 1 Stew. 345.

*Swarthout vs. Curtis*, 5 N. Y. 301.

The Association had been particularly careful to protect its securities.

30 Upon granting the application for loan, they had required that title should be examined by another lawyer, pp. 13, 34.

The securities were kept by the Treasurer in the vaults of the German National Bank, pp. 26, 27, 32, 36.

The President and Treasurer only had access to them, pp. 35, 36.

The Solicitor was required to turn over the recorded papers at the monthly meeting of the directors, p. 38.

40 Mortgages could only be receipted for cancellation by the President, who had taken particular pains to guard

against fraud by using the corporate seal in receipting, and requesting the Register not to cancel such mortgages unless the corporate seal was affixed to the receipt, pp. 39-43.

The Association had done all that prudent people could do to retain their securities and to prevent fraud, while Heyder relied upon the production of the mortgage by the mortgagor himself, with a mere statement upon it, purporting to have been made by the Register, that it had been canceled, but without any receipt for the payment or authorization by the officers of the Association. 10

In fact appellant did not rely upon the record of cancellation, for he had not seen it until after the delivery of the deed, when he went to the Register's office to leave the deed for record.

There is no proof that the bond was produced.

It is true, Mr. Rosinger says, p. 65 :

"I think he produced the bond with it. 20

" Q Will you swear to that ?

" A Yes, for I would not have closed the transaction unless he had.

" Q What makes you say you think he did ?

" A What ?

" Q You just now said, you think he produced the bond.

" A Because otherwise I would not have closed the transaction. I would not give another man's money for the neighborhood of \$500, and have an indebtedness 30 outstanding against it."

But the President and Treasurer are confident that the bond could not have been out of their possession.

The fact that they were equally confident that the mortgage was not out of their possession proves nothing, for the original mortgage was probably never among their papers.

It is much more probable that they had been imposed upon earlier, and had always supposed the copy to have 40

been the original. The copy was well calculated to mislead.

The bond was certainly not canceled for it is now produced unreceipted and unmutilated.

We submit that these facts bring this case within *Harrison's Admrs. vr. The N. J. R. R. & T. Co., supra.*

10 Inquiry of some of the officers of the Association was a duty, and amounts to notice that the mortgage had not been satisfied.

Pomeroy, in his treatise on *Equity Jurisprudence*, says, § 918: "Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment which is void, or where he was procured to execute it by fraudulent representation and under the conviction that it was an entirely different instrument; or where it was fraudulently executed in his name, without any authority, express or implied; or where, after being executed by him for one purpose, it was fraudulently altered without  
20 his knowledge or authority, so as to include the property; or where it was a forgery, and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property by means of such transfer comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by canceling the fraudulent apparent transfer, and by compelling a re-conveyance or re-assignment even as against the holder who is innocent of wrong;  
30 the doctrines of equitable estoppel and of bona fide purchase to not apply under these circumstances."

And in note to same section, foot of page 417, Vol. 2, he says:

"Where the facts detailed in the text exist, where there is no authority, express or implied, and no conduct working an estoppel, *there is no ground of principle for preferring the equity of a subsequent claimant, however innocent, over that of the original owner, who is equally innocent,*  
40 *and whose title is prior in time.*"

A purchaser who is put on inquiry cannot safely rely on an explanation given by one who, like the vendor, may have a motive for misleading him, and should have recourse to some disinterested source of information.

*Bunting vs. Ricks*, 2 Dev. & Bat. Ch. 130.

*Russel vs. Petrie*, 10 B. Monroe, 186.

There is nothing in the conduct of the Association to raise an estoppel.

They not only did all that could reasonably have been required of them to prevent such a fraud, but they took 10 action immediately upon its discovery.

In *Harris vs. Cook*, *supra*, the Chancellor said: "Those who take title to property, on which a mortgage has been given, and of which they have notice, may effectually guard themselves against being misled by such certificate, if false, by requiring proof that the mortgage has in fact been satisfied or extinguished.

"Cautiousness will protect them.

"But what vigilance short of constant watch would 20 protect the mortgagee against the making of the false certificate of cancellation, if he were to be held bound by it?"

In *Swarthout vs. Curtis*, 5 N. Y. 301, a mortgage was reinstated as against an innocent subsequent incumbrancer.

Foot, *J.*, in reading the opinion of the Court, said:

"As the mortgage was discharged by a person other than the mortgagee, the subsequent incumbrancer was bound to inquire by what authority such person as- 30 sumed to discharge it.

"Such inquiry in this case, prosecuted with ordinary diligence, would have shown that the discharge was unauthorized, and of the facts which such an inquiry would have ascertained, the law charges the party, who is bound to make the inquiry, with knowledge."

By a deed which the grantee had stolen no title is acquired, and an innocent purchaser would not be protected by the record thereof.

*Stanley vs. Valentine*, 79 Ill. 544.

Even if there had been want of care on the part of the Association, whereby the mortgage came into the hands of Johnson, no authority for him to cancel it could have been implied from it. No estoppel would be worked by it.

*People vs. Bank*, 75 N. Y. 548, 562.

10 The fact that Johnson, the vendor, might, by means of his office as Solicitor of the Association, have obtained possession of the mortgage, without authority, called for inquiry on the part of the purchaser.

In *Buckley vs. The Second National Bank of Jersey City*, 6 Vr. 400, the Supreme Court, in applying the rule that a forged endorsement would not pass title to a check, held that the fact that the forgery was committed by an agent of the plaintiff, did not change the rule, where there is no fraud or where no gross neglect is shown against the plaintiff.

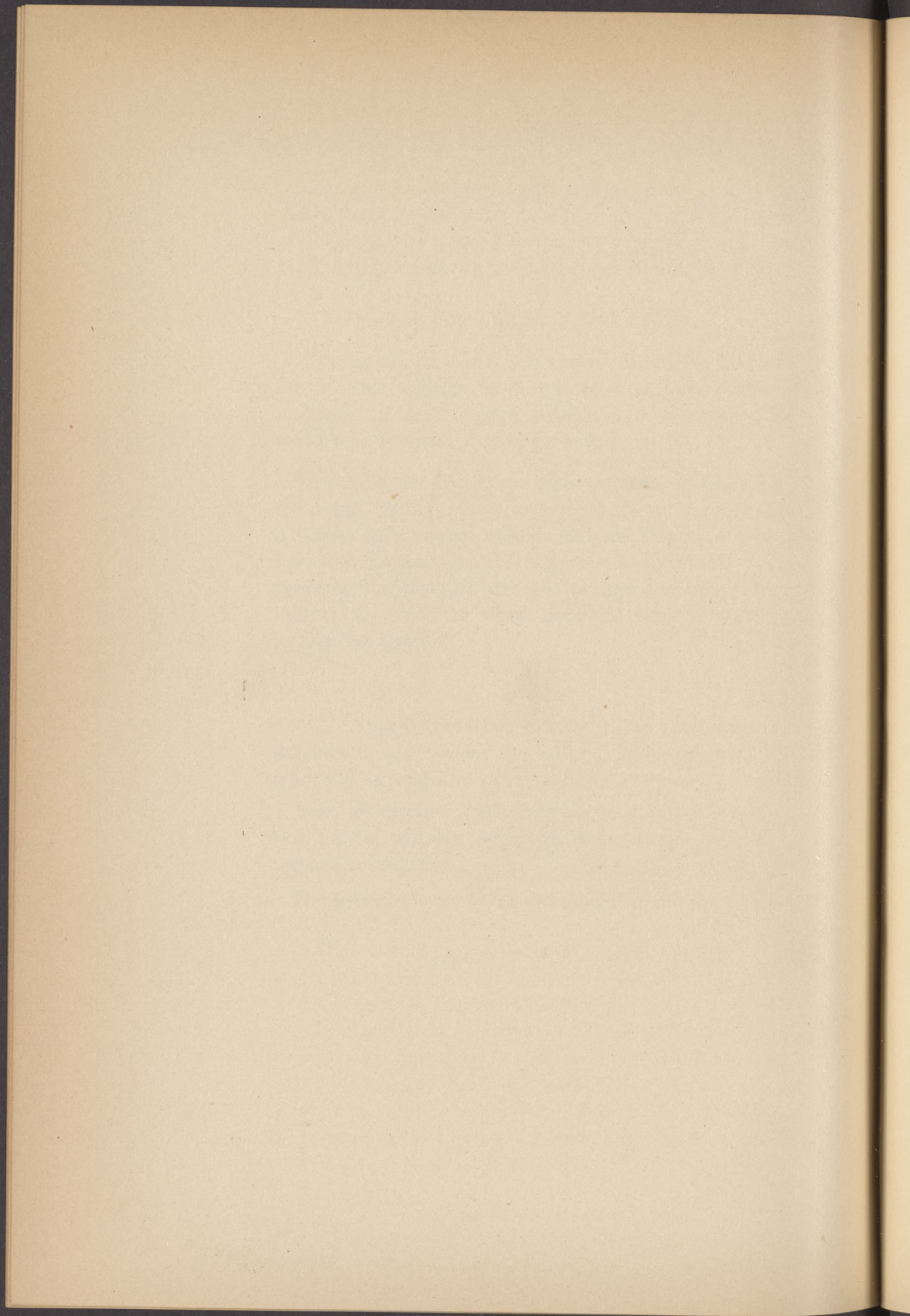
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IV. Appellants had no interest in the bond given by Johnson as security for the faithful performance of his trust, nor any right of subrogation in any event.

Had the sureties upon these bonds paid the Association for the Heyder mortgage, they would have had right of subrogation.

No advantage would have accrued to the appellants.





Clubs Tabu No 18

## In Chancery of New Jersey.

BETWEEN  
THE EXCELSIOR BUILDING AND LOAN  
ASSOCIATION, NO. 2, OF THE CITY OF  
NEWARK, NEW JERSEY,  
*Complainant,*  
AND  
FREDERICK HEYDER, ET AL.  
*Defendants.*

*To His Honor, Theodore Runyon, Chancellor of the State  
of New Jersey.*

Complaining show unto your Honor, your orators "The Excelsior Building and Loan Association, No. 2, of the City of Newark, New Jersey, a corporation existing under the laws of the state of New Jersey, and located in the city of Newark, in the county of Essex.

1. That on the fifteenth day of December, in the year eighteen hundred and seventy-nine, Finley A. Johnson, being indebted to your orators in the sum of twelve hundred dollars by his bond, dated on that day, became bound to your orators in the sum of twenty-four hundred dollars, to be paid to them, their certain attorney, successors or assigns, with a condition thereunder written, that if the said Finley A. Johnson should well and truly pay or cause to be paid unto your orators, their certain attorney, successors or assigns, during the continuance of your orators as such association, or until six shares in your orators' association, owned by the said Finley A. Johnson, and assigned as collateral security for the payment of the money specified and

hereinafter mentioned should have matured, the sum of six dollars per month with interest on the sum of twelve hundred dollars, at the rate of six per cent. per annum, payable monthly amounting to the further sum of six dollars per month, in all amounting to the sum of twelve dollars per month; the first payment to be made on or before the third Monday in each and every month thereafter, and should also pay to your orators or their successors or assigns, during the period aforesaid, all fines, forfeitures and other payments that might become due and payable from and might be charged and imposed upon him or his assigns as the holder of such shares pursuant to the constitution of your orators and the by-laws, rules and regulations of your orators, then the said bond to be null and void, otherwise to remain in full force and virtue.

2. That to secure the said payments so as aforesaid mentioned in the said condition of said bond, the said Finley A. Johnson, and Sadie P., his wife, by a deed of mortgage, bearing date on the same day as the said bond, conveyed to your orators, their heirs and assigns forever, in fee simple: All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the city of Newark, in the county of Essex and state of New Jersey.

- Beginning in the easterly line of Charlton street at a point therein distant five hundred and seventy-five feet southerly from the south line of Montgomery street; thence running easterly at right angles to Charlton street one hundred feet; thence southerly twenty-five feet; thence westerly one hundred feet to Charlton street; thence northerly twenty-five feet to the place of beginning.

Being lot No. 89 on a map of the estate of Sayres Coe, deceased, recorded in Book H 8, of deeds for Essex county, pages 590, etc., and being the same premises conveyed to the said Finley A. Johnson by John Aschenbach and wife,

by deed dated November first, eighteen hundred and seventy-six, and recorded in Book C 19, of deeds for Essex county, pages 219, etc.

3. That said mortgage contained a proviso that it should be void upon payment of the said sums of money and the said fines, forfeitures and other payments so as aforesaid mentioned in said bond, according to the condition of said bond.

4. That in said mortgage it was declared to be agreed between the parties thereto, that if default should be made in the payment of the said monthly or other payments or charges for the space of six months, then and from thenceforth the said association should and might from time to time and at all times peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the said granted and bargained premises with the appurtenances without the let, suit, trouble, hindrance, or denial of the said Finley A. Johnson, his heirs or assigns, or any other person or persons whatever.

5. That said mortgage was on the seventeenth day of January, eighteen hundred and eighty, duly registered in the office of the register of the said county of Essex, in Book R 7 of mortgages, pages 216 and 217, the execution of the same having been first duly acknowledged and such acknowledgment certified thereon as required by law.

6. That said Finley A. Johnson and Sadie P., his wife, on the first day of February, eighteen hundred and eighty-three, by their deed dated on that day, conveyed said mortgaged premises in fee to Frederick Heyder, which said deed was accepted by said Heyder, and is recorded in Book V 21 of deeds for said Essex county, on page 2.

7. That default has been made for more than six months last past in the payment of the said monthly and other payments, and there is now due and payable to your orators of

the moneys secured or intended to be secured by said bond and mortgage, the sum of nine hundred and seventy-nine dollars and forty cents.

8. That your orators have never had possession of said mortgaged premises, nor received any of the rents or issues thereof.

9. That on the fifth day of February, eighteen hundred and eighty-three, the following entry was made upon the aforesaid record of said mortgage, to wit:

“On the 5th day of February, A. D. 1883, the original mortgage here registered was produced in the office by Finley A. Johnson, receipted, cancelled and made void.

[Signed]

“HENRY W. EGNER, *Register.*”

But your orators show that the moneys so as aforesaid secured by said mortgage never were, nor was any part thereof paid to your orators, nor was the said mortgage ever in any wise satisfied or surrendered by your orators, or the cancellation thereof authorized by your orators, and that the said cancellation was obtained by fraud on the part of the said Finley A. Johnson, who at the time of the making of said entry held the office of solicitor of your orators and availed himself of his opportunities improperly to obtain possession of said mortgage, and without authority from or knowledge of your orators fraudulently caused the said mortgage to be cancelled of record and caused to be placed among your orators' securities the said bond and a paper purporting to be the said mortgage, but which your orators have lately discovered to be a copy thereof made by said Johnson and left with your orators for the apparent purpose of deceiving your orators, and preventing the discovery of the said fraud.

