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WITNESSES FOR COMPLAINANT.

WITNESSES FOR DEFENDANT.

COMPLAINANT'S EXHIBITS.

Bill of Complaint.

Filed June 29, 1929.

In Chancery of New Jersey.

To the Honorable EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey. 10

The complainants, Julius Sharff and Louis Koplowitz, of the City of Newark, County of Essex and State of New Jersey, respectfully show that:

1. On August 15th, 1928, Robert Tosti being indebted to Julius Sharff and Louis Koplowitz in the sum of $29,055.00, executed to them a bond of that date to secure that sum, payable on August 16th, 1929, with interest at the rate of six per centum per annum, payable half yearly from the date of the bond. 20

2. To secure payment of the bond, said Robert Tosti and Jennie Tosti, his wife, executed to said Julius Sharff and Louis Koplowitz a mortgage of even date with the bond; and thereby conveyed to them, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon was recorded in the Office of the Register of the County of Essex in Book N 65 of Mortgages, pages 142-143. 30

3. On August 15th, 1928, Robert Tosti being indebted to the said Julius Shaff and Louis Koplowitz in the sum of $96,000.00, executed to them a bond of that date to secure that sum, payable on February 16th, 1929, with interest at the rate of 40

six per centum per annum, payable half yearly from the date of the bond.

4. To secure payment of the bond, said Robert Tosti and Jennie Tosti, his wife, executed to said Julius Sharff and Louis Koplowitz, a mortgage of even date with the bond; and thereby conveyed to them, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon was recorded in the Office of the Register of the County of Essex, in Book D-65 of Mortgages, pages 447-450.

5. The mortgaged premises are described as follows:

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

> BEGINNING on the westerly side of South Arlington Avenue one hundred feet and fifteen hundredths feet northerly from the northerly line of Elmwood Avenue; thence north sixty degrees west one hundred thirty-six feet and twenty hundredths feet to the rear line of land conveyed by Harry Adams to William Langley; thence northerly parallel with Oak Street one hundred feet to the northerly line of land of Harry Adams; thence south sixty degrees east one hundred thirty feet and seventy-one hundredths feet to the westerly line of South Arlington Avenue; thence running southerly along said line of South Arlington Avenue one hundred feet and more to the point and place of BEGINNING.

6. On August 15th, 1928, Robert Tosti being indebted to Julius Scharff and Louis Koplowitz in the sum of $29,055.00, executed to them a bond of that date to secure that sum, payable on August 16th, 1929, with interest at the rate of six per centum per annum, payable half yearly from the date of the bond.

7. To secure payment of the bond, said Robert Tosti and Jennie Tosti, his wife, executed to said Julius Scharff and Louis Koplowitz a mortgage of even date with the bond; and thereby conveyed to them, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon was recorded in the Office of the Register of the County of Essex in Book D-65 of Mortgages, pages 454-456.

8. On August 15th, 1928, Robert Tosti being indebted to Julius Scharff and Louis Koplowitz in the sum of $96,000.00, executed to them a bond of that date to secure that sum, payable on February 16th, 1929, with interest at the rate of six per centum per annum, payable half yearly from the date of the bond.

9. To secure payment of the bond, said Robert Tosti and Jennie Tosti, his wife, executed to said Julius Scharff and Louis Koplowitz, a mortgage of even date with the bond; and thereby conveyed to them, in fee, the land herein after described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon was record-

ed in the Office of the Register of the County of Essex, in Book D-65 of Mortgages, pages 451-454.

10. The mortgage premises are described as follows:

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

BEGINNING at a point in the easterly line Oak Street therein distant two hundred fifty-six and twenty-two one-hundredths of a foot northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence north thirty degrees east thirty-five feet and seventy-eight one-hundredths feet; thence south sixty degrees east one hundred twenty-five feet and twenty-two one-hundredths of a foot to the westerly line of South Arlington Avenue; thence running southerly along said westerly line of South Arlington Avenue one hundred feet and fifteen one-hundredths of a foot; thence north sixty degrees west one hundred thirty feet and seventy-one one-hundredths feet; thence north thirty degrees east fifty-six and twenty-two one-hundredths feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the said point of BEGINNING; reserving, however, a right of way over that part of said lands that may be described as follows: Beginning at a point in the easterly line of Oak Street therein distant two hundred fifty-six feet and twenty-two hundredths feet northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees

east one hundred feet; thence south thirty degrees west eight feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the place and point of Beginning;

11. The bonds and mortgages each contained an agreement that if any installment of interest should remain unpaid for thirty days after the same should fall due, then the aforesaid principal sums of $29,055.00, $96,000.00, $29,055.00 and $96,000.00, with all unpaid interest, should, at the option of the mortgagees, their representatives or assigns, become immediately due.

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

13. The mortgages of $29,055.00 each, and its bonds are purchase money mortgages and were given to secure the payment of the purchase price of the premises described in paragraphs five and ten of this bill of complaint.

14. The bonds and mortgages in the sum of $96,000.00 each heretofore referred to were advance money mortgages, drawn in pursuance to Section

14 of an Act entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of 1892) and the various amendments and supplements thereto" and is so set forth therein and was given in order to secure the amount therein stated, which was to be advanced to the mortgagors in connection with the erection and construction of an apartment house upon each of said lands and premises hereinabove described. The full amount of $96,000.00 has been advanced to the mortgagors on each of said mortgages.

15. On November 1, 1928, Robert Tosti mortgaged the land described in paragraphs five and ten of this bill of complaint to the Otis Elevator Co., a corporation, for $11,500. which mortgage was on November 14th, 1928 recorded in the Register's Office of Essex County, in Book D 66 of mortgages, page 293.

Any interest which said Otis Elevator Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

16. On January 23, 1929, Robert Tosti mortgaged the land described in paragraphs five and ten of this bill of complaint to the Builders Hardware Supply Co., a corporation, for $1,100.00, which mortgage was on January 24th, 1929 recorded in the Register's Office of Essex County, in Book H 66 of mortgages, page 462.

Any interest which said Builders Hardware Supply Co., a corporation, may have in said lands is subject to the lien of complainant's mortgages.

17. On or about May 15th, 1929, the New Jersey Terra Cotta Co., a corporation for the benefit

of the Federal Seaboard Terra Cotta Co., a corporation recovered a judgment general against Robert Tosti and judgment special against the premises described in paragraphs five and ten of this bill of complaint apportioned equally.

Any interest which the New Jersey Terra Cotta Co., a corporation and the Federal Seaboard Terra Cotta Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

18. On February 15, 1929 Robert Tosti entered into a conditional bill of sale with Bannister & Pollard Co., a corporation, in the sum of $8,500.00, for material furnished in the buildings on the premises described in paragraphs five and ten of this bill of complaint, which conditional bill of sale was filed on February 25th, 1929.

Any interest which the said Bannister & Pollard Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

19. On February 15th, 1929 Bannister & Pollard Co. assigned said conditional bill of sale to Walter E. Heller & Co., a corporation, which assignment of conditional bill of sale was filed on February 25th, 1929.

Any interest which the said Walter E. Heller & Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

20. On October 15th, 1928 Robert Tosti entered into a conditional bill of sale with Kernerator Incinerator Co., a corporation or Thien Equipment Co., a corporation, in the sum of $710.00, for material furnished in the buildings on the premises described in paragraphs five and ten of this bill of complaint, which conditional bill of sale was filed on October 18th, 1928.

Any interest which the Kernerator Incinerator Co., a corporation, and, or, Thien Equipment Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

21. On November 1st, 1928, Robert Tosti entered into a conditional bill of sale with Otis Elevator Co., a corporation, in the sum of $11,500.00, for material furnished in the buildings on the premises described in paragraphs five and ten of this bill of complaint, which conditional bill of sale was filed on November 14th, 1928.

Any interest which the Otis Elevator Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

22. On December 18th, 1928, Robert Tosti entered into a conditional bill of sale with the Automatic Oil Heating Co., a corporation, in the sum of $1,440.00, for material furnished in the buildings on the premises described in paragraphs five and ten of this bill of complaint, which conditional bill of sale was filed on December 19th, 1928.

Any interest which the Automatic Oil Heating Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

23. On January 23rd, 1929, Robert Tosti entered into a conditional bill of sale with the Builders Hardware Supply Co. a corporation, in the sum of $1,100.00, for material furnished in the buildings on the premises described in paragraphs five and ten of this bill of complaint, which conditional bill of sale was filed on January 24th, 1929.

Any interest which the Builders Hardware Supply Co., a corporation, may have in said lands is subject to the lien of complainants' mortgages.

24. In accordance with the terms of said bonds

and mortgages, and in order to protect their security, these complainants may hereafter be compelled to pay taxes, water rents, assessments and insurance premiums, the amount of which they will prove at the trial of this cause, and which amount will be added to the amounts due on their respective bonds and mortgages. 10

25. Robert Tosti is married, and his wife's name is Jennie Tosti.

Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to complainant's mortgages.

26. Said Robert Tosti has always been in possession of the mortgaged premises.

27. There is due to complainants on said mortgage referred to in paragraph two hereof, the sum of $29,055.00, besides interest from August 15th, 1928. There is due to complainants on said mortgage referred to in paragraph four hereof, the sum of $96,000.00, besides interest from August 15th, 1928. There is due to complainants on said mortgage referred to in paragraph seven hereof, the sum of $29,055.00, besides interest from August 15th, 1928. There is due to complainants on said mortgage referred to in paragraph nine hereof, the sum of $96,000.00, besides interest from August 15th, 1928. 20 30

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

1. That Robert Tosti and Jennie Tosti, his wife, Otis Elevator Co., a corporation, Builders Hardware Supply Co., a corporation, New Jersey Terra Cotta Co., a corporation, Federal Seaboard Terra Cotta Co., a corporation, Bannister & Pollard Co., a corporation, Walter E. Heller & Co., 40

a corporation, Kernerator Incinerator Co., a corporation, Thien Equipment Co., a corporation, and Automatic Oil Heating Co., a corporation, who are the defendants to this suit, may answer this bill of complaint and each statement therein made:

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

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

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

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

BENJAMIN NEWMAN,
Solicitor and Counsel with
Complainants.

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Writ of Subpoena.

New Jersey, to wit, *The State of New Jersey,* to

Builders Hardware Supply Co., a corporation

(Seal)

Greeting: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Julius Sharff and Louis Koplowitz to be relieved touching the matters therein contained.

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Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the twenty-fourth day of July, 1929, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

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Witness, his Honor, EDWIN ROBERT WALKER, our Chancellor, at Trenton, the Sixteenth day of July, in the year of our Lord one thousand nine hundred and twenty-nine.

FERD GARRETSON,
Clerk.

BENJ. NEWMAN, Sol'r.

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Writ of Subpoena.

Filed July 30, 1929.

New Jersey, to wit, *The State of New Jersey,* to

New Jersey Terra Cotta Co., a corporation, Federal Seaboard Terra Cotta Co., a corporation.

10 *Greeting*: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Julius Sharff and Louis Koplowitz to be relieved touching the matters therein contained.

(Seal)

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days 20 from and after the 31st day of July, 1929, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

Witness, his Honor, EDWIN ROBERT WALKER, our Chancellor, at Trenton, the Sixteenth day of July, in the year of our Lord one thousand nine hundred and twenty-nine.

FERD GARRETSON,
Clerk.

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BENJ. NEWMAN, Sol'r.

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Writ of Subpoena.

Filed Aug. 1, 1929.

New Jersey, to wit, *The State of New Jersey,* to

Robert Tosti and Jennie Tosti, his wife,

(Seal)

Greeting: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Julius Sharff and Louis Koplowitz to be relieved touching the matters therein contained. 10

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the twenty-fourth day of July, 1929, and in default thereof such order or decree will be made against you as the Court shall think equitable and just. 20

Witness, his Honor, EDWIN ROBERT WALKER, our Chancellor, at Trenton, the Sixteenth day of July, in the year of our Lord one thousand nine hundred and twenty-nine.

FERD GARRETSON,
Clerk.

BENJ. NEWMAN, Sol'r. 30

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Writ of Subpoena.

Filed July 30, 1929.

New Jersey, to wit, *The State of New Jersey,* to

Morreale-Mantione Construction Co., Inc., a corporation,

10 (Seal) *Greeting*: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Julius Sharff and Louis Koplowitz to be relieved touching the matters therein contained.

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days 20 from and after the 31st day of July, 1929, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

Witness, his Honor, Edwin Robert Walker, our Chancellor, at Trenton, the Sixteenth day of July, in the year of our Lord one thousand nine hundred and twenty-nine.

FERD GARRETSON,
Clerk.

30 Benj. Newman, Sol'r.

Served the within Writ, with tickets annexed personally upon the following within named defendants, by delivering to each of them a true copy thereof, July 18, 1929 upon Aaron Lasser, agent in charge of the Automatic Oil Heating Co., a cor- 40 poration at No. 17 Academy St., Newark, N. J.

July 19, 1929, upon Robert C. Meyer, agent in charge of the Otis Elevator Co., a corporation at No. 17 William St., Newark, N. J., and upon W. R. Bannister, agent in charge of Bannister and Pollard Co. a corporation at No. 418 Washington St., Newark, N. J. and upon Agnes Koehler, as agent in charge of the Kernerator Incinerator Co., a Corporation and as agent in charge of the Thien Equipment Co., a Corporation, at No. 1060 Broad St., Newark, N. J.

Walter E. Heller and Co., a corporation, Non Est.

CONRAD DEUCHLER,
Sheriff.
By William V. Byrne,
Special Deputy.

Affidavit.

Filed July 30, 1929.

IN CHANCERY OF NEW JERSEY.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Compl'ts, and ROBERT TOSTI, *et als.*, Def'ts.	Sub. ad. Resp. Ret'ble July 27, 1929. Benjamin Newman, Sol'r.

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New Jersey, Essex County ,ss.:

20 William V. Byrne, Special Deputy Sheriff of the County of Essex, being duly sworn according to law, on his oath, saith that he has enquired for Walter E. Heller & Co. a corporation, the Defendant named in the above stated and hereto annexed writ for the purpose of serving them therewith, and has not been able to find the said Defendant in his county, and this deponent is credibly informed and verily believes that the said Defendant re-
30 sides out of the State of New Jersey.

WILLIAM V. BYRNE.

Sworn and subscribed before me, this
23 day of July, 1929.
George Yuckschwerdt
Notary Public
of New Jersey.
My Commission expires Oct. 27, 1931.

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Writ of Subpoena.

Filed July 30, 1929.

New Jersey, to wit, *The State of New Jersey,* to

Otis Elevator Co., a corporation, Bannister & Pollard Co., a corporation, Walter E. Heller & Co., a corporation, Kernerator Incinerator Co., a corporation, Thien Equipment Co., a corporation, and Automatic Oil Heating Co., a corporation,

(Seal)

Greeting: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Julius Sharff and Louis Koplowitz to be relieved touching the matters therein contained.

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the twenty-seventh day of July, 1929, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

Witness, his Honor, EDWIN ROBERT WALKER, our Chancellor, at Trenton, the Sixteenth day of July, in the year of our Lord one thousand nine hundred and twenty-nine.

FERD GARRETSON,
Clerk.

BENJ. NEWMAN, Sol'r.

Petition to be Admitted as a Party Defendant.

Filed Oct. 22, 1929.

IN CHANCERY OF NEW JERSEY.

JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, vs. ROBERT TOSTI, *et als.*, Defendants.	On Bill to Foreclose. Petition to be admitted as a party defendant.

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To HON. EDWIN R. WALKER,
Chancellor of the State of New Jersey.

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The petition of Cook and Genung Co., a corporation, with its principal office at Newark, N. J., respectfully shows that:

1. On the fourth day of October 1929, your peitoner filed a lien claim in the Clerk's Office of the County of Essex for the sum of $9314.28, for mason material sold and delivered to the defendant Robert Tosti, and used by him in the construction of the two four story apartment buildings, known as numbers 241 to 249 South Arlington Ave., in the Town of East Oange, New Jersey, on land in the bill of complaint described.

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2. At the time of filing said lien claim, each building and the land on which it was erected was encumbered by two mortgages, one for $29055, and another for $96000.

3. On the 29th day of June 1929, the complainants filed their bill of complaint in this Court

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against said Robert Tosti for the foreclosure of said four mortgages and that no final decree has yet been made in said suit.

4. The said two mortgages of $29055 each, purport to be purchase money mortgages, but petitioner says that said mortgages do not represent the true consideration.

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5. The two mortgages of $96000 each, purport to be construction loan mortgages, but petitioner is informed and verily believes that the money secured by said two mortgages was not paid by said mortgagees and applied by them to the payment of labor and materials, done and furnished for the erection of said building.

6. Your petitioner is advised and believes that the proceeds of said sale will be much more than sufficient to satisfy said mortgagees debt and also that the whole principal sum with interest thereon as alleged in said bill is not due to said complainants on their said mortgages.

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Your petitioner therefore prays, that it may be admitted as a party defendant to said suit for foreclosure and allowed to answer said bill of complaint as it may be advised or as may be necessary and proper to protect its interest, as above stated.

GAETANO M. BELFATTO,
Sol. for petitioner.

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Petition to be admitted as a party defendant.

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

Waldo C. Genung, of full age, being duly sworn on his oath says that he is the Vice President of Cook & Genung Co. the corporation mentioned in the foregoing petition and that by means of this said office he has acquired, and possesses as he verily believes, greater and more particular knowledge of the matters stated in said petition than any other officer or member of said corporation in as much as said matters relate particularly to the sphere of duties of deponent as Vice President, that he has read the above petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters that are therein stated to be on the information and belief of petitioner and as to those matters he has been so informed and believes it to be true.

WALDO C. GENUNG.

Sworn to and subscribed before me
this 16th day of October, 1929
Vincent Belfatto,
Attorney at Law of N. J.

Order.

IN CHANCERY OF NEW JERSEY.

JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, vs. ROBERT TOSTI, *et als.*, Defendants.	On Bill to Foreclose. Order.

A motion having been made before the Chancellor, on the petition of Cook and Genung Co., praying that it may be made a party defendant in the above stated cause, and the matters having been debated by the counsel of the petitioner and the counsel of the complainant, and the Chancellor having considered said matter and being of opinion that the said petitioner is a proper party defendant to this cause. It is on this 22 day of October, 1929, ORDERED, that the said Cook and Genung Co., be admitted as a party defendant in this cause and that it may have 10 days from the date of this order to file its answer to the bill of complaint herein.

E. R. WALKER,
C.

Respectfully advised,
JOHN H. BACKES,
V. C.

Notice to Report Encumbrance.

Filed July 23, 1929.

IN CHANCERY OF NEW JERSEY.

73-580.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, and ROBERT TOSTI, *et als.*, Defendants.	On Bill &c. Notice to Report Encumbrance.

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To BENJAMIN NEWMAN,
Solictor of Complainants:

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Please take notice that the Morreale-Mantione Construction Co., Inc. one of the defendants in the above entitled cause, in lieu of an answer hereby requests that its encumbrance be reported upon by the same Master and at the same time and place as the complainant's mortgages are reported upon.

SOLOMON & MILLER,
Solicitors for Morreale-Mantione Construction Co., Inc.

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Served and acknowledged Aug. 12, 1929.

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Answer and Counterclaim of Defendant, Cook & Genung Co.

Filed Oct. 30, 1929.

IN CHANCERY OF NEW JERSEY.

JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, vs. ROBERT TOSTI, *et als.*, Defendants.	On Bill to Foreclose. Answer and Counterclaim of defendant, Cook & Genung Co.

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The defendant, Cook and Genung Co., a corporation with its principal office at Newark, N. J., answering the bill of complaint, says that:

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1. Paragraphs 1, 3, 6 and 8 are admitted in so far as they regard the execution of the bonds and mortgages, but denied as to the rest.

2. Paragraphs 2, 3, 4, 5, 7, 9, 10, 11 and 12 are admitted.

3. Paragraphs 13 and 14 are denied.

4. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 15 to 27 inclusive and section 23a of the amendment to said bill of complaint.

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By way of counterclaim this defendant says that:

1. Between September 13, 1928 and June 25, 1929 this defendant, at the request of Robert Tosti, the mortgagor mentioned in the bill of complaint, did work and furnished materials for the construction of two four story brick apartment buildings, each containing about 100 rooms on land

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in the bill of complaint described, amounting to $27628.88, on account of which, said Robert Tosti paid this defendant, $18314.60, leaving a balance still due of $9314.28.

2. On September 24, 1928 the complainants in consideration of this defendant executing a postponement of lien whereby the two mortgages of $96000 would become a lien paramount to this defendant's lien on said buildings and land, promised to pay this defendant whatever sum should become due to it by said Robert Tosti, for labor and materials done and furnished for the construction of said buildings. This defendant relying on said promise signed said postponement of lien.

3. On June 25, 1929 this defendant demanded of said complainants and Robert Tosti, $9314.28 but they refused and still refuse to pay the same or any part thereof.

4. On August 23, 1929 said Robert Tosti filed a voluntary petition in the United States District Court for the District of New Jersey and was adjudged a bankrupt. In said petition Robert Tosti admitted owing to this defendant $9299.28.

