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Notice of Appeal

(Filed January 11, 1935)

IN CHANCERY OF NEW JERSEY

Between MAX DOYNE, *Complainant* —and— MINNIE ROSE, *et als*, *Defendants*	ON BILL &C. NOTICE OF APPEAL.

The defendant, Minnie Rose, hereby appeals from the Final Order or Decree made in the above entitled cause on October 22nd, 1934, by the Chancellor on the advice of Vice Chancellor James F. Fielder, and the said defendant, Minnie Rose appeals from the whole and every part of said order and decree dated October 22nd, 1934 to the Court of Errors and Appeals in the Last Resort in all causes.

Dated: December 11, 1934.

MAURICE C. BRIGADIER,
Solicitor for and of Counsel with defendant, Minnie Rose.

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

MAURICE C. BRIGADIER,
Of Counsel with Defendant, Minnie Rose.

Notice of Appeal

Service of a copy of the within notice is hereby acknowledged this 18th day of December, 1934.

ALEXANDER SECLOW,
Solicitor for Complainant.

Petition of Appeal

(Filed January 11, 1935)

NEW JERSEY COURT OF ERRORS AND APPEALS

Between MAX DOYNE, *Complainant-Respondent* —and— MINNIE ROSE, *et als,* *Defendants-Appellant*	ON APPEAL FROM THE COURT OF CHANCERY. PETITION.

TO THE HONORABLE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of MINNIE ROSE, the Appellant in the above entitled cause, respectfully shows that:

1. The petitioner finds herself aggrieved by a certain order or decree made in the Court of Chancery by His Honor; LUTHER A. CAMPBELL, Chancellor of the State of New Jersey, (on the advice of Honorable James F. Fielder, Vice-Chancellor) bearing date the 22nd day of October, 1934, in a certain cause in said Court of Chancery of New Jersey, wherein Max Doyne is complainant and Minnie Rose et als, are defendants, in this respect, to wit; that the said order finds that the respondent Max Doyne is entitled to reformation of the two bonds set forth in the Bill of Complaint filed in the said Court of Chancery of New Jersey.

And the petitioner appeals from the decree and order of the Chancellor which orders and decrees

as aforesaid upon the ground that the same is erroneous in that:

(*a*) That the Chancellor found that respondent was entitled to reformation of the bond marked "Schedule 2" in the said Bill of Complaint, which determination is wrong.

The petitioner therefore prays, that the said decree or order of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as this Court shall deem proper.

Dated: December 17th, 1934.

MAURICE C. BRIGADIER,
Solicitor for and of Counsel with Defendant-Appellant, Minnie Rose.

A True Copy.
THOMAS A. MATHIS, *Clerk.*

Service of a copy of the within Petition hereby is acknowledged this 18th day of December, 1934.

ALEXANDER SECLOW,
Solicitor for Complainant-Respondent.

Endorsed: Filed January 11, 1935,
THOMAS A. MATHIS, *Clerk.*

Bill of Complaint

(Filed December 14, 1932)

IN CHANCERY OF NEW JERSEY

To the Honorable Luther A. Campbell,
Chancellor of the State of New Jersey:

The complainant, Max Doyne, residing in the City of Bayonne, in the County of Hudson and State of New Jersey, say that:

1. On June 19th, 1930, he executed an instrument, of which a true copy is hereto annexed, marked "Schedule 1" and made part hereof.

2. On November 17th, 1930, he executed an instrument, of which a true copy is hereto annexed, marked "Schedule 2" and made part hereof.

3. The premises described in "Schedules 1 and 2" consists of two newly erected buildings owned by the defendant, Jerome-Harvey Development Company. This complainant is a member of the firm trading as Prospect Planing Mill & Lumber Company which had furnished materials for the erection of said buildings. Other than the moneys due to the complainant's firm for building materials, neither said firm nor this complainant had any interest of any nature in said mortgaged premises or in the said Jerome-Harvey Development Company.

4. Prior to the execution of the bonds mentioned in "Schedules 1 and 2", the complainant was informed by the officers of the Jerome-Harvey Development Company that said company was obtaining a mortgage loan on the said two buildings, and that the proposed mortgagee, the defendant, Minnie Rose, had requested that said Jerome-Harvey Development Company procure bonds of indemnity to protect and indemnify the said de-

fendant, Minnie Rose, against any loss or damage which she could sustain in the event that mechanics' lien claims would be filed by materialmen or contractors or other persons entitled to file the same. That the said defendant, Minnie Rose, requested that this complainant execute said mechanics' lien indemnity bonds. That this complainant, being satisfied that there was no likelihood of any loss or damage that could be sustained by the said defendant, Minnie Rose, because of any mechanics' lien claims, agreed to execute such indemnity bonds against mechanics' lien claims.

5. Before executing the bonds mentioned in "Schedules 1 and 2" which are hereto annexed, the complainant was informed by the attorney who prepared said bonds for and on behalf of the defendant, Minnie Rose, and who acted for her in this transaction and who was her duly authorized agent, that the said bonds were for the purpose only of indemnifying the said defendant, Minnie Rose, against any loss which she could sustain by reason of any mechanics' lien claims which could be filed because of the erection of said buildings, and on the strength of such representation and without reading the said bonds, this complainant executed said bonds marked "Schedules 1 and 2" under the belief that such bonds provided only for the indemnity against loss due to the filing of mechanics' lien claims against the premises described in "Schedules 1 and 2" to the said defendant, Minnie Rose. That had this complainant been aware of the scope of the said bonds, viz: that it was an indemnity beyond loss which could occur to said Minnie Rose by reason of the filing of mechanics' lien claims, this complainant would not have executed the same or would he have executed said bonds had he not been misinformed as to the contents thereof.

6. That the said bonds mentioned in "Schedules 1 and 2" heretofore referred to were executed as a result of the mutual inadvertence and mistake of all the parties to said bonds including the defendant, Minnie Rose, and the complainant.

7. That the execution of the bonds heretofore referred to and set forth in "Schedules 1 and 2" hereto annexed was induced by the fraudulent misrepresentation of the said defendant, Minnie Rose, and her attorney who prepared said bonds, that said bonds were an indemnity only as against loss which the said Minnie Rose could sustain by reason of the filing of said mechanics' lien claims, which representation was untrue and but for which said misrepresentation the complainant would not have executed said bonds.

8. That this complainant was unaware of the scope of the aforesaid bonds until recently when he was served with process in a foreclosure suit commenced by the said Minnie Rose for the foreclosure of the mortgage on premises mentioned in "Schedule 2", up to which time complainant had no reason to believe that he had executed general bonds as are set forth in the annexed "Schedules 1 and 2". That upon further inquiry after service of such process which was made in October of 1932, this complainant retained a solicitor of this court to file an answer and counter claim in said foreclosure suit, which answer and counterclaim were duly filed. Thereafter application was made by the defendant, Minnie Rose, to strike out said answer and counterclaim and that the matter came on for argument before Vice-Chancellor Fielder who struck out said answer and counterclaim on November 28th, 1932. That on December 6th, 1932, this complainant served a notice of appeal on the said defendant, Minnie Rose, appealing from the said order to the Court

of Errors and Appeals and that the petition of appeal was filed on December 9th, 1932. Said answer and counterclaim set up the same matters as are set forth in this complaint.

9. No lien claims of any kind were filed against the premises described in the aforesaid bonds set forth in "Schedules 1 and 2" nor have any actions been commenced because of which any loss may be sustained by the said defendant, Minnie Rose, by virtue of any work performed or materials furnished, and as a matter of fact, all persons and corporations who have furnished materials or performed labor and services by reason of which mechanics' liens could have been filed have been fully paid and no loss can be sustained by the said defendant, Minnie Rose, because of any mechanics' lien claims.

WHEREFORE, this complaint prays that:

1. That Minnie Rose, Jerome-Harvey Development Company, Hyman Flax, Meyer Flax, Jacob Golush and Rose Brady, who are the defendants to this suit may answer this bill of complaint and each statement therein made.

2. That the Chancellor order and decree that the bonds set forth in the annexed "Schedules 1 and 2" and mentioned in the bill of complaint be reformed so that they be limited in their terms only to an indemnity against mechanics' lien claims, or

3. That if said bonds are not reformed that this court order and decree that said bonds were fraudulently procured, and rescind and cancel the same, and that this court award to this complainant such other and further relief as may be just.

4. 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.

ALEXANDER SECLOW,
Solicitor and of Counsel with Complaint.

SCHEDULE "1."

KNOW ALL MEN BY THESE PRESENTS, that JEROME-HARVEY DEVELOPMENT COMPANY, as principal, and HYMAN FLAX, MEYER FLAX, JACOB GOLUSH, MAX DOYNE and ROSE BRADY as sureties, are held and firmly bound unto MINNIE ROSE in the sum of Forty thousand ($40,000) dollars, lawful money of the United States to be paid to the said MINNIE ROSE her heirs, executors, administrators and assigns. To which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, dated the nineteenth day of June, A. D., 1930.

WHEREAS, the said MINNIE ROSE at the request of the said obligors agreed to lend to the said JEROME-HARVEY DEVELOPMENT COMPANY the sum of Twenty thousand ($20,000) dollars to be secured by a mortgage or mortgages which are to be and remain a first and paramount lien, in preference to all other liens, on all that certain lot or tract of land, situate, lying and being in the Township of Teaneck, in the County of Bergen and State of New Jersey, described as follows:

BEGINNING at a point in the easterly line of Queen Anne Road as now laid out, which was formerly known as the public road lately laid out from the Hackensack and Fort Lee Turnpike Road to Cedar Lane, which point is distant Southerly One hundred four and sixty-one

one-hundredths (104.61) feet on a course of south 21 degrees west and along the easterly side of said Queen Anne Road from a corner formed by the said side of Queen Anne Road and the Southerly line of land formerly of Casper P. Westervelt, and beginning point being also in the southwesterly corner of lands conveyed by George M. Adler and wife to Christian Marof by deed dated January 3, 1861 and recorded in Book P 5 of deeds for Bergen County on page 44; thence running (1) easterly on a course of South 57 degrees East and along the Southerly line of lands so conveyed to the said Christian Marof by deed aforesaid, two hundred thirteen and eighty-four one-hundredths (213.84) feet; thence (2) South 21 degrees west Fifty-two (52) feet; thence (3) Westerly and parallel with the first course above run and on a course of North 57 degrees west Two hundred thirteen and eighty-four one-hundredths (213.84) feet to the easterly line of Queen Anne Road as now laid out; thence (4) Northerly and along the easterly side of Queen Anne Road as now laid out and on a course of north 21 degrees east Fifty-two (52) feet to the point or place of beginning.

NOW THE CONDITION of the above obligation is such that if the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, damages, costs, counsel fees, expenses and disbursements, in which the said Minnie Rose may be involved under any circumstance by reason of making said loan or which may arise or grow due of any liens or any claim of lien against said real estate, heretofore or hereafter attaching thereto, by virtue of "An Act to secure to mechanics' and others payment for their labor and materials in erecting any building, (Revision of 1898)" or out of any judgment, attachment or other lien, and

keep said real estate free from all such claims and liens so that such mortgage or mortgages shall always be and remain a first and paramount lien on said real estate, then the above obligation shall be null and void, otherwise it shall remain in full force and virtue.

JEROME-HARVEY DEVELOPMENT COMPANY,
By MEYER FLAX, *President*

ATTEST:
HYMAN FLAX, *Treasurer.*

Signed, sealed and Delivered in the presence of:

HYMAN FLAX (LS)
MEYER FLAX (LS)
JACOB GOLUSH (LS)
MAX DOYNE (LS)
ROSE BRADY (LS)

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

HYMAN FLAX, MEYER FLAX, JACOB GOLUSH, MAX DOYNE and ROSE BRADY, sureties in the within bond, being duly sworn on their respective oaths say that they reside in the City of Bayonne; that they are freeholders of the County of Hudson in this State and own real estate in said County worth at least Twenty thousand ($20,000) dollars, over and above all encumbrances thereon and that they are worth that sum over and above all their just debts and liabilities.

Sworn and subscribed to at Bayonne, this 19th day of June, A. D., 1930 before me,

.....

HYMAN FLAX (LS)
MEYER FLAX (LS)
JACOB GOLUSH (LS)
MAX DOYNE (LS)
ROSE BRADY (LS)

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

BE IT REMEMBERED that on this 19th day of June, in the year of our Lord, 1930, before me the subscriber, ... personally appeared HYMAN FLAX, MEYER FLAX, JACOB GOLUSH and MAX DOYNE and ROSE BRADY, who I am satisfied are the persons named in the within bond, and 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.

.....

SCHEDULE "2."

KNOW ALL MEN BY THESE PRESENTS that JEROME-HARVEY DEVELOPMENT COMPANY as principal, and HYMAN FLAX, MEYER FLAX, JACOB GOLUSH and MAX DOYNE as sureties are held and firmly bound unto MINNIE ROSE in the sum of Thirty thousand ($30,000) dollars, lawful money of the United States to be paid to the said MINNIE ROSE her heirs, executors, administrators and assigns. To which payment well and truly to be made we bind ourselves, our and each of our, heirs, executors, administrators, successors and assigns, jointly and severally by these presents. Sealed with our seals, dated the 17th day of November, A. D., 1930.

WHEREAS the said Minnie Rose at the request of the said obligors agreed to lend to the said Jerome-Harvey Development Company the sum of Fifteen thousand ($15,000) dollars to be secure by a mortgage or mortgages which are to be and remain a first and paramount lien in preference to all other liens on ALL that certain tract of land situate, lying and being in the Township of West-

wood, in the County of Bergen and State of New Jersey:

BEGINNING at a point in the northwesterly side of Third Avenue distant Northeasterly 101.45 feet from the intersection of the northwesterly side of Third Avenue with the northeasterly side of Park Avenue. Being the same premises conveyed to the Jerome-Harvey Development Company by Clifton F. Trimble and wife by deed dated May 15, 1930, and recorded in book 1718 of deeds for Bergen County on page 358.

NOW THE CONDITION of the above obligation is such that if the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, damages, costs, counsel fees, expenses and disbursements, in which the said Minnie Rose may be involved under any circumstances by reason of making said loan or which may arise or grow due of any liens or any claim of lien against said real estate, heretofore or hereafter attaching thereto, by virtue of "An Act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)" or out of any judgment, attachment or other liens, and keep said real estate free from all such claims and liens so that such mortgage or mortgages shall always be and remain a first and paramount lien on said real estate, then the above obligation shall be null and void, otherwise it shall remain in full force and virtue.

JEROME-HARVEY DEVELOPMENT COMPANY,
By MEYER FLAX, *President*

ATTEST:
HYMAN FLAX, *Treasurer.*

MEYER FLAX (LS)
HYMAN FLAX (LS)
MAX DOYNE (LS)
JACOB GOLUSH (LS)

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

HYMAN FLAX, MEYER FLAX, JACOB GOLUSH and MAX DOYNE sureties in the within bond, being duly sworn on their respective oaths say that they reside at Bayonne. That they are freeholders of the County of Hudson in this State and own real estate in said County of Hudson worth at least $30,000 over and above all encumbrances thereon and that they are worth that sum over and above all their just debts and liabilities.

Sworn and subscribed at Bayonne, this 17th day of November, A. D., 1930 before me,

PERCIVAL G. CRUDEN,
Master in Chancery of N. J.

MEYER FLAX (LS)
HYMAN FLAX (LS)
MAX DOYNE (LS)
JACOB GOLUSH (LS)

Notice of Motion

IN CHANCERY OF NEW JERSEY

Between MAX DOYNE, *Complainant* —and— MINNIE ROSE, *et als*, *Defendants*	ON BILL, &C. NOTICE OF MOTION

To MAX DOYNE, Complainant, and ALEXANDER SECLOW, his Solicitor:

Sir:

TAKE NOTICE, that I shall move before the Chancellor on the 27th day of December, 1932 at ten o'clock in the forenoon or as soon thereafter as counsel can be heard at Chancery Chambers, 1 Exchange Place, Jersey City, New Jersey, for an Order striking out the Bill of Complaint filed in the above entitled cause against the defendant Minnie Rose on the following grounds:

1. The bill of complaint fails to disclose a cause of action cognizable in equity.

2. The Bill of Complaint discloses that the subject matter of the bill has already been adjudicated and is res adjudicata by reason of the Order mentioned in paragraph 8 of said Bill of Complaint made in this court, striking out an answer and counterclaim on the 28th day of November, 1932.

3. That the Bill of Complaint discloses that there is another action pending between the parties involving the same subject matter and seeking

the same relief as that set up in the Bill of Complaint as appears in paragraph 8 of the Bill of Complaint.

4. That the complainant, Max Doyne is barred by his own laches from obtaining the relief sought in the Bill of Complaint.

MAURICE C. BRIGADIER,
Solicitor of Defendant.

Service of a copy of the within Notice of Motion is hereby acknowledged this 15th day of December, 1932.

ALEXANDER SECLOW,
Solicitor of Complainant.

Order

IN CHANCERY OF NEW JERSEY

93-520

Between

MAX DOYNE,
Complainant

—and—

MINNIE ROSE, *et als*,
Defendants

ON BILL, &c.
ORDER.

This matter being opened to the court by Alexander Seclow, solicitor of the complainant, and it appearing that the defendant, Minnie Rose, made application to strike out the bill of complaint, and the matter having been argued by Maurice C. Brigadier on behalf of the defendant, Minnie Rose, and by Alexander Seclow on behalf of the complainant, and the court having considered the argument of counsel and the application;

Whereupon, it is on this 9th day of January, 1933, ORDERED that the application of the defendant, Minnie Rose, be and the same is hereby continued to final hearing.

Respectfully advised,

JAMES F. FIELDER,
V. C.

LUTHER A. CAMPBELL,
C.

Answer

IN CHANCERY OF NEW JERSEY

Between MAX DOYNE, *Complainant* —and— MINNIE ROSE, *et als*, *Defendants*	ON BILL, &c. ANSWER.

The defendant, MINNIE ROSE, residing in the City of Bayonne, County of Hudson and State of New Jersey, by way of answer to the Bill of Complaint filed in the above entitled cause says that:

1. She admits paragraph 1 of the Bill of Complaint.

2. She admits paragraph 2 of the Bill of Complaint.

3. The allegation of paragraph 3, that the premises described in Schedules 1 and 2 consists of two newly erected buildings owned by the defendant, Jerome-Harvey Development Company, is admitted; as to the other allegations contained in paragraph 3, defendant does not have sufficient knowledge or information from which she can form a belief and therefore requires the complainant to prove the matters set up in said allegations.

4. She denies paragraph 4 of the Bill of Complaint.

5. She denies paragraph 5 of the Bill of Complaint.

Answer

6. She denies paragraph 6 of the Bill of Complaint.

7. She denies paragraph 7 of the Bill of Complaint.

8. The allegations of paragraph 8 are admitted with the exception that the allegation is denied that the complainant was unaware of the scope of the aforesaid bonds until recently when he was served with process in a foreclosure suit commenced by Minnie Rose for the foreclosure of the mortgage on premises mentioned in Schedule 2. This defendant also denies that the complainant had no reason to believe up to said time, that he had executed general bonds as set forth in the annexed Schedules 1 and 2.

9. Defendant denies paragraph 9 of the Bill of Complaint.

Further answering the Bill of Complaint, this defendant says that the matters set forth in said Bill of Complaint and the relief prayed for in said Bill of Complaint have already been adjudicated and are res adjudicata, by reason of the Order made by this Court on the 28th day of November, 1932 as set up in paragraph 8 of the Bill of Complaint, pursuant to which, the answer and counter claim filed by the said Max Doyne in the suit instituted by Minnie Rose in this Court, against Max Doyne, et als, docket number 92-536, was struck out.

Further answering the Bill of Complaint, the defendant Minnie Rose says that the complainant Max Doyne is barred by his own laches, neglect, and delay from maintaining these proceedings and from seeking the relief prayed for in the Bill of Complaint and that the defendant, Minnie Rose

has, by reason of such laches and delay suffered irreparable loss.

MAURICE C. BRIGADIER,
Solicitor for the Defendant,
Minnie Rose.

Service of a copy of the within Answer is hereby acknowledged as of time.

ALEXANDER SECLOW,
Solicitor of Complainant.

Replication

IN CHANCERY OF NEW JERSEY

93-520

Between

MAX DOYNE,
Complainant

—and—

MINNIE ROSE, *et als*,
Defendants

ON BILL &C.
REPLICATION.

The complainant, Max Doyne, by way of replication to the answer of the defendant, Minnie Rose, joins issue thereon.

ALEXANDER SECLOW,
Solicitor of Complainant.

Final Decree

IN CHANCERY OF NEW JERSEY

93-520

(Filed October 22, 1934)

Between

MAX DOYNE,
Complainant

—and—

MINNIE ROSE, *et als*,
Defendants

ON BILL &C.
FINAL DECREE.

This cause coming on to be heard in the presence of Alexander Seclow, solicitor of the complainant, Max Doyne, and Maurice C. Brigadier, solicitor of the defendant, Minnie Rose; and the court having read and considered the pleadings and having taken testimony orally and in open court, and having heard and considered the argument of counsel thereon, and it appearing that the defendants, Jerome-Harvey Development Company, Hyman Flax, Meyer Flax, Jacob Golush and Rose Brady, have filed stipulations consenting to the entry of the filing of final decree according to the prayer of the bill of complaint, and it appearing that it was stipulated in open court by the defendant, Minnie Rose, that the bond marked "Schedule 1" in the principal sum of $20,000, annexed to the bill of complaint be reformed in accordance with the prayer of the bill of complaint, and it appearing to the satisfaction of this court, that both bonds recited in the bill of complaint, and set forth in "Schedules 1 and 2" annexed thereto inadvertently and without the knowledge of any of the parties who executed the same, who are the

parties to this suit, contain covenants for the payment of the amounts of the principal and interest mentioned in the respective bonds, whereas it was the intention of all of the parties to said two bonds that the covenants therein should not extend beyond and be broader than indemnity against mechanic's liens, and it appearing to the satisfaction of the court that such inadvertence and mistake was mutual to all of the parties to said two bonds, and it further appearing to the satisfaction of this court that the complainant applied to this court for relief as soon as he ascertained the mistake aforesaid;

It is on this 22nd day of October, 1934, ORDERED ADJUDGED and DECREED that the condition of the said two bonds mentioned in the bill of complaint and in the schedules thereto annexed be and the same are hereby reformed by substituting for the condition clause in each of said bonds the following condition clause:

> The condition of this obligation is such that if the said Jerome Harvey Development Company shall pay at maturity all debts incurred in the erection of said building, and shall keep said building and lands free from the encumbrances and lien of any and all such construction debts, and shall indemnify and save harmless the said Minnie Rose from any and all suits, claims, debts, demands, damages, lien claims and any costs in the premises and any loss, claims, suits, actions, proceedings, judgments, damages, costs, counsel fees, expenses and disbursements which the said Minnie Rose may sustain by reason of any mechanics lien, liens, or claims against the said real estate attaching thereto by virtue of "An Act to secure to mechanics and others payment for their labor and materials in erection any building, (Revision of 1898)",

and the supplements thereto, then the above obligation shall be null and void, otherwise to remain in full force and virtue.

And that the obligors of said bonds mentioned in the bill of complaint shall be held and regarded as having executed the said two bonds with the conditions last mentioned, and not with the conditions as are therein set forth.

And further Ordered that there be allowed to the complainant and against the defendant, Minnie Rose, his costs to be taxed.

Respectfully advised,

James F. Fielder,
V. C.

Luther A. Campbell,
C.

Testimony

IN CHANCERY OF NEW JERSEY

93-520

Between

MAX DOYNE,
Complainant

—and—

MINNIE ROSE, *et als*,
Defendants

ON BILL, &c.

TRANSCRIPT OF SHORTHAND NOTES OF TESTIMONY taken on final hearing in above stated cause, this ninth day of October, 1934, at Chancery Chambers, Jersey City, before His Honor James F. Fielder, Vice Chancellor.

APPEARANCES

ALEXANDER SECLOW, ESQ., for complainant.

MAURICE C. BRIGADIER, ESQ., for defendant Minnie Rose.

COMPLAINANT'S CASE

PERCIVAL G. CRUDEN, sworn as a witness on the part of the complainant, testifies as follows:

Direct Examination by Mr. Seclow:

Q. You are a member of the bar of the State of New Jersey? A. Yes.

Q. How long have you been a member of the bar? A. I think about twenty-eight years.

Q. You are a member of the law firm of Benny and Cruden of Bayonne? A. Yes.

Q. Were you formerly connected with the New Jersey Title Guaranty & Trust Company? A. I was for two years assistant title officer to Howard Cruse, up to 1918.

Q. In 1930 did you take care of one or two transactions involving the placing of a $15,000 mortgage on property of the Jerome-Harvey Development Company in Westwood, and in the same year the placing of a mortage of $20,000 on property of the same owner in Teaneck? A. Yes. There were three transactions as I recall; one for $15,000 at Westwood and two in Teaneck, one for $20,000 and one for $10,000.

Q. I show you, Mr. Cruden, some instruments that appear to have been drawn in your office. Will you explain to the Court what these are?

MR. BRIGADIER: I object to the question. The papers speak for themselves.

THE COURT: Objection sustained.

By the Court:

Q. How did you come to prepare them? A. Mr. Rose and Mr. Flax came into my office, and Mr. Flax stated that Mr. Rose was making a loan to him and that they wanted papers drawn which would satisfy Mr. Rose that the title was in good shape and that his mortgage was a first lien.

Q. Mr. Rose is the husband of the complainant Minnie Rose, the complainant? A. Yes.

MR. BRIGADIER: I will stipulate for the record that Mr. Rose was acting as agent for Minnie Rose. There is no question of agency.