The said original bond is now in your orators' possession, ready to be produced and proven, and the said paper herein above in this paragraph mentioned, is also in your orators' possession, but your orators have been unable to find the

said original mortgage, and they believe and charge that the same is in the hands of the said Frederick Heyder.

10. That the said Frederick Heyder and his wife Mrs. Frederick Heyder, (whose Christian name is unknown to your orators and which they have been unable to ascertain after due inquiry,) are in possession of said premises and claim that your orators have no interest, lien or incumbrance thereon, whereas your orators claim that the aforesaid cancellation and surrender of said mortgage was fraudulent and void, and ought to be set aside, and that said mortgage is at the present time a valid and subsisting lien upon the lands and premises therein and herein above described.

11. That your orators have requested the said Frederick Heyder and Mrs. Frederick Heyder, his wife, (who are the defendants hereto) to surrender the said mortgage to your orators and to pay them the moneys so as aforesaid due on said bond and mortgage, with which request they have refused and neglected to comply.

In consideration whereof, and inasmuch as your orators are remediless in the premises in the courts of law, and can only have adequate relief in a court of equity, and to the end:

I. That the defendants and each of them may answer, without oath, (answer by oath being hereby expressly waived,) according to the best of their respective knowledge, information and belief, all and singular the premises and each fact above stated.

II. That the said cancellation may be by the decree of this court, declared to have been without consideration, fraudulent and void, and the same set aside and ordered to be vacated and annulled, and the said mortgage debt declared to be a subsisting one, and the said mortgage established and declared to be a valid lien, charge and incumbrance upon the said lands and premises.

III. That the said Frederick Heyder may be required by the decree of this court to surrender and deliver up to your orators the said mortgage.

IV. That an account may be taken under the direction of this court, of the amount due upon your orators, said mortgage.

V. That the defendants, or one of them, may be decreed to pay unto your orators the amount so found due, with interest thereon, and your orators' costs of this suit by a short day to be appointed by this court, and that in default thereof, they, and each of them, do stand debarred and foreclosed of all equity of redemption in said mortgaged premises. •

VI. That said premises may be sold by the order of this court, and out of the proceeds of sale your orators may be paid the amount so found due upon their said mortgage, with interest thereon and their costs of this suit.

VII. And that your orators may have such other relief as the nature of this case requires and as may be agreeable to equity.

May it please your Honor to grant unto your orators the state's writ of subpoena, issuing out of and under the seal of this court to be directed to the said Frederick Heyder and Mrs. Frederick Heyder, his wife, commanding them to appear before your Honor in this court, then and there to answer the premises and to stand to, abide by, and perform such order and decree as your Honor shall make therein.

CHARLES A. FEICK,  
*Solicitor for Complainant.*  
GUILD & LUM,  
*Of Counsel with Complainant.*

Filed Jan. 16, 1885.

**ANSWER.**

The joint answer of Frederick Heyder and Mrs. Frederick Heyder, his wife, the defendants, to the bill of complaint of the complainants, the Excelsior Building and Loan Association, No. 2, of the city of Newark, New Jersey.

These defendants answering say that they have no knowledge of and therefore deny that the said Finley A. Johnson was indebted to the complainants on the fifteenth day of December, 1879, in the sum of twelve hundred dollars, or in any other sum, and deny that being so indebted, he became bound to complainants in the manner and form as set forth in said bill, and they say that if the said Finley A. Johnson ever was so indebted, the said indebtedness has long since been paid and satisfied to the complainants.

And these defendants answering deny that the said Finley A. Johnson and wife made and executed a mortgage to secure said indebtedness in the manner and form, and containing the covenants and agreements in said bill set forth and alleged, and deny that same was duly acknowledged, and the acknowledgment certified as required by law; and they say that if any mortgage whatsoever was given by the said Finley A. Johnson to the complainants to secure his said alleged indebtedness, the said mortgage has been fully paid, satisfied and cancelled of record, and is no lien upon the property of these defendants, or either of them.

These defendants further answering admit that the premises described in the bill of complaint were conveyed to said Frederick Heyder by said Finley A. Johnson and wife, by deed dated February 1st, 1883, and recorded in Book V 21, pages 2 and 3, as set forth in said bill, and they further answering say that the consideration mentioned in said deed was fourteen hundred and fifty dollars; that said sum was the full purchase money agreed on between said Heyder and said Johnson for the purchase of said premises; that it was agreed upon between said Heyder and said Johnson that said Johnson was to convey said premises

described in the bill of complaint to said Heyder, free, clear and unencumbered for said sum of fourteen hundred and fifty dollars, and was to receive therefor five hundred and fifty dollars in cash, and a purchase money bond and mortgage for nine hundred dollars, as by said agreement, ready to be produced and proved, will appear ; that said Heyder caused a search of the records of Essex county to be made by his attorney, August W. Rosinger, Esq., and found said property to be free from encumbrance, and thereupon paid to said Finley A. Johnson the said sum of five hundred and fifty dollars in cash, and made, executed and delivered to said Johnson a purchase money mortgage for nine hundred dollars, which was duly registered in Book D 8 of mortgages for Essex county, page 285, as and for the full purchase money of fourteen hundred and fifty dollars aforesaid, and that he has since paid off and discharged the said nine hundred dollar mortgage, as by the same, ready to be produced and proved, will appear ; that said deed was a deed containing full covenants of seizin, of covenants against encumbrances, of right to convey, covenants of warranty, &c., and conveyed said premises to said Frederick Heyder in fee, free, clear and forever discharged of and from all manner of encumbrances whatsoever, and defendants pray leave to produce and prove the said deed now in their possession before this honorable court ; defendants further answering say that said deed was duly acknowledged by the said Finley A. Johnson and wife before Dewey A. Whitehead, a master in chancery of New Jersey, on February 5, 1883, and was on said last mentioned day delivered to said Frederick Heyder, and on said fifth day of February, 1883, duly recorded in the Register's office of Essex county, in Book V 21, pages 2 and 3, as by said deed will more fully appear.

But these defendants answering deny that the premises described in said deed now are or ever have been since the date of said purchase subject to the lien of the said alleged mortgage set up in said bill, or subject to the lien of any encumbrance of the complainants of any kind or nature, and say that if any such supposed mortgage ever had exist-

ence, it has long since been paid and satisfied, and duly cancelled and discharged of record before the purchase by the said Heyder as aforesaid.

These defendants further answering deny the default set forth in Section 7 of said bill and deny that there is now due and payable to complainants on said mortgage, the sum of nine hundred and seventy-nine dollars and forty cents, or any other sum or sums of money whatsoever.

Defendants further answering admit that on the fifth day of February, A. D. 1883, the following entry was made on the record of a mortgage, an abstract of which was registered in Book R 7 of mortgages for Essex county, pages 216 and 217, viz.: "On the fifth day of February, A. D. 1883, the original mortgage here registered was produced in the office by Finley A. Johnson, *receipted*, cancelled and made void (signed), Henry W. Egner, register," but these defendants deny that said mortgage so registered as aforesaid is a lien or encumbrance upon the lands of said Frederick Heyder set forth in said bill or any part thereof, and say that the same was fully paid, satisfied and duly and properly cancelled of record before said Frederick Heyder purchased said premises and before the payment of said purchase money and before the execution, delivery and record of the deed to said Heyder aforesaid.

Defendants further answering deny that the money secured by said mortgage has not been paid, deny that said mortgage was not satisfied or surrendered by complainants, deny that the cancellation was not authorized by said complainants and say that said mortgage was duly cancelled and receipted by the complainants before the purchase by said Heyder aforesaid and deny that said cancellation was obtained by fraud on the part of said Finley A. Johnson or of any other person, and deny that he placed said bond and a paper purporting to be said mortgage among the securities of the company and deny that the said original bond is in the possession of the complainants and denies that the papers in said bill are either originals or true copies of the said alleged bond and mortgage set up in said bill of complaint.

Defendants further say that said papers are not in their possession and they have no knowledge as to their whereabouts and that the said Heyder relied fully upon the records of Essex county, which showed that said premises were free from encumbrance when he paid said purchase money in good faith and received said deed of warranty free from encumbrance, and they further say that said bond and mortgage never was in possession of said Heyder.

Defendants further answering admit that said Finley A. Johnson was the solicitor of said complainants, and further answering say that as such solicitor he was required to give bonds in a large sum with sureties to said association to secure them against loss or damage by reason of any default or wrong doing on his part and for the faithful performance of all his duties as an officer of said association and for various other purposes, and further say that the said association has settled and compromised the liability of said Johnson to said association and have settled with and released his said sureties, thereby destroying the said Heyder's right of subrogation.

And defendants further answering say that it was held out by complainants, and was a notorious fact that said Johnson was solicitor of and an officer of said complainants, and they further show and charge that the said complainants were in the habit of entrusting said Johnson with their bonds and mortgages and other securities, that they permitted him to have free access to all parts of their office and said securities at all times, that they entrusted their mortgages to him for the purpose of recording them, and that he was allowed to take said bonds and mortgages from the register's office after record and to receipt for the same, and that when said complainants received the money for their securities they frequently entrusted said securities and bonds and mortgages to said Johnson for cancellation. Defendants further answering say that said complainants frequently permitted their bonds and mortgages and other securities to remain in the possession and under the control of said Johnson for long periods of time without requiring him to turn over

the same, that said Johnson left Newark suddenly some months ago and has not since returned, and that immediately after his departure a large number of the papers and securities of said complainants were discovered among his papers and were turned over to the said complainants or their attorney.

Defendants further answering say that if any fraud was committed in said cancellation it was rendered possible by the actings and doings of the complainants and that the loss and damage, if any occasioned thereby, should fall upon the complainants and not upon the defendants.

Defendants further answering, admit that they are in possession of the premises described in the bill and that they insist that complainants have no interest in said premises, and they deny that said cancellation was fraudulent and void and ought to be set aside, and deny that the said alleged mortgage is at the present time a valid and subsisting lien upon the lands described in said bill.

Defendants further answering, deny that complainants have ever requested them to surrender said mortgage or to pay them the moneys alleged to be due or any part thereof, deny that said cancellation was without consideration, fraudulent and void, deny that the same should be set aside, vacated and ordered to be annulled, deny that said mortgage should be declared to be a subsisting lien, or established and declared to be a charge and encumbrance upon said premises, deny that said mortgage should be surrendered to complainants, deny that an account should be taken of the amount due thereon, and deny that defendants should be decreed to pay the same or any part thereof, or that said premises should be sold, and say that the same has been fully paid, satisfied and cancelled of record.

And these defendants humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained and these defendants will ever pray, etc.

CHARLES T. GLEN,

*Solicitor and of Counsel with Defendants.*

Filed March 31, 1885.

Replication filed April, 22, 1885.

Order of Reference to Hon. A. V. Van Fleet, Vice-Chancellor, July 1st, 1885.

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Case heard December 28, 1885, before Washington B. Williams, Advisory Master, by direction of Vice-Chancellor Van Fleet.

### TESTIMONY.

**Julius Stein**, a witness produced on the part of the aforesaid complainant, having been duly sworn according to law deposeeth and saith:

*Direct examination by Mr. Guild:*

Q. You are secretary of the Excelsior Building and Loan Association of the city of Newark, are you not?

A. Yes, sir.

Q. How long have you been secretary?

A. About a year and a half—since June, 1884.

Q. And you have charge of the books of the association?

A. Yes, sir.

Q. Have you the book of records here?

A. Yes, sir.

Q. Just produce it please. (witness did so.)

Q. Turn to page 15.

A. Yes, sir.

Q. Read from it what there is there in regard to the loan to Johnson.

A. "Date, September 15th, 1879. Regular monthly meeting. Money was sold to F. A. Johnson at  $7\frac{1}{2}$ , loan 10 per cent., premises No. 162 Charlton street."

Q. Ten per cent. premium?

A. Yes, sir.

Q. Is there anything else there?

A. Yes, sir; there is another matter at the next meeting after the committee reported, in which it says here: "Board ordered search on the property of Johnson, and that the search on the property of F. A. Johnson should be made by a disinterested party in the profession, and it was agreed that lawyer MacDonald should make a search on the property, which was agreed to by the Board."

Q. Now turn to the transfer book under date of January 17th, 1880.

A. Yes, sir.

Q. Read it.

A. (Reading:) "For value received I hereby assign and transfer to the association hereinbefore named all my right, title and interest in six shares of the Excelsior Building and Loan Association of the city of Newark, standing in my name on the books of the association, to secure a loan of \$1,200 loaned to me by said association. F. A. Johnson, William A. Smith, witness."

Q. Signed by Johnson, is it?

A. Yes, sir.

Q. Now, look at the order book—at the stub?

A. I have not got that here, but I have the cash book.

Q. Have you not got the order book?

A. No, sir; not the order book.

Q. Well, you have the cash book?

A. Yes, sir.

Q. Turn to page 129?

A. Under date of January 17, 1880, the cash is credited with \$1,080.

Q. Who to?

A. Paid to F. A. Johnson, and that is a corresponding entry with the order book.

Q. Have you a journal?

A. Yes, sir.

Q. Turn to page 51?

A. There is an entry here of "Newark, January 17th, 1880, paid on bond and mortgage to F. A. Johnson's credit \$1,200, less premium 10 per cent. \$120, balance in cash \$1,080," which makes up the \$1,200.

Q. Now, look at the ledger, page I?

A. Page I is cash account—the general cash account, in which there appears a credit to cash account of \$1,080, paid to F. A. Johnson, January 17th, 1880.

Q. Now, then, go to page 110?

A. On page 110 is bond and mortgage account in discharge of the mortgage given by F. A. Johnson for \$1,200 on January 17th, 1880.

By Mr. Guild—Mr. Glen, here is the original bond by Johnson and witnessed by Mr. Colie. He wanted me to send for him in case he was needed; he is down at the Vice Chancellor's. Do you require that he should be called to testify to his witnessing this?

By Mr. Glen—Yes, I think you had better call him; I want to ask Mr. Colie some questions.

By Mr. Guild—Very well. I now offer these books in evidence.

*Cross-examined by Mr. Glen:*

Q. You became secretary after these transactions of Johnson's—after the cancellation of this mortgage?

A. I have been secretary since June, 1884.

Q. This mortgage was cancelled on the 5th day of April, 1883?

A. Yes, sir.

Q. Personally, you have no knowledge as to that transaction?

A. I have a knowledge derived from the entries of the books, so that I know such a transaction must have taken place.

Q. You know it from the books?

A. I know they must have taken place, because the different entries correspond, and the books are balanced up each six months.