5. On October 4, 1929 this defendant filed a lien claim for $9314.28 against said buildings and land. In the lien claim are Robert Tosti, described as builder and owner, and complainants as mortgagees. The action is still pending.

6. The defendant further states that the alleged two purchase money mortgages of $29055 each, do not show the true consideration, and the sum of $192000 secured by the two mortgages of $96-000 each was not actually paid by the complainants and applied by them to the payment of work and labor done and furnished for the erection of

said buildings, and therefore the defendant's lien claim is paramount to the lien of the complainant's said mortgages.

This defendant therefor prays:

1. That complainants and Robert Tosti answer this counterclaim and each statement herein made.

2. That complainants and said Robert Tosti may be decreed to disclose the true consideration paid for the sale of the land, in the bill of complaint described and also to state to whom and for what purpose the sum of $192000, secured by said construction loan mortgages were paid.

3. If the Court shall find that the principal of complainant's mortgages is now due, then the amount so due to this defendant on its lien claim, may be paid out of the money realized from the sale of said buildings and lands.

4. That this defendant may have such other and further relief as may be just.

G. M. BELFATTO,
Sol. for Defendant
Cook & Genung Co.

Order of Reference.

Filed Nov. 27, 1929.

IN CHANCERY OF NEW JERSEY.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, and ROBERT TOSTI, *et als.*, Defendants.	On Bill &c. Order of Reference.

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It is on this 27th day of November, 1929, on motion of Benjamin Newman, Solicitor of Complainants,

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ORDERED, that the above stated cause be referred to Hon. Alonzo Church, one of the Vice Chancellors to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made.

E. R. WALKER,
C.

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I hereby consent to the foregoing order.

G. M. BELFATTO,
Solicitor of Defendant,
Cook & Genung Co.

GABRIELSON, CONOVER & STASSE,
Solictor of Defendant, Federal
Seaboard Terra Cotta Corporation,
and New Jersey Terra Cotta Co.

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SOLOMON & MILLER,
Solicitors for Defendants,
Morreale-Mantione Construction Co., Inc.

JOSEPH SUSSKIND,
Solicitor for Defendant, Harry Minowitz, trading as Builders Hardware Trading Supply Co.

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Memorandum.

Filed Apr. 25, 1930.

IN CHANCERY OF NEW JERSEY.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, and ROBERT TOSTI, *et als.*, Defendants.	Memorandum. (Not for print).

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MR. BENJAMIN NEWMAN, for complainants.

MR. JOSEPH SUSSKIND, for Harry Minowitz, trading as Builders Hardware Supply Co.

MR. G. M. BELFATTO, for Cook & Genung Co.

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

30 CHURCH, *V. C.*

The two questions in this case are:

First, as to the lien of Cook & Genung Company. On September 29, 1928, that company executed an admitted postponement for each of the two houses. This instrument authorized the complainants to advance the principal secured by the advanced money mortgages and agreed to postpone and subordinate all liens against the land and buildings.

40 The postponements are, therefore, a waiver of any

right which Cook and Genung might have to a lien to the extent of monies advanced by complainants in the erection, construction and completion of the building. It appears that rents were collected and used in the completion of the building. The lien of Cook and Genung, as I see it, was only postponed insofar as the actual money that went into the building was concerned. As to monies advanced afterwards, or monies collected for rents, it seems to me they have a prior lien.

Second, the right of removal of the fixtures has been questioned, the contention being that they are part of the freehold. I cannot agree with this. The testimony says they are easily removable and that no damage to the freehold will eventuate if they are removed. It is unnecessary to cite authorities for this statement. I recently decided a similar case—Manufacturers Building & Loan Association of Newark, New Jersey vs. Public Service Electric and Gas Company—and this, I think, governs the present situation.

I will advise a decree accordingly.

When counsel appear before me to settle the decree, if they cannot agree as to the amount of money that actually went into the building, I will refer the matter to a special master.

Order for Substitution.

Filed June 10, 1930.

IN CHANCERY OF NEW JERSEY.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, and ROBERT TOSTI, *et als.*, Defendants.	On Bill &c. Order for Substitution.

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Upon reading the consent of Solomon & Miller, solicitors of the defendant, Morreale-Mantione Construction Co. Inc., and the consent of G. M. Belfatto;

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It is, on this 10th day of June, 1930, ORDERED, that G. M. Belfatto be substituted as the solicitor of the defendant, Morreale-Mantione Construction Co. Inc.

E. R. WALKER,
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Respectfully advised,
ALONZO CHURCH,
V. C.

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Final Decree.

Filed July 7, 1930.

IN CHANCERY OF NEW JERSEY.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, and ROBERT TOSTI, *et als.*, Defendants.	On Bill &c. Final Decree.

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This cause being opened to the Court by Benjamin Newman, Solicitor for and of Counsel with the complainants, and the complainants' bill having been heretofore taken as confessed against the defendants Robert Tosti and Jennie Tosti, his wife, Kernerator Incinerator Co., a corporation, Thien Equipment Co., a corporation, and Morreale-Mantione Construction Co., Inc., a corporation, and it appearing that the defendants New Jersey Terra Cotta Co., a corporation, and Federal Seaboard Terra Cotta Co., a corporation filed an answer in which they do not dispute the priority of complainants' mortgages over their judgment, and filed an answer disputing the amounts due to the complainants on their several mortgages; and it appearing to the Court that the defendant Morreale-Mantione Construction Co., Inc. filed a notice to report its claim in accordance with the rules of this Court; and it further appearing to the Court that Harry Minowitz trading as Builders

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Hardware Supply Co. filed an answer in which he disputed the priority of complainants' mortgages and alleged that his interest in certain chattels, referred to in the bill of complaint and in his answer, on which said defendant held a conditional bill of sale, was superior to the mortgages of the complainants; and it further appearing to the Court that Cook & Genung Co., a corporation filed an answer and counterclaim to the Bill of Complaint in which it alleged priority of its right of mechanics lien to the lien of complainants' mortgages, and that a certain postponement or postponements of lien executed by it to and on behalf of the complainants, whereby said defendant postponed its right of mechanics lien to the lien of complainants' mortgages, was obtained under an agreement whereby complainants' agreed to pay said defendant the amount due it under its lien claim; and it further appearing to the Court that this matter was referred for a final hearing to the Honorable Alonzo Church, Vice Chancellor of said Court; and it further appearing that the said Honorable Alonzo Church, Vice Chancellor of said Court set the matters in dispute herein down for trial on final hearing on January 29th, 1930; and it further appearing to the Court that the said Court was attended by Benjamin Newman, the Solicitor for and of Counsel with complainants, Messrs. Gabrielson, Conover & Stasse, Solicitors for the defendants, Federal Seaboard Terra Cotta Co., a corporation and New Jersey Terra Cotta Co., a corporation, Messrs. Solomon & Miller, Solicitors for the defendant, Morreale-Mantione Construction Co., Inc., a corporation, Joseph Susskind, Esq., Solicitor for the defendant, Harry Minowitz, trad-

ing as Builders Hardware Supply Co., and G. M. Belfatto, Esq., Solicitor for the defendant Cook & Genung Co., a corporation, and the Court having heard the testimony on behalf of all of said complainants and defendants, and the Court being satisfied that there is due to the complainants the sum of $29,055.00 and interest from August 15th, 1928, on a certain mortgage held by complainants, dated August 15th, 1928, covering the first tract described in the Bill of Complaint, and that said mortgage is first in point of priority of payment, and that there is due to the complainants the sum of $29,055.00 and interest from August 15th, 1928, on another certain mortgage held by complainants, dated August 15th, 1928 covering the second tract described in the Bill of Complaint, and that last mentioned mortgage is first in point of priority of payment; that said complainants also hold two advance money mortgages each in the principal sum of $96,000.00 both dated August 15th, 1928, covering respectively the first and second tracts described in the Bill of Complaint; that said complainants have advanced on said advance money mortgages a total sum of $192,000.00 and that there is due on said mortgages said amount of $192,000.00, besides interest from August 15th, 1928, and that said mortgages are second in point of priority of payment to the first mortgages of $29,055.00 each held by complainants; that all of said mortgages are liens on said lands and premises prior to the claims of all of the defendants in this cause, except Harry Minowitz, trading as Builders Hardware Supply Co.; and it further appearing to the Court that the defendant, Harry Minowitz, trading as Builders Hardware Supply

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Co. has a conditional bill of sale on certain chattels or fixtures referred to in said defendant's answer, and that the right to said fixtures on the part of said defendant is paramount and superior to the lien of complainants' mortgages; and it further appearing to the Court that there is due to the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, the sum of $2626.87 on their judgment, and interest from May 15, 1929, to be made specially of the lands and premises referred to in the Bill of Complaint, and that there is due to the defendants Cook & Genung Co., a corporation, the sum of $9314.2 and interest from June 25, 1929 on its mechanics lien to be made specially of the said lands and premises, and that there is due to the defendant, Morreale-Mantione Construction Co., Inc., on a mechanics lien the sum of $9688.81 and interest from October 10, 1929 to be made specially of the said lands and premises; and it further appearing to the Court that the premises comprised and described in the complainants mortgages are the same premises comprised and described in the lien claims of the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co., Inc., a corporation, and that the complainant's mortgages are entitled to priority of payment prior to the claims and liens of all other defendants in this cause, except Harry Minowitz, trading as Builders Hardware Supply Co., and that the premises described in the Bill of Complaint should be sold separately and that the order of payment out of the sale of each of said tracts of land and premises should be as follows:

Final Decree.

FIRST TRACT:

First: The principal and interest due complainants on their mortgage in the sum of $29,055.00 with interest from August 15, 1928.

Second: The principal and interest and insurance due on advance money mortgage of that date to complainants in the sum of $96,000.00 with interest from August 15, 1928.

Third: One-half of the judgments of the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, or the sum of $1313.43, and interest from May 15, 1929, one-half of the claim of Cook & Genung Co., a corporation, amounting to $4657.14, with interest from June 25, 1929, and one-half of the judgment of Morreale-Mantione Construction Co., Inc., a corporation, amounting to the sum of $4844.40 and interest from October 10, 1929, and if there should not be a sufficient surplus above the amounts due the complainants to pay said judgments in full, then they should share pro rata in said surplus.

SECOND TRACT:

First: The principal and interest due complainants on their mortgage in the sum of $29,055.00 with interest from August 15, 1928.

Second: The principal and interest and insurance due on advance money mortgage of that date to complainants in the sum of $96,000.00 with interest from August 15, 1928.

Third: One-half of the judgments of the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, or the sum of $1313.43, and interest from

May 15, 1929, one-half of the claim of Cook & Genung Co., a corporation, amounting to $4657.14, with interest from June 25, 1929, and one-half of the judgment of Morreale-Mantione Construction Co., Inc., a corporation, amounting to the sum of $4844.40 and interest from October 10, 1929, and if there should not be a sufficient surplus about the amounts due the complainants to pay said judgments in full, then they should share pro rata in said surplus.

That the said lands and premises be sold separately to raise and pay the complainants and defendants their several claims, and that for that purpose sale should be made of all those tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey.

FIRST TRACT:

BEGINNING on the westerly side of South Arlington Avenue one hundred feet and fifteen hundredths feet northerly fro mthe northerly line of Elmwood Avenue; thence north sixty degrees west one hundred thirty-six feet and twenty hundredths feet to the rear line of land conveyed by Harry Adams to William Langley; thence northerly parallel with Oak Street one hundred feet to the northerly line of land of Harry Adams; thence south sixty degrees east one hundred thirty feet and seventy-one hundredths feet to the westerly line of South Arlington Avenue; thence running southerly along said line of South Arlington Avenue one hundred feet and more to the point and place of BEGINNING.

SECOND TRACT:

BEGINNING at a point in the easterly line of Oak Street therein distant two hundred fifty-six and twenty-two one-hundredths of a foot northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence north thirty degrees east thirty-five feet and seventy-eight one-hundredths feet; thence south sixty degrees east one hundred twenty-five feet and 22 one-hundredths of a foot to the westerly line of South Arlington Avenue; thence running southerly along said westerly line of South Arlington Avenue one hundred feet and fifteen one-hundredths of a foot; thence north sixty degrees west one hundred thirty feet and seventy-one one-hundredths feet; thence north thirty degrees east fifty-six and twenty-two one-hundredths feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the said point of BEGINNING: reserving, however, a right of way over that part of said lands that may be described as follows: Beginning at a point in the easterly line of Oak Street therein distant two hundred fifty-six feet and twenty-two hundredths feet northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence south thirty degrees west eight feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the place and point of Beginning.

And no cause appearing or being shown to the contrary; and it appearing to the Court that due

notice of the entry of this Final Decree has been given and application having been made to this Court for Counsel fees and taxed costs on behalf of the complainants and the several defendants appearing in this cause;

It is on this 7th day of July, 1930, ORDERED, ADJUDGED and DECREED that said Bill of Complaint be dismissed as against the defendant Harry Minowitz, trading as Builders Hardware Supply Co. with their taxed costs, that a Counsel fee of $100.00 be and hereby is allowed to the solicitor of Harry Minowitz, trading as Builders Hardware Supply Co. defendant; that the mortgaged premises hereinabove described be sold as aforesaid to raise and satisfy the moneys due the complainants and the said defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co., Inc., a corporation, in the manner and time of priority as aforesaid, with the complainants' costs to be taxed, together with a Counsel fee of $2000. to the complainants, together with a Counsel fee of $300 to the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, together with a Counsel fee of $750 to the defendant, Cook & Genung Co., a corporation, and together with a Counsel fee of $250 to the defendant, Morreale-Mantione Construction Co., Inc., a corporation, together with the respective taxed costs of said defendants, and that a Writ of Fiera Facias in the form herein decreed issue for that purpose out of this Court, directed to the Sheriff of the County of Essex to make sale according to law of the said mortgaged

premises hereinabove described, and that out of the money arising from said sale he pay first to the complainants or their solicitor their debts, interest and costs, secondly to pay to the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co., Inc., a corporation, or their respective solicitors, their respective debts, interest and costs.

And it is further ORDERED, ADJUDGED and DECREED, if there be not a sufficient amount realized to pay the defendants, Federal Seaboard Terra Cotta Co., a corporation, and New Jersey Terra Cotta Co., a corporation, Cook & Genung Co., a corporation, and Morreale-Mantione Construction Co., Inc., a corporation in full, the same should be divided between said several defendants on a pro rata basis, and that in case more money shall be realized by said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of this Court, unless otherwise previously disposed of by this Court, and that the Sheriff make return, without delay, of 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 premi-

ses, when sold as aforesaid by virtue of this decree.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V. C.

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We hereby consent to the entry of the foregoing Decree.

Solicitor for Defendant,
Morreale-Mantione Construction
Co., Inc.

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Solicitor for Defendant, Harry
Minowitz, trading as Builders'
Hardware Supply Co.

Solicitor for Defendant, Federal
Seaboard Terra Cotta Co., and
New Jersey Terra Cotta Co.

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Solicitor for Defendant,
Cook & Genung Co.

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Testimony.

IN CHANCERY OF NEW JERSEY.

January 29, 1930.

Between
LOUIS SCHARFF, *et al.*,
Complainants,
and
ROBERT TOSTI,
Defendant.

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Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, ALONZO CHURCH, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of BENJAMIN NEWMAN for complainant; GABRIELSON, CONNER & STACY (by LUKE M. MCKENNY); SUSKIND & BELFATTO for defendant; IRVING SOLOMON for Morreale-Mantione Construction Company.

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(Counsel opens to Court.)

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Mr. Solomon: We have a certified copy of judgment in the Circuit Court of Essex County, and since the filing of this judgment the defendant has gone into bankruptcy, so there has been no payments made and the matter is still pending in bankruptcy. The full amount $9,688.81, which is the amount of the judgment with interest on its face—rather, the amount of the claim with interest

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as docketed in the County Clerk's office the 10th day of October, 1929, is still due. We do not claim priority over anybody in this particular suit right now.

I would like to offer that, if there is no objection, as to the amount.

10 The Court: I must say I do not think there is much testimony to be taken as to whether these door knobs and things are part of the freehold or not.

The Court certainly has judicial knowledge of what door knobs and things of that kind are. It is merely a question of law, what the courts have considered it to be.

Mr. Suskind: I think the Court is right except that testimony might help because of

20 the technical names on this sales agreement of certain parts which your Honor might not be familiar with.

The Court: All right. I will take whatever testimony counsel thinks it necessary to take.

Mr. Newman: Mr. Koplowitz.

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30 LOUIS KOPLOWITZ, sworn for complainant.

Direct-examination by Mr. Newman:

Q. You are one of the complainants in this case? A. Yes, sir.

Q. And in 1928 did you and Julius Scharff own property on the west side of South Arlington Avenue, the property in question? A. Yes, sir.

Q. I show you an agreement dated July 31,

40 1928, between Julius Scharff and wift and

yourself and wife, as parties of the first part, and Robert Tosti and wife as parties of the second part and ask you if this is the agreement under which the property in question was agreed to be sold to Mr. Tosti. A. Yes.

Mr. Belfatto: Your Honor please, there is no necessity to offer this agreement, the deed— 10

The Court: I will admit it.

Mr. Newman: I offer it in evidence.

(Paper marked Exhibit C-1).

Q. As a result of that agreement, Mr. Koplowitz, did you and Mr. Scharff give a deed to Mr. Tosti? A. Yes, sir.

Q. I show you deed dated August 15, 1928, made by you and your wife, Julius Scharff and his wife to Robert Tosti, dated August 15, 1928, and recorded in Q-78-138 and ask you if that is the deed which you gave to Mr. Tosti for the property covered in this foreclosure. A. Yes, sir. 20

Mr. Newman: That deed is offered in evidence.

(Deed marked Exhibit C-2.)

Q. Now, that deed recites "Subject to two purchase money mortgages each in the sum of $29,055, and two advance money mortgages, each for the sum of $96,000." Under the terms of that deed and that agreement did Mr. Tosti and his wife execute to you these four mortgages and bonds? A. Yes, sir. 30

Q. Now, I show you the—

The Court: Do you want to introduce the bonds and mortgages? 40

Mr. Newman: Yes, I do. I will come to that in a minute. I just want to offer the statement of closing of title.

Q. Now, I show you some figures which show the closing of title or settlement figures between yourself and Mr. Scharff and Mr. Tosti dated August 23, 1928, as of August 15, 1928, and ask you if these are the figures as of the closing of title?

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Mr. Belfatto: That is objected to, your Honor.

The Court: Why?

Mr. Belfatto: We should hae the party who acted in the transaction at the time of the closing of title and not the offering of a memorandum.

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The Court: Were you there when the title was closed?

Witness: Yes, sir.

The Court: I will admit it.

Q. And are these the figures of closing of title?

Mr. Newman: I might say to the Court the reason I am going to offer this proof is because Mr. Belfatto has raised some issues in his answer as to the purchase price.

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A. That is the figures.

Mr. Newman: Those are offered.

(Papers marked Exhibits C-3 and C-4.)

Q. I show you two bonds and two mortgages, Mr. Koplowitz, each dated August 15, 1928, made by Robert Tosti and wife and yourself and Julius Scharff, one recorded in D-65-454, 456, and the

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other recorded in N-65-142-143, and ask if these are the two purchase money bonds and mortgages that you received from Mr. Tosti on the closing of this title and if those are two of the mortgages and bonds which you are foreclosing in this case? A. They are.

Mr. Newman: Do you want to see them? 10

Mr. Belfatto: Yes. No objection.

Q. And how much is there due on these two bonds and mortgages, Mr. Koplowitz? A. The full amount of them and interest.

Q. Interest from what date? A. The date the mortgage was signed.

(Two bonds and mortgages marked Exhibit C-5.)

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Q. Now, I show you two bonds and mortgages made by Robert Tosti and wife to yourself and Julia Scharff, both dated August 15, 1928, recorded in D-65 of Mortgages of Essex County on pages 447 and 450 and the other recorded in Book D-65 of Mortgages of said county on pages 451-454 and ask you if these are the advance money mortgages that you receive from Mr. Tosti, covering this property? A. They are.

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Mr. Belfatto: No objection.

Mr. Newman: They are offered in evidence.

(Four papers marked Exhibit C-6.)

Q. Now, these two advance money mortgages, did you advance any money on them? A. Yes, sir.

Q. And I notice the date of February 16, 1929.

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Were they paid or what was advanced by you at that time? A. The money was advanced?

Q. Yes. A. Yes.

Q. I mean—what was the answer? A. Yes.

Q. Well, I mean, did Mr. Tosti pay these mortgages off to you when they were due, February 16, '29? A. No.

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Q. Now, after this title was closed did Mr. Tosti proceed to erect the two buildings referred to in $96,000 mortgages? A. Yes, sir.

Q. And in June of last year you filed your bill of complaint to foreclose? A. Yes, sir.

Q. And have the interests been paid on any of these mortgages at this time? A. No, sir.

Q. Have the taxes for the year 1928 been paid on this property? A. No, sir.

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Q. How far had Mr. Tosti proceeded to erect these two buildings? A. To about ninety-five per cent completion.

Q. Had he stopped work prior to the date of your filing your bill of complaint?

Mr. Belfatto: That is objected to. That is leading.

Q. Well, did he or did he not?

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The Court: I will allow it.