By Mr. Seclow:

Q. Go on. A. I am referring to the original memorandum I made at the time when they came in. There was one mortgage for $20,000 on 385 Queen Anne Road for three years at 6%, and as collateral security for that loan there was to be an assignment by Meyer Flax, who was also connected with the Jerome-Harvey Development Company, of a $5,000 interest in a mortgage which he held.

At that time Mr. Rose stated that he wanted me to take care of his interest, as well as Mr. Flax's, and see that there was no chance of any mechanics' lien coming in ahead of them. He referred to the fact that the building was under construction or about to be constructed. I made the searches. I notice on the margin that I gave him a price of $75 for the work. I prepared the bonds and mortgages and also a bond which Mr. Rose required from the three stockholders, I believe they were, of the Jerome-Harvey Development Company, guaranteeing the payment of the loan, and I drew a guaranty of payment of the loan by Meyer Flax, Hyman Flax and Jacob Golush who were interested in the ownership of the premises, and I also prepared a mechanics' lien bond, which was subsequently signed by Rose Brady, Max Doyne and the two Flaxes.

THE COURT: Produce the bond.

(Bond is produced.)

THE COURT: Is the execution of the bond admitted?

MR. BRIGADIER: Yes.

MR. SECLOW: The bond is admitted.

THE COURT: Let it be marked in evidence.

(Marked Exhibit C-1.)

MR. SECLOW: I call upon counsel for the production of the collateral bond which was executed at the same time.

(Bond is produced.)

Q. You referred to a collateral bond that was given to secure the repayment of the loan. A. Yes.

Q. (Showing witness) Is this the bond? A. This is the bond, with the Jerome-Harvey Development Company as principal and Hyman Flax, Meyer Flax and Jacob Golush as sureties.

THE COURT: Is the execution of this bond admitted?

MR. BRIGADIER: Of course we admit it.
THE COURT: Let it be marked.
(Marked Exhibit C-2.)

By the Court:

Q. Is Exhibit C-2 what I understand you to testify was the bond to guarantee the payment of the mortgage, which bond you were requested to draw? A. Yes.

Q. At whose instance was this Exhibit C-2 prepared? A. Well, I would not say definitely whether it was I prepared it out of caution in order to protect Mr. Rose, or whether he directly made a request that it be done. I think that it was my own thought in the matter.

By Mr. Seclow:

Q. Now, as to the mechanics' lien bond, did Mr. Rose state specifically who was to sign that bond? A. No. What happened with reference to that bond was when I said to Mr. Flax that I would require a bond against mechanics' liens and asked him whom he would offer as sureties, he said that Max Doyne's lumber company had furnished material for the building and he would get Max Doyne and he would also get Miss Rose Brady of the Consumer's Coal and Ice Company to sign the bond. I said that they were satisfactory.

By the Court:

Q. You were acting in this transaction for Mr. Rose alone? A. No; you couldn't say so. I had made the original search for Mr. Flax.

Q. You were not acting for the sureties on the mechanics' lien bond, were you? A. Oh, no. Mr. Rose stated, as a matter of fact, that he had perfect confidence in me, that the fact that I had

represented Mr. Flax previously had nothing to do with it, and that he wanted me to take every precaution possible to protect him against mechanics' lien claims and to assure him that his mortgage was a first lien.

Q. Was Exhibit C-1 signed in your presence? A. Yes; that was signed in my presence.

By Mr. Seclow:

Q. When Mr. Doyne signed that bond did you tell him what it was? A. Yes.

Q. What did you tell him? A. I told him that it was a bond to protect against mechanics' liens, to protect Rose who was making a loan to the Jerome-Harvey Development Company against the filing of any lien claim which would have priority over his mortgage.

By the Court:

Q. Doyne came to your office to sign the bond? A. Yes.

Q. You had the bond there at your office? A. At the office, yes.

Q. Or had it been given to somebody else and brought back to your office by Mr. Doyne? A. No.

Q. So far as you know, the first time Mr. Doyne saw the bond was the day he signed it? A. Yes.

Q. Did he read it? A. I don't know whether he read it, but I gave it to him and he sat at my table there, and whether he read it through or not I cannot recall. I might say that it is the same form which Mr. Doyne, as I recall, and the same form which Miss Brady have signed hundreds of times for the Title Company, because it is the same form that they have used over a period of sixteen years to my knowledge and still do.

Q. Did you tell him that the bond was anything other than a bond to guarantee the mortgagee against claims for mecanics' liens? A. No such

question came up. It was very distinctly understood that the bond which Max Doyne and Rose Brady were giving was a bond to assure against loss by mechanics' liens.

Q. You say "distinctly understood." By whom was it distinctly understood? A. By Mr. Rose, by Mr. Flax and myself. In fact, I have a memorandum to that effect, and then I also have a notation that there is to be a bond by Mayer Flax, Hyman Flax and Jacob Golush guaranteeing payment of the mortgage.

By Mr. Seclow:

Q. Did you dictate this form? A. No; I did not.

Q. How was this form prepared? A. I have a book of forms which I have gathered over my years of experience, forms that I think are the best, and I had the young lady in the office and I told her it was a mechanics' lien bond and to use the Title Company's form, substituting the words "by reason of this loan" for the words "guaranty of title."

Q. Have you the form with you that the Title Company used? A. Yes. I got this this morning from Mr. Birdsong.

Q. That is the form that you followed except for the variance which you have stated? A. Of course the names are different, and instead of saying "may be involved under any such guaranty of the title of said real estate" I substituted, as I recall the words "involved by reason of making such loan."

MR. SECLOW: I offer this form in evidence.

MR. BRIGADIER: I object.

THE COURT: Objection sustained.

Q. Have you the bond and mortgage before you? A. I have the bond and mortgage made by

the Jerome-Harvey Development Company to Minnie Rose to secure $20,000.

By the Court:

Q. That is the bond in connection with which the bonds Exhibit C-1 and Exhibit C-2 were given?
A. Yes.

MR. SECLOW: I offer in evidence bond executed by Jerome-Harvey Development Company to Minnie Rose, to secure $20,000, dated June 19, 1930, executed by Meyer Flax as president on behalf of Jerome-Harvey Development Company and attested by Hyman Flax as treasurer.

(Marked Exhibit C-3.)

MR. SECLOW: I offer in evidence mortgage dated June 19, 1930, made by the Jerome-Harvey Development Company to Minnie Rose, covering premises in Teaneck, Bergen County, New Jersey, and recorded in Liber 1256 of Mortgages for Bergen County, page 13.

(Marked Exhibit C-4.)

Q. Will you relate the circumstances connected with the second transaction concerning a $15,000 mortgage? A. This was in November, 1930. Minnie Rose made a construction loan, as I recall it, to the Jerome-Harvey Development Company on land in Westwood, and the bond and mortgage were prepared by me and also a bond of the Jerome-Harvey Development Company, Hyman Flax, Meyer Flax and Jacob Golush to guarantee the payment of the principal of the mortgage, and also a mechanics' lien bond. These are papers similar to the papers in the other transaction.

Q. In this second transaction there was a mortgage and the usual bond that accompanies a mortgage and then there was a collateral bond guaranteeing payment of the mortgage? A. Yes; signed by the stockholders or officers of the company.

Q. And then there was what you term a mechanics' lien bond? A. What was intended for a mechanics' lien bond; yes.

Mr. Seclow: I offer in evidence mortgage dated November 14, 1930, made by Jerome-Harvey Development Company to Minnie Rose, to secure payment of the sum of $15,000, covering premises in the Borough of Westwood, Bergen County, signed by Meyer Flax, president of Jerome-Harvey Development Company, and attested by Hyman Flax, treasurer, and recorded in Liber 1278 of Mortgages, page 457, in the Clerk's Office of the County of Bergen.

(Marked Exhibit C-5.)

Mr. Seclow: I offer in evidence bond executed by Jerome-Harvey Devolpment Company to Minnie Rose, in the penal sum of $30,000, to secure payment of the principal sum of $15,000, dated November 14, 1930, executed by the same persons who executed the mortgage, which bond is referred to in the mortgage and which contains $7.50 in revenue stamps.

(Marked Exhibit C-6.)

Mr. Seclow: I offer in evidence a bond which has captioned on its back "Bond Guaranteeing Payment of Mortgage," and recites that Jerome-Harvey Development Company,

Principal, and Hyman Flax, Meyer Flax and Jacob Golush as sureties, are bounden unto Minnie Rose in the sum of $30,000, which bond is dated the 17th day November, 1930.

(Marked Exhibit C-7.)

Mr. Seclow: I offer in evidence a third bond dated November 17, 1930, by Jerome-Harvey Development Company as principal and Hyman Flax, Meyer Flax, Jacob Golush and Max Doyne as sureties, conditioned for the payment of $15,000, and which is executed by the principal and sureties and which is the bond referred to in the bill of complaint, and this bond has marked on the back "Bond of Indemnity."

(Marked Exhibit C-8.)

Mr. Seclow: I want to call the Court's attention to the fact that Exhibit C-2 is captioned on the back "Bond Guaranteeing Payment of Mortgage," and that Exhibit C-1 on its back is captioned "Bond of Indemnity."

By the Court:

Q. At whose direction were these last exhibits prepared? A. They were prepared under similar circumstances with Mr. Rose asking me to protect against mechanics' liens and take all steps necessary to see that his mortgage was a first lien.

Q. Did Mr. Doyne come into your office to execute Exhibit C-8? A. Yes.

Q. What did you tell him C-8 was? A. That it was a bond guaranteeing against the filing of mechanics' liens which would affect Mr. Rose's loan.

Q. As far as you know, he had not seen the bond until he came in to execute it? A. I am sure he had not.

Q. Did he read it over? A. He had an opportunity to read it over. I cannot swear that he did.

Q. How long was he in the office to execute the bond? A. Fifteen minutes. We talked——

Q. About other things? A. Yes.

Q. As well as the bond? A. I don't recollect now.

Q. When he came in what did he say he was coming in to sign? A. He said: "I came in to sign the mechanics' lien bond that Flax has been after me for."

Q. Did he also say that when he came in to sign Exhibit C-1? .A. Words to that effect.

Q. What did you use as a form when you drew C-8? A. I used a form which I have in my form book in the office.

Q. I call your attention to the fact that the condition in C-8 is practically worded the same as the condition in C-1. Your form that you had in your office did not contain the words that are in the condition. You substituted——A. May I look at them? I do not recall. C-1 and C-8 are the mechanics' lien bonds. At the time when I drew C-8 it was several months after. I told the stenographer the words to put in in substitution of what was in the form of the Title Company, and I apparently did not use the same words that I did in the first one that I drew, but I must say not intentionally. At that time those were the words that I dictated.

(Discussion between Court and witness off the record.)

Q. When you drew Exhibit C-8 is it not quite likely, or can you say whether you had C-1 before you and used that as the form in making up C-8? A. I think it is very likely that I did because I used exactly the same words. I probably would not dictate the exact words the second time.

Cross-examination by Mr. Brigadier:

Q. You testified, did you not, that Jacob Golush signed this bond either as an officer or stockholder of the Jerome-Harvey Development Company? A. No; I think not. If I did, I meant to testify that he was interested in the property.

Q. Why did he sign these bonds? A. Only that he was interested in the property and was to share in some way, as I recollect it, in the profits, if there were any.

Q. But there is no question that the intention was that he was to guarantee these mortgages? A. No——on that bond to guarantee the principal ——there is no question. That was fully explained.

Q. Then, I call your attention to Exhibit C-7, which you say was intended as a guarantee bond, and ask you whether or not Mr. Golush signed that bond. A. No. May I explain——

Q. I call your attention to Exhibit C-8, which you term the mechanics' lien bond, and I ask you whether that is Jacob Golush's signature thereon. A. Yes; that is Mr. Golush's signature.

Q. Now, you have testified that Golush did intend to guarantee the mortgage. A. No; I did not testify that he intended to, because I have no knowledge. I can testify that Mr. Flax told me that he would go on the bond, and I prepared it that way.

Q. We are dealing with the question of what you understood the instructions of your clients were and what you intended to convey to the people who were to sign these bonds. A. Yes.

Q. Now, on direct examination you testified that Mr. Golush signed the bond guaranteeing the mortgage because as you then said or as you now modify it, because he had some interest in the property. A. That was the first one referred to.

THE COURT: I think Mr. Cruden testified in identifying the bonds that Mr. Golush was

recited as a surety in C-7 but apparently did not sign it.

MR. BRIGADIER: My purpose is to find out from Mr. Cruden, if he can tell me, why C-7 was not signed and C-8 was.

Q. Mr. Cruden, can you tell me why C-7 was not signed and C-8 was signed? A. I cannot tell you that.

Q. Is it not a fact that you were to deliver to Mr. Rose a guarantee of the mortgage by Mr. Golush in the second transaction? A. No.

Q. Were you to deliver a guarantee of the mortgage in the first transaction? A. There wasn't anything said about delivering to Mr. Rose a guarantee of the mortgage. As I recall the matter, it was my thought, because of the fact that it was a corporation, that those who were interested in the transaction should give a personal bond, because the bond of the corporation would be of no value if the corporation—

Q. That was why Mr. Golush signed C-2? A. That is my recollection.

Q. Was not that also the intention that the parties had in mind with respect to Exhibit C-7? A. I cannot tell you that.

Q. Isn't that why in C-7 you inserted Mr. Golush's name as one of the sureties, though it was never executed? A. I cannot state as to that, —as to whether I put it in under the impression that the same people were interested in it and prepared it that way, or whether I was told to put it in by Mr. Flax who was the only one I interviewed with reference to the matter.

Q. Let me ask you this question: In Exhibit C-2, which is the bond admittedly guaranteeing the mortgage indebtedness, the first transaction, Mr. Golush is named as a surety, is he not? A. The best evidence of that is to refer to the exhibit.

Q. Will you refer to it? Golush is named as a surety? A. Yes; Golush is named and he also signed.

Q. Is there any question as to whether or not there was any mistake about his being a surety in that bond? A. No; not in my mind.

Q. Not in your mind whatsoever? A. No.

Q. I call your attention to Exhibit C-7. Golush is named as a surety in that bond. Is there any question of the intention of the parties that Golush was to be a surety in that bond? A. Is there any question in my mind?

Q. Yes. A. Yes; I would say there is.

Q. Why? A. Because I might have drawn this bond improperly, and from the fact he did not sign it, he might not have intended to sign it; and then, again, you will notice I have drawn a line where his signature would have been; for what reason I cannot recall now, other than to show—

Q. But he did sign Exhibit C-8? A. Yes; he signed C-8.

Q. You don't know of your own knowledge what did happen? A. No; I cannot recall why he did not sign, but I do recall that in one of these transactions he had a personal interest, either through actually doing the carpentry work or owning an interest in the land, or something like that; I don't know.

Q. Is it not a fact that the one in which he had a personal interest is the one involved in C-7 and C-8, the Westwood job? A. I cannot tell you that.

Q. That doesn't recall anything about the transaction? A. No; I cannot tell you.

Q. Prior to June, 1930, before the instruments C-1 and C-2 were drawn in your office, had you represented the Jerome-Harvey Development Company? A. Yes.

Q. And you had been their attorney for how long? A. I incorporated the company.

Q. Had you ever been Mr. Rose's attorney prior to that time? A. No;I don't think so.

Q. Do you recall the day that they came into your office? A. Yes.

Q. Mr. Rose and Mr. Flax? A. Yes.

Q. Do I understand you to testify that Mr. Rose engaged you as his counsel? A. The circumstances were these, as I recall them: Mr. Flax and Mr. Rose came in, and Flax said that Mr. Rose was going to make a loan or loans and they wanted me to prepare the papers, and Mr. Rose said that he had confidence in me and knew that I, to put it plainly as I recall the words that he used, was on the level, and that I would prepare the papers to protect his interest so there would be no mechanics' liens filed and also see that the bond and mortgage were properly executed and that there were no prior liens; and I said: "All right gentlemen, I will be glad to do that," and I took a memorandum of the facts and I gave them a price, as I recall, of $75 for each one of the jobs; there were two at that particular time—one for $10,000 at Teaneck, since paid off, and one for $20,000 at Teaneck, the subject of this dispute.

By the Court:

Q. As I understand it, Mr. Rose gave you the names of the sureties who were to go on these bonds? A. No. I asked Mr. Flax. They were sitting together. I said: "Who will you get on the mechanics' lien bonds?"

Q. And when you asked who would go on the mechanics' lien bonds, what names were given you? A. The names of Miss Brady and Max Doyne.

Q. And then did you ask who would go on the bonds to guarantee the mortgages? A. I asked: "Who is interested in the transaction, in the company?" I knew that both of the Flaxes were and

I put them in there of my own volition. Mr. Rose didn't request this bond indemnifying.

Q. When you say "bond indemnifying," you mean the bond guaranteeing the payment of the principal? A. Yes. I could have bound them in the original bond.

By Mr. Brigadier:

Q. Coming down to C-7 and C-8, will you refer to your memorandum? A. Not as to that transaction.

Q. Have you any memorandum as to the second transaction showing who paid you for your services? A. No; I know I got $75 and I could not tell you who paid me.

Q. Is it not a fact that it was paid by Mr. Flax? A. I have no recollection. I was paid. I know that.

Q. With respect to the second transaction, C-7 and C-8, I understand your testimony to be that Mr. Rose and Mr. Flax again came into your office; is that right? A. That is my recollection.

Q. Is it not a fact that Mr. Rose said to you that he was willing to rely upon your judgment as to what should be done in this matter? A. No; not——

Q. Is it not a fact that Mr. Rose came to you and said to you that since you were Mr. Flax's attorney and since he felt that you would treat him on the level, he would leave the entire matter to you, the matter of his protection? A. No. The fact that I was Mr. Flax's attorney was never mentioned by Mr. Rose.

Q. It is your understanding that you were acting as attorney for Mr. Rose in this matter? A. I was acting as attorney for Mr. Rose in this matter.

Q. Did you at any time discuss with Mr. Rose the various bonds that you were going to procure

for him? A. Yes; I told Mr. Rose what I proposed to do, taking a bond which was signed by the outside parties, Miss Brady and Mr. Doyne, against mechanics liens; also a bond and mortgage by the corporation, and an additional bond to be signed by those in interest in the corporation.

Q. You told that to Mr. Rose? A. Yes.

Q. Do you know how the names of Rose Brady and Max Doyne came to be suggested as sureties in the first transaction and in the second transaction? A. Yes.

Q. Will you tell us? A. I asked Flax whom he would get to go on the bond, and he stated that Max Doyne of the Prospect Planing Mill and Lumber Company would be one—my recollection is that he stated that that company furnished the material on the job,—and he said that he would ask Miss Brady of the Consumers' Coal Company whether she would sign.

Q. Miss Brady was connected with the Consumers' Coal and Ice Company. In what capacity is she connected with that company? A. She is president now.

Q. And at that time? A. I think she was president at that time also.

Q. You understood that they had supplied material on these jobs? A. No; I did not.

Q. You understood what, then? A. I understood that Doyne had supplied material on the job and that Flax would ask Miss Brady to go on the bond for him as a personal matter. I did not understand that the Consumers has furnished any material. I did not know that they did or did not.

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

Q. You are attorney for the Consumers, however? A. Yes.

Q. And you were their attorney at that time? A. Yes; for many years.

Q. When Miss Brady signed that bond had she

said to you at that time that she was relying upon your statement to her as to what was in that bond? A. Oh, no; she made no such statement.

Q. I show you what purports to be a release of mechanics lien claims and I ask you whether you have seen that before. A. This was drawn, I believe, in our office, but as to whether I have seen it before or not I cannot tell you. I undoubtedly did.

Q. Is Anna D. Harz, who took this affidavit, connected with your office? A. Miss Anna D. Harz has been with us for fourteen years.

Q. I call your attention to the date of this affidavit as being the fourteenth day of November, 1930. Does that recall anything to you concerning that transaction? A. No; it does not.

Q. Do you know what that affidavit is? A. Yes; that all persons or corporations who furnished labor or material in connection with the premises in the Borough of Westwood, have been paid, that is, there is no person or corporation entitled to file a mechanics' lien against the premises for labor or material furnished in the construction of the building.

Q. In other words, was it a release? A. It is the usual form of mechanics' lien release.

Q. You will observe that that release is signed by the Prospect Planing Mill and Lumber Company; is that right? A. Undoubtedly. As a matter of fact, this was signed before me by a number of these people.

Mr. Brigadier: I ask to have this marked for identification.

(Marked D-1 for identification).

Q. Didn't you deliver D-1 for identification to Mr. Rose yourself? A. I cannot say whether I did or did not.

Q. You don't recollect? A. No; I do not.

Q. Do you, Mr. Cruden, of your own knowledge know that Max Doyne was with the Prospect Planing Mill and Lumber Company, and that it was owned and controlled by his father? A. No. My understanding, ever since I have known Max Doyne, was that he was in some way connected with the Prospect Planing Mill and Lumber Company. In what capacity I haven't any idea.

By the Court:

Q. Let me ask you this question, Mr. Cruden: In the preparation of these bonds, Exhibit C-1 and Exhibit C-8, was there anything in the instructions given to you by Mr. Rose which induced you, or which led you, to prepare a bond which would be indemnification by the people who signed, against anything except mechanics' liens? A. No; as far as Rose Brady and Doyne were concerned there was nothing said.

Q. I am talking about the bonds, Exhibit C-1 and Exhibit C-8, which you call the mechanics' lien bonds. A. No; there was not.

Q. Was it your intention to so draw these bonds that they would be indemnification for anything except mechanics' liens? A. It was not my intention to so draw them, nor was it the intention of the people who signed, to guarantee against anything except mechanics' lien.

Q. Was there anything in the statement made by Mr. Flax, when he was at your office with Mr. Doyne, when these so-called mechanics' lien bonds were prepared or authorized to be prepared, which would authorize you to prepare bonds against anything except lien claims, so far as Exhibit C-1 and Exhibit C-8 are concerned? A. Absolutely nothing.

By Mr. Brigadier:

Q. Did you draw these bonds at Mr. Roses's

direction or at Mr. Flax's direction? A. As a matter of fact, I didn't draw them at either the direction of Mr. Rose or Mr. Flax. Mr. Flax asked me to prepare such papers as would properly protect Mrs. Rose or Mr. Rose.

Q. At any time did you receive directions from Mr. Rose to draw a mechanics' lien bond? A. His direction was that I should protect him against mechanics' liens.

Q. Did you receive any directions from him to draw a mechanics' lien bond against mechanics' liens? A. No; I do not recall receiving any such direction.

Q. And the drawing of that bond was your own idea of what was necessary to protect Mr. Rose against mechanics' liens? A. One of the methods, yes.

Q. Did you ever discuss with Mr. Rose the terms of this Exhibit C-8? A. Mr. Rose, as a matter of fact, my recollection is, was with Mr. Flax when Mr. Flax gave me the names of Max Doyne and Rose Brady as sureties on the bond, because I said I would want a bond against mechanics' liens.

Q. Are you positive Mr. Rose was there- A. I believe he was there at the first session when I asked who would sign the bond.

Q. In the first session was there any talk at all about a mechanics' lien bond? A. I mentioned it.

Q. Didn't you say the subject of the mechanics' lien bond was not mentioned by Mr. Rose to you? A. And I still say that I mentioned it. I said I would require a mechanics' lien bond and asked Mr. Flax who would go on the bond as sureties.

Q. So that there was a conversation about a mechanics' lien bond in the presence of Mr. Rose on this occasion? A. That is my recollection, but Mr. Rose had no direct conversation with me. My recollection is that he sat there and listened to me

when I asked Mr. Flax who would go on the bond.

Q. This bond, as you understood it, was for the protection of the mortgagee? A. Absolutely.

Q. Against mechanics' liens? A. Absolutely.

By Mr. Seclow:

Q. Exhibit C-1 to Exhibit C-8, were they given by you to Mr. Rose after the matters were closed? A. Yes; that is my recollection, that I handed all the papers to Mr. Rose afterwards, I think when the mortgage came back from record, if I remember correctly.

MAX DOYNE, the complainant, sworn as a witness in his own behalf, testifies as follows.

Direct Examination by Mr. Seclow:

Q. In 1930 were you connected with the Prospect Planing Mill and Lumber Company? A. Yes.

Q. Were they in the lumber business? A. Lumber and mason material.

Q. Did you furnish any material to Flax or to any company that he was connected with, the Jerome-Harvey Development Company? A. We did quite some business with Jerome-Harvey Company.

Q. Did you do any business on the two jobs mentioned in the mortgage, one in Teaneck and the other in Westwood? A. Yes.

Q. What did you supply there? A. Lumber and trim.

MR. BRIGADIER: I object to that as immaterial.

THE COURT: Objection sustained.

Q. Did you go to Percival Cruden's office in connection with the execution of some papers? A. Yes.

Q. At whose request? A. Mr. Flax's request.

Q. What did Mr. Flax ask you to do? A. He said there was money up at Mr. Cruden's office and he aked me to sign a mechanics' lien release. I asked him had he paid everybody. He said he had quite a few paid and the balance would be paid from the mortgage.

Q. What did he ask you to sign? A. A mechanics' lien release. I said: "Has everybody been paid?" He said some has been paid and the balance would be paid from Mr. Cruden's office.

Q. Did he ask you to sign any other papers besides a release? A. Mr. Flax came down to me and told me to go up to Mr. Cruden's office, that something would be prepared there, that I would have to sign a mechanics' lien bond in Mr. Cruden's office, and I asked him if he is going to get any money. He said: "Yes; we are going to get some money up there," and he told me everybody has been paid except a few, and he wants to give a bond that everyobdy has been paid at Mr. Cruden's office.