Q. Well, that is the way you learned of these transactions, from the books?

A. I know nothing except from the records on the books.

Q. You made none of these records yourself—none of these entries?

A. None of the original entries, because the loan was made before I became secretary, and therefore I had no connection with it, but of course since I have been secretary the records have been made up by me.

Q. Now, go on and state what you have done since you became secretary in connection with this matter as to the

entries in the books; state all the facts that are pertinent to this matter which have occurred since you became secretary.

A. Well, these entries are all original entries made at the time that money was granted in loan, and I could not have made these entries.

Q. Did you make any entries since in any of these accounts?

A. Nothing but to keep the account of the arrears of interest due and furnishing statements.

By Mr. Guild—Pardon me, there is one question I wish to ask, which I forgot.

*Re-direct:*

Q. Have you calculated the amount which was due on this loan up to the present time?

A. Yes, sir.

Q. How much is it?

A. Do you want all the items?

Q. No; state the first amount due on the bond and mortgage?

A. The bond and mortgage is for \$1,200; arrears due on monthly dues to the association, \$64; interest in June, 1884, \$42; fines accrued, \$39.40; making a total of \$1,345.40.

Q. June, 1884?

A. Yes, sir; this amount is to be credited with the amount paid in on the shares as follows: less instalments on six shares, 5 years and 1 month, amounting to \$336, leaving a total balance of \$979.40.

Q. Due when?

A. June 1st, 1884; interest up to this date at 6 per cent. per annum, \$93.40, makes the total amount due \$1,073.80.

Q. \$1,072 or \$1,073?

A. \$1,072.80.

*Further cross:*

Q. Now, the bond and mortgage was \$1,200. What do you mean by arrears of interest—this \$64?

A. On each share the shareholder has to pay a dollar per annum per month. This allowance for \$336 was up to June; of this \$336 he was only \$64 lacking, but I have made out the account as it appears on the book.

Q. In other words you credited him as paid and then charged it back to him as unpaid.

A. I credited him with instalments of \$1 a month on six shares for five years and one month, which is up to June, 1884. Now this amount was credited to him, provided he had paid in full each month, but of that there was \$64 unpaid which appears here as arrears due, and the \$42 constitutes a dollar per loan a month, which is interest which is equal to 6 per cent. a year.

Q. This \$42 to June, 1884, is calculation of interest then?

A. The calculation of interest due to June 8th, 1884.

Q. From what time was that calculation made?

A. From the time that he obtained the money on the mortgage.

Q. Was there never any interest paid on the mortgage?

A. No, sir; not as paid by monthly instalments according to the usage of the association.

Q. Is that in addition to the amount paid on the shares?

A. Yes, sir.

Q. He had these shares?

A. Yes, sir.

Q. How much a share?

A. \$6 on the shares and \$6 for interest.

Q. He paid \$1 each on the shares, and \$6 a month for interest.

A. On interest, yes, sir.

Q. Then what were the fines for the \$39.40.

A. The association charges 10 per cent. of fines on all unpaid balances.

Q. Ten per cent. per month.

A. Yes, sir; ten per cent. on every dollar unpaid—that is for six months; after six months the fines ceased.

Q. Then \$39.40 were the fines for six months ending at what time?

A. At six months prior to June, 1884.

Q. Then they ended June 1st, 1884.

A. Yes, sir; the association was not permitted to charge fines any longer than six months.

Q. Now, had these fines been running from the date of the mortgage?

A. No, sir.

Q. How far back?

A. Six months.

Q. Did they begin precisely at the six months? When was the first fine levied? Just turn to the account and tell us when the first fine began?

A. The fines began—you want to see the instalments—I shall have to get that book if you want it; they began six months prior to June, 1884, because at June, 1884, the time ended upon which fines could be charged.

Q. Then you say on 1st of June, 1884, \$979.40 was due?

A. Yes, sir.

Q. In making up interest on that account, how do you figure on the balance \$979.40?

A. Up to date.

Q. Yes; you take \$979.40 and figure interest at six per cent to date?

A. Yes, sir.

Q. Then you practically compound the interest?

A. I didn't compound the interest.

By the Court—Well, he says what he did; that covers the ground.

Q. Are these the books of original entry of the association?

A. Yes, sir.

By Mr. Glen—I don't think there is anything further that I care to ask this witness; he states

that he knew nothing about the matter except what he learned from the books.

By Mr. Guild—He has made no entries in this matter.

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**Emil Toering**, a witness, produced on the part of aforesaid complainant, having been duly sworn according to law deposeth and saith :

*Direct examination by Mr. Guild :*

Q. You are the County Register ?

A. Yes, sir.

Q. And the book you produce here is one of the records of the mortgages of this county ?

A. Yes, sir.

Q. Produce R 7 ?

A. Yes, sir.

By Mr. Guild—I desire to offer in evidence the book of records and mortgages found in R 7 of mortgages of Essex county on page 216.

By Mr. Glen—I will say to the court that I must object to the record as not being a complete record of the mortgage set forth in the bill.

(Testimony admitted subject to objection.)

By Mr. Guild—I offer the record of mortgage made by F. A. Johnson and wife to the Excelsior Building and Loan Association, No 2, of the city of Newark, N. J., for \$1,200 on the tract and parcel of land and premises and so forth. (Counsel read same.) That's all I have with this witness.

At this point Mr. Glen enters the same witness to testify in behalf of the defendant with the understanding that he shall not be prejudiced by his examination at this time with regard to the objection entered above.

*Direct examination by Mr. Glen :*

Q. Look at the entry in this book and tell me what you find there on the margin ?

A. Well, I find an abstract of a mortgage.

Q. In the margin, I mean.

A. I find the cancellation was made by Miss Chevalier, the chief clerk up in the register's office at that time and also at the present time.

Q. That is, it was made by the register, but the actual mechanical work was done by Miss Chevalier.

A. Yes, sir.

Q. Read it, if you please ?

A. (Reading): "On the 5th of February, A. D. 1883, the original mortgage, here registered, was produced in the office by Finley A. Johnson, receipted, cancelled and made void ; Henry W. Egner, register ; Johnson to Excelsior Building and Loan Association."

Q. Is that mortgage regularly and duly cancelled in accordance with the customs and regulations of the register's office.

A. Yes, sir.

Q. In the usual form ?

A. Yes, sir.

Q. Miss Chevalier is in the habit of performing this work in that way ?

A. Yes, sir.

Q. For the register ?

A. Yes, sir.

Q. And in his absence ?

A. Yes, sir ; and even when he was present.

By Mr. Glen—I suppose probably we ought to bring Miss Chevalier to prove that fact.

By Mr. Guild—There is no question about that ; I have had Miss Chevalier seen and would have had her here if she had any recollection about it.

By Mr. Glen—I only want to have before the court the fact that it was cancelled in due form.

Q. I think you have the book here of your office—one of the records showing the receipts for papers from February 24th, 1881, to September 6th, 1883.

A. Yes, sir, I have one here; Alexander Cumber to the Excelsior Building & Loan Association, signed F. A. Johnson, March 21, 1881; that was the date it was delivered to me.

Q. Is this your regular receipt book from the register's office for papers taken away by counsel?

A. By counsel and whoever may call for them.

Q. That is Mr. Johnson's signature, is it?

A. That I would not swear to, because I don't know.

By Mr. Guild—I will save you that trouble by now admitting that, as solicitor of this company, it was part of the duty and practice of Mr. Johnson to take the mortgages given to the complainants to the register's office, leaving them for record, and after they were recorded, obtaining and receipting for them.

Q. Mr. Toering, were you aware of any instance in which Mr. Johnson has cancelled the mortgages of the association?

A. I don't know of my knowledge, only from hearsay.

Q. There is one other question, I want to ask you, and then I am through—about the practice of this association recently in regard to the cancellation of mortgages; have you known of any instance in regard to their work, so far as their solicitor was concerned lately?

(Objected to.)

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**Edward N. Colie**, a witness produced on the part of the complainants, having been duly sworn according to law, deposeth and saith:

*Direct examination by Mr. Guild :*

Q. You are the subscribing witness to this bond ?

A. In my judgment that is my signature.

By Mr. Guild—I offer it in evidence.

*Cross examined by Mr. Glen :*

Q. Do you know anything about the execution of the instrument shown you ?

A. I cannot state until I look at the bond a little more carefully ; I simply looked at my signature in reply to Mr. Guild's question.

Q. Just look at the bond carefully and examine your signature once more and be certain about it ; do you remember the circumstances attending the execution of that paper ?

A. No, sir.

Q. Do you know whether it was executed or not at the date at which it purports to be executed ?

A. I have no recollection of it.

Q. Did you notice it particularly at the time when it came to you in regard to the matter or when you signed it ?

A. I have no recollection of the facts attendant upon the execution of this paper ; I simply am certain that that is my signature made by my own hand ; I know that is mine.

Q. Johnson's office was up stairs above you ?

A. No, sir ; directly below mine I think at that time ; I have always been in the same place since I began to practice law.

Q. Was he in the habit of bringing papers to you to witness ?

A. Well, I knew him very well, and his family, too ; we were on very friendly relations.

Q. Do you at any time remember his coming in and asking you to witness a bond, and stating that the original was lost, and he wished to supply its place by executing another ?

A. No, sir.

Q. You have no recollection of anything of that kind ?

A. No, sir.

By Mr. Guild—I will ask you now if you have the mortgage.

By Mr. Glen—No, we haven't it; no, sir; certainly not; we haven't the mortgage.

Q. (Handing witness a paper.) I will ask you out of time, is that your signature also?

A. That is my signature made by the stylographic pen, the other was made by the falcon pen; at the time this was executed I wrote with a falcon pen and subsequently used the stylographic pen; I have since abandoned both for a stub pen, and I recognize it from that circumstance.

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**Joseph Isenberg**, a witness produced on the part of the complainants, having been duly sworn according to law, deposeth and saith:

*Direct examination by Mr. Guild:*

Q. You are the president of the complainants?

A. Yes, sir.

Q. The Excelsior Building and Loan Association No. 2?

A. Yes, sir.

Q. How long have you been so?

A. Ever since its existence, since 1879.

Q. In 1880 Finley A. Johnson procured a loan of \$1,200 from your association?

A. Yes, sir.

Q. The books offered in evidence here show that the loan was granted; and there is some evidence on record of its being paid; I now show you a check, what check is that?

A. That is the check we gave.

Q. The check you gave for the money?

A. For the money given for the loan secured by that mortgage.

Q. \$1,080?

A. Yes, sir; allowing the premium which he had paid—deducting that.

Q. Whose endorsement is this, Joseph Isenberg, president?

A. That is mine; yes, sir.

Q. You endorsed that?

A. Yes, sir; it would be no good without my endorsement.

Q. Now, Mr. Isenberg, Mr. Johnson was at that time the solicitor of your association, was not he?

A. Yes, sir.

Q. Do you remember when he was first appointed solicitor?

A. When it started in 1879.

Q. And how long did he remain solicitor—up to the time of his going away?

A. Yes, sir.

Q. And as solicitor what were his duties?

A. His duties were that he should all papers, make searches for loans and have the mortgages recorded, and that was all his duties.

Q. Who took the mortgages to the register's office and brought them from there?

A. Johnson generally did.

Q. Where were the securities belonging to the association kept—the bonds and mortgages?

A. With the treasurer.

Q. The treasurer kept them?

A. Yes, sir; the president has nothing to do with the bonds and mortgages.

Q. Now, you took from Johnson, or your association did, a bond and mortgage for this loan; now, when did you first discover that there was anything wrong about it?

A. After Johnson left.

Q. And do you remember about when that was?

A. I think it was in February, 1884, if I am not mistaken; I am not sure about it; maybe it was not so long.

Q. How long after he left did you first discover that there was anything wrong about the mortgage?

A. Not very long, but I could not say positively how long it was; it was not until we searched the papers to see if they were all there.

Q. And what did you find?

A. We found a copy of the mortgage.

Q. Did you find this paper—(handing witness a paper)?

A. Yes, sir.

Q. And the bond?

A. Yes, sir.

Q. And that copy of the mortgage?

A. Yes, sir.

Q. Was it then in the same shape as it is now?

A. Yes, sir.

Q. Has any part of that bond and mortgage been paid on this loan of Johnson's?

A. Certainly; part of it has been paid by his monthly instalments.

Q. Well, I mean outside of the monthly instalments?

A. No, sir.

*Cross-examined by Mr. Glen:*

Q. Johnson was solicitor of this company at the time of the entire transaction—at the time the mortgage was cancelled of record?

A. I suppose so; I don't know when it was cancelled.

Q. On the 5th of February, 1883; he was solicitor on that day?

A. Yes, sir.

Q. That was the date of the cancellation; what do you state had been his duties as such solicitor?

A. To make clean searches, to make out mortgages, and have them recorded.

Q. What else?

A. Nothing else.

Q. Have you a copy of your regulations here which cover the duties of solicitor?

A. No, sir.

Q. Were you not requested to produce such a paper, or were you not subpoenaed to do so?

A. Not that I know of.

Q. You say that these securities, the bonds and mortgages, etc., were kept by your treasurer; who was he?

A. Mr. Turkes.

Q. Where was the place of business of this association?

A. Well, our meetings were held in Court street, at Streit's Hall?

Q. How often?

A. One night in a month; the monthly instalments had to be paid on one night, and a week after that meeting when the directors met to do their business.

Q. Then you held meetings of your association once a month?

A. Yes, sir.

Q. In Streit's Hall?

A. Yes, sir.

Q. And they were held once a month for the purpose of transacting your business as a building loan association?

A. Yes, sir.

Q. During the rest of the time the hall was occupied by other organizations?

A. I suppose so.

Q. Your association never was there except the one night in a month?

A. Yes, we were also there at directors' meetings; we had a right to meet there two nights in a month.

Q. Well, one night a month was the meeting of your subscribers; the other night was for the meeting of the officers?

A. Yes, sir.

Q. You were never there except on those two nights?

A. Except we had a special meeting.

Q. Now, you have no other regular place of meeting for your business?

A. No, sir.

Q. No office where you are every day in regard to the business of this organization?

A. No, sir.

Q. Now, your treasurer, do you know where he keeps these securities, at his house or where?

A. I know he keeps them at the German National Bank.

Q. You say you discovered this difficulty about this particular bond and mortgage in January or February, 1884; how did you find it out?

A. Well, I did not find it out myself at all.

Q. How did it first come to your knowledge?

A. It was when we made our claim, I think, I am not sure; I think it was when we demanded the money for the mortgage; we wanted to foreclose the mortgage because we thought the mortgage was a good mortgage.