A. What was that?

Q. Did he or did he not stop work on his two buildings that he was erecting on this property? A. He did.

Q. How long had he stopped work, do you know? A. About a month.

Q. Now, after you filed your bill of complaint in this case did Mr. Tosti execute to you and deliver

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to you this assignment of rents (showing witness paper)? A. Yes.

Mr. Newman: Do you want to see this?

Mr. Belfatto: Yes. No objection.

(Assignment of rents marked Exhibit C-7.)

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Q. Do you recall when you received this assignment? I mean, approximately. A. I think it was around July.

Q. Well, after you received it did you enter into possession of these two properties? A. Yes, sir.

Q. And you collected the rents? A. I had to finish the buildings first.

Q. Oh, you proceeded to— A. Complete the buildings and rent them out.

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Q. And you are now in possession of these buildings? A. Yes, sir.

Q. I show you a number of checks.

Mr. Newman: For the convenience of the Court I might state, and to counsel we have listed all these many checks on a list so that counsel may quickly examine the witness and the Court may quickly see them.

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Q. Well, you have listed on this list your disbursements and receipts from these properties? A. Yes, sir.

Q. And this batch of checks that I have here coincide with this list? A. Yes, sir.

Q. And these are the checks which established your disbursements on your mortgages? A. Yes.

Q. And this list shows the list of your receipts or credits? A. Yes, sir.

Q. Now, looking at this list will you tell me how

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much you have paid out on the two $96,000 mortgages?

Mr. Belfatto: If your Honor pleases, I wish that the testimony be limited simply to the original documents, the checks themselves.

10 Mr. Newman: Well—

Mr. Belfatto: I realize that it takes a a great deal of time to read all those checks and ascertain the purpose for which they were given.

The Court: Well, I am not going to sit here and do that. If you insist on that, I will refer it to a Master.

Mr. Belfatto: I do wish that, because if there is anything here I am going to cross-
20 examine this witness on every check that was given out on account of the two mortgages of $96,000 each. That is the very purpose of this case.

Mr. Newman: We expect you to.

(Discussion.)

The Court: I shall hold that you do not have to prove it.

30 Q. Now, this list that you have before you is a list of these checks and disbursements? A. Yes, sir.

Q. How much have you disbursed in these mortgages? A. $210,002—$210,202.11 I disbursed.

Q. Have you obligated yourself to pay for any material or fixtures that went into that building and which you have not paid for? A. Yes, sir.

Q. Now, who are they and how much? A. Otis Elevator Company is due a balance of $1500 which
40 I had to pay five before they would put the elevat-

ors there. Another, the Petro Oil Burner Company is due a balance of $1255, which I drew money and guaranteed them before they put in the heat.

Q. The Petro Oil is for oil burners that went into these two houses? A. Yes.

Q. And the Otis Elevator is for two elevators that went into these houses? A. Yes, sir; there is Bannister & Pollard, due for Frigidaire $4,005.35, making a total of $6759.35 guaranteed. 10

Q. Now, that makes a grand total of how much? A. That makes a grand total of $210,202.11.

Q. Now, Bannister & Pollard furnished what? A. They furnished 64 Frigidaires.

Q. And these ice boxes are in the buildings? A. Yes.

Q. And they are a part of it? A. Yes.

Q. Now, is there any credits for rents that you have collected on this property? A. There is rent credit $13,107.92 today. 20

Q. So there is due under these two mortgages a balance of $197,094.18. And interest due you— A. From the date.

Q. From the dates of these mortgages. Now, attached to this list is also a list of receipts. Now, these are your itemized receipts from the tenants? A. Yes, sir. 30

Q. Or from the— A. Part of it is from the real estate man who rented prior to my taking possession of the buildings.

Q. And the others are the net rentals you have received. A. Yes.

Q. And those checks there are the checks that are listed on this long memorandum here? A. Exactly.

Mr. Newman: These checks are offered 40

in evidence, as well as this memorandum.

(Check and memorandum marked Exhibit C-8, and C-9.)

Q. Do you know what the Builders Supply Company, Mr. Minowitz, the Builders Hardware Company, furnished on this property? A. Supposed to furnish hardware.

Mr. Newman: Have you got your conditional bill of sale?

(Paper produced by Mr. ~~Belfatto~~ Minowitz.)

Mr. Newman: I am just wondering whether it would be best to go into this in my case or let the Biulders Hardware go into it on their case and then we could go into it on rebuttal.

The Court: It doesn't make any difference to me.

Mr. Newman: Except so far as we are concerned, we don't know without looking at their list just what they furnished, so for the minute I will rest and let counsel cross-examine.

Cross-examination by Mr. Belfatto:

Q. In the mortgage which has been offered in evidence, it is stated how the ninety-six thousand dollars were to be paid? A. Yes, sir.

Q. Now it provides that when the cellar was completed and the first tier of beams were raised, or complete, you were to pay seventy-five hundred dollars? A. Yes.

Q. Did you pay that? A. Yes, sir.

Q. To whom? A. To Robert Tosti.

Q. Robert Tosti? A. Yes.

Q. Who is Robert Tosti? A. That is the man who owned the buildings, the owner of the buildings.

Q. The owner of the buildings? A. Yes.

Q. Now, when the first floor was erected and beams laid, partitions in, you were to pay five thousand dollars? A. Yes. 10

Q. Did you pay that? A. Yes.

Q. To whom? A. The same man.

(Discussion.)

Q. Now, the third payment was to be made when the partition was set. The amount was five thousand dollars. Did you make it? A. I did.

Q. To whom? A. Robert Tosti.

Q. The fourth payment of six thousand dollars was also to be made when the beams were laid and partitions set. Did you make that payment? Do not look at that. A. I shouldn't look at that? 20

Q. No. A. Why?

Q. You just answer my questions. A. I don't remember exactly a year ago whether I made it the day before or made it the day after.

Q. Did you pay this money to anybody? A. Yes. 30

Q. To whom? A. To Tosti.

Q. The fifth payment of eight thousand dollars was to be made when the roof was completed. Did you make that payment? A. Yes.

Q. Eight thousand. To whom? A. I don't remember exactly direct to Tosti or by me or who.

Q. You don't know to whom the payment was made? A. Unless I look at the checks.

Q. Have you any checks purporting to have 40

these amounts I am reading to you? A. Yes, the checks are all here.

Q. Yes. Now, have you a check there for five thousand dollars showing a sixth payment under your mortgage when the plaster was in the building? A. Five thousand dollar check?

10 Q. Six thousand—five thousand. A. If you will allow me to look at it.

Q. I simply ask you whether you have it or not.

The Court: He doesn't know unless he looks and sees.

Mr. Belfatto: If your Honor is willing to let him see.

The Court: He has got to look at his checks, list of checks. He cannot remem-
20 ber all those dates and figures.

Q. You say you made that payment? A. I say I made that payment, but I don't know whether I made it direct to him or to his order.

Q. To him or to his order. A. Yes.

Q. Suppose you take that check. A. Yes.

Q. And see if you can find it. A. What date was it?

Q. It don't say the date, just when the roof was
30 on. A. I will have to look at the checks.

Q. You can look after, with his Honor's permission. Now, the seventh payment of five thousand dollars was to be made when the second coat of plaster was completed and the stairs in. Did you make that payment? A. Yes, sir.

Q. To whom? A. I think to Tosti or to some of his orders.

Q. To Tosti or somebody else? A. I think to
40 Tosti or some of his orders.

Q. Now, a payment of five thousand dollars was to be made when bath tubs were installed and tested. Did you make that payment? A. Yes, sir.

Q. To whom? A. Part to Tosti and part to the Newark Plumbing Supply Company.

Q. Another payment of five thousand dollars when the white coat of plaster was completed and the second floor finished and sash in. Did you make that payment? A. Yes, sir. 10

Q. To whom? A. I think we made part to the plumber and part to Tosti and part to Cook & Genung.

Q. Yes. Now, another payment of $1500 when the bathtubs were completed. Did you make that payment? A. Yes, sir.

Q. And a payment of six thousand dollars when the doors and kitchen cabinets were completed. Did you make that payment? A. Yes, sir. 20

Q. To whom? A. To Robert Tosti.

Q. Now, another payment of three thousand dollars when the tile walls and floors were completed in bath rooms. Did you make that payment? A. Yes, sir.

Q. To whom? A. To Tosti.

Q. Another payment of four thousand dollars when the parquet floors were laid throughout the building. Did you make that payment? A. Yes, sir. 30

Q. To whom? A. I think also, to Tosti.

Q. To Tosti. Now, there is another payment of eight thousand nine hundred dollars—no, eight thousand just, when ready to deliver, connected outside and approved. A. Yes.

Q. Did you make that? A. Yes, part to Tosti and part to Newark Supply Company.

40

Q. Another payment of eight thousand dollars when tile and marble work was completed in the hall and vestibules and parquet floor finished, scraped and shellacked and covered with paper. did you make that payment? A. I think, yes, sir.

Q. Eight thousand dollars? A. Yes.

10 Q. To whom? A. To three or four different orders or to Tosti.

Q. Tosti gave you the order to make that payment? A. Yes.

Q. Now, there is one more payment. When the last fixtures were installed and tested you were to pay five thousand dollars. Did you do that? A. I don't remember whether it was paid at once or it was paid by orders.

Q. Now, the last payment of fourteen thousand
20 dollars when all the work had been completed, did you make that? A. I didn't make one payment at a time, but I had to complete the buildings.

Q. No, I say, did you make the fourteen thousand dollar payment? A. Not at one time, no.

Q. How many times did you make it? A. I might have made it in twenty-five.

Q. Have you got checks showing all those? A. Checks showing all those, yes.

30 Q. Of fourteen thousand dollars? A. Yes, sir.

Q. As the last payment under your mortgage? A. Yes, sir.

Q. Now, the same payments you made with reference to the other mortgage of ninety-six thousand dollars, isn't that so? A. Yes, sir.

Q. That applies to the other mortgage. Now, you said you received an assignment of the rents. Now, that assignment, how much money have you collected from the tenants? A. Thirteen thous-
40 and dollars.

Q. Thirteen thousand? A. $13,107.93.

Q. Yes. And that should be credited to your mortgage? A. Yes, sir.

Q. So your mortgage of ninety-six thousand dollars should be reduced to a sum which would be equivalent of ninety-six—(interrupted) A. No, two mortgages of ninety-six thousand. It should be credited to two mortgages. 10

Q. Two mortgages of ninety-six thousand. Are you still collecting the rents? A. Yes, sir.

Q. There are two buildings? A. Yes, sir.

Q. And how many families in each building? A. A. Thirty-two.

Q. And how much rent have you collected from each building? A. Well, I got to figure both of them.

Q. According to the list which you have. A. According to the list which I have, I am taking care of both buildings the same. 20

Q. Yes? A. I haven't got them separately.

Q. Yes. Now, this sum which you have mentioned should be credited to two mortgages, are rents collected from the tenants living in both of them? A. Yes, sir.

Q. Now, is it true that there are now claims to the extent of $66,448 for material furnished to the buildings? 30

Mr. Newman: I object to that.

Q. And unpaid?

Mr. Newman: I object to that.

Mr. Belfatto: I would like to ask him—

The Court: Wait a minute. What is your objection?

Mr.Newman: I object on the ground it is 40

irrelevant. How would that be relevant?

The Court: Because you asked him on your direct if he was obligated for certain things.

Mr. Newman: Pardon me. He is referring to mechanics, people who furnished labor and material, who have not been paid. I do not see how that is relevant.

10

The Court: No, I do not see that is relevant. I will sustain the objection.

(Discussion.)

The Court: I will sustain the objection.

Q. Do you know whether or not Mr. Tosti was ready to finish the building before you undertook to finish it? A. Why, he was not ready.

20

Q. He was not ready? A. No.

Q. Did you serve him with any notice requiring him to finish the buildings before you undertook to finish them? A. I spoke to him personally and he came up to me and said he couldn't go ahead any more with that building, he hasn't got any more money, no capital to give payments.

Q. The question is whether you served him with a notice in writing. A. No.

30

Q. It was a verbal statement on his part? A. Yes.

Q. And when you heard he was unable to continue, you foreclosed the mortgage, is that right? A. I finished the buildings.

Q. And you foreclosed the mortgage, too? A. Yes.

Mr. Belfatto: That is all.

The Court: That is all, sir.

40

ISAAC WEINSTEIN, sworn for defendant.

Direct-examination by Mr. Suskind:

Q. Mr. Weinstein, you are connected with the Builders Hardware Supply Company? A. I am.

Q. What is your position there? A. Manager.

Q. And did you have any business with Robert Tosti with reference to the two buildings on the south side of South Arlington Avenue, East Orange? A. I did. 10

Q. What was that business? A. I sold Mr. Tosti hardware.

Q. And is this the agreement by which you sold him the hardware? A. Yes, sir, it is.

Mr. Suskind: I offer that.

(Agreement marked Exhibit D-2.)

Mr. Suskind: I also offer certificate from the Register's office showing it has been filed, a conditional sales agreement, to show it has been recorded before. 20

(Certificate marked Exhibit D-3.)

Q. Can you tell us, please, any other of the goods that you sold Mr. Tosti? A. Finished hardware.

Q. The term "finishing hardware" in the trade, what does that consist of ordinarily? 30

Mr. Newman: Not "ordinarily".

Q. In this case what did it consist of? A. Finishing hardware is locks, hinges, door checks, and coat and hat hooks, door stops, sash locks, and so forth.

Q. Now, you have an item there marked butts, what are those? A. Hinges.

Q. What are ordinarily called hinges? A. Yes. 40

Q. And are there any door checks like the one in back of you (indicating door in court room). A. Yes.

Q. Included in that sale. A. Yes.

The Court: Those things on top of the door to prevent the door from slamming.

10 Mr. Newman: Yes.

Q. There were also included in that sale window fasteners. A. Sash locks they call them.

Q. Sash locks? A. Yes.

Q. And those are to lock the window? A. And the one for lifting them up.

Q. And, among other items you have handles for drawers. A. Drawer pulls.

20 Q. Drawer pulls? A. Yes, drawer pulls. That is the regular—it is drawer pulls, that is all I can say.

Q. Those are secured on to the drawers in the kitchen cabinets? A. Yes.

Q. And do you have an item there coat hangers? What are those? A. Coat and hat hooks. That is just coat and hat hooks.

Q. Wire hooks you have in the closets? A. Yes.

Q. All of these goods, how are they attached to

30 the buildings? A. Just screwed on.

Q. Did you see these goods after they were attached? A. Yes, sir.

Q. The wood door checks, how were they fastened to the building? A. Just as you see them, just screwed on.

Q. And the locks? A. They are just screwed on.

Q. And are any of these goods attached otherwise than by screws? A. No, sir.

40 Q. And if these goods were removed, will it be

necessary to damage the building by removing them? A. No, sir.

Mr. Newman: I object to that. I think that calls for a conclusion.

The Court: Yes, that calls for a conclusion.

10

Q. What is the balance due on your conditional sales agreement? A. Six hundred dollars.

Q. And what was the total amount of the contract? A. Eleven hundred dollars.

Q. So you have received five hundred on account of it? A. Yes, sir.

Mr. Suskind: That is all.

Cross-examination by Mr. Newman: 20

Q. Eighty pair of butts. Those are hinges, you say? A. Yes, sir.

Q. Those are door hinges? A. Yes, sir.

Q. For the inner rooms? A. No. This eighty pair is four and a half by four and a half, they use them to the apartment entrance doors.

Q. On the big iron doors? A. No. I don't furnish them. The iron man furnishes them.

Q. Well, which entrance doors? A. The apartment entrance doors in each apartment. 30

Q. I see. And the woodwork is cut by the carpenter, the frame of the door is cut to fit the size of those hinges, is it not? A. Yes, sir. The hinges are all standard.

Q. I didn't ask you that. A. Well.

Q. When that frame work is built, there is no place on that frame work for those hinges, is there? A. Well, it all depends. Now, sometimes if it is 40

calament doors, usally the manufacturers when they deliver calament doors cut it out for that particular job of whatever hinges are necessary.

Q. These are not calament doors in this house, are they? A. I believe the entrance doors are calament.

10 Q. Are you sure about it? A. I am almost positive. It just happened in this particular case, I think, the carpenters cut out for the hinges.

Q. So the carpenter cuts out the woodwork for those hinges? A. Yes.

Mr. Suskind: I object to this line of examination. The question here is not what has to be done to install them. The question here to be determined is what material injury is occasioned by removing them.

20 The Court: Mr. Newman is going to argue that they had to cut the doors to install them and therefore if you take them out you leave holes in the woodwork. That is what he is getting at.

Mr. Newman: I want to show they were incorporated into the building and it may be relevant to show how the hinge got in there.

30 The Court: I think it is perfectly relevant.

(Discussion.)

Q. And after the frame work is cut out the hinge is screwed in? A. Yes.

Q. It is screwed into the frame work and then into the door? A. Yes.

Q. And the door hangs on these hinges. A. Yes.

40 Q. Now, that is these eighty pair of butts. A. Yes.

Q. Now, what are these sixty-eight entrance sets cylinders? A. Those are the cylinder entrance sets that go into each apartment.

Q. What are those, locks? A. Yes; that is one complete set.

Q. That is the way they look? A. Yes.

Q. Now, in order to put those door handles and locks in, the carpenter cuts out of each door, doesn't he? A. Yes, sir. 10

Q. And he cuts a space to put that lock in? A. Yes, sir.

Q. And bores a hole through for the handle? A. Yes, sir.

Q. And then he screws this lock in? A. Yes, sir.

Q. And that applies to the holder of the lock, I mean, there is—the lock goes into the door and then there is one part that goes into the frame of the door, doesn't it, the outside frame? A. Yes. 20

Q. And he has got to make a hole into the frame work? A. Yes.

Q. In order to catch the lock as it closes and opens. A. Yes, sir.

Q. Now, when you take off a hinge of a door you cannot use the door, can you?

Mr. Suskind: I object, your Honor, that is strictly a conclusion. 30

The Court: Yes, that calls for a conclusion. I will sustain the objection.

Q. Well, now, can you use a door without hinges?

Mr. Suskind: I object, your Honor, that is also calling for a conclusion.

The Court: I will sustain the objection.

40

Q. In what condition would the door be after the lock and the hinges are removed? I refer to the door in its frame.

Mr. Suskind: I object to that question, because of the fact that I think your Honor can take judicial notice of what can happen when a lock is unscrewed, that the door will be there without the lock.

Mr. Newman: I am willing to let his Honor take judicial notice and I presume his Honor will take judicial notice as to what happens to a door under those conditions.

The Court: Of course, we all know if we take the hinges off, the door won't stay on. The only thing for the Court to determine is whether that is a material injury. I do not think there is any use of wasting time putting this evidence in, because it is perfectly patent to anybody, if you take off the hinges the door won't stay up.

Q. Now, the one hundred thirty-eight regular sets, those are locks, aren't they? A. Yes, sir.

Q. And the two hundred closet sets, that is locks, too? A. Yes, sir.

Q. Sixty-eight bath sets. A. Yes.

Q. That is locks? A. Yes.

Q. And sixty-eight 4 by 4 nickle plated butts, those are hinges? A. Yes, sir.

Q. Three hundred fifty-eight pair of brass butts, those are hinges. A. Yes, sir.

Q. Now, one hundred thirty-six elbow catches, what are those? A. On the kitchen dressers; they have two drawers above and two doors below that.

Q. And those are the handles to the doors? A. No. And one door and lock, a catch lock fits so that it holds one door in place. That is on the inside.

Q. You mean on the inside? A. On the inside, and the other door has a catch or a turn, and one door holds it in place, the elbow catch holds that left door in place and on the other door they have a cupboard turn that goes on top and just holds that right door in place, so they have one on top and one on the bottom.

Q. Those things are screwed in, aren't they? A. Yes.

Q. Now, the ornamental hinges, we understand what they are. What are the cupboard turns? A. Those are cupboard turns I just mentioned, they go on top of the right hand door to hold it in place.

Q. Those work together with the door hinges? A. No; they work independent.

Q. But they are part of the hardware to a kitchen closet? A. That is right.

Q. Now, the two hundred seventy-two loose steel pin butts, those are hinges again? A. Yes.

Q. One hundred thirty-six brass pulls. Those are what? A. Brass pulls. Those are what open up the doors to open the kitchen cabinet.

Q. Everything here is screwed in? A. Yes, sir.

Q. Now, three hundred sixty-six—four sixty-six sash fasteners and sixty-eight, those are window sash fasteners? A. Window sash fasteners.

Q. You mean, you put them on top of the window? A. That is—

The Court: That is sash lock.

A. That is sash lock.

Q. Now, those two pair of bolts are what? A. Flush bolts.

Q. What are they used for? A. When there is double doors they put it in one door to keep one door stationary so both doors can be open at one time, if you only use one door.

10 Q. And those are cut into the woodwork, too? A. Yes, sir.

Q. And fitted in specially at the bottom of each door? A. Yes, sir.

Q. And what are these two vestibule sets? A. Vestibule lock sets.

Q. Weren't those returned to you? A. No, sir; they are on the building now.

Q. There were two door checks that were—they were two sets of door checks that were returned

20 to you, weren't there? A. No, sir.