Q. Did you sign Exhibit C-1? A. Yes.

Q. Now, when you went up to Mr. Cruden's office, just tell what happened there. A. Mr. Cruden said to me: "There is a mechanics' lien bond that we want you to sign against a mechanics' lien," and he aked me to sign it, and that is all there was to it.

By the Court:

Q. Did you read it? A. No, sir. I relied on Mr. Cruden telling me it was a mechanics' lien bond. I have done business there before and I never read any papers he presented to me.

By Mr. Seclow:

Q. Was it read to you? A. No, sir; just put down. He said: "Here is a mechanics' lien bond,"

and he was talking and he was making out a check for some money, and I think Miss Rose Brady came in after.

Q. Were you satisfied to sign a bond against mechanics' liens? A. I was paid and I was satisfied that everybody else was paid by Mr. Flax.

By the Court:

Q. Were you satisfied to sign a mechanics' lien bond? A. Yes.

By Mr. Seclow:

Q. Had you known that this was a bond beyond that scope, that is, with greater liability than a mechanics' lien bond, would you have signed it? A. No, sir.

By the Court:

Q. Did Mr. Flax or Mr. Rose or Mr. Cruden ask you to sign any bond which would guarantee the payment of the mortgage? A. No, sir.

By Mr. Seclow:

Q. I show you Exhibit C-8. You also signed that? A. Yes, sir.

Q. And that is on the Westwood property? A. Yes.

Q. You furnished material on that? A. Yes, sir.

Q. Who asked you to sign this bond? A. Mr. Flax.

Q. What did he ask you to do? A. He told me there was money up there and asked me to sign a mechanics' lien bond against mechanics' liens.

Q. Did you go to Cruden's office? A. I did.

Q. What happened there? A. Mr. Cruden said there is a mechanics' lien bond and he wanted

me to sign against mechanics' liens, and I signed.

Q. Were you satisfied that labor and material was properly taken care of? A. Mr. Flax told me that he paid the greater part of it and whatever money was due on the balance he would pay.

Q. Would you have signed Exhibit C-8 if you knew or thought that there was any greater liability than indemnity against mechanics' liens?

MR. BRIGADIER: I object on the ground that it calls for—

THE COURT: Objection overruled.

A. No, sir.

Q. When is the first time that you found out that these papers, Exhibit C-1 and Exhibit C-8, were anything else except mechanics' lien bond? A. When the foreclosure proceedings were instituted in Westwood, New Jersey.

Q. That was a long time afterwards? A. It must have been two years and a half afterwards.

Q. Until you were served with papers in foreclosure you knew nothing about it? A. No, sir.

Cross Examination by Mr. Brigadier:

Q. When you signed Exhibit C-8 at Mr. Cruden's office was Mr. Cruden at that time acting as your attorney? A. No, sir.

Q. At the time you signed Exhibit C-8 what was your connection with the Prospect Planing Mill and Lumber Company? A. I had an interest in the company.

Q. Who owned the business? A. Five of us.

Q. Prior to signing Exhibit C-8 did you have any conversation with Julius Rose with respect to said instrument- A. No, sir.

Q. Or your intention to execute it? A. No, sir.

Q. No conversation relative to it? A. No, sir.

Q. Or with Minnie Rose? A. No, sir.

By Mr. Seclow:

Q. Mr. Doyne, have you any financial interest or any other interest in this Jerome-Harvey Company? A. Other than materialman.

Q. No other interest? A. No, sir.

HYMAN FLAX, sworn as a witness on the part of the complainant, testifies as follows.

Direct Examination by Mr. Seclow:

Q. You are treasurer of the Jerome-Harvey Development Company? A. Yes.

Q. Did you have charge of the two buildings which were testified to on the stand here today? A. Yes, sir.

Q. Did you have anything to do with the arrangement with Mr. Rose concerning the procuring of a mortgage which has been testified to? A. Yes, sir.

Q. I show you Exhibit C-1, which is a paper signed by the Jerome-Harvey Development Corporation, Meyer Flax, Hyman Flax, Jacob Golush, Max Doyne and Rose Brady. Do you know how this paper came to be executed? A. Well, I procured the mortgage from Mr. Rose, and it is usual the builder alwas has to get a man to sign a bond against mechanics' liens, and he asked me—

By the Court:

Q. Who asked you? A. Nobody asked me. The fact is I knew it will have to be done. So I said to Mr. Rose and Mr. Cruden at that time in the office: "I am going to get Mr. Doyne and Miss Brady down to sign it."

Q. To sign what? A. The mechanics' lien bond.

Q. This was when you and Mr. Rose were together at Mr. Cruden's office. Did Mr. Cruden say anything about a mechanics' lien bond at that

time? A. I think that Mr. Cruden asked me who was going to sign that.

Q. Who told Mr. Cruden to draw such a bond? A. Nobody told him to draw it. He asked me. He was not told anything.

Q. For whom was he acting in drawing that bond at that time? A. Mr. Rose.

Q. Why do say that? A. Because I took Mr. Rose up there. Mr. Cruden was doing some work for me. I said Mr. Cruden was doing the work me, and Mr. Rose accepted Mr. Cruden as his attorney.

Q. For what purpose? A. Because it would be quicker.

Q. What did you tell Mr. Rose that Mr. Cruden was to do? A. I didn't say anything.

Q. You just took Mr. Rose by the hand and walked him to Cruden's office without telling him why you were going there? A. We talked it over before.

Q. Tell us what you talked over. A. We talked over about the mortgage, he will give me the loan. We came up to Cruden's office. I told him: "Mr. Cruden has my papers and it will be much quicker to have him."

Q. What was it that Mr. Cruden was to do,—anything besides making the search and drawing the bond and mortgage? A. Nothing was said because it was understood that Mr. Cruden will take care of the legal papers. Nobody said a word.

Q. Was anything said about a mechanics' lien bond? A. No; not at that time.

Q. At what time did anybody say anything? A. When everything was ready, when the papers were ready, Mr. Cruden asked me who was going to sign the bond.

Q. The papers could not have been ready at that time? A. No; not at that time. And I said: "Mr. Doyne and Miss Brady will sign it for me."

Q. Was Mr. Rose there then? A. Yes.

Q. What bond were you talking about? A. About the mechanics' lien bond.

Q. Did you also talk about another bond guaranteeing payment of the principal of the mortgage? A. No; we did not talk about that.

Q. Did Mr. Cruden speak about it? A. No.

Q. How did it come about that there was a bond signed to guarantee the payment of the mortgage? You know there was another bond besides the mechanics' lien bond? A. Yes; there was a bond that the owners signed.

Q. Who talked about that? A. Mr. Cruden gave me the paper and I signed it. I could see so many words. I would not have to be told. I knew myself what had to be done.

Q. That is, in the case of the first bond? A. The first bond.

Q. What happened with reference to the second bond, the one that had to do with the Westwood property? A. The same thing.

Q. I am talking about the one that Doyne signed. A. The same time.

Q. Didn't you say one was in June and the other in November? A. The same conversation.

Q. There was some conversation that led up to the execution of that bond in November, 1930. One was done in June and the other was done in November. A. Yes.

Q. You have already testified about the first transaction in June. A. When I went to Mr. Rose to get the mortgage on the other property we did the same thing. I said: "Mr. Cruden handled for me the papers. We will go to him," and I went up and he was supposed to prepare all the papers. I don't know what Mr. Cruden wrote. I didn't read it. He said: "There is the bond against the mechanics' liens." I knew I had to get some one to sign it. I said that Mr. Doyne and Miss Brady

would sign for me because I did a lot of business with them. They used to do me a personal favor.

By Mr. Seclow:

Q. I call your attention to the fact that Miss Brady did not sign the second bond. A. I don't remember; I cannot say.

By the Court:

Q. Put your mind on the question asked you instead of talking. A. All right.

Cross Examination by Mr. Brigadier:

Q. Before lending the money on the second transaction did Mr. Rose say anything about demanding collateral? A. What?

Q. About wanting collateral security for the payment of the loan? A. No.

Q. Nothing was said at all about collateral security for the loan? A. No.

Q. Did Mr. Rose say to you at that time, prior to the second transaction, that he would not lend you the money on the corporation's bond alone? A. No.

Q. He didn't say that? A. No.

By the Court:

Q. Listen to the question. How did you come to give the indemnity bond? A. Because as an individual I was very good at that time.

Q. If Mr. Rose didn't say anything about wanting such a bond, why did you give it? A. I am sorry; I didn't understand it.

By Mr. Brigadier:

Q. Now you understand it? A. Yes.

Q. Why did you give Exhibit C-7? A. That is my name signed on the bond.

By the Court:

Q. What is the bond? A. A bond to guarantee the mortgage.

Q. The principal and interest of the mortgage? A. Yes.

By Mr. Brigadier:

Q. Did Mr. Rose ask you for this bond? A. Yes.

Q. And did he make it a condition of the loan that this bond should be given? A. Yes, personally by me and my brother. At that time we were very good, and that is why he wanted it.

Q. Will you look at Exhibit C-7 and will you observe that Jacob Golush is named in the body thereof as surety? A. Yes.

Q. And you notice that his name is not signed on it? A. Right.

Q. Will you tell us, if you know, how Golush happened to be named as surety and yet did not sign it? A. I don't know how it happened. I didn't read the paper.

Q. Did Mr. Rose ever state to you that he wanted Golush to guarantee the mortgage? A. No.

Q. I show you Exhibit C-2. A. What property is this?

Q. The Teaneck property. Is that signed by you? A. Yes.

Q. Is that signed by Golush? A. Yes.

Q. Is this the bond that you intended to give to guarantee the mortgage in the first transaction? A. Yes.

Q. Will you tell us how Golush came to sign that bond? A. Because he had an interest in the property. I took him in as a part partner, and I told Mr. Rose about it at that time, that Mr. Golush was with me, and then we made him sign the bond.

Q. Was he a stockholder in the corporation? A. No; just a silent partner.

Q. A silent partner? A. Because he did the carpenter work and I was busy that time and I gave him a part interest in that particular building.

Q. How did you give him this interest? A. I gave him a certain percentage on the property.

Q. He was working on the Westwood property, too? A. Yes.

Q. Did you give him an interest in that? A. He didn't put any money in this. In this particular case he advanced a little money for me.

Q. That is why in the Westwood transaction he did not sign? A. Right.

Q. But his name is mentioned in the body of the bond. A. I didn't read it. This is the first time I saw it.

Q. You don't know how it happened? A. I don't know how it happened.

Q. And after that Mr. Cruden billed you for services rendered in this matter? A. He did.

Q. In both transactions? A. Yes.

Q. And you then paid him for his services rendered? A. Yes.

Q. Do you know whether Mr. Rose paid anything? A. No, sir.

Q. You know that he did not pay anything? A. Not to my knowledge.

Q. When you and Mr. Rose both came to Mr. Cruden's office on the first occasion, the June transaction, did Mr. Rose in your presence state to Mr. Cruden that he was to represent Mr. Rose? A. Yes, sir.

Q. As Mr. Rose's lawyer? A. Yes.

Q. And did he say to Mr. Cruden that he was satisfied, that Mr. Cruden acted as your lawyer, and that no harm or injury would come to Mr.

Rose? A. No; he said that he wants him to take care of his business for this transaction.

Q. And you paid for those services? A. That was the understanding between me and Mr. Rose that I should pay the expenses.

Q. That was also true after the second transaction? A. That is right.

Q. The November transaction? A. Yes, sir.

Q. When you came to Mr. Cruden's office in the November transaction, you say that Mr. Rose was present when you and Mr. Cruden spoke of the mechanics' lien bond? A. I cannot recall that he was there at that time because I went there a couple of time and I don't remember at that particular time.

Q. Was Mr. Rose ever present when you spoke of Exhibit C-8 as being a mechanics' lien bond? A. Yes, sir.

Q. When did that happen? A. I cannot say.

By the Court:

Q. Do you know what Exhibit C-8 is? A. No; I do not.

Q. Then, why do you say Mr. Rose was not there when that paper was spoken about, if you don't know what it is? A. Exhibit C-8 is—

Q. Exhibit C-8 is a mechanics' lien bond so-colled, in the second transaction, the Westwood transaction. The question is: Was Mr. Rose ever present when this paper that is before you, Exhibit C-8, was spoken of as a mechanics' lien bond? A. We spoke of it, but the paper was not there. There was no paper—just talk when we came there.

Q. That is before you signed the bond and mortgage on the Westwood property? A. Yes.

Q. And what was the talk about a mechanics' lien bond? A. I said when we arranged everything about getting the money—a bond supposed

to be signed by us. It was understood. I understood that I had to produce some one to sign the bonds.

Q. What bonds? A. Mechanics' lien bonds; and I was always prepared to have somebody sign for me.

Q. Did you also discuss the giving of a bond to guarantee the payment of the bond and mortgage besides the corporation bond? A. Myself personally?

Q. Yes. A. Yes.

Q. Look at that paper before you. A. Yes.

Q. That is signed by you? A. Signed by me.

Q. Was Mr. Doyne present when you signed it? Did you and Doyne go there together? A. No; we didn't go together. I go one day and my brother signed first and I did.

Q. What did Mr. Cruden tell you that paper was when you signed it? A. He gave me the paper and said: "There is the mechanics' lien bond," and the other was there, and I signed both. I never read anything at all.

Q. Did you go with Mr. Doyne when the bond on the Teaneck property was signed? A. No. I asked him to sign for me. I came up to his office.

Q. You went to Doyne's office? A. Yes.

Q. You did that on both bonds? A. I did; both.

Q. Both lien bonds? A. Yes.

Q. What did you ask him to sign? A. A bond.

Q. What kind of a bond? A. He understood it was a mechanics' lien bond, and so did I. That is what we understood. I didn't mention any other bond, because his main interest was, if I buy merchandise from him and I want him to sign a bond, it is understood. I cannot recollect if I said "Mechanics' Lien bond," or "Bond."

Q. Do you mean to say that you went to him and asked him to go to Cruden's office to sign a

bond and did not tell him what the bond was for? A. I said to him: "Are you going to sign this bond for me?"

Q. You didn't tell him what kind of a bond it was? A. I cannot remember if I did or did not, but he understood and I understood it was a mechanics' lien bond.

By Mr. Brigadier:

Q. Do you remember my speaking to you about this bond involved in this litigation, Exhibit C-8, which you have in front of you, several months ago? A. I don't remember.

Q. Were you in my office several months ago? A. Yes.

Q. On another matter? A. Yes.

Q. And did I question you about Exhibit C-8? A. I don't remember.

Q. And do you recall having said that it was a mistake as far as Mr. Doyne was concerned but you did not think that Mr. Rose knew it was a mistake? A. I didn't say that.

Q. You didn't say anything to that effect to me? A. No; I did not.

Q. Did you ever state that Mr. Doyne did intend to sign a mechanics' lien bond- A. Yes.

Q. You did say that? A. Yes.

Q. You remember that? A. Yes.

Q. You remember that you did say that Mr. Doyne did intend to sign a mechanics' lien bond? A. Yes.

Q. Didn't you also state that Mr. Rose was never present any time that anything was discussed about this bond? A. No, sir.

Q. You didn't say that? A. No, because I was with Mr. Rose there in the office.

By the Court:

Q. The question is whether you said that to Mr. Brigadier. A. No; I did not.

By Mr. Seclow:

Q. Your brother Meyer Flax is now in California? A. Yes.

Q. When you speak of Mr. Cruden having the papers, did Mr. Cruden search the title for you when you bought it? A. Yes.

Q. When you say that Mr. Rose wanted it done in a hurry— A. No; I was the one that wanted it in a hurry.

Q. That is why you went to Mr. Cruden? A. Yes.

Q. When you talked to Mr. Doyne about signing the bond, did he ask you what provision you had made for the payment of labor and material? A. I told him everybody is paid except a few and they will be paid from that money, and everybody was paid. Everybody did get paid.

MR. BRIGADIER: As to the first bond I will consent to a decree of rescission or reformation or whatever is the proper form of decree. As far as Schedule 1 is concerned, we are making no claim.

JACOB GOLUSH, sworn as a witness on the part of the complainant, testifies as follows:

Direct Examination by Mr. Seclow:

Q. You have heard testimony here concerning two building operations in Bergen County? A. Yes, sir.

Q. You had an interest in one of them? A. Yes.

Q. Which one? A. In Queen Anne Road.

Q. In that case you signed the bond guaranteeing payment of the mortgage? A. Yes.

Q. The other building operation was in Westwood? A. Yes.

Q. You had a carpenter contract there? A. That is right.

Q. In that case you signed Exhibit C-8. That is your signature, is it? A. That is right—my signature.

Q. Who asked you to sign Exhibit C-8? A. Mr. Flax.

Q. What did he say to you when he asked you to sign? A. He said to me I should go and sign a release for the carpenter labor. He said Mr. Rose—

MR. BRIGADIER: May I object to any conversation that took place between the witness and Mr. Flax when Mr. Rose was not present? I object upon the ground that it cannot be binding on us. I don't see how it is relevant on Mr. Doyne's case. I object to all such testimony.

THE COURT: Objection overruled.

Q. Continue. A. He said that Mr. Rose demands signed releases of all mechanics and all materialmen. He says: "I have got to get money from him," and he asked me if I would go and sign. I said: "With pleasure."

By the Court:

Q. Did you talk to Rose about it at all? A. No.

Q. At any time? A. No.

Q. Did you go to Mr. Cruden's office to sign the paper? A. Yes, sir.

Q. What did Mr. Cruden tell you the paper was? A. When I signed Mr. Cruden was not there, but my nephew was there, and my niece works in Cruden's office and she gave me some paper—I saw a bunch of papers. I asked her: "What are these papers?" She said: "Well, you

are going on bonds." I said: "I am not," and then she gave me another paper. She said: "This is a mechanics' lien release." I said "O. K.," and I signed it.

Q. Were you asked to sign any bond to guarantee the payment of the principal and interest of the mortgage? A. No, sir; not on this.

Q. On the Westwood property? A. No, sir.

By Mr. Seclow:

Q. You testified that your niece gave you a bunch of papers to sign and you refused to sign when she told you it was a guarantee. Is this the paper? A. I would not say yes.

Q. But you said that you would sign a mechanics' lien release. A. That is right.

Q. Not any guarantee? A. That is right.

Q. Would you have signed this Exhibit C-8 which you say was a mechanics' lien bond if you knew that it was a guarantee of the principal and interest of the mortgage or any part of it?

MR. BRIGADIER: I object.

THE COURT: Objection sustained.

Cross Examination by Mr. Brigadier:

Q. When you signed Exhibit C-2 did you intend to sign a guarantee of the mortgage? A. On which property—which one?

Q. Teaneck? A. Yes, sir.

Q. Why? A. I have an interest in that property. Mr. Rose spoke to me about it at that time if I would go on the bond.

Q. You signed this guarantee of mortgage at Mr. Rose's request? A. Yes.

Q. That is right? A. Yes; on the first one.

Q. Did Mr. Rose request you to sign Exhibit C-7? A. The Westwood?

Q. Look at it. A. No, sir.

Q. Do you know what Exhibit C-7 is? A. No; I do not.

Q. Then, why don't you look at it before you answer? Did Mr. Rose request you to sign Exhibit C-7, which has your name typed therein, but which is not signed by you? A. No, sir. I never saw Mr. Rose. I just met him in the—

By the Court:

Q. Did he ask you to sign that paper? A. No, sir.

By Mr. Brigadier:

Q. When you signed Exhibit C-8, which is what you call the mechanics' lien bond for Westwood— A. That is right.

Q. You say you signed it in Mr. Cruden's office but that Mr. Cruden was not present? A. No, sir. The girl in the office gave me the paper to sign.

Q. Do you know what an acknowledgment is? A. Yes; I do.

Q. I understand you to say that your niece showed you Exhibit C-8 for your signature; is that right? A. No. She showed me a bunch of papers. She took it out in the hall where the girls are. She says to me: "Sign it." I asked: "What is the bunch of papers?" She said to me: "You are going on a bond." I said: "No; I am not. I got nothing to do with this property." So she gave me another paper to sign. She said it is against mechanics' liens, and she gave me a paper to sign and I signed and left. Furthermore, when I met her the next night I said: "What did Cruden say?" She said:: "Cruden said 'I don't blame him.' "

Q. That is why you did not sign Exhibit C-7— this explanation that you have just given to us— because you found it was a bond guaranteeing payment of the mortgage? A. There was a bunch of papers there, and I didn't know.

MR. SECLOW: I want to introduce a stipulation by parties to the proceedings who were joined as defendants on the theory that they were proper parties, and they consent to a decree according to the prayer of the bill of complaint.

COMPLAINANT RESTS

DEFENDANTS' CASE

MR. BRIGADIER: I wish to offer in evidence the file in the case entitled "Minnie Rose, Complainant, and Jerome-Harvey Development Company and others, defendants, in Chancery of New Jersey, Docket No. 92, page 536," consisting of bill of complaint, answer and counter claim of the defendant Max Doyne, notice of motion to strike said answer and counter claim, order dated 28th day of November, 1932, striking answer and counter claim; notice of appeal, decree of affirmance of the New Jersey Court of Errors and Appeals, decrees pro confesso, dated the 6th day of July, 1933, as to some defendants and the 25th day of May 1933 as to other defendants; Master's report, final decree, and also order dated the 5th day of June, 1933, advised by Vice Chancellor James F. Fielder.

(Received in evidence but not marked.)

MR. BRIGADIER: Will you stipulate, Mr. Seclow, that the answer and counter claim filed by you in that case refers to two bonds and that the bonds referred to are Exhibit C-1 and C-8 in the present suit?

MR. SECLOW: We set up both bonds in the answer and I can—

THE COURT: He is asking you for consent that the bonds offered in evidence, Exhibit C-1 and Exhibit C-8, are the bonds that you refer to in your answer filed in foreclosure of the Westwood mortgage.

MR. SECLOW: Yes.

DEFENDANTS REST

CASE CLOSED

(At this point recess is taken until 1:45 P. M.)

(After recess the Court heard the argument of counsel.)

THE COURT (orally at close of argument)—I will have to disagree with your argument, Mr. Brigadier, because I cannot see that the decision of the Court of Errors and Appeals in the case of Rose against the Jerome-Harvey Development Company is at all res adjudicata, for the matter got to the Court of Errors and Appeal upon appeal from an order advised by me striking out the answer and counterclaim filed, on the ground that the answer and counterclaim did not set up a cause of action that was cognizable in equity and my conclusion in striking out the answer was based on the reason that I gave in Vanderbilt against Kipp for striking out a very similar answer, my thought being that the maker of a bond is made a party defendant to the suit merely for the purpose of giving him notice that a foreclosure suit is pending so that he may be made aware of the progress of the suit and when the property is put up for sale, may protect himself against his contingent liability by being a bidder at the sale or induce somebody else to bid, and that the only binding effect of a decree in a foreclosure suit as against the maker of the bond is to fix the amount of the obligation that is due as between

the maker of the bond and mortgage and the holder of the decree and that in any subsequent contest involving liability on the bond the maker of the bond is without legal right to contest the amount of the decree. Now, certainly in this court, in that case, there was no hearing upon the merits of the defense which the present complainant here attempted to interpose in that suit. In this suit he sets up somewhat of a different cause of action. At least it is different ground for relief than the Court of Errors and Appeals said he set up in the foreclosure suit, namely—that he here explicitly charges that the mistake was mutual and that Minnie Rose, through Julius Rose, her husband, who was acting as her agent, participated in that mistake, working a fraud, and that it would be giving Minnie Rose an unconscionable advantage over him to allow that mistake to profit Minnie Rose. I think, then, that he is here in this court with a cause of action in which he is entitled to be heard on the merits and as to which the decision in the Court of Errors and Appeals is not res adjudicata.

We come now to the merits of the case, where these bonds were entered into by Doyne under a mistake on his part and whether the obligation contained in the bonds is a broader obligation than Minnie Rose expected the sureties on the bonds to assume. Defendants' counsel concedes in his argument that there was a mutual mistake in the case of the first bond which is dated in June 1930. I think that that mistake is very plain, very obvious, and that it is an indication, if that was a mistake, that there was a similar mistake in the second bond, the one of November, 1930. Mr. Cruden, who drew both bonds, said that it never was the intention of the parties that their bond should be an indemnification to the mortgagee for anything other than loss that might ensue from mechanics'

lien claims and that when he drew the bonds he never intended to extend the liability under either bond beyond that point. As to the first bond, he is quite clear that Mr. Rose participated in the conference with him that led up to the preparation and execution of that bond, and it is quite obvious, if you will read the second bond and compare it with the first one, that the second bond is a copy of the first bond so far as the condition of the obligation is concerned. I am not clear in my own mind as to what Mr. Cruden did testify as to Mr. Rose's participation in the negotiations, that led up to the execution of the second bond, but I am clear that it never could have been Mr. Rose's intention to exact two bonds in November, 1930 which to some extent, at least as to the second bond, was a duplication of the guarantee contained in the other bond that was executed in November, 1930. In other words, Mrs. Rose, through Mr. Rose, obtained a bond which was a guarantee for the payment of the principal and interest of the mortgage. In making the loan, the natural desire of the lender would be, if he wanted that kind of a bond, to also have a bond which would protect him against mechanics' lien claims, seeing that he was making a loan which was to be used for the construction of a building. He gets the bond with certain sureties on it guaranteeing the payment of principal and interest of the mortgage, and then Mr. Cruden attempts to draw a second bond which will guarantee the mortgagee against any liability or loss or damage from mechanics' lien claims. He says that in that second case he was acting for Mr. Rose and in Mr. Rose's behalf in the preparation of that paper, even though Mr. Rose was not paying for his services. In that case he never intended to draw a bond so that it would cover liability for the payment of the principal and interest of the mortgage. I think Mr. Rose was a participant in the mistake that occurred and that

it would be unfair and unconscionable and in the nature of a fraud upon Doyne, the complainant here, to permit Rose to insist that there was no mistake on his part in the preparation and execution of the bond which is Exhibit C-8 in this case. So, I shall advise a decree in favor of the complainant, reforming both bonds so that they will express the condition whereby the obligors and the sureties guaranteed Mrs. Rose against loss or liability that she might incur by reason of mechanics' lien claims against the property which was covered by the mortgages given co-temporaneous with the two bonds. Is there anything else?