Q. How long was that after Johnson ran away that you demanded the money for it?

A. That I really could not say.

Q. Well, can you tell within a month or six weeks?

A. Well, it was only perhaps one to three months, but I cannot tell exactly.

Q. That you found this out?

A. Yes, sir.

Q. Well, what first called it to your attention—who first called it to your attention as president of the association?

A. I think our present solicitor.

Q. Who is he?

A. Charles A. Feick.

Q. You think he called it to your attention first?

A. Yes, sir.

Q. Did you make any examination of the papers after Johnson ran away to see whether it was all right or not?

A. Yes, sir.

Q. Well, how long after he ran away was that?

A. A very short time.

Q. Did you discover it then?

A. No, sir; I took it for granted that we had the genuine mortgage.

Q. Now, did you find your papers and securities all right except this one?

A. Well, in regard to what?

Q. Did you find them all there in the possession of the treasurer?

A. I think we did.

Q. Well, do not you know whether you did or not?

A. We found all the mortgages there—he had all the mortgages.

Q. Did you go over your books and check them off to see whether you had every mortgage there that you were entitled to?

A. Yes, sir.

Objected to.

Q. And you say you had all the mortgages in your possession?

A. Yes, sir.

Q. Did you have all the bonds?

A. Yes, sir.

Q. Are you sure of that?

A. Well, as much as I know.

Q. You had all the bonds in your possession?

A. Yes, sir.

Q. All the abstracts?

A. Yes, sir.

Q. Now, did not Mr. Pileh turn over to you or your attorney after Mr. Johnson's flight a lot of bonds and mortgages?

A. No, sir; he never handed none to me.

Q. Don't you know that he handed them to your attorney?

A. Well, I stated that before that Mr. Feick had the papers; he made it clear on that counterfeit mortgage.

Q. Where did you get it from?

A. I cannot say.

Q. How many bonds and mortgages were missing from your securities at that time?

A. None with my knowledge, except that one.

Q. Did you know that Mr. Johnson was in the habit of having in his possession papers belonging to the association?

A. No, sir.

Q. And in his safe from time to time?

A. No, sir.

Q. Don't you know that as a fact?

A. No, sir; it was not my business at all to look after them.

Q. Who was the former secretary of your company?

A. Mr. William A. Smith.

Q. This gentleman here (indicating)?

A. Yes, sir.

Q. The duties of your solicitor are defined in your by-laws and regulations, are they not?

A. Yes, sir.

Q. They are all set out?

A. Yes, sir.

Q. Have you those by-laws and regulations published in book form?

A. Yes, sir.

Q. You have the books containing them?

A. Yes, sir.

Q. And those you keep for the purposes of your shareholders?

A. Yes, sir.

Q. Have they ever been published in the papers that you know of?

A. No, sir.

Q. No form of publication has been made except in these little pamphlet books for the use of members?

A. That's all I know of.

Q. Your association has no regular business office?

A. No, sir.

Q. Was not Mr. Johnson, your solicitor, under bonds for his good conduct?

A. Yes, sir; he should have been.

Q. How much was his bond ?

A. \$5,000.

Q. Who were his bondsmen ?

Objected to.

Q. What was done with these six shares that Mr. Johnson held ?

A. They were placed as collateral upon the mortgage.

Q. What were those shares worth at the time they were credited on the mortgage, June 1st, 1884 ?

A. Our secretary can give you better information about that than I can.

Q. Were they worth more than the instalments actually paid on them ?

A. Yes, sir.

Q. How much more were they worth ?

A. Well, what time do you refer to ?

Q. June 1st, 1884.

A. I think a third share more than what had been paid on them.

Q. That would make \$18 more than the \$336 which the secretary says was paid ?

A. According to our secretary's accounts they would have been worth more, but I know that is what we paid if anybody wished to withdraw.

Q. How much more were they worth per share at that time ?

A. That I could not tell you ; I have no statement of that year.

Q. But you paid \$3 premium to any person desiring to withdraw ?

A. Yes, sir.

Q. Did you have any conversation with Mr. Krueger in the presence of the defendant in regard to this matter some few months ago, in January last ?

A. Well, I think—I know I had a conversation once with Gottfried Krueger at that time.

Q. In Mr. Heyder's presence?

A. Yes, sir.

Q. What statement did you make to him in regard to the association as to the care which they had taken of their securities and papers?

A. Well, I told him that I would be sorry if he was the man—as well as I recollect—if he was the man that bought that house of Johnson.

Q. Do you know whether this is the original bond or not?

A. I could not tell you.

Q. You don't know whether it is the original or not?

A. No, sir.

Q. Do you know whether that is a copy of the mortgage or not?

A. Well, it seems so.

Q. But you don't know of your own knowledge?

A. I do not.

By Mr. Glen—I desire to offer in evidence the deed from Johnson and wife to the defendant Heyder. I understand this is admitted to be the original deed.

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**Adam Turkes**, a witness produced on the part of complainant, having been duly sworn according to law, deposeth and saith :

*Direct examination by Mr. Guild :*

Q. You were the treasurer of the Excelsior Building Loan Association, No. 2, were you not?

A. Yes, sir.

Q. How long have you been treasurer of that association?

A. Well, I have been its treasurer ever since they started, I think it was June, 1879.

Q. You knew about the loan made by the association to Johnson of \$1,200 in 1880?

A. I did.

Q. Here is a check dated 17th January, 1880, drawn by

Adam Turkes, treasurer, to the order of F. A. Johnson for \$1,080; was that drawn by you?

A. Yes, sir.

Q. Was that check paid?

A. Yes, sir.

Q. The loan was \$1,200.

A. Yes, sir.

Q. And the difference was deducted for what?

A. Ten per cent. premium which he paid.

Q. Now, for that loan, Johnson was to give, it seems, a mortgage?

A. Yes, sir.

Q. And his bond?

A. Yes, sir.

Q. Did he do so?

A. Yes, sir; I saw them.

Q. Where were the securities of the association kept?

A. Well, at one time, we kept them ourselves.

Q. No, I refer to this particular time?

A. The German National Bank; we have a box there.

Q. That was in 1879?

A. Yes, sir.

Q. You had the box there?

A. Yes, sir.

Q. In which the securities were kept?

A. Yes, sir.

Q. And you were the person who had charge of them?

A. Yes, sir.

Q. And when did you first learn that the mortgage which Johnson had given to you was not the original mortgage?

A. Well, I ordered a foreclosure after six months of arrears, the same as usual; our solicitor discovered it by searching.

Q. After Johnson had left?

A. Yes, sir.

Q. You learned that from your solicitor, Mr. Feick?

A. Yes, sir; he informed the president and said we had not the original mortgage.

Q. This bond which I show you is said to be the original bond?

A. I presume so.

Q. Was that in your possession?

A. Yes, sir.

Q. And that copy of the mortgage as it afterward turned out to be?

A. I presume it is the same one as I saw; I could not swear to that, but I know that is the bond and mortgage.

Q. You supposed it was the mortgage on the property?

A. Yes, sir.

Q. It turned out that the original mortgage was not given by him to you, but this copy; didn't it?

A. That's all; we found afterwards.

Q. You found out afterwards?

A. Yes, sir.

Q. With the bond?

A. Yes, sir.

Q. You supposed that you had the original?

A. Yes, sir.

Q. Has any part of this bond and mortgage been paid?

A. Not as I know of; only merely the monthly instalments which were credited on them, but nothing else.

*Cross-examined by Mr. Glen :*

Q. You were the treasurer in 1883?

A. Yes, sir.

Q. On February 5th when this mortgage was acknowledged?

A. Yes, sir.

Q. Was this notice from the solicitor the first intimation that you had of the fact that this mortgage was missing and that there was trouble about it; when you ordered the foreclosure six months after Johnson went away?

A. Yes, sir.

Q. That is the first you knew of it?

A. Yes, sir.

Q. And you say that was six months after Johnson went away?

A. No, sir; he was in arrears before he went away.

Q. Six months after he came in arrears?

A. We generally ordered foreclosure six months after a person is in arrears.

Q. How long was this after he went away?

A. I could not tell you.

Q. Now then, when Johnson first gave this bond and mortgage what did he do with it when you gave him the check?

A. He handed the bond and mortgage to me and then he took it to the court house to have it recorded. He showed it to me when it was executed, and he was authorized by the board of directors not to make his own search, but Mr. MacDonald was to make it, and after the thing was over he showed me that everything was satisfactory.

Q. Then you gave him a check and handed him the mortgage to take up to the court house to have it recorded?

A. The mortgage was recorded before I gave the check generally.

Q. Well, do you know that fact?

A. Yes, sir.

Q. Did you go to the court house with him?

A. He generally sent his boy up to have them recorded.

Q. Do you know, of your own knowledge, that this mortgage was recorded before you gave him the check?

A. I presume so; of course, I did not see it.

Q. You did not go up there with him?

A. No, sir.

Q. Now, then, what did you do with the bond?

A. I kept it with the abstract.

Q. Where did you have the abstract?

A. I took it over with me, as I generally do, and after the mortgage came back I put them back together in their place in the box.

Q. And where did you take them to?

A. The German National Bank.

Q. Was it put in the box there right away after it was executed?

A. Yes, sir.

Q. You put them in the box?

A. Yes, sir; and when the mortgage came back I did the same with that?

Q. When did the mortgage come back to you?

A. I could not say.

Q. Did it come back to you at all?

A. Why, yes, it must have come back or we would not have had it.

Q. How do you know it came back; I am trying to get at whether it did come back or not?

A. Yes, sir, the mortgage did come back, or it may have been a copy—that I do not know.

Q. When?

A. I do not know.

Q. Where did it come back?

A. Each and every year the secretary generally makes out a list of the mortgages that are entered in the books, and we go over them and find them in rotation.

Q. Did that original mortgage ever come back?

A. One came back; whether it was the original or not I do not know.

Q. What did you do with it?

A. I placed it where it belonged, in the German National Bank.

Q. Now, who had the key of that box?

A. I had one.

Q. Who had the other?

A. The president.

Q. Are there any others except those two?

A. No, sir.

Q. When Mr. Johnson wanted any papers how would he get them?

A. He never got any; he came several times and wanted an abstract to look at and I always went and got them my-

self and gave them to him; he never had a right to take anything out of the box.

Q. Did you never give him the key to take any out?

A. He never had the key; that is, he never had my key, at any rate.

Q. Did you go through your papers and make an examination of them to see whether any of them were missing?

A. I did that every year.

Q. I mean after Johnson ran away?

A. At the end of the year we did that.

Q. And how many did you find missing?

A. There was none missing.

Q. None except this one, you mean?

A. Well, there were a couple of old papers, unfinished things.

Q. What do you mean?

A. What I mean by unfinished is that which was not paid for.

Q. Well, are you sure there were no others?

A. No, sir; not as I know of.

Q. When did you first get this box from the German National Bank?

A. I think right after we organized; they gave us that place and then I was authorized to procure a box right after that; we had deposited them formerly in the vault of the Savings Institution which we paid for, but the German National Bank offered to take it free, so, of course, we deposited it there.

Q. Was that original mortgage in your possession when you made the examination previous to Johnson's departure?

A. That I could not tell—whether it was a copy from the original, but it was one of them.

Q. You say you don't know whether that was a copy or not?

A. No, sir.

Q. You only know that there was a mortgage, but you cannot tell whether this was the one or not?

A. No, sir.

Q. Do you know whether that was the original bond or not?

A. I do not know; I only presume it.

Q. You do not know whether you ever had the original bond and mortgage or not?

A. No, sir.

Q. Did not Mr. Pilch turn over to your association a large number of papers belonging to the association, such as securities and bonds and mortgages, which were found in Johnson's safe after his departure which they had discovered in his possession?

A. Who was that?

Q. Mr. Pilch.

A. No, sir.

Q. Did he to your attorney?

A. Not as I know of.

Q. Did your attorney not produce to you a large number of papers?

A. There were some unfinished papers there, as I stated, because we were granting two or three loans every month.

Q. Well, do you mean to say they were all unfinished?

A. There were no papers that were any value as I know of; that is there were no mortgages left there.

Q. Were there any mortgages among them?

A. No, sir.

Q. (By Mr. Guild)—Unrecorded?

A. No, sir; we did not pay them until they were recorded, so whatever there was there was of no value to anybody, I do not think; they did not amount to anything.

Q. You say that Johnson was in the habit of turning over papers that he got from the record office to you as treasurer; it is your duty to keep track of these things, is it not?

A. Yes, sir; he would turn them over generally every month, and sometimes it lasted a little longer.

Q. Sometimes was it not as long as two or three months?

A. No, sir.

Q. Was it as much as two months?

A. It might have been two months some times before I got them back.

Q. Where would they have been in the meantime—in his possession?

A. No, sir; they were left in the box, which was in the register's office where the papers were placed, and he was to bring them in every month at the directors' meeting.

Q. In point of fact, were they not frequently in his office for some time?

A. Not as I know of; they ought not to have been.

Q. You took the papers as he presented them to you?

A. Yes, sir.

Q. And filed them away?

A. Yes, sir; I generally went to his office once a week or more and I always asked him if such and such papers were recorded and told him I wanted them.

Q. You were in the habit of turning over mortgages to him for record—giving him the mortgage to record, and he was in the habit of receipting for them for your company from time to time?

A. That was part of his duty.

Q. And those receipts were invariably receipted for thus after you had closed the transaction; you did not wait until the two months was out before you paid them, did you?

A. No, sir.

Q. So that the mortgages were paid as soon as they were put on record?

A. Yes, sir.

Q. And he was authorized to bring the mortgages back from record and turn them over to you after he had receipted for them?

A. Yes, sir.

Q. And he always receipted on the record for your mortgages?

A. Well, I gave a receipt after I had the mortgage.

Q. Did he ever cancel any of your mortgages that were paid?

A. No, sir, he could not according to the by-laws.

Q. I did not ask you whether he could; I asked you whether he did?

A. No, sir.

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**Joseph Isenberg**, a witness produced on the part of the aforesaid complainants, having been duly sworn according to law, deposes and says:

*Direct examination by Mr. Guild:*

Q. Suppose you just read on page 14 of the by-laws as to the duties of the solicitor.

(Witness did so to himself.)

Q. Now I want to ask you this question, and I intended to do so before: Had Mr. Johnson, as solicitor under those by-laws, any authority to cancel mortgages?

A. No, sir.

Q. Had it been the practice?

A. No, sir.

Q. To your knowledge had he ever done so?

A. No, sir.

Q. Previous to the cancellation of any mortgage of the association, what was the practice at that time in 1883?

A. How?

Q. When the mortgage was paid off and was to be cancelled what was done by the association, or any officer of it, if any?