Q. Didn't you go down to this building and take back two sets of door checks that did not fit or were not all alike? A. No, sir.

Q. Might you be mistaken or are you sure about that? A. I am almost positive.

Q. Your contract was to furnish all the door checks in this building, wasn't it? A. No, sir. My contract calls for just what is in here.

30 Q. Now, the surface bolts, eight surface bolts, what are those? A. Well, for instance, here is a pair of doors on the inside of the apartment and those surface bolts are bolts that go on top of the door, right on the surface, and it is to keep one door in place of instead of having—one door they use and the other door they keep in position.

Q. And that particular door is cut out to fit this — A. No, no.

Q. —to catch this? A. No; it is just placed on

40

top here. Say there is two doors here. The surface bolt is just put on top here to keep the door in position and just used with the other door in case you want to use both doors you pull it down, it is a sliding bolt.

Q. Is it screwed in or cut in? A. On top it is cut in where the receptacle goes to hold the bolt. 10

Q. Now, you have "two only cylinders", what are those? A. That is one cylinder from each iron door. The iron man supplies the lock and the iron doors for each house, but we give the cylinder because all the apartment entrance sets are master keys and they are given to each tenant because each tenant has to open up the doors, the front door and vestibule door, so this cylinder is the last cylinder to go in the lock the iron man furnishes.

Q. What is this key? A. It is the cylinder. 20

Q. Are you sure you finished it? A. Positively.

Q. These three master keys for— A. Three master keys for each house.

Q. Now three hundred fifty-two (1592) wire coat and hat hooks, we understand what those are, and five hundred fifty-five (550)— A. Wood door stops.

Q. —wood door stops, we understand, then those things are screwed in and all these things have to 30 be screwed into the woodwork. A. Yes, sir.

Q. Now when these screws are taken out we will say these things are removed, a fresh screw would not hold as good as the original screw?

Mr. Suskind: I object as calling for a conclusion and an opinion.

The Court: No, I think that is a matter of expert knowledge.

40

A. Yes, they are—it holds the same thing as any screw.

Q. Not with the same—

Mr. Suskind: Now, your Honor, counsel is arguing with the witness.

The Court: I will allow him to ask the question. The witness has already answered and said "Yes, it would".

Q. After a screw is taken off, see, you say that a new screw put in there will hold as fast and as firm as the old screw? A. Yes, sir. It stands to reason, because, sometimes when a new door is put on, when the doors are put on, the doors are not really sent today and the door may be returned and the carpenter comes up and shaves off part of the door and takes off the hinges and puts it right back again, the same screws and everything.

Q. Doesn't he have to plug up the holes? A. No, not necessarily.

Q. Now, unless a man—well, never mind that. Well, if these things were removed and no other hinges or locks were put on, that would show a bored spot on the surface of the woodwork, would it not?

Mr. Suskind: I object to the question. That is further along the lines—(interrupted)

The Court: I will sustain the objection. Of course, everybody knows it would show the place from which the hinge had been taken.

Mr. Newman: That is all.

Redirect-examination by Mr. Suskind:

Q. Mr. Weinstein, this elbow catch that Mr. Newman spoke about, nothing is cut out for that, is there? A. No.

Q. That is just screwed into the woodwork? A. That is just screwed on.

Q. And the cupboard turns, nothing is cut off them, nothing is cut off for them. A. No, nothing.

Q. That is just screwed on? A. Just screwed on.

Q. Now, the sash fasteners, nothing is cut out for the sash fasteners? A. No.

Q. And these surface bolts, you say they are placed on top on the surface of the door? A. Yes, sir.

Q. Nothing is cut out for that? A. This receptacle.

Q. Except the receptacle? A. No, I don't think that receptacle—no, I think that receptacle if I am not mistaken, is just a flat piece of metal with a hole on just screwed on top.

Q. Just screwed on top. That is part of the set. A. Yes, but come to think of it I don't think —(interrupted)

Q. So nothing is cut out of the bolt. A. That is right.

Q. And these door checks, is anything cut out to put the door check under the door? A. No.

Q. No. So that the only thing when you remove the screws the only thing that remains that shows is the screw bolt? A. Yes.

Q. And these—

Mr. Newman: Objected to.

Mr. Suskind: I withdraw it.

Q. These wire coat hooks, those are simply screwed in, with screws on the end of them and nothing is cut out? A. Nothing is cut out.

Q. The wire coat hook, is anything cut out to place those on the wood? A. No.

Q. And the wood door stops, is anything cut out for those? A. No.

10

Mr. Suskind: That is all.

The Court: That is all.

Mr. Newman: That is all.

The Court: What else is there?

Mr. Newman: Did your Honor want any further testimony on this conditional bill of sale?

The Court: No.

20

Mr. Newman: I don't think there is anything else.

Mr. Suskind: Your Honor will permit me to say this: Mr. Newman and I both prepared, on a motion to strike out my answer we prepared a memorandum setting forth the cases about conditional sales. Of course, all I have is a carbon copy. Vice Chancellor Berry received the original, but I would like to redraw it and copy it so your Honor gets an original. I cite in there a case which is not reported in which the very question was decided.

30

The Court: You can send me a memorandum about it.

Mr. Suskind: And will your Honor excuse me then?

The Court: Yes. Now, what else is there?

40

ROBERT TOSTI, sworn for defendant.

Direct-examination by Mr. Belfatto:

Q. Mr. Tosti, you are the owner of the buildings on 241-249 South Arlington Avenue? A. Yes, sir.

Q. And you are the person who executed the four mortgages? A. Yes, sir.

Q. Two for twenty-nine thousand and some hundred dollars, and the other ones for $96,000 each? A. Yes, sir.

Q. You built the house, didn't you? A. Yes, sir.

Q. Did you enter into agreements with the several material men and laborers who furnished work or material? A. Yes, sir.

Q. Did you enter in a contract with anybody for the purpose of doing the mason work? A. Part of it.

Q. Will you mention the names? A. Plastering.

Q. Only the plastering? A. Yes.

Q. And all of the rest of the work was done by you? A. Yes.

Q. What is the name of the plasterer? A. Morreale—Mantione.

Q. Ye. The two amounts of $96,000 each were paid to you direct? A. Yes.

Q. Did you receive that money? A. The greater part of it I received myself. Part of that money they paid direct to those supplies.

Q. Yes. Now, how much money did you receive direct? A. Well, I am not prepared to answer exact, but I received about $150,000.

Q. One fifteen? A. Fifty.

Q. Fifty. And the rest was paid to whom? A. To different contractors.

Q. Yes. Cook & Genung furnished material to you at your request? A. Yes, sir.

Q. For the erection of those buildings? A. Yes, sir.

Q. And you owe them $9,314.28. That is the amount which is listed in your bankruptcy proceedings. A. That is what it is.

10

Q. Is that amount correct? A. It must be right. I don't know because I haven't got the bill in front of me; it must be right.

Q. Then the schedule annexed to your bill in bankruptcy, this amount was set forth as being the correct amount, so you still hold that money? A. Yes.

Q. You say that $150,000 were paid to you directly by checks or in cash? A. Check.

20

Q. And the difference was paid in checks or cash? A. Everything in check.

Q. And do you also pay out money in checks? A. Yes.

Q. Are you in possession of the checks— A. Yes.

Q. —showing— A. Yes.

Q. —the money paid by you. A. Yes.

Q. For labor and material. A. Yes.

30

Q. Done and furnished this building. A. Yes.

Q. Have you the checks with you now? A. No, sir.

Q. Are you in a position to produce them? A. Yes, sir.

Q. When you abandoned the buildings, were all the claims for materials and labors paid? Did you pay all claims for materails and labors furnished up to that time? A. No, sir.

Q. You still hold $66,000?

40

Mr. Newman: I object.

Q. Or approximately that amount, do you not?

Mr. Newman: I object to that; I do not think that is relevant.

The Court: What is the question?

Q. The question is you still owe $66,000 or approximately that amount? A. On this mortgage? 10

Mr. Newman: On this building.

The Court: Oh, no. I will sustain the objection.

Mr. Belfatto: Right.

Q. Why did you not finish the building?

Mr. Newman: I object to that. 20

The Court: I will sustain the objection. He did not finish it.

Q. Did you receive any notice from the mortgagees to the effect that they were to complete—they would complete the building if you didn't do it? A. They told me.

Q. And what did you tell them? A. Well, I says, "I can't go ahead any more with money because I haven't any more to finish; if it is to be 30 finished, you got to finish yourself."

Q. How much of these two buildings had been erected or constructed at the time you made that statement to him? A. They was working with the painting.

Q. They were almost finished? A. Almost finished.

Q. How much money would be required to finish them? 40

Mr. Newman: I object to that.

The Court: I will sustain the objection.

Q. How many families have these buildings? For how many families were these buildings constructed?

The Court: Thirty-two.

10 Witness: Thirty-two each.

Q. You have filed a petition in bankruptcy, have you not? A. Yes, sir.

Q. And you have not been absolved from your obligations? A. No, sir.

Q. And the receiver is in charge of all your property, personal and real? A. Yes, sir.

Q. The price paid for the two lots on which this building—the two plots on which those two buildings have been erected was fixed at eighty thousand dollars. The price was eighty thousand dollars, yes.

20

Q. And you gave these two mortgages did you not? A. Yes.

Q. And the balance you paid how? A. I paid a building in New York.

Q. You gave a building? A. Yes.

Q. How much equity did you have in that building? A. Close to $22,000.

30 Q. 21,830. That is all.

Mr. Newman: That is all.

The Court: What else?

WALDO C. GENUNG, sworn for defendant.

Direct-examination by Mr. Belfatto:

Q. Mr. Genung, you are one of the defendants in

40 this foreclosure proceeding. A. Yes, sir.

Q. And you know Mr. Robert Tosti? A. I do.

Q. You sold him material. A. Yes.

Q. For the erection of the two buildings under discussion? A. Yes, sir.

Q. This material was furnished between what time and what time, if you can remember. A. Well, the work started in September, '28. 10

Q. Yes? A. I can't tell you the date.

Q. According to your statement, it is from September 13th, 1928, to June 25, 1929. Is that correct? A. I should think that was so, yes.

Q. And what is the balance that is due you now? A. I can't tell you ex-accurately, but ninety-three hundred and some dollars.

Q. Yes? A. I haven't the figures with me.

Q. Have you seen Mr. Tosti lately? A. Yes, sir. 20

Q. Have you received anything on account of this money? A. Of this money, no.

Q. This balance still owing to you. A. Yes.

Q. And you have filed a mechanics' lien in the Essex County Circuit Court against the land and buildings in consideration. A. Yes.

Mr. Belfatto: Take the witness.

The Court: Any cross-examination, Mr. Newman? 30

Mr. Newman: That is all.

The Court: Is that the case?

Mr. Belfatto: I wish to ask the Court now to give us the right to examine the two persons, the mortgagees and the mortgagors, with reference to the money paid under the mortgages.

The Court: I have already ruled on that.

40

Mr. Belfatto: You have denied that motion?

The Court: Yes.

Mr. Belfatto: Very well.

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10 WILLIAM MATHAISEN, sworn for defendant.

Direct-examination by L. A. McKenny:

Q. Mr. Mathaisen, you are the vice president of the New Jersey Terra Cotta Company and Federal Seaboard Terra Cotta Company? A. Yes, sir.

Q. And did the New Jersey Terra Cotta Company suing for the benefit of the Federal Seabord
20 Terra Cotta Company, recover a judgment in the Essex County Circuit Court against Robert Tosti on May 15, 1929? A. Yes, sir.

Q. For a total of $2626.87 for damages and costs? A. Yes, sir.

Q. I show you transcript of that judgment and ask you if the full amount is due on that? A. Yes, sir.

Q. Of $2626.87? A. Yes.

30 Q. Together with interest from May 15, 1929? A. Yes.

Q. Amounting to $111.64.

The Court: Do you want to offer it?

Mr. L. A. McKenny: I offer the transcript.

(Transcript marked Exhibit D-4.)

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Exhibit C-5.

MORTGAGE.

This Mortgage made the fifteenth day of August, one thousand nine hundred and twenty-eight. Between Robert Tosti and Jennie Tosti his wife of the city of New York in the county of New York and State of New York party of the first part hereinafter known as the mortgagor, and Julius Sharff and Louis Koplowitz of the city of Newark in the County of Essex and State of New Jersey party of the second part, hereinafter known as the mortgagees, Witnesseth that said Mortgagor, for and in consideration of the sum of Ninety six thousand ($96000) dollars lawful money of the United States of America to them in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said mortgagor therewith fully satisfied contented and paid has given granted bargained, sold, aliened enfeoffed, conveyed and confirmed and by these presents do give grant, bargain sell alien enfeoff, convey and confirm to the said mortgagee and to their heirs, executors, administrators and assigns, all that tract or parcel of land and premises hereinafter particularly described situate lying and being in the city of East Orange in the County of Essex and State of New Jersey.

Beginning on the westerly side of South Arlington Avenue one hundred feet and fifteen hundredths feet northerly from the northerly line of Elmwood Avenue; thence north sixty degrees west one hundred thirty-six feet and twenty hundredths feet to the rear line of land conveyed by Harry Adams to William Langley; thence northerly par-

allel with Oak Street one hundred feet to the northerly line of land of Harry Adams; thence south sixty degrees east one hundred thirty feet and seventy-one hundredths feet to the westerly line of South Arlington Avenue; thence running southerly along said line of South Arlington Avenue one hundred feet and more to the point and place of Beginning. Being part of the same premises conveyed to the party of the first part by the parties of the second part by Deed of even date herewith and about to be recorded herewith. Being an advance money mortgage and being given under the terms of section 14 of the Mechanics lien Laws of the State of New Jersey.

It is agreed that the principal sum of this mortgage or the amount from time to time due hereunder for advancements thereon, together with interest at the rate stated, shall become immediately due and payable although the period limited for the payment hereof shall not have arrived, upon the occurrence of any of the following events.

1. Upon failure to present to the mortgagee or successors and assigns, postponements of mechanic's liens from all material men or contractors who have furnished material or labor upon the premises in question or upon failure to furnish evidence that all such persons firms or corporations who have performed labor or furnished material have been paid in full.

2. Upon the filing of any mechanic's lien against said premises and the failure of the owner thereof to procure within 30 days after the same is filed, a cancellation of the said lien or a discharge thereof, in the manner and form provided by law.

Exhibit C-5.

3. Upon the abandonment of the work for 10 days or upon the failure of the said party of the first part or their heirs, executors, administrators and assigns, to prosecute the work in a diligent and effective manner for a similar period cessation of work on account of strikes not to be deemed abandonment.

4. Upon failure for 30 days to comply with any authority having jurisdiction over work similar in type herein contemplated to be erected or upon refusal for a period of 30 days to remove any work condemned by any of the said authorities or inhibited by law.

It is agreed that during the construction of the building the lender or its employees shall have the privilege of inspecting the building.

Parts or whole of any installment may be advanced before they become due if the lender believes it advisable so to do, and all such advances and payments shall be deemed to have been made in pursuance of this agreement and not to be in modification thereof.

It is agreed also that upon the occurrence of any of the contingencies above mentioned the holder of this mortgage shall be absolved from the obligation of making further advancements on account of said mortgage.

It is agreed that upon the default of the owners of said premises in the performance of the terms and covenants herein contained or, their failure to complete with dispatch construction of the said buildings in the manner above set forth, or upon the abandonment of the work for 10 days or upon the absconding of said owners from the State of New Jersey or their absence from said work for ten days, or should any event occur which entitles

the holder of this mortgage to demand the principal thereof or to refuse any further advancements on account of said principal, the holder of this mortgage shall be fully and completely entitled, empowered and authorized and is hereby empowered and authorized irrevocably, by the said owners, without any further consent or authorization to expend all sums of money which in their judgment and discretion shall be reasonably necessary, for the following purposes:

a. To protect and preserve the mortgaged premises;

b. To complete the said building and to pay and satisfy all liabilities incurred for materials and labor employed in such construction.

c. To pay for all work and materials already provided and furnished to owners, the mortgagee being authorized either to continue the construction under outstanding contracts of the owners or to create independent contracts for such completion.

It is further agreed that if the mortgagee is obliged to expend for the purposes aforesaid, sums of money which will exceed the amount of the principal agreed to be advanced hereunder such excess, with interest at six per cent. per annum from the time of each advancement shall be added to the principal due hereunder and the mortgagee shall have all the remedies for the collection thereof which are herein specified regarding the principal hereof.

To induce the mortgagee to advance the principal sum secured hereby or any part thereof, and as a prime and essential consideration to the mortgagee, the said owners do for themselves their heirs and executors, administrators, successors and as-

signs hereby constitute and appoint the mortgagee, irrevocably as their agent for the purpose of making the expenditures aforesaid and for the purpose of carrying out in every respect the authorities herein granted and upon the completion of the said building, to enter into written or oral contracts in the name of and on behalf of the said owners, for the renting or hiring of the said premises or any part thereof, under such terms and conditions as may seem advisable to the mortgagee and to use the rents issues and profits for the upkeep and maintenance of the said premises and for the payment of prior liens and the liquidation of all interest due on mortgages as well to the mortgagee as to others, and for taxes, insurance water charges, etc., and to apply any surplus to the amount due for principal on the within mortgage.

The lien of this mortgage shall attach to all materials brought in and about the premises, used or intended to be used in connection with the building to be erected.

It is also agreed that no conditional bills of sales or chattel mortgages shall be recorded against above premises for any fixtures or any thing belonging to said building to be erected as herein provided for.

It is agreed between the parties hereto that the principal sum hereof shall be paid to Robert Tosti at such times and in such amounts as the parties of the second part their executors, administrators or assigns may elect, providing however that the party of the first part will erect or cause to be erected on the premises; hereinabove described a brick apartment house building containing one hundred rooms as per plans and frigidaire in ac-

cordance with plans and specifications satisfactory to the mortgagee herein. The mortgagee, however, agrees to make subject to the agreements and contingencies herein set forth and the bond accompanying the same, the following payments; but these payments shall however not bind the mortgagee, and they may increase and decrease them at their election:

When the cellar is completed and the first tier of iron beams is ready for concrete, $7500.

When the first floor is erected and the beams are laid $5000.

When the second floor is erected and the beams are laid out and partitions set $5000.

When the third floor is erected and the beams are laid and partitions set $6000.

When the fourth floor is erected and the ceiling beams are on, and when roof is completed, building is topped out and roof water tight $8000.

Electric wiring installed and tested, plumbing and steam piping installed and tested, and building lathed throughout building and ready for plaster, $5000.

When first and second coat of plaster is completed and stairs are in $5000.

When bath tubs are installed and tested $1500.

When white coat of plaster is completed and cellar floor is finished and sash in $5000.

When trimmed, ready to receive doors and kitchen cabinets installed and completed, $6000.

When elevator, rails, motors and machinery is installed and ready to receive car and bath rooms tile walls and floors are completed $3000.

When parquet floors are laid throughout building, $4000.

Exhibit C-5.

When first coat of paint is on woodwork ceiling and walls and plumbing and steam boilers, fixtures and radiators are delivered installed connected, tested and approved $8000.

When tile and marble is completed in halls and vestibules and parquet floor is finished scraped and shellacked and covered with paper $8000. 10

When lighting fixtures are installed, tested and completed and elevator car is delivered, installed and elevator is in complete running condition, $5000.

Balance on completion.

Robert Tosti.