MR. SECLOW: I ask for a counsel fee. I want the court to bear this in mind that in previous matters Mr. Brigadier obtained a counsel fee and I think there ought to be a counsel fee of $500 in this case.

MR. BRIGADIER: I think there should be no counsel fee.

THE COURT: I don't think there ought to be any counsel fee allowed. This suit was brought about by Doyne's own carelessness or foolishness in signing a paper without reading it. He says in his testimony that if he had known these bonds were conditioned for the payment of principal and interest of the mortgage, he would never have signed them. He could have ascertained by reading just what they were, but he says he went into Cruden's office and Mr. Cruden told him that these were mechanics' lien bonds. If he had read them over or had taken any outside advice of his own counsel, he would have known that the bonds were broader in their scope and language than to cover mechanics' lien claims. I get out of patience with people who come into this court and disavow their signatures to a piece of paper on the ground that

they were misinformed as to the contents of the paper and did not read it but relied upon somebody else. Doyne was competent to read and get a clear understanding of the provisions of the bonds. He is a business man of some experience and he ought to have known the danger and foolishness of signing a paper without reading it.

Exhibit C-1

KNOW ALL MEN BY THESE PRESENTS, that JEROME-HARVEY DEVELOPMENT COMPANY, as principal, and HYMAN FLAX, MEYER FLAX, JACOB GOLUSH, MAX DOYNE and ROSE BRADY as sureties, are held and firmly bound unto MINNIE ROSE in the sum of Forty thousand ($40,000) dollars, lawful money of the United States to be paid to the said MINNIE ROSE her heirs, executors, administrators and assigns. To which payment well and truly to be made we bind ourselves, our and each of heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, dated the nineteenth day of June, A. D., 1930.

WHEREAS the said MINNIE ROSE at the request of the said obligors agreed to lend to the said JEROME-HARVEY DEVELOPMENT COMPANY the sum of Twenty thousand ($20,000) dollars to be secured by a mortgage or mortgages which are to be and remain a first and paramount lien, in preference to all other liens, on all that certain lot or tract of land, situate lying and being in the Township of Teaneck, in the County of Bergen and State of New Jersey, described as follows:

BEGINNING at a point in the easterly line of Queen Anne Road as now laid out, which was formerly known as the public road lately laid out from the Hackensack and Fort Lee Turnpike Road to Cedar Lane, which point is distant southerly one hundred four and sixty-one one-hundredths (104.61) feet on a course of south 21 degrees west and along the easterly side of said Queen Anne Road from a corner formed by the said side of Queen Anne Road and the southerly said beginning point being also in the southwest-line of land formerly of Casper P. Westervelt,

erly corner of lands conveyed by George M. Adler and wife to Christian Marof by deed dated January 3, 1861 and recorded in Book P 5 of deeds for Bergen County on page 44; thence running (1) easterly on a course of South 57 degrees East and along the southerly line of lands so conveyed to the said Christian Marof by deed aforesaid, two hundred thirteen and eighty-four one-hundredths (213.84) feet thence (2) south 21 degrees west fifty-two (52) feet; thence (3) westerly and parallel with the first course above run on a course of north 57 degrees west two hundred thirteen and eighty-four one-hundredths (213.84) feet to the easterly line of Queen Anne Road as now laid out; thence (4) northerly and along the easterly side of Queen Anne Road as now laid out and on a course of north 21 degrees east fifty-two (52) feet to the point or place of beginning.

Now The Condition of the above obligation is such that if the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, damages, costs, counsel fees, expenses and disbursements, in which the said Minnie Rose may be involved under any circumstances by reason of making said loan or which may arise or grow due of any liens or any claim of lien against said real estate, heretofore or hereafter attaching thereto, by virtue of "An Act to secure to mechanics and others payment for their labor and materials in erecting any building, (Revision of 1898)" or out of any judgement, attachment or other lien, and keep said real estate free from all such claims and liens so that such mortgage or mortgages shall always be and remain a first and paramount lien on said real estate, then the above obligation shall be null and void, otherwise it shall remain in full force and virtue.

Exhibit C-1

JEROME-HARVEY DEVELOPMENT COMPANY,
By MEYER FLAX, *President.*

Attest:
HYMAN FLAX, *Treasurer.*

Signed, Sealed and Delivered in the presence of:

PERCIVAL G. CRUDEN,
MEYER FLAX (LS)
HYMAN FLAX (LS)
JACOB GOLUSH (LS)
MAX DOYNE (LS)
ROSE BRADY (LS)

STATE OF NEW JERSEY
COUNTY OF HUDSON } ss:

HYMAN FLAX, MEYER FLAX, JACOB GOLUSH, MAX DOYNE and ROSE BRADY, sureties in the within bond, being duly sworn on their respective oaths say that they reside in the City of Bayonne; that they are freeholders of the County of Hudson in this State and own real and personal estate in said County worth at least Twenty thousand ($20,000) dollars, over and above all encumbrances thereon and that they are worth that sum over and above all their just debts and liabilities.

Sworn and subscribed to at Bayonne, this 19th day of June A. D., 1930 before me

PERCIVAL G. CRUDEN,
Master in Chancery of New Jersey.

MEYER FLAX (LS)
HYMAN FLAX (LS)
JACOB GOLUSH (LS)
MAX DOYNE (LS)
ROSE BRADY (LS)

Exhibit C-1

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS:

BE IT REMEMBERED that on this 19th day of June, in the year of our Lord, 1930, before me the subscriber, Master in Chancery of New Jersey personally appeared HYMAN FLAX, MEYER FLAX, JACOB GOLUSH and MAX DOYNE and ROSE BRADY, who I am satisfied are the persons named in the within bond, and 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.

PERCIVAL G. CRUDEN,
Master in Chancery of New Jersey.

Exhibit C-2

KNOW ALL MEN BY THESE PRESENTS, that JEROME-HARVEY DEVELOPMENT COMPANY, a corporation of the State of New Jersey, as principal, and HYMAN FLAX, MEYER FLAX and JACOB GOLUSH as sureties, are held and firmly bound unto MINNIE ROSE in the sum of Forty thousand ($40,000) dollars to be paid to the said Minnie Rose, her heirs and assigns, for which payment well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 19th day of June, nineteen hundred and thirty.

WHEREAS the said Jerome-Harvey Development Company has by instrument bearing even date herewith executed a certain bond to the said Minnie Rose to secure the sum of Twenty thousand ($20,00) dollars, to secure which said bond, the said Jerome-Harvey Development Company has executed and delivered to said Minnie Rose, a certain mortgage bearing even date herewith in the sum of Twenty thousand ($20,000) dollars, payable three years after date, with interest at six percent per annum, payable quarterly, which said mortgage covers premises known as 385 Queen Anne Road, in the Township of Teaneck, County of Bergen and State of New Jersey, and

WHEREAS one of the considerations upon which the said Minnie Rose has granted the said loan and has accepted the said bond and mortgage was that she was to be assured of the receipt of all moneys due or to grow due thereunder, including any and all interest, according to the terms of said bond and mortgage.

Exhibit C-2

Now Therefore, The Condition of the Above Obligation is such that if the above bounden Jerome-Harvey Development Company, Hyman Flax, Meyer Flax and Jacob Golush their heirs, executors, administrators, successors and assigns, do pay or cause to be paid unto the said Minnie Rose, her heirs and assigns, all of the principal, interest and costs due or to grow due on said bond and mortgage when and if the same shall become due and payable, together with any and all costs and expenses, which the said Minnie Rose may be put to in the event of it becoming necessary to foreclose said mortgage, then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof the said Jerome-Harvey Development Company hath caused its corporate seal to be hereto affixed and attested by its Treasurer and these presents to be signed by its President, and the said Hyman Flax, Meyer Flax and Jacob Golush have hereunto set their hands and seals the day and year first above written.

Jerome-Harvey Development Company,
By Meyer Flax, *President.*

Attest:
Hyman Flax, *Treasurer.*

Signed, Sealed and Delivered in the presence of:

Percival G. Cruden,
Jacob Golush (LS)
Hyman Flax (LS)
Meyer Flax (LS)

Exhibit C-3

KNOW ALL MEN BY THESE PRESENTS: That JEROME-HARVEY DEVELOPMENT COMPANY a corporation of the State of New Jersey is held and firmly bound unto MINNIE ROSE of the City of Bayonne, in the County of Hudson and State of New Jersey in the penal sum of Forty thousand ($40,000) Dollars lawful money of the United States of America, to be paid to the said Minnie Rose her heirs or assigns: FOR WHICH PAYMENT well and truly to be made, it binds itself and its successors firmly by these presents. Sealed with its corporate seal and signed by its President. Dated the 19th day of June, One Thousand Nine Hundred and thirty.

THE CONDITION of the above obligation is such that if the above bounden corporation or its successors, shall well and truly pay, or cause to be paid, unto the above named Minnie Rose, her heirs or assigns, the just and full sum of Twenty thousand ($20,000) Dollars on the 19th day of June, which will be in the year One Thousand Nine Hundred and thirty-three, and the interest thereon to be computed from the day of the date hereof at and after the rate of six per cent. per annum, and to be paid quarterly.

It is covenanted and agreed that a payment of One hundred fifty ($150) dollars on account and in reduction of the principal sum due hereunder will be made three months after the date hereof and that a like payment of One hundred fifty ($150) dollars on account and in reduction of said principal sum shall be made quarterly thereafter.

It is further covenanted and agreed that the principal sum due hereunder or any balance thereof may be paid off at any time, upon thirty

(30) days notice in writing given to the mortgagee, or her assigns.

Without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

And It Is Hereby Expressly Agreed, that should any default be made in the payment of the said interest, or installments or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest or installments remain unpaid and in arrear for the space of thirty (30) days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty (60) days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Twenty thousand ($20,000) Dollars with all arrearage of interest thereon, shall, at the option of the said Minnie Rose, her legal representatives or 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 anywise notwithstanding, and the said Mortgagee may at her option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and by this mortgage, and shall be payable on demand with interest at six per centum per annum.

Exhibit C-3

Signed, Sealed and Delivered in the Presence of

JEROME-HARVEY DEVELOPMENT COMPANY,
By MEYER FLAX, *President.*

Attest:
HYMAN FLAX, *Treasurer.*

Exhibit C-4

THIS INDENTURE, Made the nineteenth day of June in the year of our Lord One Thousand Nine Hundred and thirty.

BETWEEN JEROME-HARVEY DEVELOPMENT COMPANY a corporation of the State of New Jersey, party of the first part;

AND MINNIE ROSE of the City of Bayonne, in the County of Hudson and State of New Jersey party of the second part;

WHEREAS, the said Jerome-Harvey Development Company is justly indebted to the said party of the second part, in the sum of Twenty thousand ($20,000) Dollars, lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Forty thousand ($40,000) Dollars, lawful money as aforesaid conditioned for the payment of the said first mentioned sum of Twenty thousand ($20,000) Dollars, lawful money as aforesaid, to the said party of the second part, her heirs or assigns on the nineteenth day of June which will be in the year One Thousand Nine Hundred and thirty-three and interest thereon, to be computed from the day of the date hereof at and after the rate of six (6) per cent. per annum and to be paid quarterly.

It is convenanted and agreed that a payment of One Hundred fifty ($150) dollars on account and in reduction of the principal sum due hereunder will be made three months after the date hereof and that a like payment of One hundred fifty ($150) dollars on account and in reduction of said principal sum shall be made quarterly thereafter.

It is further covenanted and agreed that the

principal sum due hereunder or any balance thereof may be paid off at any time, upon thirty (30) days notice in writing given to the mortgagee, or her assigns.

And It Is Thereby Expressly Agreed that should any default be made in the payment of the said interest and installments or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest and installments or any part thereof remain unpaid and in arrear for the space of thirty (30) days, or said tax, assessment, water rent or other municipal governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty (60) days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Twenty thousand ($20,000) Dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, her heirs or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: and the said Mortgagee may at her option, pay such tax, assessment or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and this mortgage, and shall be payable on demand with interest at six per centum per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Exhibit C-4

Now This Indenture Witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to her heirs and assigns forever,

All that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Teaneck in the County of Bergen and State of New Jersey, more particularly described as follows:

Beginning at a point in the easterly line of Queen Anne Road as now laid out, which was formerly known as the public road lately laid out from the Hackensack and Fort Lee Turnpike Road to Cedar Lane, which point is distant southerly one hundred four and sixty-one one-hundredths (104.61) feet on a course of south 21 degrees West and along the easterly side of said Queen Anne Road from a corner formed by the said side of Queen Anne Road and the southerly line of land formerly of Casper P. Westervelt, said beginning point being also in the southwesterly corner of lands conveyed by George M. Adler and wife to Christian Marof by deed dated January 3, 1861 and recorded in Book P 5 of deeds for Bergen County on page 44; thence running (1) easterly on a course of South 57 degrees East and along the southerly line of lands so conveyed to the said Christian Marof by deed aforesaid, two hundred

thirteen and eighty-four one-hundredths (213.84) feet; thence (2) south 21 degrees west fifty-two (52) feet; thence (3) westerly and parallel with the first course above run and on a course of north 57 degrees west two hundred thirteen and eighty-four one-hundredths (213.84) feet to the easterly line of Queen Anne Road as now laid out; thence (4) northerly and along the easterly side of Queen Anne Road as now laid out and on a course of north 21 degrees east fifty-two (52) feet to the point or place of beginning.

It being the intention to convey by these presents the northerly fifty-two (52) feet of lands which were conveyed by Louis Rayot and wife to Fritz Domrau and Helena Domrau, his wife, by deed dated January 22, 1902 and recorded in book 539 of deeds for Bergen County on page 119.

Being the same premises conveyed to the said Jerome-Harvey Development Company by Fritz Domrau and Helena Domrau, his wife, by deed dated February 26th, 1930 and recorded in book 1703 of deeds for Bergen County on pages 393 &c.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, and remainder and remainders, rents, issues and profits thereof. And Also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To Have and To Hold the above granted and described premises, with the appurtenances, unto the said party of the second part, her heirs or assigns, to her or their own proper use, benefit and behoof forever.

Exhibit C-4

Provided Always, and these presents are upon this express condition, that if the said party of the first part, or its successors shall well and truly pay unto the said party of the second part, her heirs or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said party of the first part for itself and its successors does covenant and agree to pay unto the said party of the second part, her heirs or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

And It Is Also Agreed, by and between the parties to these presents, that the said party of the first part, its successors 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, and in an amount approved by the said party of the second part, her heirs or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six (6) per cent. per annum, from the time of payment of such premium or premiums.

And the Said party of the first part, the owner of the lands above described, for itself, it succes-

sor and assigns, does further convenant and agree to and with the said party of the second part, her heirs and assigns, that it will pay in full, all taxes levied, or to be levied upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto. And the said mortgagor does covenant with the mortgagee that it is seized of an indefeasible estate in fee simple in said premises, and will warrant and forever defend the title thereof unto the mortgagee, her heirs and assigns, against all lawful claims whatsoever.

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Treasurer and these presents to be signed by its President, the day and year first above written.

Signed, Sealed and Delivered in the Presence of

Jerome-Harvey Development Company,
By Meyer Flax, *President.*

Attest:
Hyman Flax, *Treasurer.*

Exhibit C-4

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

BE IT REMEMBERED, that on this 19th day of June in the year of our Lord One Thousand Nine Hundred and thirty before me the subscriber, a Master in Chancery of New Jersey, personally appeared Hyman Flax who, being by me duly sworn on his oath, says that he is the Treasurer of the Jerome-Harvey Development Company the mortgagor named in the within instrument; that Meyer Flax is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

HYMAN FLAX.

Sworn and subscribed before me at Bayonne, N. J., the date aforesaid.

PERCIVAL G. CRUDEN,
Master in Chancery of New Jersey.

Received in the Clerk's Office of the County of Bergen, N. J., on the 26th day of June, A. D., 1930, at 1:25 o'clock in the afternoon, and Recorded in Book 1256 of Mortgages for said County, on page 13 &c.

JAMES W. MERCER,
County Clerk.

Exhibit C-5

THIS INDENTURE, Made the fourteenth day of November, in the year of our Lord One Thousand Nine Hundred and Thirty

BETWEEN JEROME-HARVEY DEVELOPMENT COMPANY a corporation of the State of New Jersey, party of the first part;

AND MINNIE ROSE of the City of Bayonne, in the County of Hudson and State of New Jersey party of the second part;

WHEREAS, the said party of the first part is justly indebted to the said party of the second part, in the sum of Fifteen Thousand ($15,000.) Dollars, lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Thirty Thousand ($30,000) Dollars, lawful money as aforesaid conditioned for the payment of the said first mentioned sum of Fifteen Thousand ($15,000) Dollars, lawful money as aforesaid, to the said party of the second part, her heirs or assigns on the fourteenth day of November, which will be in the year One Thousand Nine Hundred and Thirty-two and interest thereon, to be computed from the day of the date hereof at and after the rate of six per cent. per annum and to be paid quarterly.

It is convenanted and agreed that a payment of One Hundred fifty ($150) dollars on account and in reduction of the principal sum due hereunder will be made quarterly with said interest and in addition thereto.

AND IT IS THEREBY EXPRESSLY AGREED that should any default be made in the payment of the said interest or of any part thereof, on any day whereon the same is made payable, as above ex-

pressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or any part thereof remain unpaid and inarrear for the space of thirty (30) days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty (60) days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Fifteen Thousand ($15,000.) Dollars, with all arrearages of interest thereon, shall, at the option of the said party of the second part, her heirs or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: and the said Mortgagee may at her option, pay such tax, assessment or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and this mortgage, and shall be payable on demand with interest at six per centum per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now This Indenture Witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part at or before the en-

sealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to her heirs and assigns forever,

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Westwood, in the County of Bergen and State of New Jersey:

BEGINNING at a point in the northwesterly side of Third Avenue distant northeasterly one hundred one and forty-five one-hundredths (101.45) feet from the intersection of the northwesterly side of Third Avenue with the northeasterly side of Park Avenue; said beginning point being the northeasterly corner of a brick building erected upon the lands adjoining on the southwesterly side of the lands herein conveyed; thence (1) running on a course North 51 degrees 42 minutes 25 seconds West and along the northeasterly outer face of the wall of the above mentioned building, fifty-five and sixteen one-hundredths (55.16) feet to the northwesterly corner of said building; thence running (2) on a course North 52 degrees 26 minutes 30 seconds West, forty-four and eighty-five one-hundredths (44.85) feet; thence running (3) on a course North 38 degrees 3 minutes 30 seconds East, forty-one and eighty-eight one-hundredths (41.88) feet to the northeasterly line of lands of Clifton F. Trimble and Margaret M. Trimble, his wife; thence running (4) on a course South 52 degrees 52 minutes 45 seconds East along the northeasterly line of the said Clifton F. Trimble and Margaret M. Trimble, his wife, and the line of lands of M. L. Myers and others, one hundred (100) feet to the northwesterly side of Third Avenue, being the northeasterly corner of lands of the said Clifton F. Trimble and Margaret

M. Trimble, his wife; thence running (5) on a course South 38 degrees 3 minutes 30 seconds West and along the northwesterly side of Third Avenue, forty-three and thirty-five one-hundredths (43.35) feet to the point or place of beginning.

Being the same premises conveyed to Jerome-Harvey Development Company by Clifton F. Trimble and Margaret M. Trimble, his wife, by deed dated May 15, 1930 and recorded in liber 1718 of deeds for Bergen County on page 358.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, and remainder and remainders, rents, issues and profits thereof. And Also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To Have and To Hold the above granted and described premises, with the appurtenances, unto the said party of the second part, her heirs or assigns, to her or their own proper use, benefit and behoof forever.

Provided Always, and these presents are upon this express condition, that if the said party of the first part, or its successors shall well and truly pay unto the said party of the second part, her heirs or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said party of the first part for itself and its successors does covenant and agree to pay

unto the said party of the second part, her heirs or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

And It Is Also Agreed, by and between the parties to these presents, that the said party of the first part, its successors 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, and in an amount approved by the said party of the second part, her heirs or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums; and in default thereof for thirty days after demand, the principal sum hereof, with all arrearage of interest thereon, shall, at the option of the party of the second part, her heirs or assigns, become and be due and payable immediately thereafter.

And the Said party of the first part, the owner of the lands above described, for itself, it successors and assigns, does further convenant and agree to and with the said party of the second part, her heirs and assigns, that it will pay in full, all taxes levied, or to be levied upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the

continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto. And the said mortgagor does covenant with the mortgagee that it is seized of an indefeasible estate in fee simple in said premises, and will warrant and forever defend the title thereof unto the mortgagee, her heirs and assigns, against all lawful claims whatsoever.

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Treasurer and these presents to be signed by its President, the day and year first above written.

Jerome-Harvey Development Company,
By Meyer Flax, *President.*

Attest:
Hyman Flax, *Treasurer.*

State of New Jersey, }
County of Hudson, } ss:

Be it Remembered, that on this fourteenth day of November, in the year of our Lord One Thousand Nine Hundred and Thirty, before me the subscriber, a Notary Public of New Jersey, personally appeared Hyman Flax, who, being by me duly sworn on his oath, says that he is the Treasurer of the Jerome-Harvey Development Company, the mortgagor named in the within instrument; that Meyer Flax is the President of said corpora-

tion; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

Sworn and subscribed before me, at Bayonne, N. J., the date aforesaid.

HYMAN FLAX.

ANNA D. HARZ,
Notary Public of New Jersey.

Received in the Clerk's Office of the County of Bergen, N. J., on the 19th day of November, A.D., 1930, at 1.42 o'clock, in the afternoon and recorded in Book 1278 of Mortgages for said County, on page 457, &c.

JAMES W. MERCER,
County Clerk.

Exhibit C-6

KNOW ALL MEN BY THESE PRESENTS: That JEROME-HARVEY DEVELOPMENT COMPANY a corporation of the State of New Jersey is held and firmly bound unto MINNIE ROSE of the City of Bayonne, in the County of Hudson and State of New Jersey in the penal sum of Thirty thousand ($30,000) Dollars lawful money of the United States of America, to be paid to the said Minnie Rose her heirs or assigns: FOR WHICH PAYMENT well and truly to be made, it binds itself and its successors firmly by these presents. Sealed with its corporate seal and signed by its President. Dated the 14th day of November, One Thousand Nine Hundred and thirty.

THE CONDITION of the above obligation is such that if the above bounden corporation or its successors, shall well and truly pay, or cause to be paid, unto the above named Minnie Rose, her heirs or assigns, the just and full sum of Fifteen thousand ($15,000) Dollars on the fourteenth day of November which will be in the year One Thousand Nine Hundred and Thirty-two, and the interest thereon, to be computed from the day of the date hereof at and after the rate of six per cent. per annum, and to be paid quarterly.

It is covenanted and agreed that a payment of One hundred fifty ($150) dollars on account and in reduction of the principal sum due hereunder will be made quarterly with said interest and in addition thereto.

Without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day where-

Exhibit C-6

on the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest remain unpaid and in arrear for the space of thirty (30) days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty (60) days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Fifteen thousand ($15,000) Dollars with all arrearage of interest thereon, shall, at the option of the said Minnie Rose, her legal representatives or 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 anywise notwithstanding, and the said Obligee may at her option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said mortgage and by this Bond, and shall be payable on demand with interest at six per centum per annum.

Signed, Sealed and Delivered in the Presence of

JEROME-HARVEY DEVELOPMENT COMPANY,
By MEYER FLAX, *President.*

Attest:

HYMAN FLAX, *Treasurer.*

Exhibit C-7

KNOW ALL MEN BY THESE PRESENTS, that JEROME-HARVEY DEVELOPMENT COMPANY, a corporation of the State of New Jersey, as principal, and HYMAN FLAX, MEYER FLAX and JACOB GOLUSH as sureties, are held and firmly bound unto MINNIE ROSE in the sum of Thirty thousand ($30,00) dollars to be paid to the said Minnie Rose, her heirs and assigns, for which payment well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of November, 1930.

WHEREAS the Jerome-Harvey Development Company has by instrument bearing even date herewith executed a certain bond to the said Minnie Rose to secure the sum of Fifteen thousand ($15,000) dollars, to secure which said bond, the said Jerome-Harvey Development Company has executed and delivered to said Minnie Rose, a certain mortgage bearing even date herewith in the sum of Fifteen thousand ($15,000) dollars, payable two years after date with interest at six percent per annum, payable quarterly, which said mortgage covers the premises knewn as number 208 Third Avenue, Westwood, being lot 3 in block 162 situated on the northwesterly side of Third Avenue, distant 101.45 feet from Park Avenue in the said Town of Westwood, County of Bergen and State of New Jersey, and

WHEREAS one of the considerations upon which the said Minnie Rose has granted the said loan and has accepted the said bond and mortgage was that she was to be assured of the receipt of all moneys due or to grow due thereunder, including

any and all interest, according to the terms of said bond and mortgage.