Objected to.

Q. It was made the duty of the president to give receipts for moneys paid to your association, was it not?

A. Yes, sir.

Q. Did you have a stamp?

A. Yes, sir, a seal; the regular seal of the association, for

the cancellation of mortgages or selling properties or things like that; it was our corporate seal.

Q. Permit me to ask you this question: what was done when a mortgage was paid of; was anything done by you as president of the association when the mortgage was paid?

A. When it was paid I cancelled it; I wrote my name on the mortgage and ordered that it should be cancelled off record and I put our seal on the mortgage.

Q. Was that the practice?

A. Yes, sir; and then I tore the seals off.

Q. And that was the practice?

A. Yes, sir.

Q. Had Mr. Johnson any authority outside of these by-laws of the association to cancel himself or order the cancellation of mortgages for the association?

A. No, sir.

Q. Did he ever do so, to your knowledge?

A. No, sir; not to my knowledge.

*Cross-examination by Mr. Glen:*

Q. Did your association ever cancel mortgages before Johnson ran away?

A. Hundreds of them.

Q. Are you sure?

A. Yes, sir—how is that?

Q. Just wait; I think you are getting away off; I asked you the question whether, prior to Johnson going away, your association had cancelled any mortgages, and your answer was, "Yes, hundreds of them;" now is that correct?

A. Do you refer to the Building and Loan Association?

Q. Yes, sir; the Building and Loan Association No. 2?

A. Not No. 2, but No. 1 had.

Q. Well, one moment, we are talking about No. 2 now, not No. 1; how many mortgages had No. 2 cancelled before Johnson ran away?

A. That I could not say.

Q. Had they cancelled any?

A. I could not say at present.

Q. You don't remember any instance in which they had cancelled a mortgage?

A. Well, I do.

Q. Can you give me the names of any parties whose mortgages were cancelled by you, as president, by writing your name and sealing the instrument in the way you spoke of?

A. Well, I think I can by refreshing my memory; there is one I recollect—Mr. McGuire.

Q. Well, that was before Johnson went away, was it not?

A. I think not.

Q. Was it since?

A. It was since; yes, sir.

Q. Well, my question was, before he went away?

A. Well, I could not say; I cannot give it from my memory.

Q. Is it not true that the Excelsior Building Association No. 2 never cancelled a mortgage before Johnson ran away, except Mr. Heyder's?

A. That I could not say.

Q. Since that time how many have you cancelled?

A. Well, I do not recollect how many.

Q. One, three, five?

A. More than one or two, or three.

Q. More than four?

A. Perhaps more than four; I could not say.

Q. Do you mean to say that on those mortgages that you have cancelled since, that you wrote your name in that way and put the seal on?

A. Yes, sir; as president.

Q. Every one of them?

A. Yes, sir.

Q. You are willing to swear to that fact?

A. Yes, sir.

Q. Did not Mr. Feick cancel two out of those four without your signature, or stamp, or seal?

A. He might cancel some.

Q. How did he get the mortgages to cancel?

A. From the finance committee.

Q. What did he get them for ?

A. To be paid off.

Q. Were they paid off ?

A. Yes, sir.

Q. Why did you not put your name on the back of them when they were paid off ?

A. Because I did not have the seal there at the office.

Q. Well, did you tell him to cancel them ?

A. I have told him to cancel them ; I gave instructions to our present registrar not to cancel any of them without our seal, and I thought he would make that the test whether he would cancel them without our seal, and he did cancel them without the seal.

Q. When was that, before these two were cancelled, that you gave him these instructions, or later ?

A. That was at the start, some time ago.

Q. At the start of the association ?

A. I think so.

Q. To the present registrar ?

A. Yes, sir.

Q. How long has been Mr. Toering been registrar ?

A. That I do not know—a year or so.

Q. But you gave him this order when you commenced in 1879 ?

A. Yes, sir ; not to him, but the registrar.

Q. Well, who was it you gave it to ?

A. Well, I do not know who was registrar at that time.

Q. The fact remains that two mortgages were cancelled by the solicitor of your association, having been put in his hands by the finance committee : that is all.

*Redirect :*

Q. Your association, No. 2, grew out of No. 1, did it not ?

A. Yes, sir.

Q. When did No. 2 go out ?

A. In 1879.

Q. And you say that you had cancelled hundreds of mortgages?

A. Yes, sir.

Q. Was that true?

A. Yes, sir.

Q. And they were all ordered to be cancelled by you as president?

A. By the board when they were paid off.

Q. That is all.

*Re-cross :*

Q. Did you sign every one of those hundred mortgages, and stamp them as paid?

A. Yes, sir; I signed every one, I think, and stamped them—I am not positive.

Q. Were they all cancelled in one batch?

A. No, sir; but just as people came to me, and wanted to have them cancelled.

Q. Were they not transferred to association, No. 2?

A. No, sir; not one of them.

Q. How long ago was the association, No. 2, formed?

A. Association, No. 1, was formed, I think—yes, sir; I know very well it was formed in May, 1859.

By Mr. Turkes—1869?

By the witness—Oh, yes, sir, 1869.

Q. That is all.

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**Adam Turkes**, a witness heretofore sworn for the complainant, is recalled.

*Direct examination by Mr. Guild :*

Q. Something has been said about Mr. Feick cancelling as solicitor, two mortgages since he has been solicitor of your association without their being signed by the president; do you know under what circumstances that was done?

A. Well, there was a party that wanted to pay off their mortgage, and they wanted the mortgage cancelled, and

they were sent to the president, and what he did afterwards I do not know. They wanted to have them cancelled, but we had the money for them before they got the mortgage.

Q. Who had the money?

A. I had, as treasurer.

Q. Before you delivered up the mortgage, you had the money?

A. Yes, sir, I always had the money before I delivered up the paper.

Q. That is all.

Complainants rest.

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**Adam Turkes**, a witness on behalf of the defendants is called.

*Direct examination by Mr. Glen :*

Q. That question about the bond and the disposition that was made of it—what bond did Mr. Johnson give as solicitor of this company?

A. \$5,000.

Q. Who were his bondsmen?

Objected to.

Q. Was Mr. Johnson under bonds for \$5,000 to this association at the time of the cancellation of this mortgage in February, 1883?

A. That I could not say; I was his bondsman up to 1882, nor was Mr. Ward after 1883 responsible.

Q. Were you up to this time that the bonds was given by Pitney his father-in-law?

A. No, sir, he was requested to have a new bondsman; the question was raised in 1883 of his having a new bondsman, and he had to make a new bond; that time he got Mr. Pitney and Dr. Thorn as his bondsmen, in the place of me and Henry Ward.

Q. When did you have an election of officers?

A. In June.

Q. Then it was June, 1883, was it, that he was re-elected?

A. Yes, sir.

Q. Was that the time that the question came up about your going on the bond?

A. I think it was in 1882 that our time expired.

Q. Who gave the bond then, next—was this bond given next after that?

A. I could not say whether he had another one or not, he had to give a new one every year—he had to renew it every year, maybe that was the second one; he had to renew the bond every year.

By the Court—Suppose you begin in the beginning and ascertain what bonds have been given.

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**Joseph Isenburg**, re-called:

*Direct examination by Mr. Glen:*

Q. Tell us what bonds Mr. Johnson gave; at the beginning of his term in 1879; what was the amount?

A. \$5,000.

Q. And who were his bondsmen?

A. In the beginning Mr. Turkes and Mr. Ward.

Q. Where is that bond?

A. That Mr. Turkes got back.

Q. That was the original bond?

A. Yes, sir.

Q. How came he to get it back?

A. To make a compromise he wanted his bond back.

Q. When was that compromise made?

A. It was made perhaps a year or fifteen months ago.

Q. After Johnson ran away, was it?

A. Yes, sir.

Q. What were the terms of that compromise?

A. What they agreed to pay?

Q. Yes.

A. \$1,500.

Q. That made \$3,000, out of the five?

A. Yes, sir.

Q. Did they pay that in cash to the association?

A. Equivalent to cash.

Q. What was the equivalent?

A. Part cash and part notes.

Q. The notes have been paid?

A. Yes, sir.

Q. Then the association released them from the other \$2,000 of their bond?

A. It gave the bonds back—surrendered the bonds.

Q. How many bonds did they hold of Turkes and Ward, as sureties; more than one?

A. I think I had more than one.

Q. Were there two?

A. I am not sure.

Q. Were there three?

A. I cannot say.

Q. When was the last one given?

A. The last one was given in the latter part of 1883, if I am not mistaken.

Q. The latter part of 1883?

A. Yes, sir.

Q. This is the bond?

A. Yes, sir.

Q. Did you have more than one with Turkes on?

A. Yes, sir.

Q. How many?

A. I am positive I had two.

Q. And you gave them both up to Turkes?

A. One was worthless and we gave it back and made a new one.

Q. You surrendered the first bond that was given, to Turkes, and he gave a new one?

A. Yes, sir.

Q. This new one was the one you compromised?

A. Yes, sir.

Q. Those two were the only bonds you held?

A. That is the only two to my knowledge?

Q. And you compromised those after Johnson ran away?

A. No, we compromised those after Johnson ran away;  
yes, sir.

Q. And gave them up to him?

A. Yes, sir.

*Cross-examination by Mr. Guild:*

Q. How long were they given for?

A. For one year.

Q. Did they say so in the bonds themselves?

A. I think they did.

Q. Are you sure of that?

A. I am pretty sure.

Q. Have you the original bonds, either one of them?

A. I have the last one.

Q. Will you produce it to the Master?

A. Yes, sir; I will state why that bond was given so late.

Q. Do you know how long it was—was there any bond in existence previous—at the time of giving this bond, which was in September, 1883—was there any other bond at that time in existence?

A. No, sir.

Q. For how long a time was he under bonds?

A. For quite a while; I could not say how long; I insisted that the finance committee should take a bond from our solicitor, and I insisted from meeting to meeting to get that bond, and Johnson pushed it off from month to month, and at the time he—but I insisted that I must have a bond, and he produced this bond, and I asked the finance committee if they were satisfied with the bond.

Q. I understand Mr. Turkes to say that you elected your officers on the 1st of June?

A. Yes, sir.

Q. Was Johnson elected in June?

A. Yes, sir.

Q. He gave bonds every year from June?

A. Quite a time elapsed before he gave it.

Q. I am not speaking of the lapse of the second bond, but he should have given his bond in June?

A. Yes, sir.

Q. And that was good until the next June?

A. Yes, sir.

Q. And the next June he was to give a new bond?

A. Yes, sir.

Q. And that was good until the next June?

A. Yes, sir.

Q. At the time of your settlement with these bondsmen, was this bond and mortgage of \$1,200, given by Johnson, included in your settlement with the bondsmen?

A. No, sir; it was not; we thought—the board of directors thought that they would get that money.

Q. That it was good?

A. Yes, sir.

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**Frederick H. Pilch**, a witness produced on the part of the aforesaid defendants, being duly sworn, testified as follows:

*Direct examination by Mr. Glen:*

Q. You are a counsellor at law, I believe, in this city?

A. Yes, sir.

Q. You knew Finley A. Johnson?

A. Yes, sir.

Q. And you were the public administrator of his effects; will you tell us what you found belonging to this association among his effects?

A. I did not find anything in his safe; I found some papers on his desk, and some on the floor—about half a dozen—there was a mortgage made by Jacob Pietz to the Excelsior Building and Loan Association for \$10,000, which had been signed, but not witnessed nor acknowledged; I found another mortgage for \$1,000, I think the name was Frederick Weber, but I will not be certain about that, and some searches were with those papers.

Q. That mortgage of \$1,000 was recorded?

A. I think there was a mortgage that had been recorded; I noticed more particularly this large mortgage of \$10,000 which had been executed and not acknowledged nor witnessed.

Q. But the \$1,000 mortgage had been recorded?

A. No, it had not.

Q. Had any of those mortgages been recorded?

A. There was that one mortgage of \$10,000, which had not been recorded, or witnessed or acknowledged.

Q. I think you said there were several mortgages by this one man?

A. No; one mortgage by this one man, and another mortgage by another man; I kept those papers for some time; he went away on the 12th of February; I kept them until the 21st; Oscar Naundorf said he was to be solicitor for the Excelsior Building and Loan Association, and wanted to take the papers away; I told him I didn't like to give them up to him unless he was elected solicitor, so we went to Mr. Isenburg's store, and while we were there Mr. Turkes came in, and in the presence of Mr. Isenburg I turned these papers over to Mr. Naundorf, and got this order (witness produced the order and read same). Afterward I found a large package of papers in a pasteboard box, making, if my memory is correct, in all thirty-two different packages, consisting mostly of searches; there were some mortgages scattered through which had been recorded; I did not examine them very particularly; I retained those until Mr. Charles A. Feick was elected, and gave them to him and took this receipt (witness read same). That is all I know about it.

Q. Were some of those mortgages recorded some time previous to that?

By Mr. Guild—Let him state—I understood that he was going to make a statement as to what he found belonging to this association.

By Mr. Glen—I understood that he closed, in that

statement, and I was going to ask him a question about it.

By Mr. Guild—Let him state what papers he found belonging to this association.

By the witness—As I say, thirty-two packages I think were printed Excelsior Building and Loan Association, containing county searches, supreme court searches and tax searches, some deeds, some mortgages, but I didn't examine them with any particularity, simply gathered together anything that I could find belonging to that association, and turned it over to Mr. Feick.

Q. Let me ask about the record of those mortgages; had they been recorded, do you know?

A. I think all were except those I found on his desk, which were given to Mr. Naundorff in Mr. Feick's place of business; Mr. Pitney asked me, after Johnson had absconded, to take charge of the papers.

Q. Mr. Pitney was his father-in-law?

A. Yes, sir.

Q. Did the president and treasurer of this association make any statement to you in regard to the securities, or custody of them, and the manner of keeping them at the time when you turned those matters over to them?

Objected to.

Objection overruled.

Q. What passed at that interview?

A. Mr. Naundorf and Mr. Turkes and myself went into Mr. Isenburg's store; I think he was in next door, or not there at that moment, and a young man brought him in; he was very much excited when I unloosed those papers and showed him this \$10,000 mortgage, and he told some person in the place he had better go after Mr. Turkes, but Mr. Turkes happened to come in at the time, and there was some question as to whom I ought to deliver the papers to; most of the talking was done by Mr. Naundorf, who had some

desires of being solicitor of the institution ; I do not remember what Mr. Isenburg said ; he was alarmed and surprised and excited about it, and Mr. Turkes was the same way ; I only remained a few minutes, turned the papers over and came away.