Together with all and singular the profits, priviliges and advantages with the appurtenances to the same belonging or in anywise appertaining. 20 Also all the estate, right, title interest, property, claim and demand whatsoever of the mortgagor of in and to the same and of in and to every part and parcel thereof, To Have And To Hold all and singular the above described tract or lot of land and premises with the appurtenances unto the said mortgagees, their heirs, executors administrators and assigns, to the only proper use, benefit and behoof of the said mortgagees, their heirs, executors administrators and assigns forever. 30 Provided Always, and it is agreed by and between the parties to these presents that if the said mortgagors their heirs, executors, administrators and assigns do and shall well and truly pay or cause to be paid, to the said mortgagees their heirs, executors administrators the sum of Ninety six Thousand ($96000) dollars as follows:

On the 16th day of February nineteen hundred and twenty nine with lawful interest for the same 40

from the fifteenth day of August 1928 at the rate of six per cent per annum payable semi-annually, according to the conditions of a certain bond, bearing even date herewith in the penal sum of One Hundred Ninety-two Thousand ($192000.00) Dollars, made by said Robert Tosti without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever thence and from thenceforth these presents and said obligation shall cease to be void anything herein and therein contained to the contrary in anywise notwithstanding. And the said Mortgagors, for themselves, their heirs, executors, administrators and assigns do covenant and grant to and with the said mortgagee that they shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof. And the mortgagor hereby warrants and defends the title to the said lands and premises. The mortgagors, their heirs, executors, administrators and assigns shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagees, their heirs, executors administrators and assigns, and assign the policy or policies and certificate or certificates thereof, to the mortgagees, their heirs, executors, administrators and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagors, their heirs, exec-

utors, administrators and assigns, shall neglect to pay and permit to remain in default for a period of ten days, all or any tax assessment or other municipal or governmental rate, charge, imposition or any installment or installments of monthly Building Loan dues and interest or any sums payable under any lien superior hereto or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagees, their heirs, executors, administrators and assigns, to pay such charges and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent per annum, and in the event of such payment at the option of the mortgagees, their heirs, executors administrators and assigns, the principal sum secured hereunder shall become due and payable and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable and should the same remain unpaid and in arrears for the space of sixty days or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage or in

the event that the owner of the mortgaged premises shall fail, within ten days after written request therefore, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal of prior mortgages or any carrying charges, or in the event that the default shall be made in any of the terms covenants and conditions herein contained or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof or should any action be commenced to foreclose any such prior mortgage or should the owner of the mortgaged premises fail for a period of thirty days to begin compliance with any requirements recommendation or recommendations of any of the Departments or authority of the State of New Jersey or the municipality where such mortgaged premises are situated, such municipality or State Department or authority having jurisdiction over the mortgaged premises or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thence forth, that is to say, after the lapse or expiration of either of the said periods, as the case may be the aforesaid principal sum of money with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in any wise notwithstanding. And agrees that the said mortgagees, their heirs, executors, administrators or assigns shall and may,

from time to time, and at all times after default shall, be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said mortgagors, their heirs, executors, administrators or assigns, or of any other person or persons whatsoever. And agrees that if default shall be made, as aforesaid the mortgagees, their heirs, executors, administrators, and assigns, shall have the right forthwith after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are in the event of any such default, hereby assigned to the mortgagees, their heirs, executors, administrators and assigns and the mortgagees, their heirs, executors, administrators, and assigns shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage to apply, for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagees, their heirs, executors, administrators, and assigns without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts. And it is agreed that the said mortgagors shall and will keep the building or buildings and improvements now on said

premises or that may hereafter be erected thereon, in good and substantial repair. Upon failure so to do the whole indebtedness secured and represented by this mortgage and the bond accompanying same shall at once become due and payable, and also the said mortgagee may enter upon the premises and repair and keep in repair the same, and the expense thereof shall be added to the principal sum secured hereby with legal interest. All of the covenants and conditions herein contained shall be for the benefit of and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

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

ROBERT TOSTI (Seal)
JENNIE TOSTI (Seal)

Signed, Sealed and Delivered
in the presence of
A. T. De Muro.

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

Be It Remembered That on this 24th day of August in the year of our Lord, One Thousand Nine Hundred and twenty-eight before me the subscriber, a Master in Chancery of New Jersey personally appeared Robert Tosti and Jennie Tosti, his wife who, I am satisfied, the mortgagors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and

delivered the same as their voluntary act and deed for the uses and purposes therein expressed

A. THEODORE D. MURO,
M. C. C. of N. J.

Received in the Office August 24th A. D. 1928 at 3:44 P. M. No. 150.

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Office of

REGISTER OF DEEDS AND MORTGAGES

Essex County, New Jersey

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

I, Howard S. Dodd, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Mortgage made by Robert Tosti, et ux to Julius Sharff, et al, and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book D-65 of Mortgages for said County on pages 447-450.

20

In Testimony Whereof, I have hereunto set my hand and official seal this 15th day of August A. D. 1930.

(Seal)

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HOWARD S. DODD,
Register of Deeds and Mortgages.

MORTGAGE.

This Mortgage made, the Fifteenth day of August One Thousand Nine Hundred and Twenty-eight. Between Robert Tosti and Jennie Tosti

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his wife of the City of New York in the County of New York and State of New York party of the First Part hereinafter known as the Mortgagor, And Julius Sharff and Louis Koplowitz of the City of Newark in the County of Essex and State of New Jersey., party of the Second Part, hereinafter known as the Mortgagee, Witnesseth, that said mortgagor, for and in consideration of the sum of Ninety-six Thousand ($96000.00) Dollars lawful money of the United States of America to them in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened enfeoffed, conveyed and confirmed and by these presents do give, grant bargain, sell alien enfeoff, convey and confirm to the said mortgagee and to their heirs, executors, administrators and assigns, all that tract or parcel of land and premises hereinafter particularly described situated, lying and being in the City of East Orange in the County of Essex and State of New Jersey.

BEGINNING at a point in the easterly line of Oak Street therein distant two hundred fifty-six— and twenty-two one-hundredths of a foot northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty dgrees east one hundred feet; thence north thirty degrees east thirty-five feet and seventy-eight one-hundredths feet; thence south sixty degrees east one-hundred twenty five feet and twenty-two one-hundredths of a foot to the westerly line of South Arlington Avenue; thence running southerly along said westerly line

of South Arlington Avenue one hundred feet and fifteen one-hundredths of a foot; thence north sixty degrees west one hundred thirty feet and seventy-one one-hundredths feet: thence north thirty degrees east fifty six and twenty two one-hundredths feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the said point of BEGINNING; reserving however, a right of way over that part of said lands that may be described as follows:

Beginning at a point in the easterly line of Oak Street therein distant two hundred fifty-six feet and twenty-two hundredths feet northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south 60 degrees east one hundred feet; thence south thirty degrees west eight feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the place and point of Beginning. Being part of the same premises conveyed to the party of the first part by the parties of the second part by deed of even date herewith and about to be recorded herewith. Being an advance money mortgage and being given under the terms of section 14 of the Mechanics Lien Laws of the State of New Jersey.

It is agreed that the principal sum of this mortgage or the amount from time to time due hereunder for advancements thereon together with interest at the rate stated shall become immediately the abandonment of the work for 10 days or up- due and payable although the period limited for the payment hereof shall not have arrived, upon the occurrence of any of the following events.

1. Upon failure to present to the mortgagee or successors and assigns, postponements of mechanic's liens from all material men or contractors who

have furnished material or labor upon the premises in question or upon failure to furnish evidence that all such persons firms or corporations who have performed labor or furnished material have been paid in full.

2. Upon the filing of any mechanic's lien against said premises and the failure of the owner thereof to procure within 30 days after the same is filed, a cancellation of the said lien or a discharge thereof, in the manner and form provided by law.

3. Upon the abandonment of the work for 10 days or upon the failure of the said party of the first part or their heirs, executors, administrators and assigns, to prosecute the work in a diligent and effective manner for a similar period cessation of work on account of strikes not to be deemed abandonment.

4. Upon failure for 30 days to comply with any authority having jurisdiction over work similar in type herein contemplated to be erected or upon refusal for a period of 30 days to remove any work condemned by any of the said authorities or inhibited by law.

It is agreed that during the construction of the building the lender or its employees shall have the privilege of inspecting the building.

Parts or whole of any installment may be advanced before they become due if the lender believes it advisable so to do, and all such advances and payments shall be deemed to have been made in pursuance of this agreement and not to be in modification thereof.

It is agreed also that upon the occurrence of any of the contingencies above mentioned the holder of this mortgage shall be absolved from the ob-

ligation of making further advancements on account of said mortgage.

It is agreed that upon the default of the owners of said premises in the performance of the terms and covenants herein contained or, their failure to complete with dispatch construction of the said buildings in the manner above set forth, or upon on the absconding of said owners from the State of New Jersey or their absence from said work for ten days, or should any event occur which entitles the holder of this mortgage to demand the principal thereof or to refuse any further advancement on account of said principal the holder of this mortgage shall be fully and completely entitled, empowered and authorized and is hereby empowered and authorized irrevocably, by the said owners, without any further consent or authorization to expend all sums of money which in their judgment and discretion shall be reasonably necessary, for the following purposes:

(a) To protect and preserve the mortgaged premises;

(b) To complete the said building and to pay and satisfy all liabilities incurred for materials and labor employed in such construction.

(c) To pay for all work and materials already provided and furnished to owners, the mortgagee being authorized either to continue the construction under outstanding contracts of the owners or to create independent contracts for such completion.

It is further agreed that if the mortgagee is obliged to expend for the purposes aforesaid, sums of money which will exceed the amount of the principal agreed to be advanced hereunder such ex-

cess, with interest at six per cent. per anuum from the time of each advancement shall be added to the principal due hereunder and the mortgagee shall have all the remedies for the collection thereof which are herein specified regarding the principal hereof.

To induce the mortgagee to advance the principal sum secured hereby or any part thereof, and as a prime and essential consideration to the mortgagee, the said owners do for themselves their heirs and executors, administrators, successors and assigns hereby constitute and appoint the mortgagee irrevocably as their agent for the purpose of making the expenditures aforesaid and for the purpose of carrying out in every respect the authorities herein granted and upon the completion of the said building, to enter into written or oral contracts, in the name of and on behalf of the said owners, for the renting or hiring of the said premises or any part thereof, under such terms and conditions as may seem advisable to the mortgagee and to use the rents issues and profits for the upkeep and maintenance of the said premises and for the payment of prior liens and the liquidation of all interest due on mortgages as well to the mortgagee as to others, and for taxes, insurance water charge, etc., and to apply any surplus to the amount due for principal on the within mortgage.

The lien of this mortgage shall attach to all materials brought in and about the premises, used or intended to be used in connection with the building to be erected.

It is also agreed that no conditional bills of sales or chattel mortgages shall be recorded against above premises for any fixtures or any thing be-

longing to said building to be erected as herein provided for.

It is agreed between the parties hereto that the principal sum hereof shall be paid to Robert Tosti at such times and in such amounts as the parties of the second part their executors, administrators or assigns may elect, providing however that the party of the first part will erect or cause to be erected on the premises; hereinabove described a brick apartment house building containing one hundred rooms as per plans and frigidaire in accordance with plans and specifications satisfactory to the mortgagee herein. The mortgagee, however, agrees to make subject to the agreements and contingencies herein set forth and the bond accompanying the same, the following payments; but these payments shall however not bind the mortgagee, and they may increase and decrease them at their election;

When the cellar is completed and the first tier of iron beams is ready for concrete $7500.00

When the first floor is erected and the beams are laid $5000.00

When the second floor is erected and the beams are laid and partitions set $5000.00.

When the third floor is erected and the beams are laid and partitions set $6000.00

When the fourth floor is erected and the ceiling beams are on, and when roof is completed, building is topped out and roof water tight $8,000.00

Electric wiring installed and tested, plumbing and steam piping installed and tested, and building lathed throughout building and ready for plaster. $5000.00

When first and second coat of plaster is completed and stairs are in $5000.00

Exhibit C-5.

When bath tubs are installed and tested $1500.00

When white coat of plaster is completed and cellar floor is finished and sash in $5000.00

When trimmed, ready to receive doors and kitchen cabinets installed and completed. $6000.00

When elevator, rails, motors and machinery is installed and ready to receive car and bath rooms tile walls and floors are completed $3000.00

When parquet floors are laid through out building $4000.00

When first coat of paint is on woodwork ceiling and walls and plumbing and steam boilers, fixtures and radiators are delivered installed connected, tested and approved $8000.00

When tile and marble is completed in halls and vestibules and parquet floor is finished scraped and shellacked and covered with paper $8000.00

When lighting fixtures are installed, tested and completed and elevator car is delivered, installed and elevator is in complete running condition $5000.00

Balance on completion.

Robert Tosti.

Together with all and singular the profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title interest, property, claim and demand whatsoever of the mortgagor of in and to the same and of in to every part and parcel thereof, To Have And To Hold all and singular the above described tract or lot of land and premises with the appurtenances unto the said mortgagees, their heirs, executors administrators and assigns, to the only proper use, benefit and behoof of the said mortgagees, their heirs, executors ad-

Exhibit C-5.

ministrators and assigns forever. Provided Always, and it is agreed by and between the parties to these presents that if the said mortgagors their heirs, executors, administrators and assigns do and shall well and truly pay or cause to be paid, to the said mortgagees the sum of Ninety-six Thousand ($96000) dollars as follows:

On the 16th day of February nineteen hundred and twenty nine with lawful interest for the same from the fifteenth day of August 1928 at the rate of six per cent per annum payable semi-annually, according to the conditions of a certain bond, bearing even date herewith in the penal sum of One Hundred Ninety-two Thousand ($192000.00) Dollars, made by said Robert Tosti without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever thence and from thenceforth these presents and said obligation shall cease and be void anything herein and therein contained to the contrary in anywise notwithstanding. And the Said Mortgagors, for themselves, their heirs, executors, administrators and assigns do covenant and grant to and with the said mortgagee, that they shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof. And the mortgagor hereby warrants and defends the title to the said lands and premises. The mortgagors, their heirs, executors, administrators and assigns shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such

broker or brokers selected and in an amount approved by the mortgagees, their heirs, executors administrators and assigns, and assign the policy or policies and certificate or certificates thereof, to the mortgagee, their heirs executors, administrators and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagors, their heirs, executors, administrators and assigns, shall neglect to pay and permit to remain in default for a period of ten days, all or any tax assessment or other municipal or governmental rate, charge, imposition or any installment or installments of monthly Building Loan dues and interest or any sums payable under any lien superior hereto or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagees, their heirs, executors, administrators and assigns, to pay such charges and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent per annum, and in the event of such payment at the option of the mortgagees, their heirs, executors administrators or assigns, the principal sum secured hereunder shall become due and payable and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days or if default be made in the payment of any of said taxes, water rents or other municipay or governmental rate charge imposition or any money payable under the terms of any mortgage

lien paramount hereto, on any day whereon the same shall become due and payable and should the same remain unpaid and in arrears for the space of sixty days or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal of prior mortgages or any carrying charges, or in the event that default shall be made in any of the terms covenants and conditions herein contained or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof or should any action be commenced to foreclose any such prior mortgage or should the owner of the mortgaged premises fail for a period of thirty days to begin compliance with any requirements recommendation or recommendations of any of the Departments or authority of the State of New Jersey or the municipality where such mortgaged premises are situate, such municipality or State Department or authority having jurisdiction over the mortgaged premises or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thence forth, that is to say, after the lapse or expiration of either of the said periods, as the case may be the aforesaid principal sum of money with all arrearages of interest thereon, and any other charges paid by the holder of this mort-

gage, shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in any wise notwithstanding. And agrees that the said mortgagees, their heirs, executors, administrators or assigns shall and may, from time to time, and at all times after default shall, be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, with the let, suit, trouble, hindrance or denial of the said mortgagors, their heirs, executors, administrators or assigns, or of any other person or persons whatsoever. And agree that if default shall be made, as aforesaid the mortgagees, their heirs, executors, administrators, and assigns, shall have the right forthwith after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are in the event of any such default, hereby assigned to the mortgagees, their heirs executors, administrators and assigns and the mortgagees, their heirs executors, administrators, and assigns shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage to apply, for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of

right, as security for the amounts due the mortgagees, their heirs, executors, administrators, and assigns without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such, amounts. And it is agreed that the said mortgagors shall and will keep the building or buildings and improvements now on said premises or that may hereafter be erected thereon, in good and substantial repair. Upon failure so to do the whole indebtedness secured and represented by this mortgage and the bond accompanying same shall at once become due and payable and also the said mortgagee may enter upon the premises and repair and keep in repair the same, and the expense thereof shall be added to the principal sum secured hereby with legal interest. All of the covenants and conditions here contained shall be for the benefit of and bind the heirs executors administrators, successors and assigns of the respective parties hereto.

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

ROBERT TOSTI (Seal)
JENNIE TOSTI (Seal)

Signed, Sealed and Delivered
in the presence of
A. T. De Muro.

Exhibit C-5.

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

Be It Remembered That on this 24 day of August in the year of our Lord, One Thousand Nine Hundred and twenty-eight before me the subscriber, a Master in Chancery of New Jersey personally appeared Robert Tosti and Jennie Tosti, his wife who, I am satisfied, are the mortgagors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

A. THEODORE DE MURO,
M. C. C. of N. J.

Received in the Office August 24th A. D. 1928 at 3:44 P. M. No 151.

Exhibit C-5.

Office of

REGISTER OF DEEDS AND MORTGAGES

Essex County, New Jersey

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

I, Howard S. Dodd, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Mortgage made by Robert Tosti, et ux to Julius Sharff, et al, and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book D-65 of Mortgages for said County on pages 451-454. 10

In Testimony Whereof, I have hereunto set my hand and official seal this 15th day of August A. D. 1930. 20

(Seal)

HOWARD S. DODD,
Register of Deeds and Mortgages.

No. B 739
Lis Pendens Filed July 1, 1929
Julius Scharff & als Robert Tosti & als
Complt. Deft. 30
Bill to foreclose filed —19—

No. B 761
Lis Pendens Filed July 3 1929
Julius Scharff & al Robert Tosti & als
Complt. Deft.
Bill to foreclose filed —19—

40

Exhibit C-8 and C-9.

Payments made by Sharff & Koplowitz to and for Robert Tosti on Advance Money Mortgages covering premises at 241-249 So. Arlington Avenue, East Orange.

September, 1928		
27	Robert Tosti	$4,000.00
10 October		
5	Robert Tosti	4,000.00
11	Robert Tosti	3,500.00
19	Robert Tosti	3,500.00
19	Robert Tosti	5,000.00
26	Robert Tosti	5,000.00
November		
2	Robert Tosti	10,000.00
9	Robert Tosti	8,000.00
16	Robert Tosti	6,000.00
20 23	Robert Tosti	6,000.00
30	Robert Tosti	4,000.00
December		
7	Robert Tosti	4,000.00
14	Robert Tosti	2,000.00
21	Robert Tosti	2,000.00
28	Robert Tosti	3,000.00
January, 1929		
9	Robert Tosti	3,000.00
30 16	Robert Tosti	1,600.00
18	Robert Tosti	2,500.00
29	Robert Tosti	2,900.00
February		
8	Robert Tosti	4,000.00
15	Cook & Genung Co.	2,000.00
15	Robert Tosti	4,500.00
23	Robert Tosti	5,000.00
13	City of East Orange	228.00

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Exhibits C-8 and C-9.

March		
1	Bronfman Coal Co.	389.00
1	Robert Tosti	5,000.00
8	Robert Tosti	4,000.00
11	Newark Plumbing Co.	4,000.00
15	Robert Tosti	5,000.00
22	Robert Tosti	5,000.00
28	Robert Tosti	5,000.00
April		
5	Robert Tosti	5,000.00
9	Cook & Genung Co.	2,000.00
12	Robert Tosti	5,000.00
19	Robert Tosti	5,000.00
22	Robert Tosti	2,000.00
26	Robert Tosti	5,000.00
26	Otis Elevator Co.	5,000.00
May		
1	Newark Plumbing Supply Co.	2,000.00
2	Robert Tosti	5,000.00
4	Otis Elevator Co.	2,000.00
8	Newark Plumbing Supply Co.	2,000.00
10	Robert Tosti	5,000.00
17	Robert Tosti	2,000.00
		$171,117.00

Exhibits C-8 and C-9.

		Carried	$171,117.00
	May		
	17	Newark Plumbing Supply Co.	1,000.00
	24	Robert Tosti	2,500.00
	27	Robert Tosti	300.00
	29	Robert Tosti	1,300.00
	June		
10	4	Banister & Pollard	1,300.00
	June		
	7	Robert Tosti	1,500.00
	12	Robert Tosti, lumber	106.00
	12	Newark Plumbing Supply Co.	1,000.00
	12	Robert Tosti, coal	55.10
	14	H. A. Kammerer, screens	500.00
	14	Robert Tosti	750.00
	21	Robert Tosti	450.00
20	21	Morris Karpf, window shades	100.00
	28	Robert Tosti	350.00
	28	Peoples National Bank, plants	241.60
	July		
	5	Ernesto Iezzi, painter	100.00
	5	Marino Antonio, super.	50.00
	5	Robert Tosti	57.35
	5	Mattec, mason	56.00
	5	Alfred Nielson, janitor	50.00
	5	Anton Poulson, janitor	50.00
30	9	Cook & Genung Co.	1,045.00
	9	City of East Orange, water	91.15
	9	Ernesto Iezzi,	100.00
	9	Public Service Gas Co.	42.62
	11	Hoffman Plumbing Co.	175.00
	11	N. J. Bell Telephone Co.	13.73
	12	Paola Saporito, electric	20.00
	12	Antonio, Marino, super. etc.	74.10
	12	Ernesto Iezzi,	48.00
40			

Exhibits C-8 and C-9.

12	Harry Dudkow, painter	48.00	
12	Robert Tosti	300.00	
19	Ernesto Iezzi,	60.00	
19	Harry Dudkow,	60.00	
19	Antonio Marinero	68.00	
19	Robert Tosti	50.00	
26	Cook & Genung Co.	2,005.50	10
26	Ernesto Iezzi,	48.00	
26	Harry Dudkow,	60.00	
26	Robert Tosti	50.00	
26	Antonio Marinero,	50.00	
30	Louis Koplowitz, grass cutter	10.73	
August			
2	Ernesto Iezzi,	67.35	
2	Harry Dudkow,	60.00	
2	Salvatore Sasso, painter	60.00	
2	E. Dilia, painter	60.00	20
2	Antonio Marinero	50.00	
2	Robert Tosti	50.00	
2	Alfred Nielson,	50.00	
2	Anton Poulson,	50.00	
7	Ad for janitor	.60	
7	Morris Karp, window shades	350.00	
9	Ernesto Iezzi,	60.00	
9	Harry Dudkow,	60.00	
9	Salvatore Sasso,	60.00	30
		$188,330.83	

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Exhibits C-8 and C-9.