Now Therefore, The Condition of the Above Obligation is such that if the above bounden Jerome-Harvey Development Company, Hyman Flax, Meyer Flax and Jacob Golush their heirs, executors, administrators, successors and assigns, do pay or cause to be paid unto the said Minnie Rose, her heirs and assigns, all of the principal, interest and costs due or to grow due on said bond and mortgage when and if the same shall become due and payable, together with any and all costs and expenses, which the said Minnie Rose may be put to in the event of it becoming necessary to foreclose said mortgage, then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof the said Jerome-Harvey Development Company hath caused its corporate seal to be hereto affixed and attested by its Treasurer and these presents to be signed by its President, and the said Hyman Flax, Meyer Flax and Jacob Golush have hereunto set their hands and seals the day and year first above written.

Jerome-Harvey Development Company,
By Meyer Flax, *President.*

Attest:
Hyman Flax, *Treasurer.*

Signed, Sealed and Delivered in the presence of:

Percival G. Cruden,
Meyer Flax (LS)
Hyman Flax (LS)

Exhibit C-8

KNOW ALL MEN BY THESE PRESENTS, that JEROME-HARVEY DEVELOPMENT COMPANY, as principal, and HYMAN FLAX, MEYER FLAX, JACOB GOLUSH and MAX DOYNE as sureties are held and firmly bound unto MINNIE ROSE in the sum of Thirty thousand ($30,000) dollars, lawful money of the United States to be paid to the said MINNIE ROSE her heirs, executors, administrators and assigns. To which payment well and truly to be made we bind ourselves, our and each of our, heirs, executors, administrators, successors and assigns, jointly and severally by these presents. Sealed with our seals, dated the 17th day of November, A. D., 1930.

WHEREAS the said MINNIE ROSE at the request of the said obligors agreed to lend to the said JEROME-HARVEY DEVELOPMENT COMPANY the sum of Fifteen thousand ($15,000) dollars to be secured by a mortgage or mortgages which are to be and remain a first and paramount lien, in preference to all other liens, on all that certain tract of land, situate lying and being in the Township of Westwood, in the County of Bergen and State of New Jersey:

BEGINNING at a point in the northwesterly side of Third Avenue distant northeasterly 101.45 feet from the intersection of the northwesterly side of Third Avenue with the northeasterly side of Park Avenue. BEING the same premises conveyed to the Jerome-Harvey Development Company by Clifton F. Trimble and wife by deed dated May 15, 1930 and recorded in book 1718 of deeds for Bergen County on page 358.

NOW THE CONDITION of the above obligation is such that if the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, dam-

ages, costs, counsel fees, expenses and disbursements, in which the said Minnie Rose may be involved under any circumstances by reason of making said loan or which may arise or grow due of any liens or any claim of lien against said real estate, heretofore or hereafter attaching thereto, by virtue of "An Act to secure to mechanics and others payment for their labor and materials in erecting any building, (Revision of 1898)" or out of any judgement, attachment or other lien, and keep said real estate free from all such claims and liens so that such mortgage or mortgages shall always be and remain a first and paramount lien on said real estate, then the above obligation shall be null and void, otherwise it shall remain in full force and virtue.

JEROME-HARVEY DEVELOPMENT COMPANY,
By MEYER FLAX, *President.*

Attest:
HYMAN FLAX, *Treasurer.*

MEYER FLAX (LS)
HYMAN FLAX (LS)
MAX DOYNE (LS)
JACOB GOLUSH (LS)

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS:

HYMAN FLAX, MEYER FLAX, JACOB GOLUSH and MAX DOYNE sureties in the within bond, being duly sworn on their respective oaths say that they reside at Bayonne. That they are freeholders of the County of Hudson in this State and own real estate and other securities in said County of Hudson worth at least $30,000 over and above all encumbrances thereon and that they are worth that

sum over and above all their just debts and liabilities.

MEYER FLAX (LS)
HYMAN FLAX (LS)
MAX DOYNE (LS)
JACOB GOLUSH (LS)

Sworn and subscribed at Bayonne, this 17th day of November, A. D., 1930 before me

PERCIVAL G. CRUDEN,
Master in Chancery of New Jersey.

Bill of Complaint

(Filed October 7, 1932)

IN CHANCERY OF NEW JERSEY

92-536

To the Honorable Edwin Robert Walker,

Chancellor of the State of New Jersey:

The complainant, Minnie Rose, residing in the City of Bayonne, County of Hudson and State of New Jersey, respectfully shows that:

1. On the 14th day of November, 1930, Jerome-Harvey Development Company, a corporation of the State of New Jersey being indebted to Minnie Rose in the sum of Fifteen thousand ($15,000.00) Dollars executed to her a bond of that date to secure that sum payable on the 14th day of November, 1932, with interest at the rate of six per cent per annum payable quarterly and with payment of One hundred fifty ($150.00) Dollars quarterly in reduction of the aforesaid principal sum from the date of said bond.

2. To secure payment of the bond, the said Jerome-Harvey Development Company executed to said Minnie Rose, a mortgage of even date with the bond, and thereby conveyed to her in fee, the lands 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 proven was recorded in the office of the Clerk of the County of Bergen on the 19th day of November, 1930, in Book 1278 of Mortgages, page 457.

3. The mortgaged premises are described as follows:

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Westwood, in the County of Bergen and State of New Jersey:

BEGINNING at a point in the northwesterly side of Third Avenue distant northeasterly one hundred one and forty-five one-hundredths (101.45) feet from the intersection of the northwesterly side of Third Avenue with the northeasterly side of Park Avenue; said beginning point being the northeasterly corner of a brick building erected upon the lands adjoining on the southwesterly side of the lands herein conveyed; thence (1) running on a course North 51 degrees 42 minutes 25 seconds West and along the northeasterly outer face of the wall of the above mentioned building, fifty-five and sixteen one-hundredths (55.16) feet to the northwesterly corner of said building; thence running (2) on a course North 52 degrees 26 minutes 30 seconds West, Forty-four and eighty-five one-hundredths (44.85) feet; thence running (3) on a course North 38 degrees 3 minutes 30 seconds East, Forty-one and eighty-eight one-hundredths (41.88) feet to the northeasterly line of lands of Clifton F. Trimble and Margaret M. Trimble, his wife; thence running (4) on a course South 52 degrees 52 minutes 45 seconds East along the Northeasterly line of the said Clifton F. Trimble and Margaret M. Trimble, his wife, and the line of lands of M. L. Myers and others, One hundred (100) feet to the Northwesterly side of Third Avenue, being the Northeasterly corner of lands of the said Clifton F. Trimble and Margaret M. Trimble, his wife; thence running (5) on a course South 38 degrees 3 minutes 30 seconds West and along the Northwesterly side of Third Avenue, Forty-three and thirty-five one-hundredths (43.35) feet to the point or place of beginning.

4. Both bond and mortgage contained an agreement that if any installment of principal or interest remain unpaid for thirty days after the same shall fall due, then the whole principal sum, with all unpaid interest should at the option of the mortgagee, her heirs or assigns, become immediately due.

5. On the 15th day of May, 1930, the Jerome-Harvey Development Company executed a mortgage on the above described premises to Clifton F. Trimble and Margaret M. Trimble, his wife, in the sum of Seventeen thousand five hundred ($17,500) Dollars, which mortgage was recorded on the 24th day of May, 1930, in the County Clerk's Office of Bergen County in Book 1246, page 325.

6. By written agreement dated the 14th day of November, 1930, the said Clifton F. Trimble and Margaret M. Trimble, his wife, agreed to subordinate and postpone, and did subordinate and postpone to the priority of the aforesaid mortgage made by the Jerome-Harvey Development Company to Minnie Rose, the complainant, which agreement was acknowledged and recorded on the 19th day of November, 1930, in the office of the Clerk of Bergen County in Book 115, page 656.

Any interest which the said Clifton F. Trimble and/or Margaret M. Trimble, his wife, may have had in said lands is subject to the lien of the complainant's mortgage.

7. On the 17th day of November, 1930, the Jerome-Harvey Development Company as principal, and Hyman Flax, Jacob Golush and Max Doyne, as sureties, entered into a bond under seal with the complainant, Minnie Rose, in the penal sum of Thirty thousand ($30,000.00) Dollars to secure the repayment of the sum of Fifteen thousand ($15,000.00) Dollars to the complainant, con-

dition of said bond being that the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, damages, costs, counsel fees, expenses and disbursements, in which the said Minnie Rose may be involved under any circumstances by reason of making the aforesaid loan of Fifteen thousand ($15,000.00) Dollars to Jerome-Harvey Development Company.

Any interest which the said Jerome-Harvey Development Company, Hyman Flax, Jacob Golush and Max Doyne may have in said lands is subject to the lien of the complainant's mortgage.

8. On the 10th day of March, 1931 said Jerome-Harvey Development Company, a corporation of the State of New Jersey, conveyed the said land by deed of that date to Myers & Randall Realty Co., a corporation of the State of New Jersey, which deed having been duly proved was recorded on the 27th day of October, 1931, in the Clerk's Office of Bergen County in Book 1801 of Deeds, on page 457.

Any interest which the said Myers & Randall Realty Co., a corporation of the State of New Jersey, may have in said lands, is subject to the lien of complainant's mortgage.

9. On the 14th day of August, 1932, there fell due an installment of One hundred fifty ($150.00) Dollars on account of the principal of said mortgage, which installment has remained unpaid for more than thirty days thereafter and no part has yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

10. On the 14th day of August, 1932, there fell due a quarterly installment of interest which has

remained unpaid for more than thirty days thereafter and no part has been paid yet. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

11. On the 1st day of December, 1931, there became due the taxes assessed against the property for the last half of the year 1931 which has remained unpaid for a space of sixty days and is still unpaid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

12. On the 1st day of June, 1932, there became due the taxes assessed against the property for the first half of the year 1932 which has remained unpaid for a space of sixty days and is still unpaid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

13. The Myers & Randall Realty Co., a corporation of the State of New Jersey is now in possession of the mortgaged premises.

14. There has been paid on account of the principal of said mortgage the sum of Nine hundred ($900.00) Dollars leaving the sum of Fourteen thousand one hundred ($14,100.00) Dollars now due and owing on the principal of said mortgage together with interest thereon from the 14th day of May, 1932.

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

1. That the said Jerome-Harvey Development Company, a corporation of the State of New Jersey, Myers & Randall Realty Co., a corporation of the State of New Jersey, Hyman Flax, Jacob Golush, Max Doyne, Clifton F. Trimble and Margaret M. Trimble, his wife, who are the defendants

in this suit may answer this Bill of Complaint and each statement therein made.

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

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

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

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

MAURICE C. BRIGADIER,
Solicitor and of Counsel with Complainant.

Answer and Counterclaim

(Filed November 14, 1932)

IN CHANCERY OF NEW JERSEY

92-536.

The defendant, Max Doyne, residing in the City of Bayonne, in the County of Hudson and State of New Jersey, answering the bill of complaint, says:

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13 and 14 of the bill of complaint, and therefore leaves the complainant to her proof.

2. The allegations of paragraph 7 of the bill of complaint are denied.

3. This defendant was a materialman who had furnished materials for the erection of the building on the mortgaged premises and he was requested by the officers of the Jerome-Harvey Development Company to execute a bond against mechanics' lien claims for the purpose of indemnifying the complainant against any loss or damage by reason of the filing of any mechanics' lien claims against the said lands and building, the erection of which had shortly theretofore been completed. This defendant had no interest of any nature in said mortgaged premises or in the said Jerome-Harvey Development Company. Upon the request of the said Jerome-Harvey Development Company, or some of its officers, and in the belief that he was executing a bond merely for the purpose of indemnifying the complainant against any loss by reason of the filing of any mechanics' lien claims by any persons entitled to file the same, this defendent executed a bond on November 17th, 1930. That the bond mentiined in paragraph 7

of the bill of complaint, which purports to indemnify the said complainant and which purports to obligate this defendant further than any loss which could be sustained by the said complainant by reason of the filing of any lien claims, was executed by this defendant without reading the same or without knowledge of its contents, and on the representation of the other parties to said bond and their agents that said bond was limited only to the indemnity of the complainant against loss by the filing of mechanics' lien claims, and the bond mentioned in paragraph 7 of the bill of complaint was executed contrary to the intention of the parties thereto and of this defendant, and as a result of the mutual mistake and inadvertence of the parties to such bond.

4. That the execution of the bond mentioned in paragraph 7 of the bill of complaint by this defendenat was induced by the misrepresentation of the other parties to said bond and their agents that the said bond was an indemnity against such loss only as could accrue to the said complainant by reason of the filing of mechanics' lien claims, and this defendant, because of such misrepresentations and believing that said bond was an indemnity bond only against mechanics' liens, executed the same. Had he been aware of the contents and scope of said bond, he would not have executed the same.

5. That no loss has been or will be sustained by the said complainant as a result of the filing of any mechanics' lien claims. All persons who had a right to file mechanics' lien claims have been paid. That in addition to the parties mentioned in paragraph 7 of the bill of complaint, Meyer Flax executed said bond as one of the sureties and is a necessary party to this suit.

6. That this defendant until service upon him of subpoena in the within foreclosure suit was unaware of the contents of the bond mentioned in paragraph 7 of the bill of complaint, he, until service of such process, having believed that such bond was a bond to indemnify the complainant against mechanics' lien claims only.

WHEREFORE, this defendant prays that:

(a) That the bill of complaint be dismsised as against him with costs.

(b) That the Chancellor order and decree that the bond mentioned in paragraph 7 of the bill of complaint was executed as a result of the mutual mistake of the parties thereto, and that such bond be referred in such manner that it shall be in accord with the intention of this defendant and the other parties thereto, viz: As an indemnity against mechanics' lien claims and other proceedings thereunder only.

(c) That the Chancellor order and decree that the execution of the bond by this defendant mentioned in paragraph 7 of the bill of complaint was procured through fraud and that such bond be cancelled and rescinded.

(d) That this court award to this defendant such other and further relief as may be just.

By way of counterclaim against Minnie Rose, Jerome-Harvey Development Company, Hyman Flax and Jacob Golush, who are parties to this suit, and Meyer Flax and Rose Brady, "third parties," this counterclaimant, Max Doyne, says that:

1. All of the allegations of the answer are hereby repeated and incorporated by reference as though herein fully set forth.

2. On or about June 19th, 1930, this counterclaimant as surety executed a bond in the penal sum of $40,000, conditioned for the payment of the principal sum of $20,000, which bond was executed by the Jerome-Harvey Development Company, as principal, and Hyman Flax, Meyer Flax, Jacob Golush, Max Doyne and Rose Brady, as sureties, and a true copy of the contents of which bond is hereby annexed, marked "Schedule 1" and made part hereof.

3. That said bond was executed under the like circumstances, conditions and misrepresentations as set forth in the foregoing answer concerning the execution of the bond dated November 17th, 1930 mentioned in paragraph 7 of the bill of complaint.

4. That Meyer Flax was a party and one of the sureties who executed the bond mentioned in paragraph 7 of the bill of complaint.

5. That this counterclaimant until service upon him of subpoena in the within foreclosure suit was unaware of the contents of the bond dated November 17th, 1930, and the bond dated June 19th, 1930, hereinbefore referred to. That after service of such process, he made inquiry concerning the contents of such bonds, and learned then for the first time that said bonds were other than bonds given merely to indemnify against the filing of mechanics' liens claims.

WHEREFORE, this counterclaimant prays:

(a) That Minnie Rose, Jerome-Harvey Development Company, Hyman Flax, Jacob Golush, Meyer Flax and Rose Brady, may answer this counterclaim and each statement therein made.

(b) That a writ of subpoena may issue commanding said "third parties," Meyer Flax and Rose Brady, to answer this counterclaim and

abide by such decree as this court may make in the premises.

(c) That this court adjudge and decree that the bond dated November 17th, 1930, and referred to in paragraph 7 of the bill of complaint, and also a bond referred to in paragraph 2 of this counterclaim as "Schedule 1," be decreed to have been executed as a result of the mutual mistake of the parties thereto, and that such bonds be reformed so that their effect shall be limited only to an indemnity against loss which the complainant could sustain by reason of the filing of mechanics' lien claims:

(d) or that in the alternative, this court adjudge and decree that said bonds mentioned in the last preceding paragraph *(c)* of this counterclaim were executed by this counterclaimant as a result of fraud, and that it be decreed by this court that such bonds be cancelled and rescinded because of such fraud;

(e) and that this court award this counterclaimant such other and further relief as may be just.

ALEXANDER SECLOW,
Solicitor of Defendant, Max Doyne.

SCHEDULE "1."

KNOW ALL MEN BY THESE PRESENTS, that JEROME-HARVEY DEVELOPMENT COMPANY, as principal, and HYMAN FLAX, MEYER FLAX, JACOB GOLUSH, MAX DOYNE and ROSE BRADY, as sureties, are held and firmly bound unto MINNIE ROSE in the sum of Forty thousand ($40,000) dollars, lawful money of the United States to be paid to the said MINNIE ROSE, her heirs, executors, administrators and assigns. To which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, dated the nineteenth day of June, A. D., 1930.

WHEREAS, the said MINNIE ROSE at the request of the said obligors agreed to lend to the said JEROME-HARVEY DEVELOPMENT COMPANY the sum of Twenty thousand ($20,000) dollars to be secured by a mortgage or mortgages which are to be and remain a first and paramount lien, in preference to all other liens, on all that certain lot or tract of land, situate, lying and being in the Township of Teaneck, in the County of Bergen and State of New Jersey, described as follows:

BEGINNING at a point in the easterly line of Queen Anne Road as now laid out, which was formerly known as the public road lately laid out from the Hackensack and Fort Lee Turnpike Road to Cedar Lane, which point is distant Southerly One hundred four and sixty-one one-hundredths (104.61) feet on a course of south 21 degrees west and along the Easterly side of said Queen Anne Road from a corner formed by the said side of Queen Anne Road and the Southerly line of land formerly of Casper P. Westervelt, said beginning point being also in the Southwesterly corner of lands conveyed by George M. Adler and wife to Christian Marof by deed dated January 3, 1861 and recorded in Book P5 of deeds for Bergen County on page 44; thence running (1) easterly on a course of South 57 degrees East and along the Southerly line of lands so conveyed to the said Christian Marof by deed aforesaid, two hundred thirteen and eighty-four one-hundredths (213.84) feet; thence (2) South 21 degrees West Fifty-two (52) feet; thence (3) Westerly and parallel with the first course above run and on a course of North 57 degrees West Two hundred thirteen and eighty-four one-hundredths (213.84) feet

to the Easterly line of Queen Anne Road as now laid out; then (4) Northerly and along the Easterly side of Queen Anne Road as now laid out and on a course of North 21 degrees East Fifty-two (52) feet to the point or place of beginning.

NOW THE CONDITION of the above obligation is such that if the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, damages, costs, counsel fees, expenses and disbursements, in which the said Minnie Rose may be involved under any circumstances by reason of making said loan or which may arise or grow due of any liens or any claim of lien against said real estate, heretofore or hereafter attached thereto, by virtue of "An Act to secure to mechanics and others payment for their labor and materials in erecting any building, (Revision of 1898)" or out of any judgment, attachment or other lien, and keep said real estate free from all such claims and liens so that such mortgage or mortgages shall always be and remain a first and paramount lien on said real estate, then the above obligation shall be null and void, otherwise it shall remain in full force and virtue.

JEROME-HARVEY DEVELOPMENT COMPANY,
By.....
President.

ATTEST:

.....
Treasurer.

Signed, sealed and delivered

.....(LS)
.....(LS)
.....(LS)
.....(LS)
.....(LS)

STATE OF NEW JERSEY } *ss:*
COUNTY OF HUDSON }

HYMAN FLAX, MEYER FLAX, JACOB GOLUSH, MAX DOYNE and ROSE BRADY, *sureties* in the within bond, being duly sworn on their respective oaths say that they reside in the City of Bayonne; that they are freeholders of the County of Hudson in this State and own real estate in said County worth at least Twenty thousand ($20,000) dollars, over and above all encumbrances thereon and that they are worth that sum over and above all their just debts and liabilities.

Sworn and subscribed to at Bayonne, this 19th day of June, A. D., 1930, before me,

.....

.....(LS)
.....(LS)
.....(LS)
.....(LS)
.....(LS)

STATE OF NEW JERSEY } *ss:*
COUNTY OF HUDSON }

BE IT REMEMBERED that on this 19th day of June, in the year of our Lord, 1930, before me personally appeared HYMAN FLAX, MEYER FLAX, JACOB GOLUSH and MAX DOYNE and ROSE BRADY, who I am satisfied are the persons named in the within bond, and 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.

Notice to Strike Answer and Counterclaim

(Filed November 28, 1932)

IN CHANCERY OF NEW JERSEY

92-536

To: Max Doyne, defendant, and/or Alexander Seclow, his solicitor:

Sir:

Please take notice that I shall move on the 28th day of November, 1932, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, before the Chancellor at the Chancery Chambers, 1 Exchange Place, Jersey City, New Jersey, for an Order striking out the answer filed by you in the above entitled cause on the ground that same fails to disclose any defense in equity to the bill of complaint filed in the above entitled cause and take further notice that at the same time, I shall move to strike out the counterclaim filed by you in the above entitled cause on the ground that same fails to disclose any cause of action cognizable in Equity and on the further ground that the defendant, Max Doyne, is barred by his own laches from obtaining the relief sought in the said counterclaim.

Maurice C. Brigadier,
Solicitor for and of Counsel with Complainant.

Order Striking Answer and Counterclaim

This matter being opened to the court by Maurice C. Brigadier, solicitor for the complainant, in the presence of Alexander Seclow, solicitor for the defendant, Max Doyne, upon the return of a notice of motion to strike the answer and counterclaim of the defendant, Max Doyne, filed in the above entitled cause; and the court having read the pleadings and having heard the arguments of counsel; and it appearing that the aforesaid answer does not state any defense cognizable in equity and that the aforesaid counterclaim does not state any cause of action cognizable in equity, as a counterclaim to the above entitled bill.

It is on this 28th day of November, 1932, ORDERED that the answer and counterclaim filed by the defendant, Max Doyne, in the above entitled cause be struck out, with costs to complainant in which shall be included a counsel fee of $35.

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

LUTHER A. CAMPBELL,
C.

Notice of Appeal

(Filed December 7, 1932)

IN CHANCERY OF NEW JERSEY

Between

MINNIE ROSE,
Complainant,

—and—

JEROME-HARVEY DEVELOPMENT COMPANY, a Corporation of New Jersey, *et als.*,
Defendants

On Bill, &c.

The defendant, Max Doyne, hereby appeals from the final order or decree and from the order or decree, made in the above entitled cause on November 28th, 1932, by the Chancellor on the advice of Vice-Chancellor James F. Fielder, and the said defendant, Max Doyne, appeals from the whole and every part of said order and decree dated November 28th, 1932, to the Court of Errors and Appeals in the Last Resort in all Causes.

ALEXANDER SECLOW,
Solicitor for and of Counsel with Defendant, Max Doyne.

Dated December 6th, 1932.

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

ALEXANDER SECLOW,
Of Counsel with Defendant, Max Doyne.

Acknowledgment of Service

Service of a copy of the within notice of appeal is acknowledged this 6th day of December, 1932.

MAURICE C. BRIGADIER,
Solicitor of Complainant, Minnie Rose.

Remittitur

NEW JERSEY COURT OF ERRORS AND APPEALS

February Term, 1933

Between MINNIE ROSE, *Complainant-Respondent* —and— JEROME-HARVEY DEVELOPMENT COMPANY, *Defendants* MAX DOYNE, *Defendant-Appellant*	ON APPEAL FROM CHANCERY DECREE OF AFFIRMANCE REMITTITUR.

This cause coming on to be heard at the February Term, one thousand nine hundred and thirty-three, and being argued by Alexander Seclow, counsel for the appellant, and Maurice C. Brigadier, counsel for the respondent, and the Court having taken time to consider the same, and being of the opinion that the decree of the Chancellor should be affirmed in all things—

It is now, on this 28th day of April, in the year of our Lord, one thousand nine hundred thirty-three ordered, adjudged and decreed, that the decree of the Chancellor be in all things affirmed with costs; and that the record and proceedings be remitted to the Court of Chancery, to be therein proceeded on according to law and the practice of said Court.

On motion of
MAURICE C. BRIGADIER,
Solicitor and of Counsel for Respondent.

A true copy.

THOMAS A. MATHIS, *Clerk.*

Decree Pro Confesso

(Filed May 25th, 1933)

IN CHANCERY OF NEW JERSEY

Between MINNIE ROSE, *Complainant-Respondent* —and— JEROME-HARVEY DEVELOPMENT COMPANY, *Defendants*	On Bill, &c. DECREE PRO CONFESSO.

This matter being opened to the Court by MAURICE C. BRIGADIER, Solicitor of the Complainant and it appearing that process of subpoena calling upon the defendants to answer the complainant's Bill of Complaint, has been duly issued and returned served upon the defendant, Max Doyne, and that said defendant, Max Doyne, has filed an Answer and Counterclaim to the said Bill of Complaint, which Answer and Counterclaim was stricken out by the order of the Chancellor (Advised by the Honorable James F. Fielder, Vice-Chancellor); and

It further appearing that an appeal was taken from the Order of the Chancellor to the Court of Errors and Appeals; and

It further appearing that the Order of the Chancellor striking out the Answer and Counterclaim of the defendant, Max Doyne, was affirmed by the Court of Errors and Appeals on the 28th day of April, 1933.

It is, thereupon, on this 25th day of May, 1933, on motion of MAURICE C. BRIGADIER, Solicitor of

the complainant ORDERED that said complainant's Bill of Complaint be and the same is hereby taken as confessed against the said defendant, Max Doyne, to the end that such Decree may be made against him as the Court shall deem equitable and just.

LUTHER A. CAMPBELL,
C.