Q. Were those the only papers you found belonging to this association among Johnson's effects ?

A. Those were all I found up to that time ; subsequently I found a considerable number.

Q. State what they are ?

A. I have already stated before, 32 packages ; first there was about six, I am not sure about numbers.

Q. I mean after the 32 packages ?

A. I never found anything else ; there is about a wheel barrow load of papers there now, but nothing belonging to this company.

*Cross examination by Mr. Guild :*

Q. Did you examine the last batch of papers to which you refer, to ascertain whether they had reference to the Building and Loan Association No. 1 ?

A. They all belonged to No. 2.

Q. What was there other than searches and mortgages ?

A. They were such packages as we put papers in—envelopes, say John Smith to the Excelsior Building and Loan Association, and inside were searches, supreme court searches, tax searches, and in some of them there were cancelled mortgages, and I think there were a few mortgages belonging to the association which had been recorded.

Q. Are you prepared now to say, Mr. Pilch, with any degree of positiveness that there was, among that last batch of papers, any mortgages or any bond that was an existing lien ?

A. I don't think there was any bond that was a subsisting debt, but I think there were some mortgages ; Mr. Feick can produce all the papers, you know.

Q. But you of yourself cannot speak ?

A. Not with any positiveness.

Recess.

By Mr. Glen—I offer the bonds in evidence, and Mr. Guild dispenses with the proof of them; one is dated July, 1880, and one in June, 1881.

**D. W. A. Schmidt**, a witness called on the part of the aforesaid defendant, being duly sworn, testified as follows:

*Direct examination by Mr. Glen:*

Q. You were the secretary of this association?

A. I was at one time, not now.

Q. In February, 1883?

A. 1883?

Q. Yes?

A. About two years; I used to be secretary of the association.

Q. Then your term would cover February 5th, 1883; two years and a half ago?

A. Yes, it is three years and a half ago since I was secretary.

Q. Did you become secretary, or did you leave the secretaryship when the present secretary was appointed; did he take your place?

A. Yes, sir, he took my place.

Q. You were secretary at the time that Mr. Johnson ran away, and for sometime afterwards?

A. Yes, sir.

Q. How long had you been secretary before that?

A. I became secretary of the association in 1869, which association terminated in 1879, and then a new one was started which is in existence at present.

Q. That is Excelsior No. 2?

A. Yes, sir.

Q. And you remained in the secretaryship until after Johnson ran away?

A. For a little while, yes, sir.

Q. Who had charge of the securities and property of the association—bonds, mortgages, etc?

A. As far as I know; they were from time to time in the hands of the solicitor, and who got them from the solicitor I don't know; I had nothing at all to do with them.

Q. Tell us what communication you had from time to time with the solicitor in regard to papers, bonds and mortgages, etc., belonging to this company, and where you found them at such times?

A. All the communication I had with the solicitor was merely if the board of directors had passed favorably upon a loan I would give the solicitor a description of the property from which to make the search, and report favorably to the solicitor in a written way, whereupon he would make the search and all necessary papers, then as a matter of course, after the search and papers were finished, in return he would send me a note that the papers were satisfactory, and everything was right, and then he would give me directions in this way, when I would make out the order for the money.

Q. An order on the treasurer?

A. Yes, sir; and that would be the end of my doings.

Q. Did you frequently go to his office to see him about business of this concern?

A. Very seldom.

Q. After you went there did you find any of the papers or securities of the company in his possession?

A. Very frequently a number of them.

Q. In his possession?

A. Yes, sir.

Q. The bonds and securities of this company?

A. I presume they were bonds and mortgages; papers that belonged to the company.

Q. You say you frequently found those there; how long would they remain in his hands?

A. I could not tell.

Q. As near as you can tell, were they there for a month?

Objected to.

Q. Tell us as nearly as you can how long those papers remained in his possession from time to time?

A. I could not speak of the length of time; I can only speak of the number of papers at different times, I saw in his possession appertaining to the association; there were perhaps three, four, five or six, might have been more at times, and how long they had been in his possession I could not speak of; I could only judge from the number.

Q. Where were they; that is, in what portion of his office were they?

A. He had them in his office safe.

Q. In what sort of a receptacle in the safe were they?

A. That I could not say.

Q. I mean by that, boxes, envelopes, packages or what?

A. They appeared to be in an envelope, package or something of that kind, I suppose.

Q. Plain envelope or box envelope?

A. No; they were generally tied up and placed away.

Q. And he would get them out of his safe, you say?

A. Yes, sir.

Q. Who was the treasurer at this time?

A. Mr. Adam Turkes.

Q. At this time did the association have a box anywhere in the safe deposit?

A. Yes, sir; there was a box in the Newark Savings Institution at that time, and subsequently I believe that was put into the German National Bank.

Q. Do you know who had the keys of that box, or had charge of it?

A. Well, if I remember rightly, I think it was the treasurer's duty to put the papers away, and consequently he must have had the key of it.

Q. Was there more than one key of it?

A. I don't know.

Q. Did this association have any regular every day place of business?

A. No, only twice a month.

Q. At Streit's Hall?

A. Yes, sir.

Q. Do you know whether Mr. Turkes kept all the papers he had at the Savings Institution or elsewhere?

A. I could not say.

Q. Do you know that Mr. Johnson was solicitor of the company?

A. Yes, sir.

Q. And do you know anything about his taking papers to the record office and recording them—taking them away from there, receipting for them, etc.?

A. I presume that must be the case, but I could not speak positively.

Q. You don't know personally?

A. No, sir.

*Cross-examination by Mr. Guild:*

Q. You were for a long time secretary and conversant with the rules and regulations of the association, were you not?

A. Slightly so; yes, sir.

Q. With the constitution rather?

A. Yes, sir.

Q. I see that article six provides that the treasurer shall be elected by the board of directors, and his duty shall be to receive all money paid into the association from all sources whatever, and deposit the same in a bank to be designated by the board of directors, and pay the same out on order signed by the treasurer and endorsed by the president, and shall receive in trust for the association all bonds and mortgages and other securities upon which money shall be loaned for the association. That rule, so far as you know, was in operation while you were secretary of the association?

A. Yes, sir.

Q. You say that you were very seldom at the office of the solicitor; I suppose you mean Mr. Johnson's office?

A. I only had to give an order either to the person himself who had bought the money or to some one of his friends.

Q. You were not speaking of Johnson particularly?

A. No, sir.

Q. Do you know how long Johnson acted as solicitor of this association?

A. Yes, sir; I think about five years; I would not be positive.

Q. You say you were very seldom at his office; what did you go there for when you did go?

A. I went on business of the association; if I had papers to deliver or to make searches on such and such property, whenever any person had bought, to save the other party the trouble.

Q. Upon what other occasions did you go there?

A. Hardly any, except on business purposes.

Q. I would like to know what business purposes outside of that you have mentioned, took you to the office of the solicitor—who gave the order to make searches?

A. I generally gave that in writing.

Q. What took you to the office of the solicitor?

A. I don't believe I was four times in his office while I was secretary of the association, and then I was only upon my own personal business, not connected with the association.

Q. Then how came it—how often upon the four occasions you think you were there, did you ever see in Johnson's office any papers belonging to the association?

A. I believe every time I was there.

Q. If you didn't go as secretary of the company and not with reference to the business of the company, how came it you saw any papers of the association in his office?

A. I believe I did go there on business of the association and hardly any time else.

Q. I understood you went on your own personal business?

A. A couple of times I did, but then I would not speak

about the association ; I consulted him in regard to a law suit once.

Q. So that there may be no misunderstanding between us, do I understand you to say that during Johnson's term as solicitor you were not there over four times probably on business connected with the association ?

A. I don't think I was.

Q. Do you remember what the business was on those four occasions ?

A. Generally speaking, to bring him an order to make a search on certain property on which parties had been buying.

Q. This was several years ago ?

A. Yes, sir.

Q. Do you mean to say now that you can recollect distinctly that you were there four times on business connected with the association ?

A. I cannot say positively, I said a very few times, may be eight times as far as that is concerned, but I never went into the office—(interrupted.)

Q. Tell me what business it was that you went to see him about, the name of the party, and the year ?

A. It is impossible for me to remember the names, I had 400 on the book.

Q. In what association ?

A. The building association.

Q. Number 2 ?

A. Yes, sir ; there must have been fully 400 names on the book, I could not remember all of them.

Q. Can you tell me the year that you went ?

A. Every year.

Q. What was the matter of business ?

A. The matter of business was invariably association business.

Q. What was it ?

A. I don't know ; I don't remember.

Q. What mortgages were those—did you say they were mortgages you saw there ?

A. Papers.

Q. What kind of papers?

A. A bundle of papers, I suppose they were searches, mortgages, etc.

Q. Do you know what they were of your own knowledge?

A. I know only that when I asked him for certain information, that he took those papers out of the safe and looked at them and put them one side, but I didn't look at them.

Q. What information did you ask him for; do you recollect?

A. I do not; it must have been something appertaining to the association, otherwise he would not have looked among the papers he had there.

Q. Do you know whether it was in regard to a search he was making at the time upon some property that the association had made a loan?

A. I don't know.

Q. It might have been such?

A. Yes, sir; it might have been.

Q. Your recollection is very indistinct, is it not, being so long a time?

A. Yes, sir; they are just as vivid before my mind as yesterday.

Q. The fact that you went there?

A. Yes, sir.

Q. But not the matter you went for?

A. There were so many times that I had to call upon him, because he was the solicitor of the association, and many times there was a controversy that I didn't know just how to get about it that I would ask his advice, and wanted information that he knew better than I did myself.

Q. Do you know where the securities of the association were kept, and who kept them?

A. The securities were to be kept in a tin box in the vault, I believe, at the German National Bank; that is all I know about them; I don't know whether they were placed there or not.

Q. You don't know anything about that?

A. I don't know.

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**August W. Rosinger**, a witness produced on the part of the aforesaid defendant, being duly sworn, testified as follows:

*Direct examination by Mr. Glen:*

Q. You are an attorney at law in this city?

A. Yes, sir.

Q. You were solicitor, or attorney rather of the defendant in this transaction?

A. I was.

Q. You had charge of the transaction in which he purchased the premises on Charlton street, from Finley A. Johnson?

A. Yes, sir.

Q. Did you make a search on that property?

A. I did.

Q. What encumbrances did you find upon it?

A. A bond and mortgage, as alleged in the bill, made by Finley A. Johnson and wife to the Excelsior Building and Loan Association.

Q. Did you find an abstract of that mortgage registered?

A. I did.

Q. That was in book R 7, page 216; what were the terms of sale?

A. The terms of sale were \$1,450 as the purchase of the property; \$550 was to be paid cash, and a purchase money mortgage of \$900 was to be given back to Mr. Johnson.

Q. State how that was actually paid?

A. Before I began my investigation Mr. Heyder had paid \$50 on account when he negotiated for the purchase of the property.

Q. Have you a receipt for that \$50?

A. Yes, sir; it is here. (Witness produced the same.)

Said receipt offered in evidence.

Q. How was it paid ?

A. Then I have two checks here, drawn by me, one upon P. T. Quinn, comptroller, for \$23.24 ; that check is dated February 5th, 1883, and is endorsed by P. T. Quinn, and here is another check drawn by me for \$476.76 to the order of Finley A. Johnson for the balance of the cash.

Q. The two checks together make up the \$500, after paying \$50 ?

A. Yes, sir.

Q. Where did you get that money from ?

A. I got that money from Mr. Heyder.

Q. To pay on this property ?

A. Yes, sir.

Said checks offered in evidence.

Q. That leaves a balance of \$900 due ; how was that paid ?

A. By purchase money mortgage back to Mr. Johnson.

Q. Is that the purchase money bond and mortgage ? (handing bond and mortgage to witness.)

A. That is the bond and mortgage that was given in return.

Q. You are the subscribing witness ?

A. Yes, sir.

Said bond and mortgage offered in evidence.

By Mr. Glen—The assignments of mortgages, one from Finley A. Johnson to Carter, the second one from Carter to Nicholas C. Jobs are offered in evidence, the two assignments and bond and mortgages are offered in evidence.

Q. Do you know anything about the payment of this mortgage subsequently—did that matter pass through your hands ?

A. Subsequently to that ?

Q. After it passed into Jobs' hands, when it was paid off and cancelled?

A. Yes, sir.

Q. State as to that, was that mortgage paid?

A. That mortgage was paid; Mr. Heyder paid for it—gave me the money and I paid it off to Mr. Jobs, and Mr. Jobs receipted for this cancellation in my presence.

Q. And you had it cancelled?

A. I had it cancelled.

Q. Now then about this mortgage that you found registered in R 7, page 216?

A. As I made the search I discovered this mortgage, having that paper before me on which part payment was made; it didn't say anything in there about a mortgage; I inquired of Mr. Johnson what was to be done with that mortgage, and he said, "That is paid, I will get that from the association and have it cancelled."

Q. Was this before the closing of the transaction or after?

A. Before, that was shortly before closing the transaction because it was during the time that I was making a search that I discovered it; I don't know how long, it evidently was a few days before, or somewhere in that neighborhood, and he made the remark, "I know, that will be all right, I will get that and have it cancelled."

Q. What happened when you came to close the transaction—or when was the transaction closed?

A. It was closed on the 5th of February.

Q. About what time?

A. It was in the neighborhood of noon.

Q. Fore part of the afternoon.

A. It might have been the afternoon; I remember going there in the morning sometime and he was not in, and I went there again afterward, so that it might have been the fore part of the afternoon, it might have been after one o'clock.