		Carried	$188,330.83
	August		
	9	E. Dilia	60.00
	9	Antonio Marinero	63.30
	14	Public Service Gas Co.	58.70
	16	Ernesto Iezzi,	69.30
10	16	Harry Dudkow,	60.00
	16	Salvatore Sasso,	60.00
	16	E. Dilia	60.00
	16	Expert Parquet Floor Co.	303.50
	20	Rosenblatt, covering water pipe	65.00
	22	Louis Koplowitz, nails	3.30
	23	Stone & Co. paint	71.00
	23	Ernesto Iezze,	60.00
	23	Harry Dudkow,	60.00
	23	E. Dilia	60.00
20	23	Salvatore Sasso	60.00
	23	Amalgamated Paint Co.	210.88
	30	Anton Poulson	69.00
	30	Ernesto Iezzi	61.40
	30	O. Iezzi	60.00
	30	Salvatore Sasso,	60.00
	30	E. Dilia	60.00
	September		
	4	Otis Elevator Co.	3,000.00
30	6	Ernesto Iezzi,	48.00
	6	O. Iezzi	48.00
	6	Salvatore Sasso,	48.00
	6	E. Dilia	48.00
	9	Alfred Nielson,	56.68
	9	Anton Poulson,	50.00
	10	City of East Orange, water	39.48
	13	Banister & Pollard	1,075.65
	12	Star Electric Co.	12.00
	13	Ernesto Iezzi	96.98
40			

Exhibits C-8 and C-9.

13	O. Iezzi	60.00
13	Anton Poulson,	60.00
14	Paolo Sponito, electrician	42.00
21	O. Iezzi	33.00
23	Hoffman Plumbing Co.	169.95
25	Newark Evening News, ad.	48.30
27	Acme Lumber Co.	192.49
27	Louis Koplowitz, labor, material	16.75
27	Public Service Electric & Gas Co.	176.04
October		
3	Anton Poulson	50.00
3	Alfred Nielson,	50.00
3	Orange Hardware Co.	27.58
3	Wooley & Glorieux, coal	281.15
3	Louis Koplowitz, mats	6.58
8	Louis Koplowitz, sign painter	35.00
21	Banister & Pollard	362.10
21	Petro Oil Heating Co. burners	500.00
21	Louis Koplowitz, misc.	2.37
21	P. S. Electric & Gas Co.	130.53
November		
2	Anton Poulson	135.82
2	Alfred Nielson	50.00
7	Banister & Pollard	363.88
8	Ernesto Iezzi,	31.50
		$197,314.04

Exhibits C-8 and C-9.

		Carried	$197,314.04
	November		
	8	Newark Evening News, ad	6.44
	9	Orange Hardware Co.	16.65
	9	Reliable Furniture Co. end tables	16.00
	9	Hotaling, repairs	97.97
	9	City of East Orange, taxes	115.94
10	9	N. J. Exterminating Co.	15.00
	9	Petrol Oil Heating Co., oil	124.75
	9	Thompson-Goodyear Rubber Co.	43.52
	9	Preserve, Inc.	51.45
	9	Woolley & Glorieux Co., coal	205.88
	16	Eglowstein Electric Co.	187.85
	21	Expert Parquet Co., floors	282.80
	21	P. S. Electric & Gas Co.	172.93
	27	Louis Koplowitz, misc.	2.75
20	December		
	5	Hoffman Plumbing & Heating Co.	50.00
	6	Louis Koplowitz, painting	18.00
	6	Poulson,	77.30
	6	Alfred Nielson,	55.00
	6	Banister & Pollard	365.65
	9	Hoffman Plumbing & Heating Co.	122.00
	9	N. J. Exterminating Co.	15.00
	9	Electric Arc Cutting & Welding Co.	22.50
30	9	Orange Hardware Co.	2.88
	9	Branford Press	3.00
	9	W. A. Eichhorn, Ins.	202.50
	9	O. J. Hotaling	102.89
	9	Petrol Oil Heating Co., oil	478.24
	9	Newark Window Shade & Awning Co.	23.75
	20	P. S. Electric & Gas Co.	161.87
	20	Otis Elevator Co.	40.50
40			

Exhibits C-8 and C-9.

21	Christmas present, janitors	20.00
27	Standard Iron Works	33.50
January, 1930		
4	Alfred Nielson	56.60
4	Anton Poulson	52.55
4	Newark Plumbing Supply Co.	198.00
6	Newark Evening News, ad	11.27
6	Banister & Pollard	367.43
13	Hoffman Plumbing Co.	19.40
16	Orange Hardware Co.	13.63
16	Eglowstein Electric Co.	14.70
16	N. J. Exterminating Co.	15.00
16	Otis Elevator Co.	31.43
20	Petroleum Heat & Power Co. oil	691.15
	Total	$201,919.71
23	Petro Oil Heating Co. burners	1,521.50
23	Louis Koplowitz, leases	1.55
	Total	$203,442.76

Assumption of liability:		
Otis Elevator Co.	$1,500.00	
Petrol etc.	1,255.00	
Banister & Pollard	4,004.35	
	$6,759.35	6,759.35
		$210,202.11
Rents received	$13,107.93	13,107.93
		$197,094.18

Notice of Appeal.

Filed July 12, 1930.

IN CHANCERY OF NEW JERSEY.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants, and ROBERT TOSTI and JENNIE, his wife, HARRY MINOWITZ, trading as BUILDERS HARDWARE SUPPLY CO., COOK & GENUNG CO., and MORREALE-MANTIONE CONSTRUCTION CO., FEDERAL SEABOARD TERRA COTTA CO., Defendants.	On Bill to Foreclose. Notice of Appeal.

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20

The defendants Cook & Genung Co. and Morreale-Mantione Construction Co. hereby appeal from the final decree and from the whole and every part thereof, made in this cause by the Chancellor upon the advice of the Honorable Alonzo Church, Vice Chancellor as declares that said complainants have advanced on the two advance money mortgages a total sum of $192,000 and that there is due on said mortgages said sum of $192,000 besides interest from August 15, 1928 and that said advance money mortgages are in point of priority of payment second to the first two mortgages of $29,055 each held by complainants on said buildings and lands,

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and that advance money mortgages are liens on said lands and premises prior to the claims of all the defendants in this cause except Harry Minowitz trading &c. and also the allowance of $2,000 as a counsel fee to complainant's solicitor; and as denies the relief asked for by the defendants Cook & Genung Co. and Morreale-Mantione Construction Co. to the Court of Errors and Appeals in the last resort in all causes. 10

Dated July 9, 1930.

G. M. BELFATTO,
Solicitor for defendants Cook & Genung Co., and Morreale-Mantione Construction Co.

I conceive there is a good cause for appeal in the above stated cause. 20

G. M. BELFATTO,
Of Counsel.

FERD GARRETSON,
Clerk.

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Petition of Appeal.

Filed July 12, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants-Appellees, and ROBERT TOSTI and JENNIE, his wife, *et als.*, Defendants-Appellants.	On Bill to Foreclose. Petition of Appeal, of defendants Morreale-Mantione Construction Co., Cook & Genung Co.

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To the Honorable Court of Errors and Appeals in the last resort in all causes.

20

The petition of the defendants Morreale-Mantione Construction Co. and Cook & Genung Co. the appellants in the above stated cause respectfully shows that the petitioners find themselves aggrieved by a final decree made in the Court of Chancery of New Jersey by his Honor Edwin R. Walker, Chancellor, bearing date July 7, 1930, wherein the said Julius Sharff and Louis Koplowitz were complainants and Robert Tosti and Jennie his wife, Kernerator Incinerator Co., Thien Equipment Co., Federal Seaboard Terra Cotta Co., and New Jersey Terra Cotta Co., Harry Minowitz trading as Builders Hardware Supply Co., Morreale-Mantione Construction Co. and Cook & Genung Co. are defendants in this respect to wit:

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> "And it appearing to the Court that Cook & Genung Co. a corporation filed an answer and counterclaim to the bill of complaint in

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which it alleged priority of its right of mechanics lien to the lien of complainants mortgages and that a certain postponement of lien executed by it to and on behalf of complainants whereby said defendant postponed its right of mechanics lien to the lien of complainants mortgages was obtained under an agreement whereby complainants agreed to pay said defendants the amount due it under its lien claim." 10

And the Court having heard the testimony on behalf of all the complainants and the defendants and the Court being satisfied that complainants also hold two advance money mortgages each in the principal sum of $96,000 both dated August 15, 1928 covering respectively the first and second tracts described in the bill of complaint; that said complainants have advanced on said advance money mortgages, a total sum of $192,000, and that there is due on said mortgages said amount of $192,000 besides interest from August 15, 1928 and that said mortgages are second in point of priority of payment to the first mortgages of $29055 each held by complainants; that all of said mortgages are liens on said lands and premises prior to the claims of all of the defendants in this cause except Harry Minowitz trading as Builders Hardware Supply Co. 20 30

"That the said land and premises be sold to satisfy the money due to complainants and said defendants in the manner and time of priority as aforesaid with the complainant's costs to be taxed together with a counsel fee of $2000 to the complainants."

"That out of the money arising from said sale he pay first to the complainants or their solicitor their debts, interest 40

and costs; secondly, to pay to the defendants Federal Seaboard Terra Cotta Co., Cook & Genung Co., their respective debts, interest and costs."

And your petitioners humbly appeal from said decree of the Chancellor upon the ground that the same is erroneous for that said decree should have ordered and directed.

10

(a) That the postponement of lien of which there is no proof in this cause is a waiver of any rights which the defendant Cook & Genung Co. has in the buildings to the extent of the money advanced by complainants for their construction.

(b) That the lien of the defendants Morreale-Mantione Construction Co. and Cook & Genung Co. are prior to the lien of the two advance money mortgages of $96,000 and subject only to the two purchase money mortgages of $29055 each; the complainants having failed to prove that the sums of $158,650 alleged to have been paid to Robert Tosti and $51,045 to other persons were actually applied to the payment of labor and materials for the erection of said buildings."

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(c) That at the time Robert Tosti abandoned the work at said buildings there remained unpaid on account of each advance money mortgage the 14, 15, and 16, payments aggregating $27000 which should be credited to said mortgages."

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(d) That the rents collected by complainants from the tenants of said premises from July 1, 1929 to June 1, 1930 amounting as alleged to $16,643.75 shall be brought into court subject to the payment of said defendants claims.

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(e) That complainants are not entitled to counsel fee and costs of this suit they having failed to establish their claim under said advance money mortgages.

Your petitioners therefore pray that said decree of the Chancellor may be reversed, set aside and for nothing holden and that your petitioners may have such relief in the premises as this Honorable Court shall seem meet.

G. M. BELFATTO,
Solicitor for Defendants-Appellants.

INDEX

DECREE PRO CONFESSO.

Filed August 28, 1929.

In Chancery of New Jersey

Between JULIUS SHARFF and LOUIS KOPLOWITZ, *Complainants,* *and* ROBERT TOSTI, *et als.,* *Defendants.*	*On Bill, &c.* *Decree Pro Confesso.*

10

This cause being opened to the Court by Benjamin Newman, solicitor of complainants, and it appearing that process of subpoena for the appearance of Robert Tosti and Jennie Tosti, his wife, Otis Elevator Co., a corporation, Builders Hardware Supply Co., a corporation, New Jersey Terra Cotta Co., a corporation, Federal Seaboard Terra Cotta Co., a corporation, Bannister & Pollard Co., a corporation, Walter E. Heller & Co., a corporation, Kernerator Incinerator Co., a corporation, Thien Equipment Co., a corporation, Automatic Oil Heating Co., a corporation, and Morreale-Montione Construction Co., Inc. has been duly issued and returned served upon said defendant, except the defendant Walter E. Heller & Co.; and that the said defendants, Robert Tosti and Jennie Tosti, his wife, New Jersey Terra Cotta Co., a corporation, Federal Seaboard Terra Cotta Co., a corporation, Kernerator Incinerator Co., a corporation, Thien Equipment Co., a corporation, and Morreale-Mantione Con-

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struction Co., Inc., have not, nor have any of them, filed any plea, demurrer or answer to the said bill within the time limited by law, but have wholly failed and neglected so to do:

It is thereupon, on this 28th day of August Nineteen Hundred and Twenty-nine, ordered, adjudged and decreed that the said bill be taken as confessed against the said defendants, Robert Tosti and Jennie Tosti, his wife, New Jersey Terra Cotta Co., a corporation, Federal Seaboard Terra Cotta Co., a corporation, Kernerator Incinerator Co., a corporation, Thien Equipment Co., a corporation, and Morreale-Mantione Construction Co., Inc.

To the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,

C.

REPLICATION AND ANSWER TO COUNTER-CLAIM OF DEFENDANT, COOK & GENUNG CO.

IN CHANCERY OF NEW JERSEY.

Between JULIUS SHARFF and LOUIS KOPLOWITZ, *Complainants,* *and* ROBERT TOSTI, *et als.*, *Defendants.*	*On Bill to Foreclose.* *Replication and Answer to Counter-Claim of Defendant, Cook & Genung Co.*

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REPLICATION.

20

The complainants join issue on the answer of the defendant, Cook & Genung Co., a corporation.

By way of answer to the counter-claim the complainants say that:

1. They deny paragraph one, but admit that the defendant, Cook & Genung Co. did furnish some materials for the defendant Robert Tosti.

2. They deny paragraph two.

30

3. As to paragraph three, they deny that any demand was made upon these complainants. They admit that they refuse to pay said defendants, and so far as said paragraph refers to said Robert Tosti they have no knowledge or information sufficient to form a belief.

4. They admit the first sentence in paragraph four. As to the last sentence they have no knowledge or information sufficient to form a belief.

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5. They admit the last sentence in paragraph five, and have no knowledge or information sufficient to form a belief as to the balance of said paragraph.

6. They deny the sixth paragraph.

10 Further answering the counter-claim, these complainants allege and aver:

1. Neither said lands nor said buildings are liable for said debt.

2. On or about September 29, 1928 the defendant, Cook & Genung Co., executed two agreements in writing wherein and whereby they postponed their right of mechanics lien to the lien of these complainants' mortgages set forth in the 20 bill to foreclose, each in the sum of $96,000.00, by reason whereof said mortgages are prior and paramount in point of priority to the lien of defendant, Cook & Genung Co.

3. The mortgages held by these complainants were placed on record in the Essex County Register's Office on August 24, 1928, and were recorded prior to the commencement of the construction and erection of any building upon the lands and premises described in the complaint, by 30 reason whereof all the mortgages held by these complainants are prior and paramount in point of priority to the lien of defendant, Cook & Genung Co.

4. The mortgages held by these complainants are prior in point of priority to the lien of defendant, Cook & Genung Co.

5. These complainants, by their deed, on or about August 15, 1928, sold and conveyed the 40 premises described in the bill to foreclose to the

said Robert Tosti, and in order to secure the payment of a part of the purchase price of said conveyance or conveyances to the said Robert Tosti, said Robert Tosti executed and delivered the two mortgages each in the sum of $29,055.00 to these complainants covering said lands and premises. Said mortgages are purchase money mortgages and by reason thereof are prior in point of priority to any right of lien of the defendant, Cook & Genung Co.

6. The lands and premises referred to in the bill to foreclose were conveyed to the said Robert Tosti by these complainants by deed of even date with said mortgages.

6a. As part of the consideration of said conveyance these complainants, the grantors, agreed to accept in part payment for the purchase price of said lands and premises the two mortgages each in the sum of $29,055.00 referred to in the bill to foreclose, and also agreed to advance the sum of $96,000.00 to be secured by two mortgages, each in said amount and each covering a portion of the premises as described in the bill to foreclose, which amounts each in the sum of $96,000.00 the said Julius Sharff and Louis Koplowitz agreed to pay to the said Robert Tosti in accordance with the terms set forth in said mortgages of $96,000.00 each.

6b. The said mortgages in the sum of $29,055.00 were purchased money mortgages, and the mortgages each in the sum of $96,000.00 were advance money mortgages and given under the terms of section 14 of the Mechanics Lien Law of the State of New Jersey.

6c. The deed to the said Robert Tosti made by these complainants sets forth that the said con-

veyance is made subject to the four mortgages above referred to, and the mortgages of $29,-055.00 each recite therein that they are purchase money mortgages, and the mtorgages in the sum of $96,000.00 each recite that they are advance money mortgages and given as set forth in the last mentioned paragraph.

6d. These complainants have disbursed all the moneys due said Robert Tosti under said mortgages.

6e. By reason of all of the above, all of said mortgages are mortgages prior and paramount to the lien of said defendant, Cook & Genung Co.

7. Such moneys as have been disbursed by these complainants on the mortgages of $96,000.00 have been actually advanced and paid by them, and applied to the erection of the buildings on the mortgaged lands, and by reason whereof the two mortgages of $96,000.00 each, of these complainants, are prior to the lien of the defendant, Cook & Genung Co.

8. The complainants will plead that any agreements such as is set forth in paragraph two of the counter-claim, not being in writing, cannot bind these complainants, by reason of an act entitled, "An Act for the Prevention of Frauds and Perjuries," its supplements and amendments, Compiled Statutes of New Jersey.

BENJAMIN NEWMAN,
Solicitor and of Counsel with Complainants.

EXHIBIT C. 1.

This AGREEMENT made this thirty-first day of July, One Thousand Nine Hundred and Twenty-eight, between JULIUS SHARFF and ANNIE SHARFF, his wife, and LOUIS KOPLOWITZ and IDA KOPLOWITZ, his wife, of the City of Newark, County of Essex and State of New Jersey, parties of the first part, and ROBERT TOSTI and JENNIE TOSTI, his wife, of the City of New York, County of New York and State of New York, parties of the second part, WITNESSETH:

1. The vendors agree to sell and the vendees agree to buy for the sum of Eighty Thousand ($80,000.00) Dollars, premises described as follows:

All those tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey.

FIRST TRACT:

BEGINNING at a point in the easterly line of Oak Street therein distant two hundred fifty-six and twenty-two one-hundredths of a foot northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence north thirty degrees east thirty-five feet and seventy-eight one-hundredths feet; thence south sixty degrees east one hundred twenty-five feet and twenty-two one hundredths of a foot to the westerly line of South Arlington Avenue; thence running southerly along said westerly line of

Exhibit C. 1.

South Arlington Avenue one hundred feet and fifteen one-hundredths of a foot; thence north sixty degrees west one hundred thirty feet and seventy-one one-hundredths feet; thence north thirty degrees east fifty-six and twenty-two one-hundredths feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the said point of Beginning; reserving, however, a right of way over that part of said lands that may be described as follows: Beginning at a point in the easterly line of Oak Street therein distant two hundred fifty-six feet and twenty-two hundredths feet northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence south thirty dgrees west eight feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the place and point of Beginning.

SECOND TRACT:

Beginning on the westerly side of South Arlington Avenue 100.15 feet northerly from the northerly line of Elmwood Avenue; thence north 60 degrees west 136.20 feet to the rear line of land conveyed by Harry Adams to William Langley; thence northerly parallel with Oak Street 100 feet to the northerly line of land of Harry Adams; thence south 60 degrees east 130.71 feet to the westerly line of South Arlington Avenue; thence running southerly along said line of South Arlington Avenue 100 feet and more to the point and place of Beginning.

Exhibit C. 1.

The parties of the first part represent that the premises are located in a zoning district permitting apartment houses, and also that they will secure necessary permits and pay for same, otherwise this contract is to be void.

This conveyance is to be made subject to the effect, if any, of the local zoning ordinance. The warranties of title hereinafter set forth do not apply to a strip of land eight feet in width by a depth of 100 feet running from the east side of Oak Street.

The premises are to be conveyed subject to a mortgage of Forty-five Hundred ($4500.00) Dollars and unpaid assessments, which mortgage and assessments are to be paid by the vendors upon the payment of the purchase money mortgages hereinafter set forth, which shall be incorporated in said mortgages.

2. The vendees agree to purchase said lands and premises and to pay for the same as follows:

Fifty-five Thousand Eight Hundred and Fifty ($55,850) Dollars, less the apportionments hereinafter provided for, by executing and delivering two purchase money bonds and mortgages, each bond and mortgage covering an approximate one-half of the lands and premises hereinafter described, as set forth on a survey of George H. Gardner, Surveyor, dated June 3rd, 1927, which bonds and mortgages are to be for Twenty-seven Thousand Nine Hundred and Twenty-five ($27,-925.) each, less one-half of the apportionments, to be due in one year from the date thereof, besides interest at six per cent per annum, payable semi-annually, and to contain the usual thirty day interest, sixty day tax and assessment default

clause, a prepayment privilege and a clause providing for no deduction for taxes.

Twenty-four Thousand One Hundred and Fifty ($24,150) by the vendees conveying to the vendors or their nominees, all that tract or parcel of land and premises, situate in the Borough of Manhattan, City of New York, known as No. 39 Great Jones Street, and also known and distinguished on a Map of Lands of the late Samuel Jones, Esq., deceased, lying between Broadway and the Bowery made by Stephen Ludlam and E. W. Bridges, C. S., recorded in the Office of the Register in and for the City and County of New York in Liber 125 Cp. 587 as Lot No. 67 bounded and described as follows:

> BEGINNING at a point on the southerly side of Great Jones Street, distant two hundred and sixty-one feet eight inches or thereabouts westerly from the corner formed by the intersection of the southerly side of Great Jones Street with the westerly side of the Bowery; running thence westerly along said southerly side of Great Jones Street twenty-seven feet; thence southerly one hundred feet; thence easterly and parallel with Great Jones Street, twenty-seven feet; thence northerly one hundred feet to the point or place of BEGINNING.
>
> Be the said several dimensions more or less.
>
> Having erected thereon a seven story brick building containing one store and six lofts.