Decree Pro Confesso

(Filed January 6, 1933)

IN CHANCERY OF NEW JERSEY

Between
MINNIE ROSE, *Complainant,*
—and—
JEROME-HARVEY DEVELOPMENT COMPANY, a Corporation of New Jersey, MYERS & RANDALL REALTY CO., a Corporation of New Jersey; HYMAN FLAX, JACOB GOLUSH, MAX DOYNE, CLIFTON F. TRIMBLE and MARGARET M. TRIMBLE, his wife, *Defendants.*

On Bill, &c.
DECREE PRO CONFESSO.

This cause, being opened to the Court by MAURICE C. BRIGADIER, of counsel with the complainant, and it appearing that process of subpoena for the appearance of the defendants hath been duly issued and returned served by the Sheriff of the County of Hudson upon JEROME-HARVEY DEVELOPMENT COMPANY, a corporation of New Jersey, HYMAN FLAX, JACOB GOLUSH, and by the Sheriff of the County of Bergen upon MYERS & RANDALL REALTY CO., a corporation of New Jersey, CLIFTON F. TRIMBLE, and MARGARET M. TRIMBLE, his wife.

And that the order of this Court, made on the 7th day of October, 1932 last past, directing JEROME-HARVEY DEVELOPMENT COMPANY, a corporation of New Jersey, MYERS & RANDALL REALTY CO., a corporation of New Jersey, HYMAN FLAX, JACOB GOLUSH, CLIFTON F. TRIMBLE, and MARGARET M. TRIMBLE, his wife, the said defendants to ap-

pear, and answer the complainants bill on or before twenty days after service upon them of said subpoena, and that the said defendants, JEROME-HARVEY DEVELOPMENT COMPANY, a corporation of New Jersey, MYERS & RANDALL REALTY CO., a corporation of New Jersey, HYMAN FLAX, JACOB GOLUSH, CLIFTON F. TRIMBLE and MARGARET M. TRIMBLE, his wife, have not, nor have any or either of them, filed any answer to said bill, within the time limited by law and said order, or at any other time, but that they have wholly failed and neglected so to do:

It is thereupon, on this 6th day of January, in the year of Our Lord One Thousand Nine Hundred and Thirty-three ordered, adjudged, and decreed, that the said bill be taken as confessed as against the said defendants, JEROME-HARVEY DEVELOPMENT COMPANY, a corporation of New Jersey, MYERS & RANDALL REALTY CO., a corporation of New Jersey, HYMAN FLAX, JACOB GOLUSH, CLIFTON F. TRIMBLE and MARGARET M. TRIMBLE, his wife, to the end that such decree may be made against them as the Chancellor shall think equitable and just.

LUTHER A. CAMPBELL,
C.

A true copy.
FERD GARRETSON, *Clerk.*

Master's Report

(Filed June 5, 1933)

IN CHANCERY OF NEW JERSEY

Between MINNIE ROSE, *Complainant,* —and— JEROME-HARVEY DEVELOPMENT COMPANY, a Corporation of New Jersey, *et als,* *Defendants.*	On Bill, &c. MASTER'S REPORT

I, NATHAN L. GOODMAN, one of the Masters in Chancery of the State of New Jersey, do hereby certify and report to His Honor, the Chancellor, that I have seen the bond and mortgage marked Exhibits C-1 and C-2 mentioned in the Bill of Complaint in this cause and that there is due this complainant on the bond, payment whereof was intended to be secured by the said mortgage, the sum of $14,100.00 with interest thereon from the 14th day of May, 1932 as by Schedule hereto annexed will more fully appear.

There is also due to Maurice C. Brigadier, the sum of $10.32 for searching the records in connection with this property made necessary in bringing these foreclosure proceedings as appears from the affidavit filed herewith.

Dated: June 2nd, 1933.

NATHAN L. GOODMAN,
A Master in Chancery of New Jersey.

SCHEDULE

Bond bearing date the 14th day of November, 1930 in the penal sum of $30,000.00 conditioned for the payment of $15,000.00 in two years, with lawful interest at the rate of 6% per annum, secured by the mortgage in the complainant's bill mentioned	$15,000	
Principal paid	900	
Amount due on bond		$14,100.00
Interest from May 14, 1932 to June 1st, 1933		884.59
Amount due complainant, June 1st, 1933		$14,984.59

MASTER'S FEES

Making Report	$10.00
Drawing Report	2.60
Attendance	6.00
Two Exhibits	.30
Total	$18.90

NATHAN L. GOODMAN,
Master in Chancery of New Jersey.

Final Decree

(Filed June 5, 1933)

IN CHANCERY OF NEW JERSEY

Between

MINNIE ROSE,
Complainant,

—and—

JEROME-HARVEY DEVELOPMENT COMPANY, a Corporation of New Jersey, *et als,*
Defendants

On Bill, &c.
FINAL DECREE.

This cause being opened to the Court by MAURICE C. BRIGADIER, Solicitor of the complainant, and the complainant's Bill having heretofore been taken as confessed against the defendants, Jerome-Harvey Development Company, a corporation of New Jersey, MYERS & RANDALL REALTY CO., a corporation of New Jersey, HYMAN FLAX, JACOB GOLUSH, MAX DOYNE, CLIFTON F. TRIMRLE, and MARGARET M. TRIMBLE, his wife whereupon, and upon reading a report on file made by NATHAN L. GOODMAN, one of the Masters of this Court, bearing date the 2nd day of June, 1933, whereby it appears that there is due to the complainant for principal and interest on her mortgage the sum of $14,984.59; and that in the opinion of the Master, it will be necessary to sell the entire mortgaged premises to raise and pay the moneys due to the complainant, together with the costs of this suit and for that purpose sale should be made of

all that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Westwood, in the County of Bergen and State of New Jersey:

BEGINNING at a point in the northwesterly side of Third Avenue distant northeasterly one hundred one and forty-five one-hundredths (101.45) feet from the intersection of the northwesterly side of Third Avenue with the northeasterly side of Park Avenue; said beginning point being the northeasterly corner of a brick building erected upon the lands adjoining on the southwesterly side of the lands herein conveyed; thence (1) running on a course North 51 degrees 42 minutes 25 seconds West and along the northeasterly outer face of the wall of the above mentioned building fifty-five and sixteen one-hundredths (55.16) feet to the northwesterly corner of said building; thence running (2) on a course North 52 degrees 26 minutes 30 seconds West, forty-four and eighty-five one-hundredths (44.85) feet; thence running (3) on a course North 38 degrees 3 minutes 30 seconds East, forty-one and eighty-eight one-hundredths (41.88) feet to the northeasterly line of lands of Clifton F. Trimble and Margaret M. Trimble, his wife; thence running (4) on a course South 52 degrees 52 minutes 45 seconds East along the northeasterly line of the said Clifton F. Trimble and Margaret M. Trimble, his wife, and the line of lands of M. L. Myers and others, one hundred (100) feet to the northwesterly side of Third Avenue, being the northeasterly corner of lands of the said Clifton F. Trimble and Margaret M. Trimble, his wife; thence running (5) on a course South 38 degrees 3 minutes 30 seconds West and along the northwesterly side of Third Avenue, forty-three and thirty-five one-hun-

dredths (43.35) feet to the point or place of beginning.

and no cause appearing or being shown to the contrary;

It is, on this 5th day of June, 1933, ORDERED, ADJUDGED and DECREED, that the said report and all the matters and things therein contained do stand ratified and confirmed; that the said mortgaged premises be sold as aforesaid, to raise and satisfy the money due to the said complainant, that is to say, to pay and satisfy unto the complainant, the sum of $14,984.59 together with lawful interest thereon to be computed from the 2nd day of June, 1933, being the date of the master's report, with the complainant's costs to be taxed, including a counsel fee of $174.00, which is hereby allowed to said complainant; and that a writ of *fieri facias* issue for that purpose out of this court, directed to the Sheriff of the County of Bergen, commanding him to make sale according to law of said mortgaged premises, and that out of the money arising from said sale he pay to the complainant or her solicitor, her said debt, interest and costs, and that in case more money shall be raised by said sale than shall be sufficient to answer such payments, that such surplus be brought into this court, to abide the further order of this court, unless otherwise previously disposed of by 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 premises when sold as aforesaid by virtue of this Decree.

LUTHER A. CAMPBELL,

C.

Order

(Filed June 5, 1933)

IN CHANCERY OF NEW JERSEY

92-536

Between

MINNIE ROSE,
Complainant,

—and—

JEROME-HARVEY DEVELOPMENT COMPANY, a Corporation of New Jersey, MAX DOYNE, *et als.*,
Defendants.

On Bill, &c.
ORDER.

This matter being opened to the court by Alexander Seclow, solicitor for the defendant Max Doyne, in the presence of Maurice C. Brigadier, solicitor of the complainant Minnie Rose, upon notice of motion by the defendant Max Doyne to permit the amendment of the answer and counter-claim heretofore filed in this cause and said solicitor for said defendant submitting a form of proposed amendment of said answer and of said counter-claim which he desired to file and the court having heard the argument of counsel and it appearing that the answer and counter-claim heretofore filed by said defendant have been stricken out and that a decree pro confesso has been entered against said defendant and further that the proposed amendmenut of the answer does not disclose an equitable defence to the complainant's cause of action and that said proposed counter-claim does not set out a proper cause of action which can be conveniently disposed of in this action, it is on this 5th day of June, 1933,

Order

ORDERED, that the motion of the defendant Max Doyne for an order permitting the filing of the proposed amendment of the answer and the counter-claim heretofore filed in this cause, as submitted on behalf of the said defendant, be denied and that the complainant be and is hereby allowed a counsel fee of one hundred dollars, which the said defendant Max Doyne is adjudged, ordered and directed to pay to complainant, together with the costs of this motion to be taxed and that the complainant have execution therefor according to the practice of this court.

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

LUTHER A. CAMPBELL,
C.

Order of Reference

(Filed November 25, 1933)

In Chancery of New Jersey

92-536

Between

MINNIE ROSE,
Complainant,

—and—

JEROME-HARVEY DEVELOPMENT COMPANY, *et als,*
Defendants

On Bill &c.
Order of Reference.

This matter being opened to the court by Alexander Seclow, of counsel with the defendant, Max Doyne, and it appearing that said defendant, Max Doyne, filed objections to the confirmation of the foreclosure sale in this cause, and praying in his application against the confirmation except upon condition that said defendant receive credit for the fair and reasonable value of the premises, upon which application an order to show cause was made by the Chancellor on September 7th, 1933, and the matter having been argued by Maurice C. Brigadier, solicitor of complainant, and Alexander Seclow, solicitor of the defendant, Max Doyne, and said parties having submitted affidavits, and the court having considered said affidavits and the arguments of counsel, and it appearing that the defendant, Max Doyne, is entitled to relief in the premises, and that the sale should not be confirmed unless the complainant shall allow credit to said defendant, Max Doyne, in an amount equal to the fair and reasonable value of the mortgaged premises;

Order of Reference

WHEREUPON, it is on this 20th day of November, 1933, ORDERED that this matter be referred to Jacob J. Feinberg, Esq., one of the masters of this court, to ascertain and report to the Chancellor the fair value of the mortgaged premises at the time of the sheriff's sale, and that such fair value be ascertained by appropriate proofs to be submitted to him on behalf of the complainant and said defendant, Max Doyne, and that said master do make his report thereon with all convenient speed and all further equity is reserved until the coming in of the said report.

Respectfully advised,
JNO. J. FALLON,
Vice Chancellor.

LUTHER A. CAMPBELL,
Chancellor.

A true copy.

ALEXANDER SECLOW,
Solicitor of Defendant.

Remittitur

(Filed April 21st, 1934)

NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 52, February Term, 1934.

Between

MINNIE ROSE,
Complainant-Appellant

—and—

JEROME-HARVEY DEVELOPMENT COMPANY, a Corporation of New Jersey,
Defendants

MAX DOYNE,
Defendant-Respondent

On Appeal from Chancery.

Decree of Affirmance and Remittitur.

This cause coming on to be heard at the February Term, 1934, and having been argued by Maurice C. Brigadier, Esq., of counsel with the appellant, and Alexander Seclow, Esq., of counsel with the respondent, and the court having considered the same and having filed an opinion that the order of the Chancellor should be affirmed in all things;

It is on this 12th day of April, 1934, ORDERED, ADJUDGED and DECREED that the order of the Chancellor appealed from be in all things affirmed with costs; and that the record and proceedings be remitted to the Court of Chancery, to be therein

proceeded with in accordance to law and the practice of said court.

On motion of

ALEXANDER SECLOW,
Solicitor and of Counsel for Respondent.

A true copy

THOMAS A. MATHIS,
Clerk.

Reported in 115 N. J. E. 574, 171 Atl. 832

Order Confirming Master's Report

(Filed April 30, 1934)

IN CHANCERY OF NEW JERSEY.

92-536

Between

MINNIE ROSE,

Complainant

—and—

JEROME-HARVEY DEVELOPMENT Co., *et als*,

Defendants

On Bill &c.

Order Confirming Master's Report.

This matter being opened to the court by Alexander Seclow, solicitor of the defendant, Max Doyne, who made an application to the Chancellor objecting to the confirmation of the Sheriff's sale which was held on August 30th, 1933, and whose petition prayed that the sale be not confirmed, except on condition that the complainant give credit for the fair and reasonable value of the mortgaged premises which were sold for the nominal amount of $100, and an order to show cause having been made by the Chancellor directing the complainant to show cause why a resale should not be ordered or a minimum or upset price fixed thereon, and it appearing that pursuant to said order to show cause an order of reference was made by the Chancellor on November 20th, 1933, to Jacob J. Feinberg, one of the masters of this court, to ascertain and report to the Chancellor the fair value of the mortgaged premises upon appropriate proofs; and the said master having taken such proofs at which time he was attended by the complainant, and the defendant, Max

Doyne, and their respective witnesses, and by the solicitors of said parties, after which the said master filed with this court the depositions taken by him and his report, by which report the said master found and determined that the mortgaged premises were at the time of said sheriff's sale of the fair value of $18,300;

And it further appearing that the defendant, Max Doyne, gave notice to the complainant of his application to confirm the master's report and for an order against the confirmation of sale unless the complainant will credit such fair value, or that in case of resale, an upset price be ordered upon the basis of said fair value so determined, which application also included the fixing of the master's fees and costs of said proceeding, and the complainant having also served notice of her exceptions to the master's report, all of which matters were argued before the Chancellor on April 2nd, 1934, by Alexander Seclow on behalf of the defendant, Max Doyne, and Maurice C. Brigadier on behalf of the ocmplainant, and the court having considered the depositions of the witnesses who appeared before the master and the conclusions, and the report of the master thereon, and the argument of counsel, and it appearing to the court that the master's report should be sustained and the exceptions overruled;

WHEREUPON, it is on this 30th day of April, 1934, in the presence of Maurice C. Brigadier, solicitor of the complainant, and Alexander Seclow, solicitor of the defendant, Max Doyne, ORDERED that the master's report be and the same is hereby sustained and that the exceptions of the complainant to said report be and the same is hereby overruled, and it is adjudged that the fair and reasonable value of the mortgaged premises,

at the time of the Sheriff's sale is $18,300, upon which should be credited the sum of $800 for taxes and penalties due against the said mortgaged premises for the years 1931, 1932 and 1933, and such portion of 1934 to the date hereof, which amount has been agreed upon by counsel;

And it is further ORDERED that if the complainant will stipulate and agree that there shall be credited on any claim she may have against said defendant, Max Doyne, by reason of the collateral bond mentioned in the bill of complaint, the sum of $17,500, that the sheriff's sale may be confirmed;

AND IT IS FURTHER ORDERED that if such stipulation and agreement, which shall be in writing and signed by the complainant, is not given, that the sheriff's sale shall not be confirmed.

AND IT IS FURTHER ORDERED that there is hereby allowed to Jacob J. Feinberg, the master, the sum of $113.40 for the expenses of the stenographer who took the testimony, and the further sum of $250. as and for his master's fees, making a total of $363.40 which amount shall be paid for by the complainant and the defendant, Max Doyne, in equal proportions.

Respectfully advised,

JAMES F. FIELDER,
Vice Chancellor.

LUTHER A. CAMPBELL,
Chancellor.

A true copy

EDW. L. WHELAN,
Clerk.

New Jersey Court of Errors and Appeals

Between

MAX DOYNE,
Complainant-Respondent

—and—

MINNIE ROSE, et als,
Defendants-Appellant

ON APPEAL FROM COURT OF CHANCERY.

BRIEF OF MINNIE ROSE, Defendant-Appellant.

STATEMENT

This appeal has been taken by one of the defendants Minnie Rose from the Decree of the Chancellor, adjudging and decreeing the reformation of a bond entered into by the complainant-respondent, Max Doyne and others, as obligors, with the defendant-appellant Minnie Rose as obligee.

THE PLEADINGS

The complainant-respondent, Max Doyne filed a bill in Chancery, in which he alleged (Case, p. 5 to 14), that he had executed two instruments, one dated June 19th, 1930, a copy of which is annexed to the bill and marked Schedule 1, and the other dated November 17th, 1930, a copy of which is annexed to the bill and marked Schedule 2. That it was his intention in the execution of these instruments, to sign two bonds which would indemnify the defendant, Minnie Rose, the mortgagee, from any loss which she would sustain by reason of the filing of mechanics lien claims

against the premises encumbered by the mortgages executed to her; that through mutual inadvertence and mistake of all the parties to the bond, including the defendant-appellant, Minnie Rose, and the complainant-respondent, Max Doyne, and also by reason of the fraudulent misrepresentation of the defendant-appellant, Minnie Rose and her attorney who prepared said bonds, the complainant-respondent, Max Doyne, executed the said two bonds believing that same constituted bonds indemnifying the mortgagee against mechanics liens; that it was not until after the defendant-appellant, Minnie Rose commenced a foreclosure action of the mortgage on the premises mentioned in the bond designated Schedule 2, that the complainant-respondent Max Doyne ascertained the actual contents of said bond. The complainant-respondent prayed that both bonds, Schedules 1 and 2, be reformed so that they be limited in their terms only to an indemnity against mechanics lien claims, or that if said bonds are not reformed that the Court should order and decree a rescission and cancellation of the same. The bill also alleged in paragraph 8 (Case, p. 7, l. 19) that in the foreclosure action brought by Minnie Rose to which the complainant-respondent, Max Doyne was made a defendant, the complainant-respondent filed an answer and counterclaim; that thereafter application was made by Minnie Rose to strike out said answer and counterclaim filed by Max Doyne in the foreclosure action and that the Chancellor on the 28th day of November, 1932 ordered that the answer and counter-claim be stricken; that an appeal was prosecuted by the said Max Doyne from the Order of the Chancellor striking out said answer and counter-claim filed

by him in the foreclosure action and that "*said answer and counter-claim set up the same matters as are set forth in this complaint.*" (Case, p. 8, l. 2 to 4.)

The defendant-appellant, Minnie Rose, served a notice of motion (Case, p. 15) to strike the bill of complaint of the complainant-respondent, Max Doyne, on the ground that the bill of complaint discloses that the subject matter of the bill has already been adjudicated and is *res adjudicata* by reason of the order mentioned in paragraph 8 of said bill of complaint, striking out the answer and counter-claim filed by Max Doyne in the foreclosure action, and that the bill of complaint discloses that there is another action pending between the parties involving the same subject matter and seeking the same relief as that set up in the bill of complaint as appears in paragraph 8 of the bill of complaint. Upon the return of the motion, the Chancellor ordered, under the provision of the rules, that the motion of Minnie Rose be continued to final hearing (Case, p. 17).

The defendant, Minnie Rose, filed an answer (Case, p. 18 to 20), in which she denied the existence of any mistake in the execution of the bond and in which she denied that Max Doyne was induced to sign the bonds as the result of misrepresentation by her or her attorney as to the contents thereof. She further pleaded that the matters set forth in said bill of complaint has already been adjudicated and are *res adjudicata* by reason of the order made by the Court of Chancery in the foreclosure action striking the answer and counterclaim filed by Max Doyne, and that Max

Doyne was barred by his own laches from seeking the relief prayed for. Upon this answer, issue was joined.

THE EVIDENCE

Upon the final hearing, the complainant, Max Doyne called witnesses to establish the existence of the mistake alleged by him in his bill of complaint.

With respect to the bond dated, June 19th, 1930 and marked Schedule 1 (Case, p. 9) the solicitor of the defendant stipulated as follows (Case, p. 57, l. 21 to 25 inclusive):

> "Mr. Brigadier: As to the first bond I will consent to a decree of rescission or reformation or whatever is the proper form of decree. As far as Schedule 1, is concerned we are making no claim."

This admission avoided the necessity of taking any proof with respect to Schedule 1 (Exhibit C-1, Case, p. 67), and the issue tried was that concerning the bond marked Schedule 2 (Exhibit C-8, Case, p. 94).

The defendant's case consisted of evidence in support of her defense of *res adjudicata.* No witnesses were called by the defendant, but there was offered and received into evidence, the pleadings containd in Docket No. 92, page 536, in Chancery of New Jersey in the suit instituted by Minnie Rose against Jerome-Harvey Development Company and others, among the defendants, Max Doyne, the complainant-respondent in the present suit. The solicitor for the complainant-respond-

ent stipulated with the solicitor for the defendant that the two bonds referred to in the pleadings received in evidence as contained in case marked Docket No. 92, page 536, are the same bonds which were marked C-1 and C-8 in the present suit, namely, Schedules 1 and 2 annexed to the bill. (Case, p. 61, l. 30 to 40, Case, p. 62, l. 1 to 6.)

The pleadings offered by the defendant and received in evidence as contained in Docket No. 92, page 536, In Chancery of New Jersey, consisted of the following:

1. **Bill of Complaint** (Case, p. 97 to 102), filed October 7th, 1932. This bill was filed by Minnie Rose as complainant (the defendant-appellant in the present suit) to foreclose a mortgage executed by Jerome-Harvey Development Company to Minnie Rose on the 14th day of November, 1930, in the sum of $15,000.00, which mortgage had been executed as collateral security for a bond of the same date made between the same parties for the true sum of $15,000.00. The bill also alleged, in paragraph 7 (Case, p. 99, l. 30) as follows:

> "7. On the 17th day of November, 1930, the Jerome-Harvey Development Company, as principal, and Hyman Flax, Jacob Golush and Max Doyne, as sureties, entered into a bond under seal with the complainant, Minnie Rose, in the penal sum of Thirty thousand ($30,000.00) Dollars to secure the repayment of the sum of Fifteen thousand ($15,000.00) Dollars to the complainant, condition of said bond being that the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, damages, costs, counsel

fees, expenses and disbursements, in which the said Minnie Rose may be involved under any circumstances by reason of making the aforesaid loan of Fifteen thousand ($15,000-.00) Dollars to Jerome-Harvey Development Company.

"Any interest which the said Jerome-Harvery Development Company, Hyman Flax, Jacob Golush and Max Doyne may have in said lands is subject to the lien of the complainants mortgage."

The bill also alleged in paragraphs 9, 10, 11 and 12 Case, p. 100 and 101) defaults in the terms of said mortgage under which the complainant had elected that the whole principal sum with all unpaid interest should be now due. The complainant therein prayed that all the defendants, including Max Doyne, may answer the bill of complaint, that an account be taken of the amount due on the complainant's mortgage, that the defendants, including Max Doyne, be decreed to pay the complainant the amount so found due and that in default of such payment the equity of redemption be barred and foreclosed and a decree made for the sale of the premises.

2. **Answer and Counter-claim of defendant, Max Doyne,** filed November 14th, 1932 (Case, p. 103 to 110). To that bill of complaint, the defendant, Max Doyne (the complainant-respondent in the present suit) filed an answer and counter-claim, in which answer the said Max Doyne first denied the making of the bond and then alleged that the same was executed as the result of mutual mistake and inadvertence of the parties to such bond (Case, p. 104, l. 14).

In paragraph 4 of said answer (Case, p. 104, l. 19) the defendant pleaded as follows:

> "4. That the execution of the bond mentioned in paragraph 7 of the bill of complaint by this defendant was induced by the misrepresentation of the other parties to said bond and their agents that the said bond was an indemnity against such loss only as could accrue to the said complainant by reason of the filing of mechanics' lien claims, and this defendant, because of such misrepresentations and believing that said bond was an indemnity bond only against mechanics' liens, executed the same. Had he been aware of the contents and scope of said bond, he would not have executed the same."

In this answer the defendant, Max Doyne prayed for a cancellation and rescission of the bond and for a reformation thereof.

Since the bill of complaint made reference to only one bond, namely, the one involved in that foreclosure suit (the same bond which is marked Exhibit C-8 in the present suit, Case, p. 94), the defendant, Max Doyne, in the counter-claim filed by him, set up the same facts as to this bond and also as to another bond marked Exhibit C-1 (Case, p. 67) and prayed for a reformation of both bonds or in the alternative, a cancellation and rescission of both.

3. **Notice of Motion to Strike Answer and Counter-claim,** filed November 28th, 1932 (Case, p. 111). The complainant, Minnie Rose, in the foreclosure action, thereupon served a notice of motion to strike the answer on the ground that same failed to disclose any defense in equity to

the bill of complaint and also to strike the counter-claim on the ground that same fails to disclose any cause of action cognizable in equity and on the further ground that the defendant, Max Doyne, is barred by his own laches from obtaining the relief sought in the said counter-claim.

4. **Order Striking Answer and Counter-claim,** dated November 28th, 1932, Case, p. 112). Upon the return of the motion, the Chancellor on the advice of James F. Fielder, Vice-Chancellor, ordered that the answer and counter-claim filed by the defendant, Max Doyne, be struck out on the ground that the same did not state any defense or cause of action cognizable in equity.