Q. What happened then?

A. I then went to him and he was in—(interrupted.)

*By the Master :*

Q. Johnson do you mean ?

A. Yes, sir ; in his office in the State Bank building, he was in, he produced to me the old papers cancelled.

Q. What do you mean by old papers ?

A. This bond and mortgage.

*Further direct :*

Q. You mean this mortgage in R 7, 216 ?

A. Yes, sir.

Q. You mean that bond and mortgage ?

A. Yes, sir.

Q. And what do you mean by cancelled ?

A. That it was cancelled on the face of it.

Q. By whom ?

A. By the then register, Henry W. Egner.

Q. Do you know Mr. Egner's signature ?

A. I do.

Q. Was that his signature that was signed to the certificate of cancellation on the outside of the paper ?

A. Yes, sir ; it was.

Q. And that was the mortgage recorded in R 7, 216 ?

A. It was.

Q. Was that before or after you closed the transaction ?

A. Before I closed the transaction.

Q. Did you pay over this money, \$500, before or after you had that produced to you ?

A. After.

Q. Upon what did you rely in that transaction which caused you to pay it over ?

A. Why that the old bond and mortgage was cancelled and produced to me.

Q. Would you have paid it if it had not been there, on Johnson's promise to procure it ?

A. No, sir.

Q. Did you pay it on his promise to produce it ?

A. No, sir.

Q. You say it was produced before ?

A. It was produced before I closed the transaction.

Q. And cancelled in the ordinary way in which these are cancelled by the register of Essex county?

A. Yes, sir.

Q. By writing across the face and signing by the register?

A. Yes, sir; the usual way of doing it.

*Cross-examination by Mr. Guild:*

Q. Will you tell us now—have you the search you made for Mr. Heyder?

A. Yes, sir.

Q. Have you the search itself?

A. Yes, sir. (Witness produced the same.)

*By Mr. Glen:*

Q. Was the certificate on the back of the mortgage same as the other day?

A. Yes, sir.

Q. And that is the usual way in which mortgages are cancelled in this county?

A. Yes, sir; that is the usual way.

*Further cross:*

Q. What became of the mortgage just produced and cancelled?

A. I am unable to say, now.

Q. This search you made for Mr. Heyder?

A. Yes, sir.

Q. It is dated on the 5th of February?

A. Yes, sir.

Q. And you certify that you made a search down to that date, do you?

A. Yes, sir.

Q. And did you make it down to the 5th of February?

A. I did, sir.

Q. Do you know what time it was cancelled on the 5th of February?

A. No; only this, that it was cancelled before I closed the transaction.

Q. I see that among the mortgages on file that you state is a lien on that day is the mortgage in question, Finley A. Johnson and wife to the Excelsior Building and Loan Association No. 2, of the city of Newark, New Jersey, Book R 7, 216, dated December 15th, 1879; acknowledged January 15th, 1880; registered January 17th, 1880, mortgage for \$1,200, upon the premises in question?

A. Yes, sir.

Q. This is red ink, I suppose, is in your handwriting?

A. That is my handwriting.

Q. And that across the face of this record, "Cancelled February 5th, 1883, A. W. Rosinger;" now what time in the day—what time did you make that entry in the red ink?

A. When, I am unable to say; that search was not written up when I closed the transaction; I have my notes here, and from it I prepared that search.

Q. Well, you made your search down to, and including the time of closing this transaction, did you not?

A. Yes, sir.

Q. And when did you last examine the record to see whether anything had been put upon the property?

A. Immediately on the recording of the deed.

Q. That same day?

A. Yes, sir.

Q. How long did you examine the record before you permitted your client to pay his money, and take the deed?

A. I don't know whether I looked at the record that very morning.

Q. Would you not naturally have done so in the course of your business?

A. Done what?

Q. Looked at the record that morning, the morning of the 5th, before you would permit your client to take title and pay his money?

A. I may not have done so.

Q. Your business is generally that of searching, is it not?

A. Yes, sir.

Q. Is that not your practice?

A. Yes, sir; it is my practice to do so.

Q. Search up to the last hour?

A. Yes, sir.

Q. And do you think the possibilities are that you did search the records that morning of the 5th?

A. Yes, sir; I think that is the case—still, I won't say positively that I did that, but I think I did.

Q. When did you first know that this mortgage, in point of fact, had been cancelled of record?

A. When I closed the transaction with Mr. Johnson.

Q. Did you know it before Johnson produced the mortgage to you cancelled?

A. That, I am not able to say positively.

Q. What else did he produce to you beside the mortgage?

A. I think he produced the bond with it.

Q. Will you swear to that?

A. Yes, for I would not have closed the transaction unless he had.

Q. What makes you say you think he did?

A. What?

Q. You just now said you think he produced the bond?

A. Because, otherwise, I would not have closed the transaction; I would not give another man's money for the neighborhood of \$500, and have an indebtedness outstanding against it.

Q. What other endorsement was there upon this mortgage other than the notice of cancellation by the register?

A. That, I am unable to state; that, I don't remember.

Q. When he produced—Johnson produced it to you, where was this matter closed—in his office?

A. Yes, sir; in his office.

Q. Who were present?

A. I don't know that any one was present at the time; some one or two of his clerks might have been in the other room, but I don't think any one was present at the time.

Q. Except yourself and Johnson?

A. No, sir; Johnson and myself.

Q. Then when he produced that mortgage you read the cancellation of it?

A. I did.

Q. Had it had been cancelled by the register upon Johnson's production of it to him?

A. Yes, sir.

Q. When did you first see the entry of cancellation on record?

A. I think that I first saw the entry of the cancellation on record after I had closed the transaction with him in his office, and as I went up to put the deed on record.

Q. Then when Johnson produced this mortgage cancelled you then received for your client, Mr. Heyder, the deed, paid him the balance of the money agreed to be paid and delivered to him Heyder's bond and mortgage for \$900?

A. I did.

Q. So that the matter was substantially closed up at the same time?

A. Yes, sir.

Q. Now what became of that mortgage of \$1,200?

A. I don't remember; in due course of time when the deed came back I wrote up the search for Mr. Heyder and turned over all the papers that I thought he was entitled to, and I then, if I had the bond and mortgage, must have turned it over to him with the balance of the papers.

Q. If you had them, do you know if you did have them or not?

A. No; I cannot swear now whether I had them or not.

Q. Did it occur to you at that time, acting for your client, that you were doing an extraordinary thing in taking from the mortgagor or mortgagee, without knowing certainly that it had been paid to the mortgagee?

A. No, sir; Johnson informed me that he was the solicitor of the association, and, as I said previously, he told me that he would get it from the association, I don't know the exact words, but he said when I broached him about the mortgage on record a few days ago before closing, he

said, "That is all right, I am attorney for the association and I will get that mortgage and have it cancelled."

Q. You said a moment ago that he would get it from the association; is that so?

A. Yes, sir; that is so.

Q. Did you look upon the mortgage to see whether it bore any receipt of payment or order of cancellation from any officers of the association?

A. I don't remember now whether I did or not.

Q. Is it not a fact that you had confidence in Johnson's integrity at that time and dealt with him accordingly?

A. I had confidence in Johnson, not knowing anything against him; at the same time I would not have closed the transaction unless I knew legally the matter was in shape properly as it should be to enable me to close the matter with him.

Q. But if he had delivered to you then and there the mortgage with an order of cancellation on it, you would have taken the mortgage just the same, wouldn't you, and cancelled it yourself?

A. I might have done so, but I didn't do it.

Q. You would not have hesitated to have done that, regarding it entirely proper?

Objected to.

*Re-direct:*

Q. You didn't accept Mr. Johnson's word for it?

A. No, sir.

Q. You saw this mortgage cancelled, certified by the proper officer, and you relied upon it?

A. Yes, sir.

Q. Did you know anything about the association or its rules and regulations at that time?

A. No, sir; I did not.

Q. Did you know what the duties of this solicitor were at this time?

A. No, sir.

Q. Outside of the ordinary duties of solicitor and attorney?

A. No, sir.

Q. As you stated you had this mortgage produced, cancelled of record?

A. Yes, sir.

Q. And you immediately took it up to the recorder's office and had deed recorded, and then found the record to verify this statement which you saw on the back?

A. I think I did that before I recorded it, that is my habit; after closing a transaction I look at the record before I record the papers.

Q. You found it verified; the production of this mortgage with the certificate of the register upon it, cancelled of record, you found that verified by the records?

A. Yes, sir.

Q. You say this search was not written up at that time?

A. No, sir.

Q. Is it your habit sometimes to make searches down to within a day or two before the transaction is closed, and leave it open, so as to make one certificate, including the one that goes on record?

A. Yes, sir.

Q. Does that account for the date being on the 5th in this case; refer to your notes and tell us how far you came down, and whether that embodies the continuation as well as the original search?

A. On my notes it does not say here to what date or time of day I searched, but I have here continued to February 5th, 1883.

Q. It continues to February 5th, showing that there was a rest and continuation, and that this search was written up from those notes?

A. Yes, sir.

Q. You say you knew nothing about the rules and regulations of this association?

A. No, sir; I didn't know the officers.

**Frederick Heyder**, called and sworn in his own behalf, testified as follows :

*Direct examination by Mr. Glen :*

Q. Do you talk English ?

A. Very little.

Mr. Smith was sworn as interpreter.

Q. Are you defendant in this case ?

A. Yes.

Q. Ask him if at the time he bought the Charlton street property from Finley A. Johnson he knew about the mortgage which was on the property to the building and loan association ?

A. Mr. Rosinger informed me to that effect, that there was a mortgage upon it.

Q. And you furnished the money to pay for this transaction—to pay for this property ?

By the court—Not the money to pay for the mortgage, but for the property.

A. His children paid for the property.

Q. Ask him whether he has this old bond and mortgage in his possession or not ?

A. There was a mortgage upon it for \$900, Mr. Rosinger says he paid \$450 or \$500—(interrupted.)

*By the court :*

Q. That has nothing to do with the question ; what we want to get at is whether he has got in his possession this old mortgage of the association of \$1,200.

A. No, he has not got that mortgage, and did not receive it.

*Further direct :*

Q. Ask him if he was there at the time when it was closed, or whether Mr. Rosinger brought him the papers and turned them over to him ?

A. No, I was not there.

Not cross examined.

By Mr. Guild—Does the master understand that this original bond has been in the possession of the association from the first?

By the court—So I understand.

By Mr. Guild—I intend to prove that that original bond is in the possession of the complainants.

By the court—It is so understood, that it comes from their possession, but I do not remember whether you asked the question, whether it was always in their possession.

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**Mr. Isenburg**, recalled for the complainants.

*Direct examination by Mr. Guild:*

Q. The bond that has been called the original bond; has that ever been out of the possession of the association from the time it was delivered?

A. Not to my knowledge.

*Cross examination by Mr. Glen:*

Q. Do you know anything about it really; was this bond in your custody?

A. When I first looked at them it was not amongst them.

Q. I ask whether this bond was in your charge?

By Mr. Guild—I think that appears from Mr. D  
 \_\_\_\_\_ testimony.

Q. You didn't have charge of this bond?

A. No, sir.

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**Adam Turkes**, a witness produced on the part of the aforesaid defendant, is recalled for further examination.

*By Mr. Guild :*

Q. Who had the care of this bond since it was first delivered to you ?

A. I had.

Q. Where has it been kept ?

A. In the box where they were all kept.

Q. Has it been out of your possession ?

A. Not as I know of it has not.

*Cross examination by Mr. Glen :*

Q. Do you know of your own knowledge whether it has or not ?

A. It should not have been.

Q. Answer my question ; you can tell whether it has or not ?

A. It should not have been ; I do not think so.

Q. Has that bond ever been out of your possession or not ?

A. No, sir.

Adjourned.

### EXHIBITS OFFERED BY COMPLAINANTS.

1. Transfer book of complainants.
2. Cash book of complainants.
3. Journal of complainants.
4. Check to Johnson.
5. Bond, Johnson to complainants.
6. Copy of mortgage, Johnson to complainants.
7. Book R 7 of mortgages for Essex county, page 216, showing registry and cancellation of complainants' mortgage, as follows :

FINLEY A. JOHNSON AND WIFE,  TO  THE EXCELSIOR BUILDING AND LOAN ASSOCIATION, No. 2, OF THE CITY OF NEWARK, NEW JERSEY.	\$1,200.
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On the fifth day of February, A. D. 1883, the original mortgage here registered was produced in the office by Finley A. Johnson, receipted, cancelled and made void.

HENRY W. EGNER,

*Register.*

Johnson to Excelsior B. and L. Assoc'n.

All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the city of Newark, in county of Essex, and state of New Jersey : Beginning in the easterly line of Charlton street, at a point therein distant five hundred and seventy-five feet southerly from the south line of Montgomery street ; thence running easterly at right angles to Charlton street, one hundred feet ; thence southerly twenty-five feet ; thence westerly one hundred feet to Charl-

ton street; thence northerly twenty-five feet to the place of beginning, being lot No. 89 on a map of the estate of Sayres Coe, deceased, recorded in Book H 8 of Deeds for Essex county, pages 590, etc., and being the same premises conveyed to the said Finley A. Johnson by John G. Aschenbach and wife by deed dated November 1st, 1876, and recorded in Book C 19 of Deeds for Essex county, pages 214, etc.

The premises above described are mortgaged by Finley A. Johnson and Sadie P., his wife, of the said city of Newark, to "The Excelsior Building and Loan Association, No. 2, of the city of Newark, New Jersey," to secure the payment of twelve hundred dollars.

The special conditions and provisions binding said mortgagors will be found in the mortgage of which this is an abstract.

The mortgage is dated the fifteenth day of December, A. D. eighteen hundred and seventy-nine; was acknowledged the fifteenth day of January, 1880, before Edward M. Colie, a master in chancery of New Jersey, and received in the office the seventeenth day of January, A. D. 1880, at twenty-five minutes after nine o'clock in the forenoon.

H. W. EGNER, *Register.*

### EXHIBITS OFFERED BY DEFENDANTS.

1. Warranty deed free from encumbrance, Johnson to Heyder, Book V 21, pages 2 and 3, Essex county.
2. Order of complainants to Pilch to deliver papers to Naundorf.
3. Receipt of Feick, solicitor of complainants, to Pilch for papers.
4. Receipt of Garrabrant, broker, for \$50 on account of purchase money from Heyder.
5. Two checks of A. W. Rosinger, attorney, on account of purchase money.
6. Cancelled purchase money bond and mortgage, Heyder to Johnson, for balance of purchase money.
7. Two assignments of same.
8. Search.
9. Bond of Johnson, solicitor to complainants, as follows :

### BOND.

FINLEY A. JOHNSON, HENRY WARD AND ADAM TURKES, TO THE EXCELSIOR BUILDING AND LOAN ASSOCIATION, No. 2, OF THE CITY OF NEWARK, NEW JERSEY.	}	\$5,000 Dated July 19, 1880.
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“The condition of the above obligation is such that whereas the said Finley A. Johnson has been duly elected and appointed by the board of directors of the said, The Excelsior Building and Loan Association No. 2, to the office of solicitor of the said association, now therefore if the said Finley A. Johnson shall and do well and faithfully

perform, all and singular, the duties and services required of him by the said association in and about his said office of solicitor so long as he shall continue and remain in such office, then this obligation to be void or else to be and remain in full force and effect."

10. Bond of Johnson, solicitor to complainants, as follows:

BOND.