Said premises are to be conveyed subject to a first mortgage in the sum of $27,500.00 given to the Title Guaranty and Trust Company due in about two years, containing no amortization and bearing interest at 5½%,

Exhibit C. 1.

payable semi-annually; also subject to a second mortgage upon which there is now due $13,350.00, payable at the rate of $300.00 every three months, with interest at six per cent, payable quarterly and due in about five years. Also subject to four leases, one for the store at $175.00 per month and the three other tenancies being not less than $350.00 per month. Said rentals are a material representation, and no allowances nor discounts have been given therefrom. Subject to facts on survey of G. C. Hollenith, dated 9/29/26 & redated 8/6/27.

3. The deeds from the respective parties shall be Warranty Deeds with full covenants and warranty, excepting that the deed for the New York premises shall be in proper statutory short form, and the respective deeds shall be duly executed and acknowledged by the respective owners, at their respective expense, so as to convey to each of the parties the fee simple of the respective premises free of all encumbrances, except as herein set forth.

4. If there be a water meter on the premises, the seller shall furnish a reading to a date not more than thirty days prior to date herein set for closing title and the unfixed meter charge for the intervening time shall be apportioned on the basis of such last meter reading.

5. If at the time of the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments, then for the purpose of this contract all the unpaid installments of any such assessment, including those which are to become

due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

10

6. This sale covers all right, title and interest of the seller of, in and to any land lying in the bed of any street, road or avenue opened or proposed, in front of or adjoining said premises to the centre line thereof, or all right, title and interest of seller in and to any award made or to be made in lieu thereof, and the seller will execute and deliver to the purchaser, on the closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of such award.

20

7. All personal property appurtenant to or used in the operation of said premises owned by the seller is included in this sale.

8. All notes or notices of violation of law or municipal ordinances, orders or requirements noted in or issued by any Department of the City and State of New York, against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of the same. The seller shall furnish the purchaser with an authorization to make the necessary searches therefor.

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9. The reasonable expense of the examination of the title to said premises are hereby made liens thereon, but such liens shall not continue after default by the purchaser under this contract.

10. The risk of loss or damage to said premises by fire until the delivery of the deed is assumed by the seller.

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Exhibit C. 1.

11. The respective parties do further covenant that their titles do not rest upon any tax or assessment sale; that the building erected upon the premises owned by the vendees is erected entirely within the lines thereof and that there are no encroachments upon the respective premises. 10

12. Taxes, water rents, insurance, rentals, gas and electric charges shall be apportioned as of the date of closing title.

13. The vendors agree to loan to the vendees on their bonds and mortgages covering the lands and premises agreed to be conveyed by the vendors the sum of Ninety-six Thousand ($96,000) Dollars covering each portion of the premises as above defined to be mortgaged under the purchase money mortgages to be given to the vendors, said mortgages shall be advance money mortgages and shall contemplate the erection and completion of an apartment house on each tract, in accordance with the plans and specifications prepared by Kasoff & Platt, Architects. Said bonds and mortgages shall be advance money mortgages under the terms of section 14 of the Mechanics Lien Laws of the State of New Jersey, and shall be on the forms used by Benjamin Newman, and contain the clauses therein set forth, and which mortgages or forms hereof are hereunto annexed and made a part hereof. The same shall provide for payments in accordance with the schedule attached to said mortgages. 20 30

14. The vendees agree to pay for the cost of drawing and recording their purchase money and advance money mortgages.

15. Anna Sharff, Ida Koplowitz and Jennie Tosti join in this agreement solely for the pur- 40

pose of conveying their right of dower. The mortgages to be given are to be executed to Julius Sharff and Louis Kopolowitz.

16. The vendors covenant that as inducement to purchase on each of the premises as mortgaged by the purchase money mortgages, they will procure for the vendees two mortgages each in the sum of One Hundred and Forty ($140,000.) Thousand Dollars, which shall be a straight mortgage and amortization not exceeding 3% per annum, at six per cent interest, payable quarterly or semi-annually, which mortgage shall not be given to a building and loan association. The expense of procuring said mortgages shall be borne by the vendees not exceeding 4½%, covering all commissions, lawyers and title company fees and surveys. The mortgages shall be for not less than three years. In case the vendors are unable to obtain a mortgage for $140,000.00 then for the difference between the amount of loan granted and the sum of One Hundred and Forty Thousand ($140,000) Dollars they are to postpone their purchase money mortgages so as to make the total of mortgages covering said lands and premises, each lot, a total of One Hundred and Forty Thousand ($140,000) Dollars, and are to extend said purchase money mortgages for the unpaid balance until the due date of said mortgages.

17. The vendees agree that at any time after the payment for the first coat of paint, etc. of $8,000.00 is made that they will execute and proceed to close up the above mortgage loans to be obtained for them by the vendors. It is agreed that said advance money mortgages shall provide that no conditional bills of sales or chattel

mortgages shall be recorded against said real estate for any fixtures or anything belonging to said buildings to be erected as herein provided for. The sellers shall deliver to the buyers six sets of plans and specifications for the building of the said apartments without additional cost. 10

And It Is Further Agreed by the parties hereto, that the said Deeds of Warranty shall be delivered and received at the office of Benjamin Newman, 790 Broad Street, in the City of Newark, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the sixteenth day of August, next ensuing the date hereof.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above written. 20

Signed, sealed and delivered in the presence of

ROBERT TOSTI (L. S.)

State of New Jersey,
County of Essex. } *ss.* 30

Be It Remembered, That on this thirty-first day of July, in the year of our Lord One Thousand Nine Hundred and Twenty-eight, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared ROBERT TOSTI and JENNIE TOSTI, his wife, who, I am satisfied, are the parties of the second part mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the 40

same as their voluntary act and deed, for the uses and purposes therein expressed; and the said JENNIE TOSTI being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary
10 act and deed, FREELY, without any fear, threats or compulsion of her said husband.

Note: Attached to agreement is mortgage printed on page 75 of State of Case.

EXHIBIT C. 2.

This Indenture, Made the 15th day of August,
20 in the year of our Lord One Thousand Nine Hundred and Twenty-eight.

Between JULIUS SHARFF and ANNIE SHARFF, his wife, and LOUIS KOPLOWITZ and IDA KOPLOWITZ, his wife, all of the City of Newark in the County of Essex and State of New Jersey party of the first part;

And ROBERT TOSTI of the City of New York in the County of New York and State of New York party of the second part:

30 Witnesseth, That the said party of the first part, for and in consideration of One ($1.00) Dollar and other good and valuable considerations lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given,
40 granted, bargained, sold, aliened, released, en-

feoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, ALL those tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange in the County of Essex and State of New Jersey.

FIRST TRACT: BEGINNING at a point in the easterly line of Oak Street therein distant two hundred fifty-six and twenty-two one-hundredths of a foot northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence north thirty degrees east thirty-five feet and seventy-eight one-hundredths feet; thence south sixty degrees east one hundred twenty-five feet and twenty-two one-hundredths of a foot to the westerly line of South Arlington Avenue; thence running southerly along said westerly line of South Arlington Avenue one hundred feet and fifteen one-hundredths of a foot; thence north sixty degrees west one hundred thirty feet and seventy-one one-hundredths feet; thence north thirty degrees east fifty-six and twenty-two one-hundredths feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the said point of BEGINNING; reserving, however, a right of way over that part of said lands that may be described as follows: BEGINNING at a point in the easterly line of Oak Street therein distant two hundred fifty-six feet and twenty-

two hundredths feet northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence south thirty degrees west eight feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the place and point of Beginning.

SECOND TRACT: Beginning on the westerly side of South Arlington Avenue one hundred feet and fifteen hundredths feet northerly from the northerly line of Elmwood Avenue; thence north sixty degrees west one hundred thirty-six feet and twenty hundredths feet to the rear line of land conveyed by Harry Adams to William Langley; thence northerly parallel with Oak Street one hundred feet to the northerly line of land of Harry Adams; thence south sixty degrees east one hundred thirty feet and seventy-one hundredths feet to the westerly line of South Arlington Avenue; thence running southerly along said line of South Arlington Avenue one hundred feet and more to the point and place of Beginning.

Being the same premises conveyed to the parties of the first part by Louis Bohrer and Jeanette L. Bohrer, his wife, by Deed dated January 24, 1927 and recorded in the Essex County Register's Office in Bk O-77 page 206-7, and by Harry Adams and Lillie May Adams, his wife, by Deed dated January 24, 1927 and recorded in the Essex County Register's Office in Bk P 75, page 369-370, respectively.

Exhibit C. 2.

This conveyance is made subject to the legal effect, if any, of the local zoning ordinances and the warranties of title and covenants hereinafter set forth do not apply to the strip of land eight feet in width by a depth of one hundred feet, running from the east side of Oak Street.

The premises are also conveyed subject to a mortgage of $4500.00 and unpaid assessments. Also subject to two purchase money mortgages, each in the sum of $29,055.00, and two advance money mortgages, each for the sum of $96,000.00.

The above mentioned mortgage of $4500.00 and assessments are to be paid by the said Julius Sharff and Louis Koplowitz upon the payment of the purchase money mortgages above referred to.

Together with all and singular, the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To Have and To Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever:

And the said JULIUS SHARFF and LOUIS KOPLOWITZ do for themselves, their heirs, executors and administrators covenant and agree to and with the said party of the second part, their heirs and assigns, that they the said JULIUS SHARFF and LOUIS KOPLOWITZ,

are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever; except as aforesaid.

And also that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

And also, that JULIUS SHARFF and LOUIS KOPLOWITZ will Warrant, secure, and forever defend the said land and premises unto the said ROBERT TOSTI, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever, except as aforesaid.

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

Julius Sharff (L. S.)
Annie Sharff (L. S.)
Louis Koplowitz (L. S.)
Ida Koplowitz (L. S.)

Exhibit C. 2.

Signed, Sealed and Delivered
in the Presence of

Seymour Klein
As to Louis & Ida Koplowitz

Hyman M. Goldstein
As to Julius Sharff and Annie Sharff 10

STATE OF NEW JERSEY,
COUNTY OF MONMOUTH. } *ss.*

BE IT REMEMBERED, That on this 15th day of August in the year of our Lord One Thousand Nine Hundred and Twenty-eight, before me, the subscriber, a Master in Chancery of New Jersey personally appeared LOUIS KOPLOWITZ and IDA KOPLOWITZ, his wife who, I am satisfied, 20 are two of the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed;

Seymour Klein
A Master in Chancery of N. J.

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Exhibit C. 2.

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

Be It Remembered, That on this 16th day of August in the year of Our Lord One Thousand Nine Hundred and Twenty-eight before me, the subscriber, an attorney at law of New Jersey personally appeared JULIUS SHARFF and ANNIE SHARFF, his wife who, I am satisfied, are two of the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

Hyman M. Goldstein
An Attorney at Law of New Jersey

Received in the Register's Office of the County of Essex, N. J. on the 24th day of August A. D., 1928, at 3:44 o'clock, in the afternoon, and Recorded in Book Q 78 of Deeds for said County, on page 138-139.

Howard S. Dodd,
Register.

EXHIBIT C. 3.

STATEMENT OF CLOSING TITLE BETWEEN JULIUS SHARFF and LOUIS KOPLOWITZ and ROBERT TOSTI, TO PROPERTY IN EAST ORANGE,

10

August 23, 1928 as of August 15, 1928.

Lots	$80,000.00
To equity in New York City	$21,830.09
taxes 239.52	59.88
allowance	.03
purchase money mortgage	29,055.00
purchase money mortgage	29,055.00
	$80,000.00

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EXHIBIT C. 4.

NEW YORK PROPERTY

August 23, 1928 as of August 15, 1928.

First mortgage	$27,500.00
Int on From May 1, 1928	440.07
Second mortgage	13,350.00
Int. from July 1, 1928	100.12
1927—½ tax	742.50
Int.	36.80
1928—½	742.50
Int from May 1	15.17
last ½ apportioned	185.63
Water from May 4, 1928	15.00
Rent ½ of 525—262.50	262.50
Equity	21,830.09
	$65,220.38
Price	$65,000.00

Insurance

312422 Millers Nat'l 11/22/28 1 yr. 16 m.	444.79	119.20
750712 Am Eq. 11/26/28 3 yr 10 m.	556.87	52.00
311555 Millers Nat'l 10/2/30 3 yr 1 m.	69.50	49.18
		$65,220.38
		43,390.29
Equity		$21,830.09

EXHIBIT C. 7.

To JULIUS SHARFF & LOUIS KOPLOWITZ:

WHEREAS, you are the holders of various mortgages on my property known as Nos. 241-249 South Arlington Avenue, East Orange, New Jersey, which mortgages are now in default, 10

Now, Therefore, be it known that I, ROBERT TOSTI, in consideration of the premises and of the sum of one dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over unto JULIUS SHARFF and LOUIS KOPLOWITZ all rents due to me or hereafter to accrue to me on said premises, and I do hereby authorize you, as my attorney in fact or otherwise, to sue for and collect all the rents, issues 20 and profits of said lands and premises; and I do hereby authorize and direct you to complete said premises and to charge the same to my account, or to said mortgages held by you; and I do hereby authorize you to manage the premises as if you were the owner, (to make leases in my name) and out of the receipts collected by you to pay for the management and upkeep of the said lands and premises, and to pay off any existing or hereafter accruing liens or encum- 30 brances on said building, or any chattels placed in said premises by me, and from any balance that there may remain I direct you to deduct the amount due by me to you on the above bonds and mortgages covering said lands and premises; and I do also authorize you to hire counsel, if necessary, for the performance of the above, and to charge the cost thereof to my account; and I do hereby ratify and confirm any and all things that you may do; and I do agree to hold and 40

Exhibit C. 7.

save you harmless by reason of anything that you may do for and on my behalf; and I do hereby direct all tenants in said lands and premises to pay you said rent; and I do hereby authorize you to hire and discharge employees upon such terms and such prices as you may
10 think fit and proper. I do also authorize you to employ anyone you may desire to help and assist you in the management of the premises, and do authorize you to pay such person or persons a reasonable charge for the management of said premises.

Signed, sealed and dated this eleventh day of June, One Thousand Nine Hundred and Twenty-nine.

Robert Tosti (L. S.)

20 Witness
(Illegible.)

POWER OF ATTORNEY.

ROBERT TOSTI,

TO

JULIUS SHARFF & LOUIS KOPLOWITZ

30

DATED: June 11, 1929.

BENJAMIN NEWMAN
Counsellor at Law
725-727 Kinney Building
Newark, N. J.

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94

New Jersey Court of Errors and Appeals

Between JULIUS SHARFF and LOUIS KOPLOWITZ, Complainants-Appellees, and ROBERT TOSTI and JENNIE, his wife, COOK & GENUNG CO. and MORREALE - MANTIONE CONSTRUCTION CO., Defendants-Appellants.	On Bill to Foreclose.

BRIEF OF COOK & GENUNG CO. AND MORREALE - MANTIONE CONSTRUCTION CO., DEFENDANTS-APPELLANTS.

Facts.

This is an appeal from a final decree of the Court of Chancery made in this cause on July 7, 1930 adjudging that the lien of complainant's two advance money mortgages of $96,000 each covering two tracts of land and the buildings thereon known as 241-249 South Arlington Avenue, East Orange, N. J., is prior to the appellant's lien claims for work done and materials furnished for the erection of said building. (State of Case, p. 31, ll. 30-40; p. 39, ll. 1-10)

The evidence in this cause shows that:

On August 15, 1928 the defendant Robert Tosti and wife executed to complainants two purchase money mortgages for $29,055 each and two advance

money mortgages for $96,000 each covering said tracts of land. The money secured by said advance money mortgages was to be applied to the payment of the labor and materials for the erection of two, four-story brick apartment buildings one on each tract (State of Case, pp. 1-9 inclusive)

On September 13, 1928 Tosti started to erect said buildings employing laborers and purchasing materials for that purpose.

On September 24, 1928 the complainants in consideration of said Cook & Genung Co. executing a postponement of lien whereby said advance money mortgages would become a lien paramount to Cook & Genung Co.'s claim on said land and buildings, promised to pay Cook & Genung Co. whatever sum should become due to it for materials sold and delivered to said Tosti for the construction of said building. Cook & Genung Co. believing in said promise signed said postponement (p. 24, ll. 10-20)

Between September 15, 1928 and June 25, 1929 Cook & Genung Co., appellant in this suit, sold and delivered to Tosti, mason materials, for the erection of said buildings, amounting to $27,628.-88. Tosti paid on account $18,314.60 (p. 70, ll. 1-10).

On June 25, 1929 there became due from Tosti to said Cook & Genung Co. for mason materials sold and delivered to him for erection of said buildings $9314.28. On said day Cook & Genung demanded of Tosti and the complainants the payment of said sum of money, but they refused to pay the same or any part thereof (p. 24, ll. 10-20).

On October 4, 1929 Cook & Genung Co. filed in the Clerk's Office of the County of Essex a lien claim against said land and buildings to recover said sum of $9314.88 and started suit thereon, mak-

ing parties defendants, Tosti, as builder and owner, and the complainants as mortgagees. By said suit Cook & Genung claims priority over said advance money mortgages on the ground that the money secured by said mortgages was not applied to the payment of labor and materials for the erection of said buildings. The amount claimed is admitted in this suit, although the action is still pending in the Circuit Court of the County of Essex (p. 73, ll. 20-30).

On October 10, 1929 Morreale-Mantione Construction Co. also appellants in this suit obtained judgment for $9688.81 in the Essex County Circuit Court general against said Tosti and special against said land and buildings for plaster work done in the erection thereof (p. 41, ll. 20-40)

On June 29, 1928 complainants filed a bill of complaint to foreclose said four mortgages (pp. 1-10 inclusive) On that day the buildings were 95% completed (p. 46, ll. 20-30).

In the month of July 1928 Tosti assigned the rents of said premises to complainants (p. 47, ll. 1-10). From that day until January 29, 1930 complainants collected as rents $13,107.92 and until the signing of the final decree (July 7, 1930) they allege having collected additional rents making a total of $16,643.75 (p. 109, ll. 30-40).

At the time of the filing of the bill of complaint (June 29, 1928) there still remained unpaid on each advance money mortgage the 14th payment of $8,000 the 15th payment of $5,000 and the last payment of $14,000 (p. 81, ll. 1-20).

Under the terms of said advance money mortgages the complainants agreed to pay out of the money secured thereby, the appellants respective claims (p. 91, ll. 20-40).

Complainants further testified, that from September 27, 1928 to June 29, 1929 they paid Tosti by checks $158,650 and to other persons also by checks $15,045 (pp. 102, 103, 104, 105; p. 47, ll. 30-40; p. 70, ll. 10-30).

Law.

It is respectfully submitted that there is no evidence in this case that the money paid by complainants to Tosti and other persons on account of said advance money mortgages was actually applied to the payment of labor and materials for the erection of said buildings.

Section 14 of the mechanic's lien law makes the appellant's claims a lien prior to said advance money mortgages to the extent of the money remaining to be advanced by the mortgagees.

Section 15, makes the said mortgages prior over the appellant's lien to the extent of the money actually advanced and paid by the mortgagees and applied to the erection of the buildings.

In view of the provisions of section 15, a mortgagee cannot claim a lien superior to a mechanic's lien without showing that the money was loaned for and actually applied to the erection of the building on the premises.

Stiles vs. Galbreath, 69 E. 222;
Porch vs. Agnew, 70 E. 328, aff. 71 E. 299;
Young vs. Height, 69 L. 453;
Franklin Society vs. Thornton, 85 E. 525.

In the case of Thirteenth Ward B. & L. Assn. vs. Kanter, reported in the advance sheets of At-

lantic Reporter of January 4, 1930, Vice Chancellor Backes held: "A mortgage executed after the commencement of a building is not entitled to priority over mechanic's liens for money advanced on the building, unless it is actually applied to the erection of the building. The proof must trace the money from the mortgagee into the hands of labor and material men." (Young vs. Height.)

To displace the statutory priority of a mechanic's lien by a mortgage given for money to be used for the erection of a building the proof must be clear, certain and convincing that the money was actually used for labor and materials in the structure. (idem)

"In the case of Fishgrund vs. Ericson Real Estate Co. reported in the same advance sheets he also held: "There is no proof whatever that the person to whom checks were given for materials furnished, and if furnished, that it was used in the building. There is no memorandum or record of any kind of labor singly or in groups working on the building and when, and the wages paid them."

In the case of Lead vs. Gifferd, 41 E. 464, aff. 45 E. 245, it was held, "A prior mortgagee who has had possession of the mortgaged premises must account for rents and profits to the subsequent incumbrancers."