5. **Notice of Appeal** filed December 7th, 1932 (Case, p. 113). The defendant, Max Doyne, appealed to this Court from the aforesaid Order striking the answer and counter-claim.

6. **Remittitur,** dated April 28th, 1933 (Case, p. 115). The appeal was heard at the February Term, 1933, of this Court and after opinion filed by this Court, a copy of which is annexed to this brief, this Court affirmed the order striking the answer and counter-claim and remitted the record and proceedings to the Court of Chancery to be therein proceeded on according to law.

7. **Decree Pro Confesso,** filed May 25th, 1933 (Case, p. 116). Upon the cause being remitted by this Court to the Court of Chancery upon the affirmance of the order of the Chancellor striking out the answer and counter-claim of the defendant, Max Doyne, the Chancellor ordered that the

bill of complaint be taken as confessed against the defendant, Max Doyne.

8. **Decree Pro Confesso,** filed January 6th, 1933 (Case, p. 118). Previously to the entry of the decree pro confesso against the defendant, Max Doyne, the bill had already been taken confessed as against all the other defendants in the suit who had failed to file an answer to the bill.

9. **Master's Report,** filed June 5th, 1933 (Case, p. 120). Pursuant to the rules provided for in such case, proof was made before Nathan L. Goodman, a Master in Chancery of New Jersey, of the amount due upon the bond and mortgage, whereupon he filed his report with the Chancellor.

10. **Final Decree,** filed June 5th, 1933 (Case, p. 122). Upon receiving the Master's Report, the Court, by final decree, directed that a sale be had of the mortgaged premises.

11. **Order Denying Application for Amendment,** filed June 5th, 1933 (Case, p. 125). The defendant, Max Doyne, served notice of motion for leave to file a proposed amended answer and counter-claim. The Chancellor on the advice of Vice-Chancellor James F. Fielder denied this application.

THE DECREE

The Chancellor on the advice of Vice-Chancellor James F. Fielder in the present suit, after hearing the proofs and the arguments of counsel, decreed that the condition of the said two bonds mentioned in the bill of complaint in the present suit, be and

the same are hereby reformed by substituting for the condition clause in each of said bonds, the following condition clause (Case, p. 23, l. 20):

> "The condition of this obligation is such that if the said Jerome-Harvey Development Company shall pay at maturity all debts incurred in the erection of said building, and shall keep said building and lands free from the encumbrances and lien of any and all such construction debts, and shall indemnify and save harmless the said Minnie Rose from any and all suits, claims, debts, demands, damages, lien claims and any costs in the premises and any loss, claims, suits, actions, proceedings, judgments, damages, costs, counsel fees, expenses and disbursements which the said Minnie Rose may sustain by reason of any mechanics' lien, liens, or claims against the said real estate attaching thereto by virtue of 'An Act to secure to mechanics and others payment for their labor and materials in erection any building, (Revision of 1898),' and the supplements thereto, then the above obligation shall be null and void, otherwise to remain in full force and virtue."

This appeal is taken from that part of said final decree as orders, adjudges and decrees the reformation of the condition contained in bond marked Schedule 2 annexed to the bill of complaint and received in evidence as Exhibit C-8.

POINT I

THE CHANCELLOR ERRED IN DECREEING REFORMATION OF THE BOND DATED NOVEMBER 17th, 1930. (Exhibit C-8—Schedule 2 annexed to the Bill of Complaint).

The only question which this appeal brings before the Court, is whether or not the order of the Chancellor striking the answer and counter-claim in the foreclosure action, together with the decree pro confesso and final decree, entered in that foreclosure action, constitutes *res adjudicata* of the issues raised in the present action brought by Max Doyne, the complainant-respondent, who was a defendant in the foreclosure action.

It is the contention of the appellant, Minnie Rose, that it does constitute *res adjudicata* and that therefore, the Chancellor erred in decreeing the reformation. It is the contention of the appellant, Minnie Rose, that the parties and issues in the present suit are identical with the parties and issues raised in the foreclosure action brought by Minnie Rose and that therefore, the proceedings in the foreclosure action constitute a final adjudication of the issues and hence constitute a bar to the present action by way of defense of *res adjudicata.*

THE LAW

In *Volume* 34, *Corpus Juris, page* 742, *Section* 1154, under the title of "Judgments," the following statement and grounds of the doctrine of *res adjudicata* is set forth:

> "The doctrine of *res judicata,* first definitely formulated in the Duchess of Kingston's case, embodies two main rules, which may be stated as follows: (1) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other

tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. These rules afford a logical and convenient method of dividing the numerous cases falling within the principle of *res judicata.* The term 'bar by former judgment' is generally employed in reference to the cases governed by the first rule, under which is also included the doctrine of merger of a cause of action or defense in a higher security, while the phrase 'conclusiveness of judgment' is used to indicate the cases falling within the second rule. *Res judicata* is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation — interest *republicae ut sit finis litum;* the other, the hardship on the individual that he should be vexed twice for the same cause—*nemo debet bis vexari pro eadem causa.* The doctrine applies and treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided.''

To the same effect is the statement of the rule by Justice Lloyd in the opinion of the Supreme

Court in the case of *Esper v. Manhattan Transit Co.*, 112 *N. J. L.* 186, wherein it was said:

> "There is perhaps no rule of law of greater importance than that of *res adjudicata*. There must come a time when litigation is at an end, and this doctrine came into being for the purpose of determining when this result should be reached, and what it should be. The doctrine has been proclaimed in the jurisprudence of all civilized nations (Freeman on Judgments, Vol. 2, p. 1321), found its most distinctive recognition in England in 1776 in the Duchess of Kingston's Case (Smith's Leading Cases, Vol. 3, p. 1998), has found general acceptance in the states of the Union, and in this state as defined and applied in *Re Walsh's Estate*, 80 *N. J. Eq.* 565.

In *Volume* 34, *Corpus Juris, page* 776, *Section* 1194, the rule is stated as follows:

> "If the judgment is general, and not based on any technical defect or objection, and the parties had a full legal opportunity to be heard on their respective claims and contentions, *it is upon the merits, although there was no actual hearing or argument on the facts of the case;* and it is immaterial what the judgment is called or how it is framed, if it really involved a consideration and determination of the merits."

In the same Volume of Corpus Juris, under the same title of "Judgments" on page 818, Section 1236, the rule is stated as follows:

> "A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or defeat

> the claim, *but as to every other matter which might with propriety have been litigated and determined in that action.* In order, therefore, that this general rule, as to the operation of a judgment on the merits as an estoppel as to matters which might have been litigated, may apply a party must present in one action all the reasons, grounds, and evidence which he may have in support of his claim or defense, and if he has several claims or titles to the property in controversy he must assert them all. Again if a party is brought into a case and has a fair legal opportunity to present and enforce any claim he may have in relation to the subject matter, he must avail himself of it, and whether an original party or an intervener, *he must present his whole case, extending his claim so as to embrace evrything which properly constitutes a part of his cause of action or defense. . . . .* ''

In the footnote referred to in this Section, the following cases in this State are cited as authority for the rule:

McEligot, etc., Co. v. Nutley, 92 *N. J. L.* 636 *affirming,*

92 *N. J. L.* 120; *Denver City Waterworks Co. v. American Waterworks Co.,* 81 *N. J. Eq.* 139; *in Re: Walsh,* 80 *N. J. Eq.* 565;

Rosenstein v. Burr, 80 *N. J. Eq.* 424;

Commonwealth Roofing Co. v. Riccio, 81 *N. J. Eq.* 315.

In *Black on ''Judgments,'' Volume* 2, *Section* 754, the rule is stated in the following language:

> ''A party cannot relitigate matters which he might have interposed but failed to do in

> a prior action between the same parties or their privies in reference to the same subject matter. And if one of the parties failed to introduce matters for the consideration of the Court that he might have done he will be presumed to have waived his right to do. *If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proven, the law can afford him no relief.* When a party passes by his opportunity the law will not aid him."

In the case of, *in re: Leupp,* 108 *N. J. Eq.* 49, Vice-Chancellor Lewis, on page 58 of the opinion stated:

> "It is a doctrine of universal acceptation that the judgment of a competent court of jurisdiction is, until reversed, final and conclusive upon the parties, not only as to every matter which was offered and received to sustain or defeat the claim or demand but *as to any other admissible matter which might have been offered for that purpose.* In re: Walsh's Estate, 80 N. J. Eq., 565; Shearman v. Cameron, 78 N. J. Eq. 532; Sarson v. Maccia, 90 N. J. Eq. 433; West New York Improvement Co. v. West New York, 88 N.J. Eq. 571; Rosenstein v. Burr, 80 N. J. Eq. 424; Margolies v. Goldberg, 101 N. J. L. 75; Nachamkis v. Goldsmith, 101 N. J. L. 356; Cromwell v. County of Sac, 94 U. S. 351; 24 L. Ed. 195; Sawyer v. Woodbury, 73 Mass. 499."

In *Denver City Waterworks Co. v. American Waterworks Co.,* 81 *N. J. Eq.* 139, on page 143 of the opinion, Vice-Chancellor Howell stated:

> "The first ground alleged on behalf of the motion is that there has already been an adjudication against the receiver on the same

question, and this must be true if, as a matter of fact, the remedy now sought in the suit pending in the United States District Court is the same sought in the previous Colorado suit. But it is urged that there are new maters alleged in the present suit which were not alleged or dealt with in the first suit. I have failed to find any such new matter, but if it exists, I do not see how under the rules of law, and the allegations in these pleadings, such new questions can be availed of by the receiver. *The rule undoubtedly is that it is the duty of one who brings a suit to include in it every cause of action available to him, which is consistent with the general purpose of his bill, and the same rule must, from the nature of things, apply to defenses. It is the duty therefore of every defendant to set up and prove every defense which he may have to the claim, and if either complainant or defendant shall omit to allege or prove any available claim or defense, such claim and such defense are lost to him forever.''*

(Italics mine.)

In the case of *Rosenstein v. Burr,* 80 *N. J. Eq.* 424, a suit was brought to compel specific performance of a contract to convey lands. Prior to this action, the defendant had brought an action to cancel the contract on two grounds, namely: (1) That it had been obtained by fraud and (2) That it had been executed on a Sunday and was therefore void. The bill filed by the defendant to cancel the contract was dismissed and the payers of same denied. In the suit for specific performance the defendant filed an answer denying the due execution of the contract. At the hearing defendant offered in defense that the contract was invalid for lack of assent and that there was a stipula-

tion that the agreement should not be binding until drawn up in a formal document and executed. Vice-Chancellor Howell held, that the new defense could not be interposed to the suit for specific performance on the ground that same was available to the defendant in his first suit and hat having neglected to use this defense it was lost to him forever. The Court on page 426 of the opinion stated:

> "The defences now interposed appear to be an afterthought devised for the purpose of evading the prayer of the bill. When the first suit was brought to set aside the so-called agreement the facts on which these defences are based existed and could have been used by Burr as affirmative weapons of attack. In addition to his allegations of fraud and violation of law he might have added the matters on which he now relies; they are entirely consistent with the causes that he did allege and they tended toward the result for which he then prayed. It is the duty of one who brings a suit to include in it every cause of action which is consistent with the general purpose of his bill, to put all his grounds of action in one complaint."

On page 428 of the opinion the Vice-Chancellor cites from and quotes with approval, the case of *New York Life Insurance Co. v. Bangs,* 13 *Otto* 780:

> "There an action at law was brought against the life insurance company on policies of life insurance in which the plaintiff recovered. Subsequently the company brought suit in equity to set aside the policies on the ground of fraud to which the former recovery was pleaded as a defence. The court said: 'The judgment in the action at law was

a bar to this suit. Its recovery concluded all matters which might have been urged as a defence to the policies; a fraudulent purpose in procuring them subsequently carried into execution would have been a good defence. It was in fact originally pleaded and afterwards withdrawn; its withdrawal did not authorize a suit in another form for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant denying its obligation either from payment or release or any other matter affecting its original validity or subsequent discharge, must present his defence for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action.' These principles apply directly to the case in hand. In the former suit the issue was whether the so-called contract was valid. Two grounds of invalidity were asserted; two further grounds of invalidity existed but were not alleged and are now made the basis of a second attack upon the validity of the contract. It is quite manifest that the question now raised was raised and decided adversely to the present defendant in the former suit, and he therefore cannot have the question re-litigated in this proceeding. He is bound by the decree in the former suit.

Besides, the parties ought not to be given the opportunity to split up their causes of action or their defences and attempt to hold them in reserve for purposes of attack or defence in future litigation, for the reason that it is to the interest of the state that there should be an end to litigation.''

In the case of *In re*: *Walsh's Estate,* 80 *N. J. Eq.* 565, this Court approved the statement of the

rule in the cases of *City of Paterson v. Baker,* 51 *N. J. Eq.* 57 and *Cromwell v. Sac County,* 94 *U. S.* 351. The Court on page 569 of the opinion stated:

> "All that is necessary is that the right to relief in the one suit shall rest upon the same point or question which, in essence and substance, was litigated and determined in the first suit, and in such a case the parties and those in privity with them are concluded, 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' "

In the case of *W. D. Cashin & Co. v. Alamac Hotel Co., Inc.,* 98 *N. J. Eq.* 432, in the headnote of the opinion written by Chancellor Walker the rules are stated as follows:

> "Parties and those in privity with them are concluded, not only as to every matter offered and received to sustain or defeat a demand, but as to any other admissible matter which might have been offered for that purpose.
>
> "Defensive matter existing at the time a party is called upon to respond to an order to show cause, but not set up as a defense, cannot afterwards be made the ground of an application for an order to show cause to restore the status which the responding party lost by the making of the prior order to show cause absolute, the matter being *res judicata.*"

In the case of *White v. Mindes,* 106 *N. J. L.* 606, in the headnote preceding the opinion of this Court, the rule is stated as follows:

> "To constitute *res judicata* the right to relief in the one suit must rest upon the same

> point or question which, in essence and substance, was litigated and determined in the first suit, and in such a case the parties and those in privity with them are concluded, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

ARGUMENT

It is the contention of the defendant-appellant, Minnie Rose, that the order striking the answer and counter-claim in the foreclosure action followed by the decree pro confesso and final decree in the foreclosure action, constitutes a final adjudication of the issues raised in the suit brought by the complainant-respondent Max Doyne for reformation of the bond marked Schedule 2 annexed to his bill and received in evidence as Exhibit C-8. In the foreclosure action the bond which constitutes the basis of the reformation suit, was also set forth as the subject matter in the foreclosure suit. This Court held, in the opinion which forms an appendix to this brief, upon its affirmance of the order striking the answer and counter-claim in the foreclosure action, that the answer was properly stricken, not because of the fact that the defendant was not entitled to answer, but rather because his answer set up no defense. This Court in that opinion stated:

> "The point appellant makes, therefore, that it was proper for him to answer is correct as far as it goes, always providing that he has an answer to make. Vanderbilt v. Kipp, 110 N. J. Eq. 10.

> "The contention that the appellant should have had a final hearing because of fraud, mutual mistake and the like pleaded by him is without merit.
>
> "The respondent was no party to the fraud, misrepresentation or mutual mistake. The appellant does not so charge. To avoid responsibility on a contract or bond due to fraud, the obligee must have been a party to the fraud. A bond cannot be voided by the person bound because of false representations of a third person unless the obligee participated in the fraud or knew of it."

It can be seen from the above quotation of this Court's opinion that if the defendant had charged that the bond was executed as a result of fraud practiced upon him by Minnie Rose, or as a result of the mutual mistake under which both he and Minnie Rose labored, this Court would have sustained his answer. The point made by this Court in its opinion was that although defendant was entitled to raise this question, he failed to raise it, because as can be seen from the inspection of the answer and counter-claim filed by him, while he charged fraud, misrepresentation and mutual mistake, he did not charge that Minnie Rose was a party thereto and for that reason this Court sustained the order striking out his answer and counter-claim. It must be conceded therefore, that the defendant in that case, Max Doyne, (the complainant-respondent in the present case) was afforded an opportunity to raise the defense if he had one to make and as can be seen from the citation of the authorities above set forth, having been afforded this opportunity he cannot now be heard to say that he failed to avail himself of it.

The Vice-Chancellor who heard the present cause below and whose oral opinion is found on pages 62 to 66 of the case, however, did not agree hat this was what this Court intended by its opinion. He stated as follows: (Case, p. 62.)

> "I will have to disagree with your argument, Mr. Brigaier, because I cannot see that the decision of the Court of Errors and Appeals in the case of Rose against the Jerome-Harvey Development Company is at all *res adjudicata,* for the matter got to the Court of Errors and Appeals upon appeal from an order advised by me striking out the answer and counterclaim filed, on the ground that the answer and counterclaim did not set up a cause of action that was cognizable in equity and my conclusion in striking out the answer was based on the reason that I gave in Vanderbilt against Kipp for striking out a very similar answer, my thought being that the maker of a bond is made a party defendant to the suit merely for the purpose of giving him notice that a foreclosure suit is pending so that he may be made aware of the progress of the suit and when the property is put up for sale, may protect himself agaist his contingent liability by being a bidder at the sale or induce somebody else to bid, and that the only binding effect of a decree in a foreclosure suit as against the maker of the bond is to fix the amount of the obligation that is due as between the maker of the bond and mortgage and the holder of the decree and that in any subsequent contest involving liability on the bond the maker of the bond is without legal right to contest the amount of the decree."

It can thus be seen that the Vice-Chancellor below was of the impression that in the foreclosure

action Max Doyne could not have raised the question of fraud, misrepresentation, and mutual mistake by way of answer, although this Court distinctly pointed out that he could do so provided the charge was made that Minnie Rose the mortgagee and the obligee in the bond had been a party to such fraud, misrepresentation or mutual mistake. The Vice-Chancellor, we believe, erred in his interpretation of the opinion of this Court in holding that the only issue that could be raised was the amount due on the bond executed by the mortgagor to the mortgagee, for as this Court said on page 165 of the opinion in Volume 113, New Jersey Equity:

> "The appellant's final point is that it was proper for the defendant below to answer and that it was improper to strike out the answer and counterclaim. This of course is true if an answer on the merits could be made."

The Vice-Chancellor continuing in his oral opinion (Case, p. 63) states:

> "Now, certainly in this court, in that case, there was no hearing upon the merits of the defense which the present complainant here attempted to interpose in that suit. In this suit he sets up somewhat of a different cause of action. At least it is different ground for relief than the Court of Errors and Appeals said he set up in the foreclosure suit, namely: that he here explicitly charges that the mistake was mutual and that Minnie Rose, through Julius Rose, her husband, who was acting as her agent, participated in that mistake, working a fraud, and that it would be giving Minnie Rose an unconscionable advantage over him to allow that mistake to profit Minnie Rose. I think, then, that he is

> here in this court with a cause of action in which he is entitled to be heard on the merits and as to which the dcision in the Court of Errors and Appeals is not *res adjudicata.*"

We submit that this statement of law is erroneous. While it is true that in the answer to the foreclosure suit, Max Doyne did not charge that Minnie Rose was a party to the fraud or mistake and while it is true that in his present bill, he does charge that she was a party to the fraud or mistake, the fact remains that Max Doyne could have by proper answer, raised this issue in the foreclosure suit and under the authorities aforementioned having failed to do so, he is now barred by the adjudication in the previous suit, for a decree is not only conclusive as to the defenses that were actually interposed in the suit, but is also conclusive as to any defense that could have been interposed.

The statement mentioned above in Vice-Chancellor Fielder's oral opinion, that there was no hearing before him in the first suit upon the merits of the defense, is likewise not a correct statement of the rule. As pointed out in the authorities hereinabove quoted, it is not necessary that there should be a hearing of the facts in order that the decree may constitute a judgment on the merits. If in fact, the defendant has been afforded an opportunity to interpose a defense and has failed to avail himself of that opportunity, the decree rendered is one that is founded upon the merits as binding as if any decree rendered where such defense had been interposed and the proofs taken.

CONCLUSION

In conclusion we urge that the Chancellor erred in granting a reformation of the bond marked Schedule 2, Exhibit C-8, on the ground that the decree in the foreclosure suit constituted a final adjudication of the question of fraud and mistake raised by the present suit.

Respectfully submitted,

MAURICE C. BRIGADIER,
Solicitor for Defendant-Appellant, Minnie Rose.

SYDNEY A. ROSE,
On the Brief,

APPENDIX

COURT OF ERRORS AND APPEALS

113 N. J. Eq. 161

MINNIE ROSE, *complainant-respondent,*

v.

JEROME-HARVEY DEVELOPMENT COMPANY, a corporation of New Jersey, et al., defendants, and MAX DOYNE, defendant-appellant.

[Submitted February term, 1933.

Decided April 28th, 1933.]

1. To seek to bring a second bond, alien to the present action on a first bond, into this suit is premature and anticipatory, and the court below properly struck a counter-claim asking the reformation of the second bond.

2. Since the court below did not base its striking of the answer and counter-claim on laches, the question of laches will not be considered on appeal.

3. Objection to an answer on the ground of "want of equity" amounts to a general demurrer at law and is sufficient where the lack of equity is manifest on the face of the pleading.

4. The answer in this case denied the execution of the bond; the counter-claim admitted it but seeks reformation on the ground of mistake and fraud. While inconsistent pleadings are permissible, contradictory pleadings as to the same fact are not countenanced either at law or equity. The answer was properly struck.

5. A bond cannot be voided by a person bound because of false representations of a third person,

unless the obligee participated in the fraud or knew of it.

6. Mutual mistake will not help a person avoid a bond on which he is liable unless the obligee was a party thereto.

On appeal from the court of chancery.

Mr. Alexander Seclow, for the appellant.

Mr. Maurice C. Brigadier, for the respondent.

The opinion of the court was delivered by
Brogan, Chief-Justice.

The case under review presents an appeal from an order, entered in the court of chancery, striking out the answer and counter-claim of the appellant. Upon examination of the record, it appears that the complainant below filed a bill to foreclose a mortgage, in the seventh paragraph of which she names, in addition to the mortgagor, several individuals as defendants, among them Max Doyne (who is the appellant here), charging that on November 17th, 1930, the said Doyne and two others executed a separate bond in favor of the complainant, Minnie Rose, in the penal sum of $30,000 to secure the repayment of the sum of $15,000 to the complainant, condition of said bond being that the said obligors shall indemnify and save harmless the said Minnie Rose of and from all loss, claims, suits, actions, proceedings, damages, costs, counsel fees, expenses and disbursements in which the said Minnie Rose may be involved under any circumstances by reason of

making the aforesaid loan of $15,000 to Jerome-Harvey Development Company (the mortgagor).

The defendant below answered, alleging no knowledge or information as to each and every allegation in the entire bill except that it denied the allegations of paragraph seven, which alleged the making of the bond above mentioned.

Further answering, the defendant Doyne, inconsistently says that he executed this very bond with others but attempts to avoid it by claiming that he intended only to sign a bond saving the mortgagee from loss that might arise from the filing of mechanics liens and that this bond was so represented to him by "the other parties to said bond and their agents;" that he executed same without reading it and as result the bond was "executed contrary to the intention of the parties thereto * * * and as a result of the mutual mistake and inadvertence of the parties to such bond." He prays that the bill be dismissed; that the court order and decree the bond mentioned to have been executed as a result of mistake; that it was procured by fraud and should be canceled.

He also files a counter-claim saying that he and his co-obligors executed still another bond, entirely unrelated to this litigation and with respect to other property but that it (this alien bond) was executed "under like circumstances, conditions and misrepresentations" praying on the counter-claim that both bonds be declared to have been executed as a result of mutual mistake, that both bonds be reformed in accordance with the defendant's understanding of what they should be and

were intended to be or that the bonds be decreed to have been executed as a result of fraud and cancelled.

The court, upon notice, advised an order striking out the answer and counter-claim and this appeal lies from that order on the grounds that: the striking of the answer and counter-claim was error; the finding that the answer did not set forth an equitable defense to the bill and that the counter-claim did not set forth an equitable cause of action was also error.

That the court properly dismissed the counter-claim, so far as it applied to the second bond, alien to this action, is clear. Bringing this second bond into this suit was premature and anticipatory. Manifestly it could not conveniently be tried out in this case and the court was within its discretion in striking it out (chancery rule No. 28). On this point, it might be remarked that if the defendant's prayer for relief was well grounded as to the first bond and the court so found, such disposition, the bonds being identical in character, would have been *res adjudicata as* to the second bond.

The grounds of appeal will be considered together.

The complainant below moved to strike the answer on the ground "that same fails to disclose any defense in equity," and to strike the counter-claim on the ground "that same fails to disclose any cause of action cognizable in equity," and on the further ground that the defendant Max Doyne is barred by his own laches from obtaining the relief sought in said counter-claim.

Now the order striking the answer and counter-claim recites that same was stricken because "it appearing that the aforesaid answer does not state any defense cognizable in equity, and that the aforesaid counter-claim does not state any action cognizable in equity, it is ordered, &c." Thus the question of laches, which is argued by the appellant in the brief, is not pertinent to this appeal and need not now concern us. The court did not base its finding on laches.

The main objection of the appellant to the striking of the answer was that under chancery rule 75 the notice to strike out was deficient because it did not state the objection to the pleadings with particularity. This argument is of no avail because in challenging the efficacy of a pleading "want of equity" is a valid ground of objection if the pleading attacked shows its defect and lack of sufficiency on its face. This attack upon a pleading amounts to a general demurrer and certainly an answer which pleaded no knowledge or information as to each and every allegation of the bill and which denied the making of the bond and latterly admits it, pleading a misunderstanding as to its import and obligation, is not such an answer as calls for particular objection save the one stated. *Essex Paper Co.* v. *Greacan,* 45 *N. J. Eq.* 504; *Larter* v. *Canfield,* 59 *N. J. Eq.* 461. It is unnecessary to specify the cause for demurrer or motion to strike under the present practice, when the lack of equity in the pleading is manifest. *Safford* v. *Barber,* 74 *N. J. Eq.* 352.