FINLEY A. JOHNSON, HENRY WARD AND ADAM TURKES, TO THE EXCELSIOR BUILDING AND LOAN ASSOCIATION NO. 2, OF THE CITY OF NEWARK, NEW JERSEY.	}	\$5,000 Dated June 20, 1881.
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"The condition of the above obligation is such that whereas the said Finley A. Johnson has been duly elected and appointed by the board of directors of the said, The Excelsior Building and Loan Association No. 2, to the office of solicitor of the said association. Now, therefore, if the said Finley A. Johnston shall and do well and faithfully perform, all and singular, the duties and services required of him by the said association in and about the said office of solicitor, so long as he shall continue or remain in such office, then this obligation to be void, or else to be and remain in full force and effect.

"And further that if at the end of the term for which he has now been elected, he should again be elected to and discharge the duties of solicitor of the said Excelsior Building and Loan Association No. 2, then it is the true intent and meaning of these presents, that the above obligation shall remain in full force and effect during the time that the said Finley A. Johnson shall act as such solicitor for

such Building and Loan association, whether he shall hold such office and discharge such duties by virtue of an election by the board of directors of such association, or otherwise, and to bind and hold the said obligors on said bond for any and all the acts of the said Finley A. Johnson so long as he shall act as solicitor of said association, whether it be by virtue of subsequent election or otherwise."

### OPINION.

Of W. B. Williams, Advisory Master, Jan. 4, 1886.

This case differs from *Harrison v. N. J. R. R. Co.*, 4 C. E. G, 488, because there the defence did not rest on the ground, "that the mortgage in dispute was marked satisfied upon the county register, and that the defendants took their title in reliance upon that fact." Here the defence rests expressly on that ground.

So in that case after the mortgage was lodged by the mortgagee with the county clerk, it was withdrawn from that custody by the mortgagor; and the burthen of showing that the mortgagor was authorized to have it in his possession, was held to rest on the defendants.

In this case the mortgage came duly to the mortgagee after being recorded, and its production by the mortgagor after its cancellation had been entered of record appeared proper and usual.

So, in that case, the non production of the bond was held an important factor in resolving the question whether the defendants had been negligent. Here, it is testified that the bond was produced, and this is not disproved.

True, complainants' officers say, that so far as they know and believe, the bond was never out of their custody; but so they thought about the mortgage, which yet had certainly left their custody.

The defendant relied on the official entry of cancellation, which is said in *Miller v. Wack*, Saxt. 204, to be evidence "of a high character," and see also the remarks of the chief justice in 4 C. E. Gr. 499.

Such an entry throws the burthen of proof on the party attacking its truth; but that is all. The entry is not conclusive, and may be impeached as false. If the party who attacks it shows its falsity, and that he is in no way privy

to it, or estopped by his own acts or negligence, it has been held in this court that his mortgage will be enforced even against an innocent purchaser for value.

*Harris v. Cook*, 1 Stew., 345.

The complainants have fully met this requirement, and have sustained this burden of proof. They have proved that their mortgage was never paid, but was surreptitiously obtained by Johnson by some unknown means from the place where their securities were kept, without their assent or knowledge.

It was in fact stolen by him. If a receipt was written on it, as the words of the record of cancellation indicate, it was either a forgery, or if signed by Johnson only, was without authority. The officers of the association neither signed it, nor authorized it, nor knew of it, nor did they place the mortgage in such a position that it was likely to be tampered with. They seem to have been as careful as people usually are, to keep such papers in safety.

The following quotations from *Harris v. Cook* express the position of the complainants in the present case :

“The complainants were not aware that their mortgage had been cancelled of record until after the purchase by Cook and Bernheimer had been completed.”

It has never been paid or satisfied, and its cancellation of record was “entirely without their knowledge, and was not due to any negligence on their part, nor is any laches imputable to them.”

“The action of the clerk in cancelling the mortgage of record was without warrant or authority and was therefore of no effect. His false certificate, while it misled those who examined the record in respect to the property, did not satisfy or extinguish the mortgage, nor in any wise affect its validity, and it cannot affect the rights of the lawful owners of the mortgage (*Trenton Banking Co. v. Woodruff*, 1 Gr. Ch., 117).”

“Those who take title to property on which a mortgage has been given and of which they have notice, may effectually guard themselves against being misled by such certifi-

cate, if false, by requiring proof that the mortgage has in fact been satisfied or extinguished. Cautiousness will protect them. But what vigilance, short of constant watch, would protect the mortgages, against the making of the false certificate of cancellation, if he were to be held to be bound by it."

Where the cancellation is unauthorized, nothing but an estoppel will prevent the holder from enforcing the mortgage.

But to estop the party must be affected with knowledge of the facts; or at least with implied knowledge that what he is doing or neglecting will probably result in injury to another who may act in reliance on it.

Here there was no knowledge, or omission of duty toward the purchaser. The complainants took at least ordinary care of their property and it was in effect stolen by Johnson and disposed of by him; this would not give title to an innocent purchaser. Even some want of care on their part would not have raised an estoppel under the circumstances.

"It is certainly not a general rule of law, that a person can be deprived of his property by an unauthorized transfer thereof, simply because he has not exercised ordinary care to prevent such transfer."

"I may place my unindorsed bill in the hands of an agent and thus place it in his power to forge an indorsement, and yet the indorsement would not bind me. The principle that when one of two persons equally innocent must suffer a loss by the act of a third person, he shall bear the loss who placed it in the power of such third person to perpetrate the act, does not apply to such cases."

"The negligence alleged is simply that Raines did not use ordinary care to discover and prevent the frauds of Phelps; and there is no authority for holding that such negligence can work an estoppel. If it could, merchants, bankers and other business men having numerous clerks, would frequently hold their property by a precarious tenure."

*People v. Bank*, 75 N. Y. 548-562.

To relieve the defendant in this case it would be necessary

to hold in effect, that theft or forgery will confer good title on an innocent purchaser as against the true and innocent owner.

The fact that Johnson was the general solicitor of the complainant, was not a matter to disarm the vigilance of the defendant in regard to the question whether their mortgage was paid. It was not natural to suppose he was authorized as solicitor to receipt to himself his own debt or mortgage. This should rather have awakened inquiry. The complainants are entitled to a decree.

**FINAL DECREE.**

This cause coming on to be heard upon bill, answer, replication and proofs, in the presence of Guild and Lum, of counsel with the complainants, and of Charles T. Glen, of counsel with the defendants, and the pleadings having been read, and testimony taken and heard, and the arguments of counsel having been heard thereon, and the court having considered the said pleadings, proofs and arguments, and it appearing to the court that the complainants are entitled to the relief sought and prayed for in their bill of complaint:

It is thereupon on this twenty-eight day of December, eighteen hundred and eighty-five, by his Honor, Theodore Runyon, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the cancellation of the mortgage of the complainants set forth in their said bill, bearing date the fifteenth day of December, eighteen hundred and seventy-nine, made by Finley A. Johnson and Sadie P., his wife, to the complainants to secure the sum of twelve hundred dollars besides interest, and recorded in Book R 7 of Mortgages for Essex County, on pages 216 and 217, which said cancellation was entered by the register of said county on the fifth day of February, eighteen hundred and eighty-three, was without consideration, fraudulent and void, and is hereby set aside, vacated and annulled; and that the said mortgage be and the same is hereby established, and declared to be a valid lien, charge and encumbrance upon the lands and premises therein and in said bill described, and that there is due to the complainants upon their said mortgage on this day for principal and interest, the sum of one thousand and seventy-two dollars and eighty cents; and that the said mortgaged premises be sold to raise and satisfy the sum of money due to the complainants, that is to say the sum of one thousand and seventy-two dollars and eighty cents, together with lawful interest thereon, to be computed



### NOTICE OF APPEAL.

The defendants hereby appeal from the final decree made in this court, in the above stated cause, and from the whole and every part thereof, to the court of errors and appeals in the last resort in all causes, the said decree being erroneous in the following particulars:

First—In that it declares that complainants are entitled to the relief prayed for in the bill.

Second—In that it decreed that the cancellation of the mortgage of the complainants set forth in said bill was without consideration, fraudulent and void, and in that it thereby set aside, vacated and annulled said cancellation.

Third—In that it thereby established the mortgage of the complainants and declared the same to be a valid lien, charge and encumbrance upon the lands and premises therein and in said bill described.

Fourth—In that it decreed that there is due to complainants upon their said mortgage on the date of said decree for principal and interest the sum of \$1,072.80.

Fifth—In that it decreed that said mortgaged premises be sold to raise and satisfy the said sum of \$1,072.80, together with lawful interest to be computed from December 28th, 1885, with complainants' costs to be taxed and to complainants a counsel fee of ten dollars, and that a writ of *feri facias* do issue for that purpose out of this court directed to the sheriff of the county of Essex, commanding him to make sale according to law of said mortgaged premises, and that out of the money arising from such sale he pay to the complainants or their solicitor their said debt, interest and costs, and in case more money should be raised

by said sale than should be sufficient to answer such payments, that such surplus be brought into this court, and that said sheriff make return without delay of his proceedings by virtue of said writ.

Sixth—In that it decreed that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises when sold by virtue of said decree.

Dated February 27, 1886.

CHARLES T. GLEN,  
*Solicitor and of Counsel with Defendants.*

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

CHARLES T. GLEN,  
*Of Counsel.*

Filed February 27, 1886.

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**ACKNOWLEDGMENT.**

Of due and legal service of notice of appeal, March 1, 1886.

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**DEPOSIT**

of \$100 with clerk in chancery, April 1, 1886, receipted for by clerk.

**PETITION OF APPEAL.**

To the Honorable Court of Errors and Appeals, in the last resort in all causes :

The humble petition of Frederick Heyder and Mrs. Frederick Heyder, his wife, appellants in the above-stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his honor, Theodore Runyon, Chancellor of New Jersey, bearing date the 28th day of December, 1885, wherein the said the Excelsior Building and Loan Association, No. 2, of the city of Newark, New Jersey, were complainants, and the appellants were defendants, in this respect, to wit: That said decree declares that the complainants therein named are entitled to the relief sought and prayed for in their bill of complaint, and that said decree adjudges as follows, viz. : " That the cancellation of the mortgage of the complainants set forth in their said bill, bearing date the 15th day of December, 1879, made by Finley A. Johnson and Sadie P., his wife, to the complainants, to secure the sum of \$1,200, besides interest, and recorded in book R 7 of mortgages for Essex county, on pages 216 and 217, which said cancellation was entered by the register of said county on the 5th day of February, 1883, was without consideration, fraudulent and void, and is hereby set aside, vacated and annulled, and that the said mortgage be and the same is hereby established and declared to be a valid lien, charge and encumbrance upon the lands and premises therein and in said bill described, and that there is due to the complainants upon their said mortgage, on this day for principal and interest, the sum of \$1,072.80, and that the said mortgaged premises be sold to raise and satisfy the sum of money due to the complainants—that is to say, the sum of \$1,072.80, together with lawful interest thereon, to be computed from the 28th day of December,

1885, with complainants' costs to be taxed, and a counsel fee of \$10, and that a writ of *feri facias* do issue for that purpose out of this court directed to the sheriff of the county of Essex, commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from such sale, he pay to the complainants or to their solicitor, their said debt, interest and costs; and in case more money should be raised by the said sale than shall be sufficient to answer such payments, that such surplus be brought into this court to abide the further order of this court, unless otherwise previously disposed of by the order of this court, 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 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."

And your petitioners humbly appeal from the said decree, and all and every part thereof upon the ground that the same is erroneous and contrary to equity and good conscience, for that the complainants are not entitled to the relief sought and prayed for in their bill of complaint, and for that the cancellation of the mortgage of the complainants was not without consideration and was not fraudulent and void, and that the same should not be set aside, vacated and annulled, and that the complainants' mortgage should not be established and declared to be a valid lien, charge and encumbrance upon the lands and premises therein and in said bill described, and that there is not due to said complainants upon said mortgage the sum of ten hundred and seventy-two dollars and eighty cents, or any sum whatsoever, and that the said premises should not be sold to pay and satisfy said sum of ten hundred and seventy-two dollars and eighty cents, with interest, costs and counsel fees as ordered by said decree, and that a writ of *feri facias* should not issue for the sale of said lands as ordered by said decree, and for that the defendants ought not to stand

absolutely debarred and foreclosed of and from all equity of redemption of, in and to said premises as ordered by said decree.

For that the original mortgage was not produced or proved at the trial of the cause, nor were the contents thereof proven.

For that the registry of said mortgage was improperly admitted in evidence on the part of the complainant.

For that the mortgage mentioned in said bill was duly cancelled of record before petitioner purchased said premises, and that the said mortgage with the bond secured thereby were produced to petitioner duly cancelled of record before his purchase, and that petitioner purchased said premises in good faith by warranty deed free and clear of encumbrance and paid full value therefor, after making a careful search in and relying fully upon the records of Essex county, which showed at the time of his purchase that said mortgage was regularly and properly cancelled of record.

For that a minute of the discharge of said mortgage was made on the margin of the registry thereof before the purchase by the petitioner, according to section 23 of "An act concerning mortgages," revision approved March 27, 1874, which section 23 is fully set forth on page 707 of said revision, and that petitioners were entitled to rely and did rely upon said record and the said minute as a full and absolute bar to and discharge of the said registry and mortgage according to the statute in such case made and provided.

For that if said mortgage was improperly cancelled, it was owing to and rendered possible by the negligence of the complainants, and that petitioners are not properly chargeable with loss caused by complainants' negligence.

For that the complainants were secured from all loss and damage in the premises by bonds of Finley A. Johnson, the maker of said mortgage as complainants' solicitor, with good sureties, which bonds they were bound in equity to exhaust or to turn over to your petitioners before any proceedings against the property of petitioners were taken,

but which said bonds the complainants settled and compromised with the sureties of said Johnson without the knowledge or consent of your petitioners.

And for that said decree is in divers other particulars erroneous and contrary to equity and good conscience.

Your petitioners therefore pray that the said decree of the said chancellor, and the whole and every part thereof may be reversed, set aside, and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

CHARLES T. GLEN,  
*Solicitor and of Counsel with Petitioners.*

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#### ACKNOWLEDGMENT.

We hereby acknowledge due and legal service of a copy of the petition of appeal filed in the above stated cause.

Dated March 30th, 1886.

GUILD & LUM,  
*Solicitors for Respondents.*  
CHARLES A. FEICK,  
*Solicitor.*

**ANSWER TO PETITION OF APPEAL.**

The answer of the above named respondents to the petition of appeal of the above named appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto nevertheless say and admit that a decree was on the twenty-eighth day of December last, past, and made entered in the court of chancery in this cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

GUILD & LUM,

*Solicitors for and of Counsel with Respondents.*

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**NOTICE OF HEARING.**

For 3d Tuesday in June, 1886.

Due and legal service acknowledged May 24, 1886.