The final decree made in this cause should be reversed and the appellant's claims be decreed to be a lien prior to the lien of said advance money mortgages; and subject only to the lien of the two purchase money mortgages or that the sum of $16,643.75 collected as rents by complainants and the sum of $54,000 remaining unpaid under said advance money mortgages be deposited with the

clerk of the Court of Chancery and applied to the payment of the appellant's claims should this Honorable Court hold that the said advance money mortgages are a lien prior to the appellants said lien claims.

And also that the complainants are not entitled to costs or counsel fee they having failed to establish their claims under said advance money mortgages.

Respectfully submitted,

G. M. BELFATTO,
Solicitor for and of Counsel
with Defendants-Appellants.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between, JULIUS SHARFF and LOUIS KOPLOWITZ, *Complainants-Appellees,* *and* ROBERT TOSTI and JENNIE TOSTI, his wife, COOK & GENUNG CO., and MORREALE-MANTIONE CONSTRUCTION CO., *Defendants-Appellants.*	*On Bill to Foreclose.* *On Appeal from Court of Chancery.*

BRIEF OF JULIUS SHARFF AND LOUIS KOPLOWITZ, COMPLAINANTS-APPELLEES.

Facts.

Those set up by defendants-appellants are controverted, and the following are those set up by complainants-appellees.

On July 31, 1928, Julius Sharff and Louis Koplowitz, complainants-appellees, and their wives, entered into an agreement for the sale to the defendant, Robert Tosti, and his wife, of the premises in question for the sum of $80,000.00 See Exhibit C. 1. Title was closed as of August 15, 1928 and the deed from the complainants to Robert Tosti was dated that date and recorded on August 24, 1928 in the Essex County Register's Office. The deed recites "subject to two purchase money mortgages each in the sum of $29,055.00 and two advance money mortgages

each for the sum of $96,000.00." See Exhibit C. 2.

As part of the consideration for the sale of said lands the complainants-appellees received two purchase money mortgages each in the sum of $29,055.00. See Exhibit C. 3 and C. 4, and as part of said agreement of sale (Exhibit C. 1) the vendors, or complainants-appellees, agreed to advance on each of the two tracts referred to in the bill of complaint the sum of $96,000.00, which monies were to be paid to Tosti or his materialmen as two proposed apartment houses were erected by Tosti. See Exhibit C. 5. There seems to be no dispute as to the purchase money mortgages. The two advance money mortgages each in the sum of $96,000.00 recite therein "being part of the same premises conveyed to the party of the first part by the parties of the second part by deed of even date herewith and about to be recorded herewith, being an advance money mortgage and being given under the terms of Section 14 of the Mechanics Lien Laws of the State of New Jersey." See page 76, State of Case, lines 10-18.

After the recording of the deed and all mortgages Robert Tosti commenced the erection of his buildings. Counsel for defendants-appellants makes the date September 13, 1928. See page 2 of his brief. On June 21, 1929 the builder and owner, Robert Tosti, because complainants mortgages were in default, executed and delivered (about July 1) to the complainants an assignment of all the rents, issues and profits of the premises in question to complainants, and authorizes them therein to complete the buildings. See Exhibit C. 7. Complainants mortgage being in default the bill to foreclose was filed.

The defendant-appellant, Morreale-Mantione Construction Co. filed a notice to report its claim under the rules of our Court of Chancery, and a decree *pro confesso* was entered against this defendant-appellant on August 28, 1929. On October 23, 1929 the remaining defendant-appellant Cook and Genung Co. petitioned to be admitted a party defendant in the foreclosure instituted by the complainants, and on October 22, 1929 they filed their answer and counterclaim alleging that they had a mechanics lien, denying that the two mortgages of $29,055.00 were purchase money mortgages and that the two mortgages of $96,000.00 each were advance money mortgages, and as to the amounts due thereunder said defendant alleged that it had no knowledge or information sufficient to form a belief. This defendant also counterclaimed, admitting that it executed a postponement of its right of mechanics lien to the two mortgages of $96,000.00, and that the defendant had executed the same on certain promises of payment by complainants. That the two purchase money mortgages of $29,055.00 each, do not show a true consideration, and that the two mortgages of $96,000.00 were not actually paid by complainants and applied by them to the payment of work and labor done and furnished for the erection of said buildings, and that therefore the lien claim of this defendant was paramount to the lien of complainants mortgages. To this answer and counterclaim of this defendant the complainants filed their replication and answer which has not been printed in the State of Case, setting forth in brief that: 1. Said lands, nor said buildings were not liable for the debt of this defendant. 2. That this defendant had executed two postponements, postponing their right of mechanics lien to the lien of the two mortgages each for $96,000.00. 3. That the

mortgages held by complainants were placed on record on August 24, 1928 and were recorded prior to the commencement and construction or erection of any building upon the lands and premises described in the bill of complaint, and by reason thereof the mortgages held by complainants were prior to the lien of this defendant. 4. That the complainants mortgages were prior. 5. That the deed recites that the premises were sold subject to the two mortgages of $29,-055.00 which were purchase money mortgages. 6. That the two mortgages of $96,000.00 were advance money mortgages which complainants agreed to pay to the mortgagor in accordance with the terms set forth in said mortgages. 7. That the said mortgages of $29,055.00 were purchase money mortgages, and the mortgages of $96,000.00 were each advance money mortgages and given under the terms of section 14 of the Mechanics Lien Law. And several other answers as to the execution of the postponements of lien, which, because no proof thereon was taken by the defendant, Cook & Genung Co., I have regarded as waived.

In the proof of the case complainants show that they had collected $13,107.92 as rentals and that they had advanced in the completion of the buildings, and had obligated themselves for a total of $210,202.11, and that there was due to complainants on their mortgages $197,094.18. See Exhibit C. 8 and C. 9, page 109. The postponements of lien referred to in the Court's opinion, and which were before the Court at the time of the signing of the Final Decree, are annexed to the brief herein.

It is to be noted, that at the trial the testimony submitted upon on behalf of the defendant was very brief. They did not prove the amount due

them with any certainty, nor any of the allegations set forth in their answer and counterclaim.

Appellees in their brief, on the top of page 2, state that the moneys secured by the advance money mortgages were to be applied to the payment of labor and material for the erection of two buildings, and on the bottom of page 3 state that complainants agreed to pay out of the mortgage moneys the amount of appellants respective claims. An examination of the State of the Case, where referred to, discloses that the pleadings and mortgages are drawn to the contrary. Counsel for the appellants has also referred to certain rents as being collected from the date of the hearing to the date of the final decree. No such proof or evidence is before the Court, nor was there any proof before the Court as to the amount, if anything, unpaid at the time of the hearing, on the advance money mortgages.

LAW.

1. As to the appeal of the defendants-appellants, Morreale-Mantione Construction Co., a decree *pro confesso* was entered against it on the 28th day of August, 1929, and thus no right of appeal lies with it to reverse the final decree herein.

New Jersey, etc. v. *Lord,* 66 Eq. 344;
Rock Hill v. *Herr,* 89 Eq. 583.

In addition, the said defendant-appellant, Morreale-Mantione Construction Co., through its solicitor, Mr. Solomon, admitted at the opening of this case, that the said Morreale-Mantione Construction Co. did not claim priority over complainants' mortgages. (See State of Case page 42, lines 2-4.)

2. We will now consider the grounds of appeal as set forth in the petition of appeal by the defendant-appellants. See page 114 State of the Case.

3. The first marked A refers to postponements of lien referred to in the defendant-appellants, Cook & Genung, pleadings and countercliam. No evidence was taken thereon by this defendant and outside of his reference thereto under facts in his brief on page 2, paragraph 2 counsel for the same does not argue thereunder and I am regarding the same as abandoned by him.

The next two grounds for appeal marked B and C attack the priority of complainants purchase money mortgages each for $29,055.00 and then their two advance money mortgages, each for $96,000.00. Apparently this defendant has abandoned his appeal as to the purchase money mortgages of $29,055.00, because on page 5 of his brief, last paragraph, counsel admits that the decree should be that his lien claim is subject to the lien of each of the two purchase money mortgages of $29,055.00.

As to the two advance money mortgages of $96,000.00 it is respectfully submitted that counsel is confusing section 14 with section 15 of the Mechanics Lien Laws of the State of New Jersey. These two mortgages are advance money mortgages. The proofs of the sale by complainants to Tosti, the agreement of sale, the deed and the mortgages show the exact picture which was contemplated when Section 14 of the Mechanics Lien Law was drafted. Section 14 reads in full, as follows:

> "Whereas it is the practice of owners of lots or tracts of land to dispose of the same

to a builder or builders, taking therefor a mortgage or mortgages in excess of the purchase money price of said lot or tract of land,

the mortgagee agreeing to pay such excess to the aforesaid builders, from time to time, as the building or buildings progress,

such mortgages being known as advance money mortgages;

therefore, in all such transactions the building or buildings so erected

shall be liable for the payment of any debt contracted and owing to any person or persons

for labor performed or materials furnished for the erection and construction thereof,

which debt shall be a lien on such building or buildings and on the land whereon they stand, including the lot or curtilage whereon the same are erected,

and the lien for labor performed or materials furnished for the erection and construction of any such building or buildings,

shall be a prior lien to the lien of any mortgage created on such building or buildings and lot or tract of ground to secure either in whole or in part any advances in money to be used in and about the construction of such building or buildings,

but to the extent only of the moneys remaining to be advanced by the mortgagee under such agreement;

provided, such mortgage shall be recorded or registered before the filing of any claim in pursuance of this act."

The law on this section has been laid down repeatedly, and it is quite clear that an advance

money mortgagee does not have to show that his mortgage moneys went into the buildings.

In the case of *Franklin Society* v. *Thorton,* 85 Eq. 525, Justice Swayze, speaking for this Court, on page 530, regarding the difference between Sections 14 and 15 of the Mechanics Lien Act, says:

> "Section 14 deprives the mortgagee of a legal right he would otherwise have by recording his mortgage before the commencement of the building and protects him only to the extent of actual advances, but it does not require that those advances should have been applied to the erection of the new building. Section 15 on the other hand, gives the mortgagee a right he would not otherwise have since his mortgage is not recorded before the commencement of the building, but in order that he may have that right, he must show that his advances have been applied to the erection of the new buildings."

It is to be also noted that these mortgages were recorded prior to the commencement of the buildings. See also cases listed in Luce's Mechanics Lien Law, bottom of pages 203-204. The cases referred to by counsel I regard as not being in point, as they refer to section 15 of the Mechanics Lien Law.

As to points C and D in appellants petition for appeal, these complainants had a right under the terms of their advance money mortgages and under the terms of their assignment of rents from the owner, Tosti, to complete the buildings. It was done not only for their benefit but also for appellants, as the buildings being completed are returning rents, reducing, or at least keeping in check, the accruing interest charges and taxes on the mortgaged premises. Complainants at the time of the final hearing credited the mortgage moneys due them with the rents collected,

and at the time of sale of the property they will announce the amounts due to them, less such receipts of rents. There is no proof before the Court as to the figures referred to in ground D of appellants petition for appeal. Appellees admit that such rents as are realized from the mortgaged premises to the date of sale should be and will be credited against the total of their mortgage indebtedness.

Ground E contends that complainants are not entitled to a counsel fee and costs of suit because they have not supported their allegations as to their advance money mortgages. Appellees admit, as before stated, that complainants are entitled to priority as to their two purchase money mortgages. As to their advance money mortgages they submit the decree should be affirmed and that under the statute the allowance of counsel fees and costs were justified.

Respectfully submitted,

BENJAMIN NEWMAN,
Solictor for and of Counsel
with Complainants-Appellees.

POSTPONEMENT OF MECHANICS LIEN

WHEREAS, the undersigned, have furnished materials and performed labor in the construction and erection of upon a curtilage of lands and premises owned by ROBERT TOSTI which lands and premises are situated in the City of East Orange County of Essex and State of New Jersey, and more particularly described as follows:

BEGINNING at a point in the easterly line of Oak Street therein distant two hundred fifty-six and twenty-two one-hundredths of a foot northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one hundred feet; thence north thirty degrees east thirty-five feet and seventy-eight one-hundredths feet; thence south sixty degrees east one hundred twenty-five feet and twenty-two one-hundredths of a foot to the westerly line of South Arlington Avenue; thence running southerly along said westerly line of South Arlington Avenue one hundred feet and fifteen one-hundredths of a foot; thence north sixty degrees west one hundred thirty feet and seventy-one one-hundredths feet; thence north thirty degrees east fifty-six and twenty-two one-hundredths feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the said point of BEGINNING; reserving however, a right of way over that part of said lands that may be described as follows: Beginning at a point in the easterly line of Oak Street therein distant two hundred fifty-six feet and twenty-two hundredths feet northerly from the northerly line of Elmwood Avenue; thence running along said line of Oak Street north thirty degrees east eight feet; thence south sixty degrees east one

hundred feet; thence south thirty degrees west eight feet; thence north sixty degrees west one hundred feet to said easterly line of Oak Street and the place of BEGINNING.

WHEREAS, the said ROBERT TOSTI did apply to JULIUS SHARFF and LOUIS KOPLOWITZ for a loan of $96,000.00 upon the security of a first mortgage lien on said lands and premises and the buildings thereon, which loan was granted upon condition that all the persons who have furnished and hereafter will continue to furnish materials, or have performed labor or will continue to perform labor in the erection of the said building and all persons who might or could have a right of mechanic's lien against said lands or buildings, should and would postpone and subordinate their right of mechanic's lien in favor of the mortgage to be given to said JULIUS SHARFF and LOUIS KOPLOWITZ and

WHEREAS, the said ROBERT TOSTI did make, execute and deliver to said JULIUS SHARFF and LOUIS KOPLOWITZ an Indenture of Mortgage, embracing the lands and premises above described, which mortgage is given to secure the payment of the principal sum of $96,000.00 and which mortgage is dated August 15, 1928 and recorded on and

WHEREAS, the undersigned are desirous that all or some of the principal money secured by said mortgage shall be available to said ROBERT TOSTI and that the said JULIUS SHARFF and LOUIS KOPLOWITZ should proceed to advance all or some or part of the principal of said mortgage and in order to induce the said JULIUS SHARFF and LOUIS KOPLOWITZ to make such advance, and in consideration of One Dollar to each of the undersigned in hand paid the undersigned do hereby jointly and severally,

postpone and subordinate any and all liens which they and each of them may have or hereafter might or could have against the lands and buildings, by virtue of the Mechanic's Lien Law of New Jersey, for the payment of any debt contracted and owing to them and each of them for labor heretofore performed and materials furnished by them in the erection and construction of such building or for labor which may hereafter be performed or materials hereafter furnished in the erection, construction and completion of such building, IN FAVOR of the mortgage given to said JULIUS SHARFF and LOUIS KOPLOWITZ and particularly mentioned in the preambles hereto, so that the mortgage of said JULIUS SHARFF and LOUIS KOPLOWITZ shall at all times be superior, paramount and prior in lien to any and all liens which we now have or hereafter can have against said lands and buildings by reason of the Mechanic's Lien Law of New Jersey.

It is hereby understood and agreed that the subordination and postponement herein and hereby effectuated shall in no way be lessened or impaired by the fact that the said JULIUS SHARFF and LOUIS KOPLOWITZ may pay the principal of said mortgage or any part thereof, to persons other than such as have or will have performed labor or as have or will have supplied materials in the erection of said building and we do hereby give our consent that said JULIUS SHARFF and LOUIS KOPLOWITZ by their officers, agents, attorneys and representatives may and disburse the whole of said principal moneys or any part thereof in payment and discharge of any existing liens (in which event said JULIUS SHARFF and LOUIS KOPLOWITZ may be subrogated to the rights

of the present holders of such liens) and in any payment of any unpaid taxes or assessments, and we further consent and agree that said JULIUS SHARFF and LOUIS KOPLOWITZ may, at their option, pay said funds or any part thereof directly to the said ROBERT TOSTI or those claiming under him; and we agree that any such payment made shall have the same force and effect as though the moneys so paid were actually used in the construction and erection of said building.

It is distinctly understood and agreed that with respect to the said JULIUS SHARFF and LOUIS KOPLOWITZ this instrument shall at all times be deemed and construed as a release of all right of mechanics' lien and at no time and in no event shall the right of mechanic's lien of the undersigned be asserted against the said mortgage lien of said JULIUS SHARFF and LOUIS KOPLOWITZ

In Witness Whereof, the undersigned have in due form executed the within postponement of lien, this 29th day of September 1928.

COOK & GENUNG COMPANY (L. S.)

W. D. Genung, Vice Pres and Treasurer (L. S.)

Garfield Iron Works, Inc. (L. S.)
By Frank Grisch Pres. (L. S.)

POSTPONEMENT OF MECHANICS LIEN

WHEREAS, the undersigned, have furnished materials and performed labor in the construction and erection of upon a curtilage of lands and premises owned by ROBERT TOSTI which lands and premises are situated in the City of East Orange County of Essex and State of New Jersey, and more particularly described as follows:

BEGINNING on the westerly side of South Arlington Avenue one hundred feet and fifteen hundredths feet northerly from the northerly line of Elmwood Avenue; thence north sixty degrees west one hundred thirty-six feet and twenty hundredths feet to the rear line of land conveyed by Harry Adams to William Langley; thence northerly parallel with Oak Street one hundred feet to the northerly line of land of Harry Adams; thence south sixty degrees east one hundred thirty feet and seventy-one hundredths feet to the westerly line of South Arlington Avenue; thence running southerly along said line of South Arlington Avenue one hundred feet and more to the point and place of BEGINNING.

WHEREAS, the said ROBERT TOSTI did apply to JULIUS SHARFF and LOUIS KOPLOWITZ for a loan of $96,000.00 upon the security of a first mortgage lien on said lands and premises and the buildings thereon, which loan was granted upon condition that all the persons who have furnished and hereafter will continue to furnish materials, or have performed labor or will continue to perform labor in the erection of the said building and all persons who might or could have a right of mechanic's lien against said lands or buildings, should and would postpone and subordinate their right of me-

chanic's lien in favor of the mortgage to be given to said JULIUS SHARFF and LOUIS KOPLOWITZ and

WHEREAS, the said ROBERT TOSTI did make, execute and deliver to said JULIUS SHARFF and LOUIS KOPLOWITZ an Indenture of Mortgage, embracing the lands and premises above described, which mortgage is given to secure the payment of the principal sum of $96,000.00 and which mortgage is dated August 15, 1928 and recorded on and

WHEREAS, the undersigned are desirous that all or some of the principal money secured by said mortgage shall be available to said ROBERT TOSTI and that the said JULIUS SHARFF and LOUIS KOPLOWITZ should proceed to advance all or some or part of the principal of said mortgage and in order to induce the said JULIUS SHARFF and LOUIS KOPLOWITZ to make such advance, and in consideration of One Dollar to each of the undersigned in hand paid the undersigned do hereby jointly and severally, postpone and subordinate any and all liens which they and each of them may have or hereafter might or could have against the lands and buildings, by virtue of the Mechanic's Lien Law of New Jersey, for the payment of any debt contracted and owing to them and each of them for labor heretofore performed and materials furnished by them in the erection and construction of such building or for labor which may hereafter be performed or materials hereafter furnished in the erection, construction and completion of such building, IN FAVOR of the mortgage given to said JULIUS SHARFF and LOUIS KOPLOWITZ and particularly mentioned in the preambles hereto, so that the mortgage of said JULIUS SHARFF and LOUIS KOPLOWITZ

shall at all times be superior, paramount and prior in lien to any and all liens which we now have or hereafter can have against said lands and buildings by reason of the Mechanic's Lien Law of New Jersey.

It is hereby understood and agreed that the subordination and postponement herein and hereby effectuated shall in no way be lessened or impaired by the fact that the said JULIUS SHARFF and LOUIS KOPLOWITZ may pay the principal of said mortgage or any part thereof, to persons other than such as have or will have performed labor or as have or will have supplied materials in the erection of said building and we do hereby give our consent that said JULIUS SHARFF and LOUIS KOPLOWITZ by their officers, agents, attorneys and representatives may and disburse the whole of said principal moneys or any part thereof in payment and discharge of any existing liens (in which event said JULIUS SHARFF and LOUIS KOPLOWITZ may be subrogated to the rights of the present holders of such liens) and in any payment of any unpaid taxes or assessments, and we further consent and agree that said JULIUS SHARFF and LOUIS KOPLOWITZ may, at their option, pay said funds or any part thereof directly to the said ROBERT TOSTI or those claiming under him; and we agree that any such payment made shall have the same force and effect as though the moneys so paid were actually used in the construction and erection of said building.

It is distinctly understood and agreed that with respect to the said JULIUS SHARFF and LOUIS KOPLOWITZ this instrument shall at all times be deemed and construed as a release of all right of mechanics' lien and at no time

and in no event shall the right of mechanics' lien of the undersigned be asserted against the said mortgage lien of said JULIUS SHARFF and LOUIS KOPLOWITZ

In Witness Whereof, the undersigned have in due form executed the within postponement of lien, this 29th day of September 1928.

COOK & GENUNG COMPANY (L. S.)

W. D. Genung, Vice Pres and Treasurer (L. S.)

Garfield Iron Works, Inc. (L. S.)
By Frank Grisch Pres. (L. S.)