The appellant further argues that the execution of the bond in question was denied by his answer;

that this denial was re-alleged in the counter-claim and that for the purposes of motion the denial must be taken as true, which creates a fact issue and therefore it was improper to strike the pleading. As opposed to this, however, obviously the counter-claim admits the execution of the bond; seeks its reformation; claims it to have been misunderstood; alleges it was procured by fraud. and while inconsistent pleadings are permissible, contradictory pleadings as to the same fact are not countenanced in either law or equity and a pleading will be judged not by its self-serving parts, which manifest strength, but equitably with all its weaknesses as well.

The appellant's final point is that it was proper for the defendant below to answer and that it was improper to strike out the answer and counter-claim. This of course is true if an answer on the merits could be made. The appellant Doyne was made a party defendant by virtue of the provisions of *P. L.* 1932 *ch.* 231 *p.* 509, which provides, generally, that no action shall be instituted against any party answerable on the bond unless such party is joined in the proceedings to foreclose the mortgage. The point appellant makes, therefore, that it was proper for him to answer is correct as far as it goes, always providing that he has an answer to make. *Vanderbilt* v. *Kipp,* 110 *N. J. Eq.* 10.

The contention that the appellant should have had a final hearing because of fraud, mutual mistake and the like pleaded by him is without merit.

The respondent was no party to the fraud, misrepresentation or mutual mistake. The appellant does not so charge. To avoid responsibility on a contract or bond due to fraud, the obligee must have been a party to the fraud. A bond cannot be voided by the person bound because of false representations of a third person unless the obligee participated in the fraud or knew of it. *Fieganspan* v. *Wilson,* 68 *N. J. Law* 83. Mutual mistake will not help the appellant unless the obligee is party thereto. *Levine* v. *Lafayette Building Corp.,* 103 *N. J. Eq.* 121.

Clearly then it follows that it was proper to strike the pleadings on their face as no defense to liability or a cause for the relief sought was apparent.

The action of the court below will be affirmed.

For affirmance—The Chief-Justice, Trenchard, Parker, Lloyd, Case, Bodine, Donges, Heher, Van Buskirk, Kays, Hetfield, Dear, Well, Dill, JJ. 14.

For reversal—None.

New Jersey Court of Errors and Appeals

Between

MAX DOYNE,
Complainant-Respondent

—and—

MINNIE ROSE, et als.,
Defendants-Appellant.

On Appeal from Court of Chancery.

BRIEF OF RESPONDENT.

STATEMENT OF FACTS.

This is an appeal from a final decree of the Court of Chancery. This decree reformed two bonds as having been executed through the result of fraud and mutual mistake. These bonds were executed in connection with two building operations in Bergen County and were dated respectively June 19th, 1930 and November 17th, 1930. The Court of Chancery adjudged that these bonds were intended to indemnify against mechanics' lien claims only, and that they were never intended to go beyond such indemnification. Altogether three bonds were executed in connection with each single mortgage transaction. Exhibit C-3 (Case, p. 73) is the ordinary bond of the mortgagor obligor to secure the principal amount of $20,000, and provides for payment of installments, interest and principal. Exhibit C-2 (Case, p. 71) dated June 19th, 1930 is a collateral bond in the penal sum of $40,000, and is executed not only by the mortgagor, but by three indivi-

duals, two of whom are officers of the company, and the third being Jacob Golush, who was financially interested in this particular building operation (Case, p. 59). This bond contains a preamble as to the reason for its execution and then in the broadest terms creates the liability upon its makers in the event of foreclosure and any consequent loss to the mortgagee. This bond was not executed by the respondent. The third and last bond in relation to this mortgage is Exhibit C-1 (Case, p. 67). This bond is dated June 19th, 1930, is in the penal sum of $40,000 and was executed, in addition to the persons who were financially interested in the mortgage loan, by Max Doyne, the respondent, and Rose Brady, both being connected with building material concerns who furnished materials for these building operations, but neither of whom had any financial interest in said operation. This bond is the ordinary mechanics' lien indemnity bond with a slight change in verbiage to which we shall presently call attention. The purpose of this bond is summarized in its concluding words to the effect that the mortgage is to remain a paramount lien (Case, p. 68). The manifest intention of the bond was broadened by the insertion of the preposition "or" in its concluding paragraph.

The three bonds executed in connection with the $15,000 mortgage are similar to the three bonds in connection with the mortgage loan already mentioned. There was the usual bond of the mortgagor dated November 14th, 1930, Exhibit C-6 (Case, p. 90). The second bond executed by the mortgagor and its officers is in the penal sum of $30,000, is dated November 17th, 1930,

and is a collateral bond, Exhibit C-7 (Case, p. 92). The attestation of this bond recites that Jacob Golush executed it, but as a matter of fact, it was not executed by him because he had no financial interest in this particular property (Case, p. 59). This bond like its counterpart collateral bond in connection with the earlier mortgage loan contains a preamble and a condition for the payment of the principal, interest and costs of foreclosure in the event that the mortgage of $15,000 should be foreclosed. The third bond in connection with the $15,000 mortgage loan is dated November 17th, 1930 and is Exhibit C-8 (Case, p. 94). This bond was executed by the obligor and its officers, and in addition by Max Doyne, the respondent, and Jacob Golush. The text of the condition of this bond is a counterpart of the indemnity bond executed in connection with the $20,000 mortgage loan (Case, p. 68). Golush held a contract on the mortgaged building and the respondent, Max Doyne, was a materialman. This bond, like its counterpart, refers to indemnification from liens and claims arising out of mechanics' liens and contains also the preposition "or" in the condition which broadens its scope (Case, p. 95).

The mortgagor filed a bill to foreclose the $15,000 mortgage dated November 14th, 1930 (Case, p. 97), and paragraph 7 thereof refers to the bond of the respondent (Case, p. 99). The respondent Doyne filed an answer and counterclaim on November 14th, 1932 (Case, p. 103). He alleged that he had intended only to execute an indemnity against mechanics' liens. He prayed for rescission and reformation. He did not dis-

pute the right of the mortgagee to foreclose. He further alleged that until the service upon him of subpoena he was unaware that he had executed any other instrument than an indemnity against mechanics' lien claims and he prayed for the same relief concerning the $20,000 bond arising from the earlier transaction. This counterclaim was stricken on November 28th, 1932 as not being a proper counterclaim to the bill in foreclosure (Case, p. 112). This court affirmed the striking of the answer and counterclaim and a final decree ordering a sale of the mortgaged premises to pay $14,984.59 besides taxed costs was made on June 5th, 1933 (Case, p. 122). On June 5th, 1933 upon an application previously noticed, an order was filed denying the application to amend the answer and counterclaim and this order stated that such counterclaim could not be conveniently disposed of in the foreclosure suit (Case, p. 125). No foreclosure has ever been commenced of the $20,000 mortgage.

At the hearing, the file in the foreclosure suit of the $15,000 mortgage was offered (Case, p. 61). However, none of the proceedings pertaining to respondent's application for the determination of the fair value of the mortgaged premises have been printed in the state of the case. Timely objection was made to this omission. This objection is being countered by the appellant who contends that only a portion of the original file had been introduced. An appeal was taken by the appellant herein from the order of the Chancellor which directed that the fair value should be ascertained by a reference to a master. This court, in *Rose* v. *Jerome-Harvey Development Co.*, 115

E. 574, 171 A. 832, filed an opinion on April 12th, 1934 which affirmed the order of the Chancellor. The matter was remitted to the Court of Chancery on the affirmance, and on April 30th, 1934 upon the master's report, the Chancellor adjudged the fair and reasonable value of the mortgaged premises to be $18,300 less $800 credit for taxes, leaving the net amount of $17,500. The amount of the decree and costs were $2,000 less. No appeal has been taken from this order adjudging the fair value. On December 14th, 1932, shortly after the respondent's counterclaim was stricken, the respondent Doyne filed an original bill for reformation and rescission on the ground of fraud and mutual mistake (Case, p. 5). This bill prayed for rescision and reformation of the bonds of $15,000 and $20,000 respectively. On the appellant's application to strike the bill of complaint, an order was made by the Chancellor on January 9th, 1933 directing that the application be held until final hearing (Case, p. 17).

At the final hearing, stipulations were filed by all the parties to the suit except the appellant, consenting to the rescission and reformation as prayed for (Case, p. 22). These stipulations are not printed in the case, but are referred to in the final decree (Case, p. 22). The respondent called four witnesses: Percival G. Cruden, Esq., a member of the bar of this state for twenty-eight years; Hyman Flax, who carried on the negotiations on behalf of the mortgagor, and who is one of the officers of the company; the respondent, and Jacob Golush. Meyer Flax, the other officer of the company mortgagor was not called because he had moved to California. These four witnesses

testified explicitly concerning the circumstances surrounding the execution of the bonds, and they all stated that as to the particular bonds which were sought to be reformed, that they were intended as indemnity bonds against mechanics' liens only and not as general obligations. Mr. Cruden stated that the error had crept in because of the use of a form from which a copy had been made. After all the witnesses had testified on the part of the respondent, including himself, and when all the testimony except the testimony of Jacob Golush was in, the appellant stipulated that he would consent to a decree of rescission and reformation as prayed for in the bill, as to the $20,000 bond (Case, p. 57). We call attention to the fact that nearly all the proofs were in at that time.

The appellant did not take the stand nor did she call any witnesses. The Chancellor decreed reformation.

CONTENTIONS OF RESPONDENT.

1. The appeal should be dismissed because the question is now moot abstract and academic.

2. The decree appealed from did not determine an issue that was res judicata and should therefore be affirmed.

ARGUMENT.

POINT 1.

The Appeal Should Be Dismissed Because the Question Is Now Moot, Abstract and Academic.

Such portion of the decree as relates to the $20,000 bond of June 19th, 1930 was consented to in open court and is therefore removed from consideration. We are concerned here with the $15,000 bond dated November 17th, 1930 (Case, p. 94). The decree and costs upon the foreclosure of the mortgage which was originally for $15,000 is so substantially less than the reasonable value fixed by the order, that no possible benefit can enure to the appellant from a determination that the respondent is liable upon the collateral bond. The time for appeal from the said order adjudging the reasonable value has long expired. Consequently the question now before this court is abstract and academic. This principle is stated in 3 Corpus Juris page 358, as follows:

> It is not within the province of appellate courts to decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.

This principle has been uniformly followed in all jurisdictions.

In *Machlin* v. *Essex Park Realty Co.,* 101 E. 776, 139 A. 32, Mr. Justice Black, speaking for this court, said:

> "In this situation, there is nothing for us to consider, except a moot or academic question, and this we decline to entertain. It is an elementary rule of law, long settled and firmly established, not only in this court, but in other jurisdictions, that courts do not and will not consider moot questions; hence the appeal must be dismissed."

It is our contention that the entire proceedings in the foreclosure suit were admitted in evidence (Case, p. 61). Because all of the proceedings were not set forth in the state of the case, timely objection was made and the appellant counters with the assertion that only a portion of the records in the foreclosure proceeding were offered and received. In effect the appellant is seeking a strained and narrow construction of the offer tendering the file in the foreclosure suit so that it shall exclude any portion of the proceeding which might be harmful to her appeal. This notwithstanding that appellant has not even attempted to assert any meritorious or substantial reason for holding the respondent to the supposed penalty of the bond.

The assertion of this limitation is repugnant to the fundamentals upon which a court of equity proceeds. In *Brown* v. *Fidelity Union Trust Co.*, 10 M. 555, 159 A. 809, Vice-Chancellor Berry cites with approval the following language from Professor Pomeroy:

> "Equity is and long has been in every sense of the word a system and although it is impossible that any new general principles should be added to it, yet the truth stands, and always must stand, that the final object of equity is to do right and justice."

And he quoted the words of Vice-Chancellor Van Fleet in *Ogden* v. *Thornton,* 30 E. 569, as follows:

> "A court of equity must always aim to act upon broad principles of justice, disentangled as much as possible from little technicalities."

And in *Livermore* v. *McNair,* 34 E. 478, as follows:

> "Equity cares very little about mere matters of form; it endeavors to deal with the substance of affairs, and to regulate its judgment according to the real purposes which have controlled parties in the (various) matters brought before it for relief or correction."

However, appellate courts have not hesitated in dealing with academic questions to consider extrinsic evidence and the rule is stated in 3 Corpus Juris 360, as follows:

> "On the same principle the general rule is well settled that if, pending an appeal, an event occurs which renders it impossible for the appellate court to grant any relief, or renders a decision unnecessary, the appeal will be dismissed. And the occurrence of such event may be shown by extrinsic evidence, or noticed by the court where it is a matter of judicial notice."

This court may undoubtedly take judicial notice of files and records in another suit formerly pending in this court. Such was the holding in *McCleave* v. *John J. Flanagan Co.,* 160 A. 305, 115 Conn. 36, and in *Davis* v. *Maislen,* 165 A. 451,

116 Conn. 375, and in *Bishop* v. *City of Meriden*, 169 A. 41, 117 Conn. 409. In the statement of facts, attention has already been called to the fact that the foreclosure suit involving the $15,000 mortgage was in this court in *Rose* v. *Jerome-Harvey Development Co.*, 115 E. 574, 171 A. 832.

POINT II.

The Decree Appealed From Did Not Determine An Issue That Was Res Judicata and Should Therefore Be Affirmed.

A.

In New Jersey under statutory provisions, court rules and judicial construction, counterclaims are permissive and directory, and the refusal of the court to permit any counter-claim is discretionary.

At the very outset, attention is directed to the rules and statutory provisions governing counterclaims in our equity practice. The act concerning set-offs, 4 C. S. 4837, Section 5, provides:

> "In suits for the foreclosure of mortgages, and in suits for the redemption of mortgaged property, all just set-offs shall be allowed in ascertaining the amount due upon any mortgage, whether the holder of such mortgage be a party complainant or defendant, in the same manner and to the same extent as the like set-offs are allowable in actions at law. (P. L. 1900, p. 310)."

Chancery Rule 28 provides as follows:

> "Subject to the provisions of other rules herein contained, a defendant may counter-

claim or set-off any cause of action against the complainant. He may, and when required by the court, shall, issue subpoena against any third party necessary to be brought in; *but in the discretion of the court, separate hearings may be ordered; or if the counter-claim cannot be conveniently disposed of in the pending action, the court may strike it out.*" (Italics ours.)

Chancery Rule 70 provides as follows:

"Any matter, being the proper subject of a cross-bill under the existing practice, *may* be set up by counter-claim. A counter-claim *may* be stated in the answer, being introducted substantially thus:" (Italics ours.)

The Chancery Act of 1915, page 191, provides:

"Court May Strike Out or Order Separate Hearing. The court *may order* a separate hearing of, *or may strike out, any cause of action which cannot be conveniently heard with other causes of action joined in the same suit.*" (Italics ours.)

"Counter-claim. Subject to the provisions of other rules herein contained, a defendant *may counter-claim* or set-off any cause of action against the complainant. He may, and when required by Court, shall, issue subpoena against any third party necessary to be brought in; but, in the *discretion of the court, separate hearings may be ordered;* or if the counter-claim cannot be conveniently disposed of in the pending action, the court may strike it out." (Italics ours.)

Because a foreclosure of a mortgage is an action in rem, no set-offs were permitted in such an action until the enactment referred to (4 C. S. 4837). *Hanneman* v. *Richter,* 63 E. 753, 53 A. 177. But the very enactment limits set-offs only

to the extent necessary to ascertain the amount due on the mortgage. (4 C. S. 4857.)

A set-off is strictly limited to liquidated damages. *Curtis-Warner Corporation* v. *Thirkettie,* 99 E. 806, 134 A. 299. The case at bar involves a counter-claim filed in a foreclosure suit, which counter-claim did not dispute the amount due upon the mortgage, nor that it was in default, nor the mortgagee's right to foreclose, but merely invoked the aid of the Court of Chancery to determine whether or not two unrelated collateral obligations executed by a surety who had no interest in the lands should be rescinded for fraud or reformed for mutual mistake. One of the bonds arose from a transaction ante-dating the execution of the mortgage by many months and on other property. The other writing was executed three days after the mortgage which was being foreclosed. Furthermore there were numerous parties to the foreclosure suit. In *Beller* v. *Fenning,* 101 E. 430, 139 Atl. 327, Vice-Chancellor Backes construed the Chancery rules as to setoffs as follows:

> "Under rule 70 of this court, 'any matter, being the proper subject of a cross-bill under the existing practice, may be set up by counter-claim.' The rule introduced into our practice the Code term 'counter-claim' to take the place of its esteemed but old-fashioned ancestor the 'cross-bill.' The change was purely of terminology, and as our Court of Appeals said in McAnarney v. Lembeck, 97 N. J. Eq. 361, 127 A. 197:
>
> " 'Only those matters which were formerly the proper subject of a cross-bill can be set up in a counter-claim. The purpose of a cross-bill is to enable a defendant to make

his defense more complete and effectual than it would be if he stood on an answer alone; but the new facts which he may introduce into pending litigation by means thereof are such and such only, as it is necessary for the court to have before it in deciding the questions raised in the original suit, so that the court may do full and complete justice to all of the parties in respect to the cause of action on which the complainant rests his right to relief.' ''

''He intimates that the Court of Appeals in deciding the case just cited overlooked the rule, and he argues, in effect, that by virtue of its provision any and all unrelated and independent causes of action against the complainant may now be the subject of a counter-claim or set-off. Carried to its extreme, that would permit a wife to ask for support in her husband's suit to decree a resulting trust in lands held by her, or allow an action for damages for assault and battery as an offset to a foreclosure suit. The context of the rule does not permit the latitude of construction claimed for it. In terms and in effect it is circumscribed by, consistent with, and subject to, the provisions of rule 70. The rule invoked as to counterclaims was not intended to allow alien issues, nor other than those that could be tendered by a cross-bill to be pleaded and, as to set-offs, only those that may discharge or reduce the complainant's demand. Neither of the rules has the effect of substantially altering the then existing practice.''

In *Yeskel* v. *Gross,* 105 L. 308, 144 A. 312, affirmed 106 L. 611, 148 A. 920, the late Justice Katzenbach cited with approval the cases of *McAnarney* v. *Lembeck* and *Beller* v. *Fenning,* supra, and added that the rules as to filing coun-

ter-claims were merely directory and not mandatory and that the court could in its discretion refuse to consider any counter-claim. He stated the rule as follows:

> "But if the respondents could have filed a counterclaim, they would not be barred from maintaining this action. Rules 28 and 70 do not make it compulsory to file a counterclaim. It is only permissive. If filed, the Court of Chancery in its discretion may refuse to consider it. There is no provision in the Chancery Act (1 Comp. St. 1910, p. 408) or rules which makes failure to file a counter-claim a bar to cross-action. As the respondents were not bound to set-off by counter-claim in the chancery action their claim, the argument that the chancery decree is *res adjudicata* as the present suit falls."

In *Hanneman* v. *Richter,* 63 E. 753, 53 A. 177, supra, Vice-Chancellor Stevenson, in discussing the convenience of entertaining a suit for accounting, said:

> "The difficulty about the various debts set up in the cross-bill by way of set-off is that they are not between the same parties between whom the claim for an accounting exists. 'Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or, conversely, of a separate debt against a joint debt, or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights.' (2 Story, Eq. Jur. Sec. 1437.)"

In the instant case the mortgagee seeks an accounting of the mortgaged debt and to foreclose a mortgage against the mortgagor corporation, and it is understandable why a court of equity should not desire to inject into this situation a

dispute between the mortgagee and a surety on two collateral obligations the determination of which could in no manner affect the right to foreclose.

In making the order upon the respondent's application to amend the counter-claim the Chancellor stated that the counter-claim could not be conveniently disposed of in the foreclosure action (Case, p. 125). Again in the opinion of the court (Case, p. 62) the court's attitude is reflected. Whether the Chancellor could have entertained the counter-claim or not is of no moment. Under every rule of our established practice, he had the widest latitude in determining that matter, and in the absence of abuse of such discretion there can be no review.

B.

There can be no res judicata where the cause has not reached the stage of hearing upon its merits.

The attack here is made not upon a substantative right, but upon a supposed technical noncompliance with a method of procedure. Prior to the final hearing, there had never been a hearing upon the merits. In *Gery* v. *Gery,* 113 E. 59, 166 A. 108, Mr. Justice Case, speaking for this court, said:

> "Appellant's first point is that, the right to a partition by the complainant having been heard, that question is *res adjudicata* because of the order, entered on the advice of Vice-Chancellor Bigelow, striking the counter-claim and certain parts of the answer and the separate defenses. The prin-

ciple of *res adjudicata* is not applicable. The cause had not reached the stage of a hearing upon its merits. Indeed the matters recited in the order of dismissal had never been presented or considered; and, had the cause gone so far as final hearing, the Chancellor would properly have dismissed the bill had no ground of equity jurisdiction appeared."

In *Benjamin* v. *Van Voorhis,* 106 E. 196, 150 Atl. 393, this court held:

"We consider, however, that the decree of dismissal in the present case in no bar to the right of the complainant to file a new bill based upon the same grounds as those set forth in the case now before us. If the present bill contains a true statement of the facts in issue, clearly the complainant is entitled to the relief which she seeks. Although, where a bill in equity has been dismissed by the court and another bill is subsequently filed between the same parties based upon the same subject-matter, the court in its discretion may dismiss the latter bill without a hearing, nevertheless, if the first suit is dismissed on any ground which did not go to the merits of the action, the decree rendered is not necessarily a bar to another suit and in the interest of justice it should not be permitted to deprive the complainant of a just cause of action. This is the principle stated in Henninger v. Heald, 51 N. J. Eq. 74, 26 A. 449, and is justified by the citation contained in the opinion from the case Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303, and other authorities cited in the opinion. It is the ordinary practice in cases like that now before us for the Court of Chancery in entering the decree of dismissal to state that such decree shall be without prejudice to the filing of a new bill, but the omission of any such reservation does

> not compel the court to refuse to recognize a new bill if and when the complainant files it."

Appellant on pages 11 and 12 of her brief refers to 34 Corpus Juris, page 742. This text states that the judgment must be based upon the merits. Again appellant refers to the text in 34 Corpus Juris, page 776 on page 13 of her brief, but this statement is preceded by the following statement of law:

> "A judgment is not on the merits if the case went off on any preliminary, subsidiary, or technical plea or objection. Accordingly a judgment for defendant on the ground that the court is without jurisdiction, or for defects in parties or pleadings, or because plaintiff has misconceived his remedy or has brought his action prematurely, is not a bar to a subsequent action."

The following principle is stated in 34 Corpus Juris 775-776:

> "A judgment is on the merits when it amounts to a decision as to the respective rights and liabilities of the parties, based on the ultimate fact or state of facts disclosed by the pleadings or evidence, or both, and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions. If the case is brought to an issue, heard upon evidence submitted pro and con, and decided by the verdict of a jury or the findings of a court, the judgment rendered is upon the merits."

In the instant case, so far as the counter-claim is concerned the parties had gotten no further than the bare pleadings, and this is certainly not a trial upon the merits. The appellant's conten-

tion that the order striking the counter-claim is one based upon the merits does violence to any fair conception of common sense and justice.

In 34 Corpus Juris, 794, the rule is stated with respect to defects in pleadings as follows:

> "A judgment rendered on the ground of formal defects in the pleadings does not touch the merits of the controversy and therefore is no bar to a second suit on the same cause of action. Nor is a dismissal of an action for failure of the complaint to state a cause of action a bar to a new action on a good complaint."

If this were otherwise, the striking of a counter-claim because of a defect in pleading would be an absolute bar to an action, whereas in a direct proceeding, an amendment could always be had.

In 34 Corpus Juris, 763, it is stated that:

> "The determination of a motion or summary application is not *res judicata* so as to prevent the parties from litigating the same matters again in the more regular form of an action, especially if the matter affected by the motion was only incidental or collateral to the determination of the main controversy."

And in 34 Corpus Juris, 764, the following:

> "So where the purpose of a cross complaint is to set up an independent cause of action, an order striking it as coming too late is not *res judicata* of any right which cross complainant may have in that respect"

And in 34 Corpus Juris, 815-816, the following:

> "If plaintiff has misconceived his remedy

> and the suit is dismissed or judgment is rendered against him on that ground, it is not an adjudication of the merits, and will not bar a second action rightly brought; nor is it a bar where the new action, although based on the same facts, proceeds upon a different theory as to their legal consequences or the relative rights of the parties; nor where two or more distinct causes of action arise out of the same transaction or state of facts; nor where the one action was in *rem* and the other in *personam.*''

And in 34 Corpus Juris, 866, the following:

> ''A party is not barred from suing on a claim or demand because he pleaded it as a set-off in a former action, if it was not adjudicated or allowed in such action, as where it was excluded or rejected by the court.''

In *Beck* v. *Beck*, 109 E. 109, 156 A. 423, this court remarked in answer to a contention that failure to file a set-off was *res judicata*:

> ''The contention of the appellant before us is that the decree was erroneous for the reason that the matters involved herein were not *res judicata.* In our opinion, this contention is well founded. The statement just made with relation to the scope of the earlier decree shows that the matters involved in the present litigation were not decided in the earlier suit, and, this being so, the doctrine of *res judicata* has no application to those matters.''

CONCLUSION

The decree should be affirmed with costs.

ALEXANDER SECLOW,
Solicitor and of Counsel with the Respondent.